Cartel Enforcement in the New Regime: Continuity and Change

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In the United States, criminal antitrust or ‘cartel’ enforcement has been characterised by continuity across administrations of both parties throughout the careers of current day practitioners. There have been significant developments over the years, such as the dramatic and ongoing success of the Department of Justice antitrust leniency programmes, the emulation of these programmes by numerous other jurisdictions as cartel enforcement has become a global phenomenon, the ever increasing sanctions enacted into law in the United States and abroad, and the record fines and penalties won by DoJ and other enforcers in proceedings against both domestic and international cartel conduct. Whatever may have been the case regarding other aspects of antitrust enforcement, it is fair to say that DoJ’s consistent, aggressive, and generally well articulated enforcement policies in this area have played a major role in forging an international consensus that cartel enforcement lies at the core of sound competition policy.

Now there is a new administration in Washington. Moreover, the Democrats control not only the presidency but also both the Senate and the House of Representatives. In the months following his inauguration, President Obama has pursued unprecedented federal intervention in the private sector and dramatic expansions of government spending and regulatory oversight. The president addressed antitrust enforcement, saying that the previous administration had ‘what may be the weakest record of antitrust enforcement of any administration in the last half century’, and pledging to ‘direct [his] administration to reinvigorate antitrust enforcement’.1 In the wake of this proclamation, newly appointed Assistant Attorney General Christine Varney gave a major address before the United States Chamber of Commerce promising vigorous antitrust enforcement in a time of economic distress. Varney acknowledged DoJ’s record of success in criminal enforcement, and pledged to build upon it.2

The past year has been tumultuous economically, with steep declines in financial markets worldwide accompanied by rising job losses and business failures. The new administration in Washington is taking bold steps to enact sweeping changes in a range of areas, including aggressive and intrusive economic regulation and even outright ownership of major companies in key industries. At the same time, there have been ongoing and significant developments in criminal antitrust and cartel matters. This article summarises those developments and addresses the question whether and if so how the new administration’s agenda for ‘change’ may affect cartel enforcement.

A financial crisis and a new administration

Today’s economic environment provides a textbook setting for cartel activity. More often than not, cartels are formed not simply to boost profits when times are good, but rather to resist margin pressures in times of excess capacity brought on by economic or industry distress.1 It would not be surprising to discover in the next few years that price-fixing or similar conduct occurred during the current crisis in an effort to contain price declines, particularly during the early months of the crisis when producers in a myriad of industries saw orders disappear and prices plummet. Adding fuel to the fire, financial distress may lead to cutbacks in corporate compliance budgets at the very time preventive measures could be most valuable.

Past economic crises also produced industry calls for relaxed antitrust enforcement. During the Great Depression, industry pressure led to government policies that gave legitimacy, and insulated from prosecution, activities we would today condemn as per se illegal.3 The Antitrust Division appears to understand this history well, and has, in some of its first policy pronouncements since the change in administrations, clearly rejected the idea that cartel enforcement should be relaxed. In her first major speech as the new head of the Antitrust Division, Christine Varney stressed that ‘[c]ontinued criminal and civil enforcement under section 1 of the Sherman Act will also be an important part of the Antitrust Division’s response to the distressed economy.’4

In fact, the Division has warned that the ‘recent infusion of vast amounts of federal funding to distressed industries’ may lead to increased collusion and fraudulent activity. In response, the Division has launched a new programme, the Antitrust Division Recovery Initiative, to assist federal agencies receiving funds from the American Recovery and Reinvestment Act (which provided for over US$700 billion dollars in new federal ‘stimulus’ spending) to detect collusion and other fraudulent activity. This initiative seems certain to ratchet up the focus – already substantial – on fraud and collusion in government contracting across the board.

AAG Varney’s policy statements suggest that the US government will continue the longstanding vigorous cartel enforcement policies of the Antitrust Division. In this field, at least, we believe the transition in administrations portends more continuity than change. In light of the economic crisis, the next few years are likely to bring new record-setting cartel investigations, building on the Division’s already impressive track record. And the greater focus on conduct relating to government contracts will lead to increased use of non-Sherman Act criminal charges involving a number of federal laws prohibiting fraud, obstruction of justice, false statements and other conduct. In 2008, the Division already filed a record 28 non-Sherman Act criminal charges, compared to 15 in 2007, 13 in 2006 and 9 in 2005.4 The Division had an impressive record in the prosecution of these cases, winning 22 of the 28 cases filed in 2008. These developments may signal further increases in the use of non-Sherman Act charges to combat collusive or fraudulent conduct that does not readily lend itself to antitrust prosecution, because of, for example, insufficient evidence on the agreement element of section 1.

