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**“The Evolution of Criminal Antitrust Enforcement
Over the Last Two Decades”**

By

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I. Introduction

Over the last two decades the cartel enforcement landscape has dramatically changed in the United States and around the globe. In the early 1990's, the sanctions imposed in criminal cartel cases brought by the Antitrust Division of the U.S. Department of Justice were not sufficiently severe and our original Corporate Leniency Program was simply not producing cases. In the last two decades, the world has seen the proliferation of effective leniency programs, ever-increasing sanctions for cartel offenses, a growing global movement to hold individuals criminally accountable, and increased international cooperation among enforcers in cartel investigations.

The Antitrust Division has spent the last two decades building and implementing a “carrot and stick” enforcement strategy by coupling rewards for voluntary disclosure and timely cooperation pursuant to the Antitrust Division’s Corporate Leniency Program with severe sanctions. In addition, the Antitrust Division utilizes all available investigatory tools to create a significant risk and fear of detection and prosecution for violators of U.S. antitrust laws. The seeds of this “carrot and stick” enforcement strategy were planted by the Antitrust Division in the mid-1990s and began to bear fruit over the next decade. Since the mid-1990, the Antitrust Division has uncovered and prosecuted dozens of international cartels, secured convictions and jail sentences against culpable U.S. and foreign executives, and obtained hefty corporate fines. In recent years, competition enforcers around the world have intensified their cartel enforcement efforts and achieved similar results.

This paper will trace the evolution of cartel enforcement over the last two decades, highlighting U.S. milestones and achievements critical to the current success of cartel enforcement programs around the world.

II. The Carrot: Proliferation of Effective Corporate Leniency Programs

<i>Number of Jurisdictions with Leniency Programs</i>	
1990	Today
1	50+

The single most significant development in cartel enforcement is the proliferation of effective leniency programs.¹ The advent of leniency programs has completely

¹ In the United States, the terms corporate “immunity,” “leniency,” and “amnesty” are all synonymous and refer to a complete pass from criminal prosecution for a company and its cooperating employees. Under the U.S. Corporate Leniency Program, only one company can qualify. In other jurisdictions, including the E.U., leniency programs offer a 100 percent reduction from fines (referred to as “full immunity”) and also

transformed the way competition authorities around the world detect, investigate, and deter cartels. Cartels by their nature are secretive and, therefore, hard to detect. Leniency programs provide enforcers with an investigative tool to uncover cartels that may have otherwise gone undetected and continued to harm consumers. While the notion of letting hard core cartel participants escape punishment was initially unsettling to many prosecutors, the Antitrust Division recognized that the grant of full immunity was necessary to induce cartel participants to turn on each other and self-report, resulting in the discovery and termination of the conduct, the successful prosecution of the remaining cartel participants, and damage recovery for victims. Moreover, the hope was that the benefits of leniency would extend beyond the cartels it directly uncovered and that the very existence of the leniency policy would be viewed by executives as raising the risk of detection and punishment, leading to greater deterrence of cartel activity.

The original version of the U.S. Corporate Leniency Program dates back to 1978. However, the original Corporate Leniency Program was rarely utilized and the Antitrust Division received on average only about one leniency application per year. No leniency application made under the original Corporate Leniency Program resulted in the detection of an international or large domestic cartel. In August 1993, the Antitrust Division revised its Corporate Leniency Program to make it easier and more attractive for companies to come forward and cooperate with the Antitrust Division.² Three major revisions were made to the program: (1) leniency is automatic for qualifying companies if there is no pre-existing investigation; (2) leniency may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who come forward with the company and cooperate are protected from criminal prosecution.³

These revisions made the program more transparent and raised the incentives for companies to report criminal activity and cooperate with the Antitrust Division. As a

offer cooperating companies that do not win the race for full immunity the possibility of a fine reduction (referred to as “leniency”). For purposes of this paper, “leniency” refers to full immunity.

² Antitrust Division, U.S. Department of Justice, Corporate Leniency Policy (1993), *available at* <http://www.justice.gov/atr/public/guidelines/0091.htm>.

