Global Cartel Enforcement: Recent Developments and their Implications

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During the past year competition authorities worldwide have continued to identify cartel enforcement as their highest priority. Amnesty or leniency policies have continued to play a central role in cartel enforcement. Their utilisation by several major jurisdictions is now well established, and cooperation among enforcers across the globe is common. US and EC enforcers continue to win substantial fines in cartel matters, and the importance of compliance and preparedness efforts by multinational businesses is greater than ever.

The developments discussed in this article are consistent with, and in some cases flow from, the continued success of amnesty policies and coordination among enforcement authorities in Europe, Asia, and the Americas. As has been true for several years, the incentives created by amnesty policies have continued to prompt corporate self-reporting in cartel matters, and the ‘domino effect’ of the amnesty plus concept has spawned successive investigations across distinct product lines in large industries.

In the United States, the steady upward ratcheting of corporate and individual sentences began to highlight two challenging issues. One, calculation of the volume of commerce to be used in determining corporate fines, can be complicated by the multinational character of certain cartelised markets. A second issue, pertaining to individual prison sentences, can be raised by the tension between the DoJ’s demand for higher minimum sentences under the 2004 statutory amendments, and the Sentencing Guidelines’ call for proportionality in the relationship between sentences.

Moreover, cross-currents in the rising enforcement tide, identified in last year’s article, persisted. The Department of Justice lost another criminal case, which highlighted again the hazards of reliance on immunised, cooperating witnesses especially in cases arguably lacking in unambiguous evidence of agreement. In the United Kingdom, on the other hand, the see-saw battle of Ian Norris against extradition to the United States recently tilted in favour of the prosecution. Although Norris won an important appeal when the House of Lords ruled in his favour, on referral the lower court has now ruled that extradition may be sought on obstruction of justice charges that were joined with the antitrust charges in the case. If sustained this ruling has important implications for the DoJ and defence counsel going forward.

In addition, the long running Stolt-Nielsen case yielded a potentially significant ruling on possible disclosure of amnesty agreements under the Freedom of Information Act.

Amnesty continues to drive major investigations

Consistent with the high priority given to criminal antitrust enforcement by the DoJ, for its fiscal year ending 30 September 2007, the Antitrust Division won fines totalling US$630 million, the second-highest amount of fines ever obtained by the Division in a single year. At present, the Division reports there are more than 140 pending grand jury investigations, which include approximately 30 investigations of suspected international cartel activity. This is the highest number of pending grand jury investigations since 1992.

After a strong 2007, the pace has not slackened in 2008. For example, the air cargo investigation, which was launched in early 2006 when investigators in several jurisdictions around the world coordinated dawn raids and the execution of search warrants, has now rolled up some US$1.275 billion in fines in the United States alone. The initial fruits of that investigation were announced on 1 August 2007, when the DoJ reported that British Airways and Korean Airlines had ‘each agreed to plead guilty and to pay separate US$300 million criminal fines for their roles in conspiracies to fix the prices of passenger and cargo flights’. Since then, an additional US$675 million in fines has been won by the DoJ from Qantas Airways, Japan Airlines, Air France, Cathay Pacific, KLM Royal Dutch Airlines, Martinair, and SAS Cargo Group.

In the air cargo and passenger investigations, as well as the high-profile marine hose matter and others, the DoJ’s successes flowed not only from its amnesty programme, but also from its sophisticated management of the settlement and cooperation process. As in years past, companies unable to secure amnesty and thus avoid entirely the payment of a corporate fine and the prosecution of their executives, were still provided ample incentive to cooperate, and to do so in a timely fashion. Those companies cooperating sooner – such as ‘second in’ as opposed to ‘third in’ – continued to secure relatively better treatment for their executives in terms of the number of ‘carve-outs’ and the sentences demanded of them in plea negotiations.

Finally, companies able to qualify for amnesty plus, by cooperating not only in the pending investigation but also in the provision of information not yet known to enforcement authorities about conspiracies involving other products or services, obtained greater fine discounts and provided the DoJ with added grist for the grand jury mill. In sum, the DoJ has continued to enjoy success in its use of the process to obtain greater cooperation even as greater penalties are imposed, and to discover evidence leading to the initiation of additional investigations as the result of the amnesty plus incentives. Enforcers in other jurisdictions have increasingly followed suit, making the landscape for the defence more treacherous than ever.