Large display industry fines follow air cargo successes, raise volume of commerce issues

Building on its success in the air cargo investigation, the Division issued its first plea agreements and indictments in what appear to be at least four separate conspiracies in related display industries. As a result, these public documents reveal new details about alleged conspiracies to fix prices of liquid crystal display (LCD) panels and cathode ray tubes (CRT). In these and other matters, the Antitrust
Division continued to win staggering criminal fines from corporate defendants.

The Division issued its first indictment stemming from its CRT investigation, describing what are alleged to have been large scale, well-organised and methodical conspiracies. In its indictment of a former CEO of Chunghwa Picture Tubes, the Division described conspiracies to fix prices and allocate market shares of TV and computer monitor cathode ray tubes. These conspiracies allegedly lasted from at least March 1997 until April 2003. According to the Division, the conspiracies involved competitor meetings throughout Asia, including Taiwan, Korea, Malaysia and China. The co-conspirators allegedly implemented an ‘auditing system’ that enabled them to visit each other’s production facilities to verify that production lines were shut down as agreed.

As of the writing of this article, the Division has not issued any indictments against, or entered into reported plea agreements with, corporate defendants in the CRT matters. Nevertheless, the alleged length and scale of the conspiracies, and the size of the CRT market (according to the Division, US$27 billion in 1997 alone) suggest that the Division will be seeking to impose significant fines over the next year or so and that a number of executives in addition to Chunghwa’s former CEO may be facing imprisonment.

The Division also revealed new details of what are alleged to be two distinct conspiracies to fix LCD prices. According to the Division, LG, Chunghwa and unnamed co-conspirators participated in a conspiracy to fix the price of LCD panels sold worldwide. The conspiracy allegedly lasted at least from September 2001 until December 2006. In addition, Sharp pled guilty to its role in ‘separate conspiracies’ to fix prices of LCD panels sold to individual US electronics companies. The Division described conspiracies to fix the price of panels sold to Dell from April 2001 to December 2006 for use in computer monitors and laptops; to Motorola from autumn 2005 to the middle of 2006 for use in Razz mobile phones; and to Apple Computer from September 2005 to December 2006 for use in iPod portable music players.

For the fiscal year ending 30 September 2008, the Antitrust Division collected fines exceeding US$696 million. During the first six months of the current fiscal year, the Division claimed nearly US$1 billion in corporate criminal fines and will likely end the year with a new record in total criminal fines collected.

These fines include US$385 million from LG, Sharp, and Chunghwa Picture Tubes for their roles in the LCD conspiracies. Of the US$585 billion, LG paid a US$400 million fine, the second highest fine ever imposed by the Division.

The Division has also continued to collect massive fines in its air cargo investigation. Since the announcement of the first fines two years ago (US$300 million each against British Airways and Korean Airlines), the Division collected US$350 million from Air France/KLM, US$119 million from Cargolux, US$110 million from Japan Airlines and US$109 million from Lan Cargo/Aerolinhas Brasileiras. The Division has collected fines exceeding US$40 million each from an additional six companies and a US$15.7 million fine from EL AL.

In these and other investigations, an issue of continuing importance is the methodology used by DoJ in calculating the volume of commerce affected by a violation, which in turn is the starting point for the determination of an appropriate fine under the Sentencing Guidelines. In the air cargo matters, questions arose as to the inclusions of sales occurring entirely outside the United States for the shipment of cargo into the United States. In the display investigations, the similar question arises whether sales of foreign manufactured components (panels and cubes) occurring entirely outside the United States can somehow be counted for fine calculation purposes, because products containing the components (eg, computers or television sets) are ultimately sold in the United States. These are challenging issues of the sort likely to arise again in international investigations.

**Continuing aggressive enforcement against individual defendants, including foreign nationals**

Plea agreements signed during the last 12 months suggest that prison terms exceeding three years are no longer unusual for cooperating domestic defendants while sentences for cooperating foreign nationals of one year or more may soon become the norm.