³ For a fuller discussion of these changes and the application of the Division’s Corporate Leniency Policy, see “Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters,” by Scott D. Hammond and Belinda Barnett (November 19, 2008), *available at*, <http://www.justice.gov/atr/public/criminal/239583.htm>; see also “Cornerstones of an Effective Leniency Program,” speech by Scott D. Hammond, before the ICN Workshop on Leniency Programs (Nov. 22-23, 2004), *available at* <http://www.justice.gov/atr/public/speeches/206611.htm>; “When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual’s Freedom?,” speech by Scott D. Hammond, Fifteenth Annual National Institute On White Collar Crime (March 8, 2001), *available at* <http://www.justice.gov/atr/public/speeches/7647.htm>; “Detecting And Detering Cartel Activity Through An Effective Leniency Program,” speech by Scott D. Hammond, before International Workshop on Cartels (November 21-22, 2000), *available at* <http://www.justice.gov/atr/public/speeches/9928.htm>; “Making Companies An Offer They Shouldn’t Refuse,” speech by Gary R. Spratling, before Bar Association of the District of Columbia’s 35th Annual Symposium on Associations and Antitrust (February 16, 1999), *available at* <http://www.justice.gov/atr/public/speeches/2247.htm>; “The Corporate Leniency Policy: Answers To Recurring Questions,” speech by Gary R. Spratling, before ABA Antitrust Section 1998 Spring Meeting (April 1, 1998), *available at* <http://www.justice.gov/atr/public/speeches/1626.htm>.

result of these changes, the Antitrust Division has seen a nearly twenty-fold increase in the leniency application rate, making the Leniency Program the Antitrust Division's most effective investigative tool. Leniency programs provide unparalleled information from cartel insiders about the origins and inter-workings of secretive cartels. In the United States, companies have been fined more than \$5 billion for antitrust crimes since Fiscal Year 1996, with over 90 percent of this total tied to investigations assisted by leniency applicants. The Antitrust Division typically has approximately 50 international cartel investigations open at a time, and more than half of these investigations were initiated, or are being advanced, by information received from a leniency applicant.

The success of the Antitrust Division's revised leniency program led to the adoption of similar voluntary disclosure programs by other jurisdictions. For example, Canada had some form of leniency in place since 1991 and the European Commission's first leniency notice was adopted in 1996. However, these programs, like the Antitrust Division's pre-1993 leniency program, lacked sufficient transparency and predictability to effectively induce self-reporting. When Canada issued its Immunity Bulletin in 2000 and the European Commission issued its revised Leniency Notice in 2002, the corporate leniency programs of the United States, the European Union, and Canada came into substantial convergence.⁴ This convergence in leniency programs has made it much easier and far more attractive for companies to simultaneously seek and obtain leniency in the United States, Europe, Canada, and in a growing list of other jurisdictions where the applicants have exposure. In the last decade, many other jurisdictions around the world have implemented leniency programs and today over 50 jurisdictions have leniency programs in place. Leniency programs have led to the detection and dismantling of the largest global cartels ever prosecuted and resulted in record-breaking fines in Australia, Brazil, Canada, the European Union, Japan, Korea, Poland, the United Kingdom, the United States, and other jurisdictions.

Effective leniency programs create a race among conspirators to disclose their conduct to enforcers, in some instances even before an investigation has begun, and quickly crack cartels that may have otherwise gone undetected. However, simply creating a leniency program does not ensure that it will be *effective*. The business community and the private bar must have confidence in a leniency program or there will be no race to the enforcer's door to take advantage of it. There are three essential cornerstones that must be in place before a jurisdiction can successfully implement a leniency program. First, the jurisdiction's antitrust laws must provide the threat of severe sanctions for those who participate in hard core cartel activity and fail to self-report. Second, organizations must perceive a high risk of detection by antitrust authorities if they do not self-report. Third, there must be transparency and predictability to the greatest extent possible throughout a jurisdiction's cartel enforcement program, so that companies can predict with a high degree of certainty how they will be treated if they

⁴ Canada subsequently revised its immunity program in 2007, *available at* http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02000.html, and issued a revised draft bulletin on leniency for those ineligible for immunity in 2009, *available at* <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html>. The European Commission again revised its leniency program in 2006, *available at* http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html.

seek leniency, and what the consequences will be if they do not.⁵ These three major cornerstones – severe sanctions, heightened fear of detection, and transparency in enforcement policies – are the indispensable components of every effective leniency program.

Effective leniency programs destabilize cartels. If cartel members have a significant fear of detection and the consequences of getting caught are too severe, then the rewards of self-reporting become too important to risk losing the race for leniency to another cartel member, or perhaps to its own employee if individual leniency is available. The dynamic literally creates a race to be the first to the prosecutor’s office.