Corporate fines and volume of commerce issues

As noted above, the DoJ has continued to collect staggering fines from companies pleading guilty to price-fixing charges. The fines recently levied on British Airways and Korean Air Lines, and the fine imposed on the combined Air France/KLM, meet or exceed all but one fine ever collected by the Antitrust Division, the US$500 million fine paid by F Hoffman-La Roche for its participation in the vitamins cartel. These examples reflect the Division’s enforcement focus on international cartel activities and on the conduct of enterprises in transnational markets. Scott Hammond, the head of criminal enforcement at the Antitrust Division, recently noted that “[o]f the over US$4 billion in criminal fines imposed in Division cases since the financial year 1997, well over 90 per cent were obtained in connection with the prosecution of international cartel activity.”

Amid these many successes, some recent cases underscore the challenges faced in calculating the volume of commerce to be used in determining a base fine for a violation when potentially affected sales comprise a mix of domestic, import, export, and wholly foreign commerce, or involve a chain of sales in which an affected product

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component is embodied in and then sold as a part of a larger product. The methodology utilised in recent plea agreements may complicate the resolution of future cases involving one or both of these complexities. Two recent examples illustrate the issues.

In the air cargo investigation, plea agreements published thus far reflect some degree of struggle over volume of commerce calculations. In its plea agreement with Qantas, for example, the Division calculated the affected volume of commerce using only cargo shipments out of the US. At the same time, the Division seemed to maintain that shipments into the US also comprised affected US commerce, even though such shipments were excluded from its volume of commerce calculations. The Qantas plea agreement addressed the issue as follows:

> The volume of affected commerce calculation […] does not include commerce related to the defendant’s cargo shipments on routes into the United States. […] The United States disputes the defendant’s position and contends that the defendant’s cargo shipments on routes into the United States during the charged conspiracy period violated the US antitrust laws. Moreover, the United States asserts that a Guidelines fine calculation that fails to account for cargo shipments into the United States affected by the conspiracy charged in the Information would understated the seriousness of, and the harm caused to US victims by, the offense and would not provide just punishment.

Elsewhere in the Qantas plea, the Division took the position that it agreed to ‘a fine at the lower end of the Guidelines’ sentencing range’ because the ‘parties recognise the complexity of litigating the issues’ related to the volume of commerce calculation. The approach to volume of commerce taken in the air cargo matter does not provide a clear indication of how this issue will be approached in future cases that arguably involve a ‘mix’ of US and entirely foreign commerce.

At least one other pending investigation suggests that further complications lie ahead for parties discussing volume of commerce calculations with the DoJ. During the past year, the Division has been investigating manufacturers of liquid crystal display (LCD) panels for possible price-fixing violations. Should these investigations lead to plea negotiations, the Division is likely to face the issue of whether, and under what circumstances, sales of a product component to original equipment manufacturers (OEMs) located outside of the US can be factored into volume of commerce calculations. Foreign OEMs purchase an input, such as an LCD panel, and incorporate it into a final product, which may be a computer monitor. They then sell the final product to distributors, which may be located in the US or which may have US customers. Is there a requisite (ie, foreseeable, direct and substantial) effect on US commerce if defendants fixed prices on LCD panels and sold the panels outside of the US, to non-US OEMs, whose final products were ultimately sold to US customers?

The Division has encountered this issue before, but the question of whether and how sales to non-US OEMs can be used in volume of commerce calculations has not been clearly resolved. In the DRAM cases, for example, only sales to US OEMs were used in calculating the volume of commerce affected by a conspiracy to fix the prices of DRAM chips. Thus, the DoJ/Samsung Joint Sentencing Memorandum noted that the ‘Guidelines calculations […] are based on Samsung’s DRAM sales in the United States to certain OEMs of US$1.2 billion.’

> It remains to be seen whether the DoJ will take the same approach in the LCD investigation or other investigations presenting analogous facts. Limiting volume of commerce only to sales to US OEMs could reduce corporate fines and such reductions are likely to be more pronounced in the future as manufacturing continues to migrate out of the US. The DoJ may find itself unable to impose fines with desired deterrence levels if it follows the approach used in DRAM, but is likely to encounter stiff opposition if it seeks to reverse course by including sales to non-US OEMs – that is, sales occurring entirely outside the US – in volume of commerce calculations.