In January of this year, the Division obtained the longest sentence ever imposed for a single antitrust charge and the first such sentence exceeding three years. The 48 month sentence was imposed pursuant to a plea agreement with a former shipping executive, Peter Bacic, for his role in a conspiracy involving maritime transport of goods from the continental US to Puerto Rico. The conspiracy included customer allocation, bid rigging (in government and private contracts) and price-fixing.

Prison sentences for foreign nationals have continued recent trends, suggesting that six months is the absolute minimum sentence to which the Division will agree and that sentences of 12 months or more are a real possibility for many cooperating defendants. In the LCD investigation, for example, thus far the Division has entered into plea agreements with incarceration periods ranging from six to 12 months. Three of these involved Taiwanese nationals, the first citizens of Taiwan prosecuted by the US government for antitrust offences. These are also the Division’s first prosecutions of individuals from the Chinese speaking world. With these prosecutions, the Division has firmly placed to rest the idea that first prosecutions in a foreign country will involve no-jail deals, or plea agreements that are otherwise relatively lenient.

Since last year’s article, three more foreign nationals have pleaded guilty for their roles in the air cargo conspiracy, agreeing to six and eight-month sentences. Even longer sentences were imposed in the marine hose investigation, where a number of foreign nationals were arrested in the US during cartel meetings. Maximum sentences in the marine hose matter have exceeded two years.

As we discuss in more detail below, the Division’s push for longer incarceration periods for cooperating defendants, which shows no signs of abating, will increase trial incentives for domestic defendants and increase incentives for foreign defendants to stay out of the US and thereby out of the Division’s jurisdictional reach.

**The Division continues to face extradition obstacles**

Despite the Division’s recent successes in the prosecution of foreign nationals, some foreign nationals suspected of cartel violations continue to exercise the ‘option’ of refusing to submit to US jurisdiction. While the Division has issued strongly worded statements about its efforts to apprehend such individuals, it has in fact never yet secured the physical extradition of a defendant to the United States on the basis of a criminal antitrust charge.

Over the past year, based on the public record it appears that a number of foreign nationals have decided not to submit to US jurisdiction. These include two Taiwanese nationals, one Korean and one Japanese citizen indicted for their roles in the LCD conspiracy. While one or more of these individuals could choose to travel to the US and stand trial, there is no indication that any of them will do so. It is more likely that they have simply decided not to submit to jurisdiction and trial in the US.
The changing geopolitical and international economic landscape suggests that the Division’s practical ability to secure plea agreements with foreign nationals may face new impediments. The current financial crisis has led many to predict a relative decline of US economic dominance in conjunction with the rise of China, specifically, and East Asia more generally. East Asia has been a relative hotbed of cartel activity and companies based there have grown dominant in some manufacturing industries that appear susceptible to collusion.

It would be interesting, for example, to observe attempts by the Division to prosecute Chinese nationals for cartel activity, a prospect that is not hard to imagine in light of economic developments. Would Chinese nationals submit to US jurisdiction when their country is unlikely to extradite them and when they could likely pursue successful business careers without traveling to the US? More generally, would individuals from other rising nations feel emboldened to resist the reach of US jurisdiction by the perceived decline in US economic preeminence coupled with the less assertive approach to foreign policy adopted by the new administration? On the other hand, will Australia’s recent adoption of criminal penalties provide added leverage to offset these factors and foster interest in multijurisdictional resolutions of potential charges against executives?

In sum, it is safe to say that uncertainty concerning the risk of extradition facing foreign nationals will continue. There are reasons to be skeptical of perennial predictions that this risk is rising inexorably, and that executives have ever greater incentives to ‘deal’ with US prosecutors. Still, criminalisation of cartel conduct is spreading with it the risks of prosecutions for international executives are escalating without regard to the prospects of extradition to the United States.