Consider the “empty seat at the table” scenario. Five members of a cartel are scheduled to hold an emergency meeting, but when the meeting starts there is an empty seat at the table. One of the conspirators has unexpectedly not arrived at the meeting and is not returning phone calls. The cartel members at the meeting start to get nervous. Has the missing cartel member had a change of heart and abandoned the cartel? Has he already reported the others to the government? Or did he just miss his plane? In this environment, with the risk of detection and resulting sanctions so high, can the conspirators afford to trust one another? Each member of a cartel knows that any one of its co-conspirators can report the others in exchange for total immunity – a decision that will seal their fate. Imagine the vulnerability of cartel members in that position asking, “Can I really trust my competitors to look out for my best interests?” The answer to this question leads them directly to the prosecutor’s door.

III. The Stick: Movement Toward Severe Sanctions, Including Individual Accountability

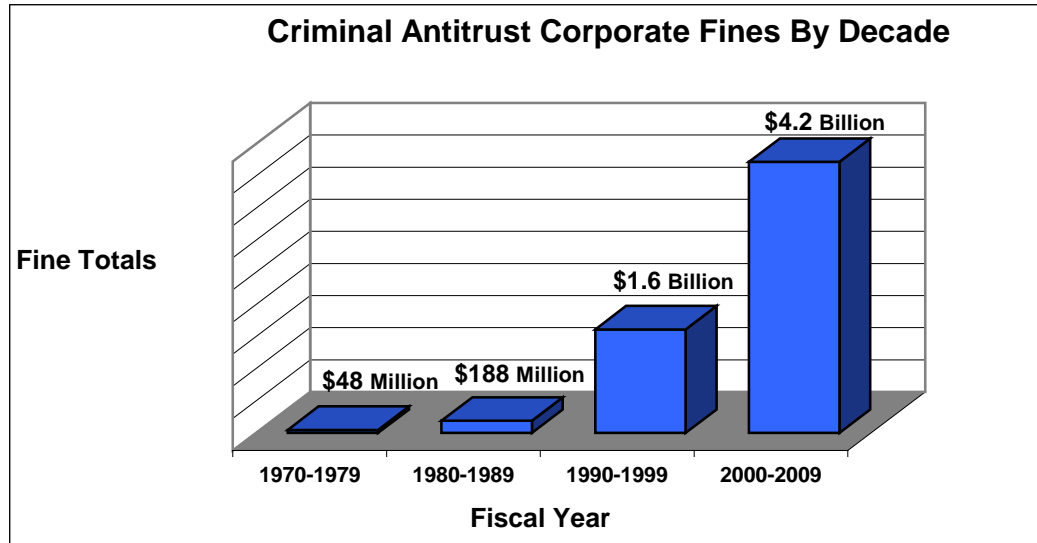
If the potential penalties that can be imposed upon cartel participants are not perceived as outweighing the potential rewards of participating in a cartel, then the fine imposed becomes merely part of the cost of doing business. The Antitrust Division has steadfastly emphasized the importance of individual accountability and stiff corporate fines to induce leniency applications and optimize deterrence of cartel conduct.

Over the last three decades sanctions imposed in cartel cases brought by the Antitrust Division have increased exponentially. This increase is attributable to a number of factors, including increases in maximum penalties for antitrust crimes,⁶ the Antitrust

⁵ For a fuller discussion, see “Cornerstones of an Effective Leniency Program,” speech by Scott D. Hammond, before the ICN Workshop on Leniency Programs (Nov. 22-23, 2004), available at <http://www.justice.gov/atr/public/speeches/206611.htm>.

⁶ In 1974 criminal violations of the Sherman Act became a felony with a maximum three-year term of imprisonment and fine maximums of \$1 million for corporations and \$100,000 for individual defendants. The statutory maximum jail time was unchanged for three decades, but fine levels were increased twice between 1974 and 2004. The maximum individual fine for criminal Sherman Act violations was increased to \$250,000 in 1984, through a combination of the Omnibus Crime Control of 1984 and the Criminal Fines Enforcement Act of 1984, and the maximum corporate fine remained \$1 million. In 1990, the Sherman Act was amended to raise the maximum fines to \$10 million for corporations and \$350,000 for individuals. In

Division's reallocation of resources to focus on international cases involving larger volumes of commerce, and the change in perception by judges as to the seriousness of antitrust crimes. These factors came together in the 1990s to produce record fines, and this trend has continued in the 21st Century.