### Sentencing of individuals under the 2004 statutory amendments

The Antitrust Division’s ability to obtain substantial corporate fines is paralleled by its continued emphasis on jail terms for culpable executives. Following enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, the maximum jail sentence for criminal antitrust violations was increased from three to 10 years. Moreover, according to Antitrust Division statistics, the average sentence in criminal antitrust cases has increased in six of the past eight years, from an average of 10 months in fiscal year 2000 to an average of 31 months in fiscal year 2007 and the first half of fiscal year 2008. This increase in average sentence length is the result of a deliberately pursued Department of Justice policy, which has been strengthened (but was not caused) by the 2004 statutory amendment and related changes to the sentencing guidelines.

The dramatic increase in average prison sentences for executives, to 31 months, reflects a trend that is only now gaining traction in cases involving foreign nationals. Since the Antitrust Division began insisting on jail sentences for foreign nationals earlier in this decade, sentences for such executives have generally been lower than for their domestic counterparts. At least in part, this has been in recognition of the fact that the United States lacks personal jurisdiction over foreign nationals and they are very unlikely to be extraditable.

As the 2004 statutory amendments and 2005 Sentencing Guidelines revisions take hold, however, a significant upward ratcheting of sentencing of foreign nationals seems inevitable as domestic sentences increase and the DoJ seeks to equalise treatment of domestic and foreign executives.

As a result, it appears that the DoJ is moving towards the view that the minimum acceptable sentence for cooperating foreign nationals has moved from three or four months several years ago, to six or eight months today. Indeed, in the air cargo investigation individual sentences of six and eight months have only recently been announced. Higher sentences have been obtained, of course, and likely will be demanded without substantial cooperation or other mitigating factors.

As increased minimum sentences are demanded by the DoJ in light of changes in the law, the issue will arise as to whether individuals who receive ‘minimum’ sentences, because they are relatively junior cartel participants whose cooperation has been immediate and substantial, are being penalised in a fashion that achieves the sentencing goal of proportionality in relation to individuals whose conduct has been more significant and extensive. Of course, the Division has stated its intention to achieve proportionality as between members of the same and different cartels, but an insistence on minimum sentences of some fixed duration could make this challenging in some circumstances.

In considering sentencing matters, it should also be remembered that the DoJ has continued its historic practice of bringing various fraud-related criminal charges either in tandem with, or in lieu of, the prosecution of antitrust offences. In some cases this can enhance potential sentences, while in others it simply provides an alternate or additional basis for prosecution. In all events, the Antitrust Division (often in cooperation with other federal prosecutors) continues to bring charges for mail fraud, false statements, conspiracy to
commit commercial bribery, income tax evasion, false statements on tax returns, obstruction of justice, and other fraud-related crimes in appropriate circumstances.

The Swanson (DRAM) trial
Last year’s article reported on the acquittal of Stora Enso Oyj, a leading forest products company, on charges that it conspired to fix the prices charged for magazine papers sold in the United States.14 Stora Enso was noted as a case that underscores the risk of criminal prosecutions built on circumstantial evidence, especially where trial testimony devolves into a swearing contest between witnesses who engaged in suspect communications, with the prosecution witness characterising the communications as giving rise to an agreement and the defendant telling a very different story. In Stora Enso, a testimonial standoff of this sort led to an acquittal, when the jury was not persuaded that an agreement or understanding was formed, especially given the absence of documentary and other direct evidence of the sort often found in cartel investigations.

A similar outcome was reached earlier this year when a mistrial was declared in the antitrust prosecution of Gary Swanson, a Hynix Semiconductor executive. Swanson had been indicted along with two employees of Samsung Electronics in late 2006, in connection with the government’s investigation of price fixing among DRAM manufacturers.15 Swanson was the only defendant to go to trial. Testifying in his own behalf, he disputed the testimony of government witness Michael Sadler of Micron Technology, who testified that the two had discussed specific prices and reached an understanding on actions designed to stabilise the market prices for DRAM. Micron and Sadler were cooperating with the DoJ under the terms of an amnesty agreement.

Swanson acknowledged having discussions with Sadler, but testified that their communications related to general market conditions and trends and not to specific Hynix prices or price movements. According to press reports, the jury was sceptical about Sadler’s testimony, and concerns on this score were exacerbated by discrepancies between FBI telephone logs and certain e-mails that referred to contacts between Swanson and Sadler. Following the mistrial, the DoJ ultimately decided not to retry the case against Swanson.