The revised model leniency letters
At the end of 2008, the Division issued revised model leniency letters and a Frequently Asked Questions guide to its leniency programme. While the Division has stressed that these documents do not represent substantive changes to the programme, they do offer some notable clarifications and elaborations that address issues that have arisen since the Division’s previous guidance was issued. As the Division has recognised, the model letters are also an important step in clarifying the requirements of the leniency programme and remove what the Division has described as ‘perceived’ ambiguities in the letters. These clarifications have also been viewed as a product of the Division’s revocation of Stolt-Nielsen’s immunity, which, after extensive litigation, resulted in a district court decision dismissing the Division’s revocation of Stolt-Nielsen’s immunity, which, after

The guide provides: ‘A company that argues that an agreement to fix prices, rig bids, restrict capacity, or allocate markets might be inferred from its conduct but that cannot produce any employees who will admit that the company entered into such an agreement generally has not made a sufficient admission of criminal antitrust violation to be eligible for leniency.’

In order to secure leniency, therefore, a company must produce employees who will admit to committing a criminal antitrust violation. If the company secures immunity from prosecution, the interests of these employees may be aligned perfectly with those of the company. Problems may arise, however, if the company does not secure immunity or if the company and the individuals at issue are targets of a separate criminal investigation by the Division or an investigation of related conduct by a different part of the Department of Justice.

The prospect for jail time makes the individuals’ cooperation decision, and the company’s role in influencing that decision, difficult, particularly when the individuals at issue are not US nationals and are located outside of the US. A corporate leniency applicant must produce employees (without regard to their nationality) in the US for testimony and interviews, even if the employees are subject to arrest for conduct to which the immunity does not apply (such as an amnesty plus conspiracy). These employees are also required by the conditions of the leniency programme to ‘respond fully and truthfully to all inquiries of the United States in connection with the anticompetitive activity being reported’ even if their ‘responses may relate to, or tend to incriminate [them] in [another] investigation.’ Moreover, a leniency applicant cannot secure immunity (for itself or its employees) from prosecution for non-antitrust conduct by federal prosecutors outside of the Antitrust Division. As the leniency guide makes clear: ‘the leniency letter would not prevent the Criminal Division of the US Justice Department or any other prosecuting agency from prosecuting the applicant for a [non-antitrust] violation regardless of whether that violation was committed in connection with the antitrust offense.’ While such prosecutions have not occurred to date, a leniency applicant and its employees have no assurance that they would not be subject to prosecution by the Criminal Division or other agencies.

The potential for conflict between the company and its employees is particularly stark in the amnesty plus setting where the company secures immunity for its participation in one conspiracy and more favourable treatment, but not immunity, in another. Company employees who were involved in both conspiracies would therefore have immunity for their role in the first. However, they would face jail time for their role in the second conspiracy and be required to cooperate fully with the Division’s investigation. At the same time, the company is likely to have a strong incentive to apply for amnesty plus by, among other things, proffering to the Division information provided by the employees. In this setting, company counsel has to walk a fine line between its duties to its corporate client and the decision when to secure individual counsel for employees subject to prosecution. Recent cases in the non-antitrust setting serve as a reminder that corporate counsel is subject to serious sanction if it fails to give adequate ‘Upjohn warnings’ to corporate employees and then uses information obtained from these employees in making proffers to the government. In one egregious example, corporate counsel which represented an executive in an ongoing civil matter, interviewed the executive and proffered the resulting information to federal prosecutors without adequately informing the executive of the nature of their representation. The prosecutors used the proffered information to bring charges against the executive. The court ultimately held that the information could not be used against the executive, but referred corporate counsel to state disciplinary authorities for its conduct.
In addition to highlighting potential conflicts between corporate defendants and their employees, the Division’s revised leniency documents also remind companies that lose the race for immunity of the successful immunity applicant’s extensive duty to cooperate with the Division. Because of its duty to cooperate, the successful immunity applicant is likely to provide specific and detailed testimony and other evidence that it and its co-conspirators reached agreements in violation of the Sherman Act, not just general admissions of guilt or general descriptions of competitor meetings.