The Antitrust Division's sentencing statistics over the last two decades show a steady trend toward higher corporate fines for cartel offenses and longer jail sentences for individuals. For example, in Fiscal Year 1991 the average corporate fine for an antitrust offense in the United States was a little less than \$320,000 and the largest corporate fine ever imposed for a single Sherman Act count was \$2 million.⁷ In the mid-1990's the amount of corporate fines began to grow steadily, with multimillion dollar fines becoming more commonplace.⁸ In 1996, corporate fines reached a new order of magnitude when the Archer Daniels Midland Company ("ADM") paid a \$100 million fine for its participation in two international antitrust conspiracies (lysine and citric acid) in the food and feed additives industry. Then-Deputy Assistant Attorney General of the Antitrust Division Gary Spratling predicted that the historic ADM fine was not an aberration, and that we would see more corporate fines in criminal antitrust cases above \$100 million.⁹ This prediction quickly proved to be accurate. In April 1998, UCAR International agreed to pay a \$110 million fine for its participation in the graphite electrodes conspiracy and in 1999, SGL agreed to pay a \$135 million for its role in the

addition, since 1984, fines in excess of the statutory maximum may be imposed pursuant to 18 U.S.C. § 3571(d), which provides for a fine of up to twice the gain derived by, or twice the loss caused by, the cartel. Recognizing the rising threat to U.S. businesses and consumers caused by cartels, in June 2004, Congress significantly raised the maximum penalties for criminal Sherman Act violations increasing the statutory maximum corporate fine to \$100 million, the statutory maximum individual fine to \$1 million, and the maximum jail term to 10 years.

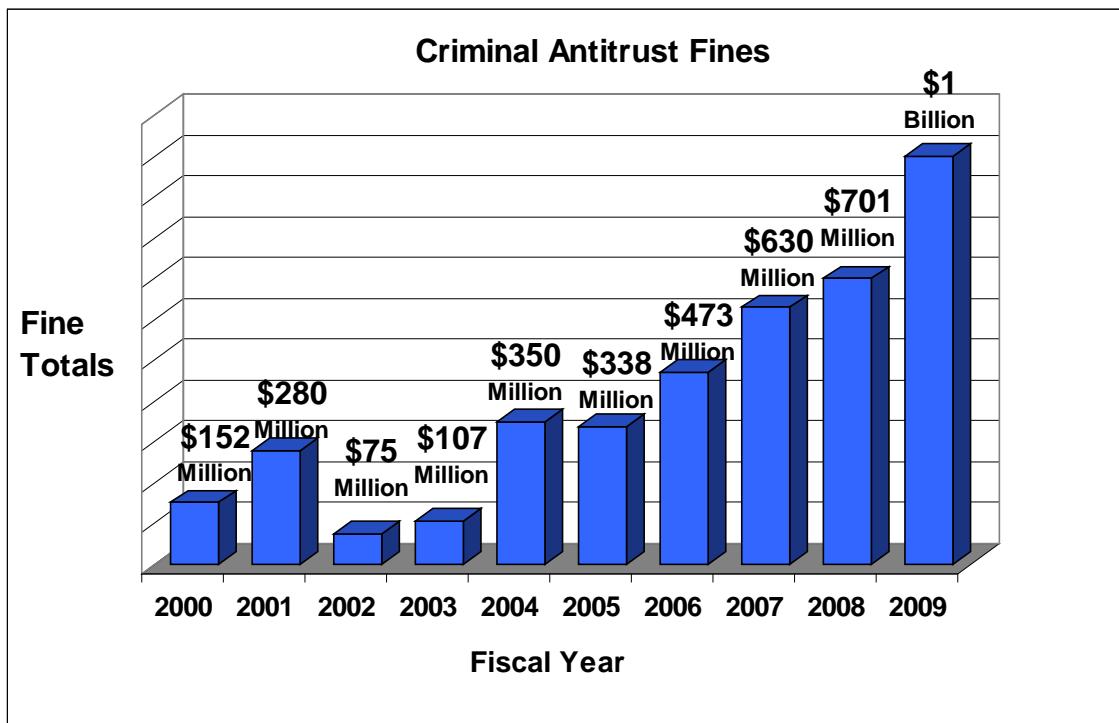
⁷ See "The Trend Towards Higher Corporate Fines: It's A Whole New Ball Game," speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before ABA National Institute On White Collar Crime (March 7, 1997), available at <http://www.justice.gov/atr/public/speeches/4011.htm>.

⁸ See *id.*

⁹ See *id.*

graphite electrodes conspiracy. These record fines were quickly eclipsed in May 1999 when the worldwide vitamin cartel was exposed and pharmaceutical giant F. Hoffmann-La Roche Ltd agreed to plead guilty and pay a record \$500 million criminal fine for leading the conspiracy and BASF AG agreed to pay a \$225 million fine for its role.