As in the Stora Enso case, and in contrast to many cartel prosecutions, there were no clear agreements memorialised by meeting minutes or witnessed by numerous participants. Likewise, there were no documents tracking the conspirators’ compliance with a cartel agreement, or evidence that false cover stories were created around competitor meetings or communications.16 On the other hand, Swanson did not deny that others had conspired, and the DRAM investigation was a dramatic success for the DoJ. Whatever the sufficiency of the evidence in the trial against Swanson, numerous companies and individuals made presumably informed decisions not in the loop as to cartel agreements they might have reached.

With the stakes higher than ever given trends towards longer sentences for individuals, executives who enjoy the support of their companies may choose to go to trial in these cases more often in the future, especially when persuasive documentary evidence is in short supply for the government.

The Norris extradition saga continues
The long-running legal saga over the DoJ’s effort to extradite Ian Norris continued to see-saw during the past year, tilting most recently in favour of extradition. Norris, former chief executive of Morgan Crucible, had been indicted for price fixing and for coordinating a conspiracy to obstruct justice, tamper with witnesses, and destroy documents. The conduct for which Norris was indicted occurred before price fixing was criminalised in the UK by the enactment of the Enterprise Act in 2002.17 The US had attempted to extradite Norris initially on the grounds that his participation in a price-fixing conspiracy was tantamount to a criminal conspiracy to defraud, a common law crime in the UK.

In June 2005, a British magistrates’ court ruled that Norris was subject to extradition. The British home secretary ordered Norris to be extradited in September 2003, and the High Court of Justice dismissed his appeals in January 2007. The winds of fortune shifted for Norris when the House of Lords agreed to hear his appeal later in 2007.

In March 2008, the House of Lords ruled in favour of Norris, holding that he should not be extradited because price fixing was not a crime in the UK at the time of his alleged participation in the conspiracy, so that the ‘dual criminality’ required for extradition was lacking.18 Notably, however, charges that Norris had participated in a conspiracy to obstruct justice were referred back to the lower court. The Lords ruled that the obstruction of justice charges were an extraditable offence in principle, although extradition might not be appropriate if those charges were merely ‘subsidiary’ to the allegations of price fixing.19 In short, the House of Lords’ ruling was seen as a significant victory for Norris, but it did not end the story.

In July 2008, Judge Nicholas Evans of the magistrates’ court ruled that the obstruction of justice allegations were substantial – ‘in no sense’ minor – and not merely ‘subsidiary’ to the price-fixing case. Specifically, the judge ruled that even without the price-fixing charges, ‘the remaining obstruction charges are not only distinct and substantial offences, they are ones of such gravity that standing alone they merit prosecution’.20 The court also rejected Norris’ assertions that extradition would violate his rights under European human rights laws due to his age and health. Thus, although further appeals will likely ensue, the current state of play is that Norris is subject to extradition for obstruction of justice.

This turn of events is significant because, as noted in this article last year, the availability of extradition for crimes other than antitrust offences is a strategy with some precedent in criminal antitrust enforcement.21 Whether or not Norris is ultimately extradited for obstruction of justice, this most recent ruling may lead to an even greater focus by the DoJ on obstruction and other crimes often committed in tandem with antitrust violations, and for which dual criminality does exist across numerous foreign jurisdictions.

Amnesty agreements and the Freedom of Information Act
During its litigation with the Antitrust Division regarding the revocation of its amnesty agreement,22 Stolt-Nielsen made a request under the Freedom of Information Act for copies of all amnesty agreements entered into by the Antitrust Division from the time of the revision of its Corporate Leniency Policy in August 1993 until October 2005. The Division’s objections to this request were sustained in the lower court, but very recently the DC Circuit vacated the district court ruling and remanded the case for further factual findings.

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The DC Circuit held that the amnesty agreement could be exempt from disclosure as potentially interfering with law enforcement proceedings, or as disclosing the identity of a confidential source or information provided by such a source.\textsuperscript{24} The lower court record lacked sufficient findings as to whether FOIA-exempt portions of the agreements were segregable and thus redactable from any non-exempt portions of the agreements. The DC Circuit sent the case back to the district court for specific findings on segregability and to determine ‘the feasibility of the release of redacted versions of the amnesty agreements’.\textsuperscript{25}

The lower court’s forthcoming ruling on disclosure will be of interest to past amnesty applicants whose agreements might be disclosed in some (probably redacted) form, and to potential applicants and their counsel, whose letters could be targeted by future FOIA requests.