A defence victory at trial

In our last two articles, we reported on the Division’s loss of two trials, one against Stora Enso Oyj, a company charged with fixing prices of magazine paper, the other against Gary Swanson, who was accused of participation in the DRAM cartel. We noted that the outcomes of these trials underscore the risk of criminal prosecutions built on circumstantial evidence, which often turns trials into swearing contests between government witnesses and defendants about the nature of allegedly conspiratorial discussions. This year, the Division lost another trial, again underscoring this risk. In late June, a jury acquitted two individuals and a corporate defendant alleged to have participated in a conspiracy to allocate customers and rig bids for scrap metal in the Cleveland, Ohio area. Following a three week trial, the jury returned not guilty verdicts against all defendants on the antitrust charges and against one of the individual defendants on perjury and obstruction charges.17

While the Division’s response to these losses has been muted, the not guilty verdicts do not suggest fundamental problems with the Division’s enforcement programme. Rather, they reflect case-specific issues with witness credibility, circumstantial evidence, and the like. In addition, the Division’s ever increasing demands in plea negotiations provide defendants with greater incentives to go to trial, and it is generally the ‘toughest’ cases for the prosecution that are taken to trial by defendants.

The lesson here is that defendants perceiving weaknesses in the DoJ’s case against them, and facing demands for lengthy sentences in plea negotiations, will be more likely to go to trial. And perhaps the Division will become marginally more likely to decide against charging antitrust defendants in close cases. In any event, more frequent trials could have the positive effect of providing judicial guidance to antitrust defendants in close cases. In any event, more frequent trials could have the positive effect of providing judicial guidance to antitrust defendants in close cases.

The past year has seen dramatic developments in the US and global economies as well as a massive shift in political power in the US. While these developments may have indirect influence on cartel enforcement, the Antitrust Division’s longstanding and consistent policy of aggressive criminal enforcement is likely to continue with only minor modifications such as increased emphasis on bringing non-Sherman Act charges in order to facilitate prosecution of fraud and collusive conduct in government contracting. Major changes and challenges over the coming years will likely be a product of long-standing Division policy, such as the emphasis on longer prison sentences and larger fines. And we expect prosecutors and defence counsel alike to devote continued attention to issues, such as the methodology for calculating volume of commerce, that have remained unresolved but prominent over the last several years.

Notes

1 Statement of Senator Barack Obama for the American Antitrust Institute (February 2008).
2 Christine A Varney, assistant attorney general, Remarks prepared for the Center for Am Progress, Vigorous Antitrust Enforcement in this Challenging Era (11 May 2009).
3 See, eg, Carl Shapiro, deputy assistant att’y general for economics, Remarks prepared for ABA’s Antitrust Symposium: Competition as Public Policy, Competition Policy in Distressed Industries (13 May 2009).
4 Varney, supra note 3.
5 Varney, supra note 2, at 14.
6 Dep’t of Justice, Antitrust Division Workload Statistics FY 1999-2008.
7 Dep’t of Justice, LG, Sharp, Chunghwa Agree to Plead Guilty, Pay Total of $585 Million in Fines for Participating in LCD Price-Fixing Conspiracies (12 Nov 2008).
8 Varney, supra note 2, at 14.
9 Supra note 7.
10 Dep’t of Justice, Former Shipping Executive Sentenced to 48 Months in Jail for His Role in Antitrust Conspiracy (Jan 30, 2009).
11 Dep’t of Justice, Former Top SAS Cargo Group A/S Executive Agrees to Plead Guilty to Participating in Price-Fixing Conspiracy (28 July 2008); Dep’t of Justice, Dutch Airline Executive Agrees to Plead Guilty for Fixing Prices on Air Cargo Shipments (29 Apr 2009); and Dep’t of Justice, Former British Airways Executive Agrees to Plead Guilty to Participating in Price-Fixing Conspiracy on Air Cargo Shipments (30 Sept 2008).

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12 Dep’t of Justice, Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine Hose and Related Products (10 Dec 2008).

13 Dep’t of Justice, Three Foreign Executives Indicted for Their Roles in LCD Price-Fixing Conspiracy (3 Feb 2009); Dep’t of Justice, Hitachi Executive Indicted for His Role in LCD Price-Fixing Conspiracy (31 Mar 2009). In the case of a foreign national, the filing of an indictment without a plea agreement is strong evidence that the defendant has decided not to submit to US jurisdiction.


16 Order Suppressing Privileged Communications, United States v Nicholas, Dkt No SACR 08-00139-CJC (1 Apr 2009).

17 Judgment, United States v Alliance Nat’l Ltd Partnership, Dkt No. 1:08 CR 68 (29 June 2009).
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Mr Hartwell currently serves as a member of the International Task Force of the ABA Section of Antitrust Law, and is the co-chair of the Cartel and Criminal Practice 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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