The ADM fine truly was the tip of the iceberg for large corporate antitrust fines. The Antitrust Division's record of cracking large international cartels affecting huge amounts of commerce and obtaining nine-figure fines has continued in the new millennium with the Antitrust Division's prosecutions of cartels in the air transportation (more than \$1.6 billion in criminal fines obtained to date), liquid crystal display (more than \$860 million in criminal fines obtained to date), and dynamic random access memory (more than \$730 million in criminal fines obtained to date) industries, among others. To date, the Antitrust Division has obtained 18 fines above \$100 million¹⁰ and this trend shows no signs of decline, with the Antitrust Division obtaining just over \$1 billion in fines in Fiscal Year 2009.



Other jurisdictions, most notably the European Union, have also steadily raised fines over the last two decades and imposed increasingly large fines against cartel participants. Before 1990, the highest cartel fines imposed in Europe were fines totaling 60 million ECU on 23 petrochemical producers for price fixing in the plastic industry.¹¹

¹⁰ See Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More, available at <http://www.justice.gov/atr/public/criminal/sherman10.htm>.

¹¹ Press Release, European Commission, Commission Imposes Heavy Fines On Cartels In The Plastic Sector (December 21, 1988), available at

Since 2006, the European Commission has imposed more than €1 billion in cartel fines per year, reaching a high of over €3 billion in 2007.¹² In December 2008, the Commission imposed its largest fines ever, ordering four car glass manufacturers to pay a combined total of more than €1.3 billion for their cartel conduct.¹³

Individual Accountability

The Antitrust Division's detection and prosecution of the worldwide vitamin cartel was important not only because it resulted in record fines, but because for the first time a foreign executive agreed to serve time in U.S. prison for his participation in an international cartel. The historic plea agreement the Antitrust Division entered into in May 1999 with a Swiss vitamin executive was the first that called for the imposition of jail time for a foreign national who had participated in an international cartel.¹⁴ This plea agreement marked a watershed in the Antitrust Division's prosecution of international cartels. Before the filing of this case, foreign defendants prosecuted for their participation in international cartels, such as the lysine and citric acid cartels, had pled guilty but the Division did not seek a jail sentence in return for their admission of guilt, cooperation, and submission to U.S. jurisdiction. When the Division began prosecuting international cartels, just convincing a foreign national to submit to U.S. jurisdiction and plead guilty was a major achievement. At that time, a no-jail deal was necessary for the Division to secure access to an important foreign witness or key foreign-located documents.

However, by 1999, the Antitrust Division's ability to successfully investigate and prosecute foreign nationals who violate U.S. antitrust laws had significantly advanced, with enhanced investigative tools and increased international cooperation. Thus, "no-jail" deals became a relic of the past.¹⁵ Division practice now is to insist on jail sentences for *all defendants* domestic and foreign. The Division will not agree to a "no-jail" sentence for any defendant, and our practice is not to remain silent at sentencing if a defendant argues for a no-jail sentence.

Since May 1999, more than 40 foreign defendants have served, or are serving, prison sentences in the United States for participating in an international cartel or for obstructing an investigation of an international cartel. Foreign nationals from France, Germany, Japan, Korea, Norway, the Netherlands, Sweden, Switzerland, Taiwan and the

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/88/852&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹² See EU cartel fine statistics (updated October 2009), available at

<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>

¹³ Press Release, European Commission, Commission fines car glass producers over €1.3 billion for market sharing cartel (November 12, 2008), available at