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Over the past several years cartel enforcement has enjoyed unprecedented success as authorities improve their coordination and cooperation, and refine and expand their use of amnesty programs and settlement incentives to promote cooperation by companies under investigation. As noted above, there are significant legal and policy issues to be sorted out. But there is almost certain to be great continuity in 2009 and beyond.

Notes

1 DoJ Press Release, Major International Airlines Agree to Plead Guilty and Pay Criminal Fines Totalling More Than US$500 Million for Fixing Prices on Air Cargo Rates (26 June 2008).
2 See, for example, Remarks by Scott D Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, DoJ, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiating (29 March 2006).
3 Scott D Hammond, Recent Developments, Trends, and Milestones in the Antitrust Division’s Criminal Enforcement Program (26 March 2008), at 12.
4 Ibid. at 17.
5 Plea agreement at 4, United States v Qantas Airways Ltd, Criminal No. 07-00322 (DCC 14 January 2008).
6 Ibid. at 5.
10 See for example, DoJ press release, 17 April 2008 (reporting sentence of 12 months and 1 day for Italian executive in marine hose investigation).
11 USG sec 1A1.1 (part A introduction, 3. The Basic Approach (Policy Statement)) (1 November 2007) (‘proportionality’ to be achieved via ‘appropriately different sentences for conduct of different severity’).
13 See, for example, DoJ press release, Former Education Consultant Sentenced to 7 ½ Years in Fraud and Bid Rigging in the Federal E-Rate Program, (19 March 2008) (reporting 7 ½ year sentence for fraud and bid rigging in the ongoing E-Rate investigation).
15 United States v Kin, No. CR 06 0692 P H (N.D. Cal. 18 October 2006).
17 See, for example, DoJ press release, Sixth Samsung Executive Agrees to Plead Guilty to Participating in DRAM Price-Fixing Cartel (19 April 2007), (reporting guilty pleas and sentences of DRAM executives).
18 Second Superseding Indictment, United States v Noris, Crim. No. 03-362 (DCC 28 September 2004).
20 Ibid. at pp. 101, 110-111.
22 For example, the US DoJ extradited Michael L Domecq from Spain to the US to stand charges for conspiring to commit tax fraud and to defraud Allied Domecq plc. Domecq pled guilty and agreed to serve 10 years in prison. See DoJ press release, Former President of Domecq Imports Inc. Plead Guilty to Conspiracy Charges (26 June 2007).
23 The Stolt-Nielsen case was discussed in this space two years ago. See Pate and Hartwell, Global Cartel Enforcement: Developing Issues, The Antitrust Review of the Americas 2007 at 14.
24 These exemptions are set forth in 5 USC section 552(b)(7)(A) and (D).

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Hunton & Williams’ global competition practice group combines high-level government and private litigation experience. Lawyers in the group come from both of the US antitrust enforcement agencies and include a former assistant attorney general and deputy assistant attorney general from the US Department of Justice Antitrust Division, a former deputy director of the US Federal Trade Commission’s Bureau of Competition, and two former senior litigators and other officials from the FTC and DoJ. The group includes experienced counselling and seasoned litigators, and counts several former judicial clerks from the US Supreme Court and other federal courts, and former staff members at the federal enforcement agencies among its associates. Working from offices in the US and abroad, the group serves domestic and international companies in competition litigation, merger review, intellectual property matters, consumer protection and privacy, and criminal antitrust defence and related price-fixing litigation.
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Ray V Hartwell III has over 30 years’ experience in antitrust and competition-related investigations, litigation and counselling, and has represented more than 50 corporations and executives in connection with criminal antitrust and international cartel investigations and related issues of amnesty and leniency in the United States, Canada and Europe. His practice also includes merger filings and review in the United States and abroad, corporate compliance programmes and internal investigations, and antitrust and related class action and similar litigation.

Mr Hartwell currently serves as a member of the international cartel task force of the ABA section of antitrust law, and is the chair of the criminal practice and procedure committee. He has previously served on the council of the section, as chair of the compliance and ethics committee (2005 to 2008), and as a member of the Association’s task force on antitrust sentencing guidelines. He has chaired the antitrust sections of both the District of Columbia Bar and the Virginia State Bar. He sits on the editorial board of The Antitrust Bulletin and served as editor of the ABA Handbook on Grand Jury Investigations (2nd edn, 1988). He is listed in The International Who’s Who of Competition Lawyers and Economists, The Best Lawyers in America, and the Guide to the World’s Leading Competition and Antitrust Lawyers. He was recently elected to be a Fellow of the American Bar Foundation.

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