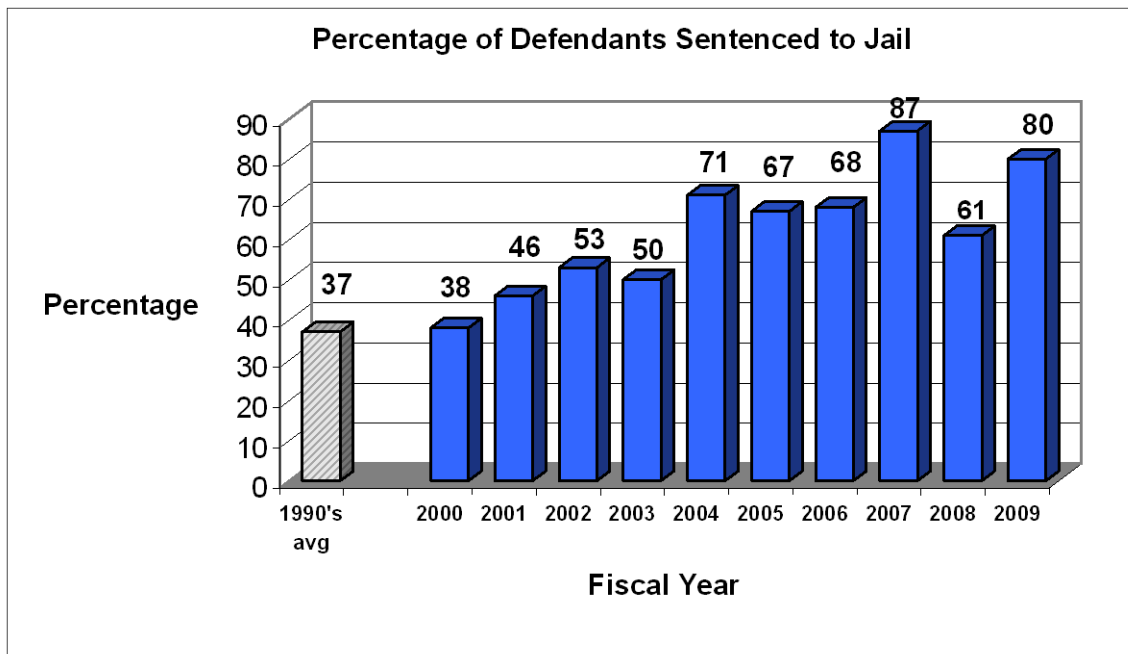
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1685&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹⁴ Plea Agreement at 7-8, *United States v. Sommer*, Crim. No. 3:99-CR-201-R (N.D. Tex. 1999), available at <http://www.justice.gov/atr/cases/f2400/sommer.pdf>.

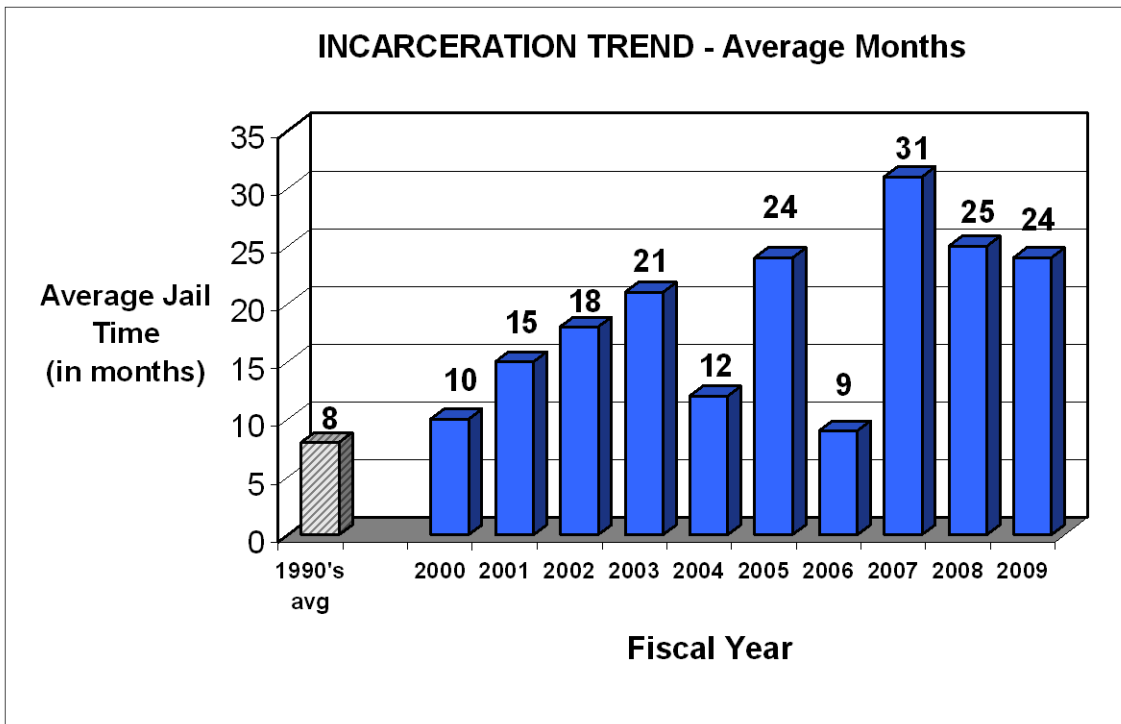
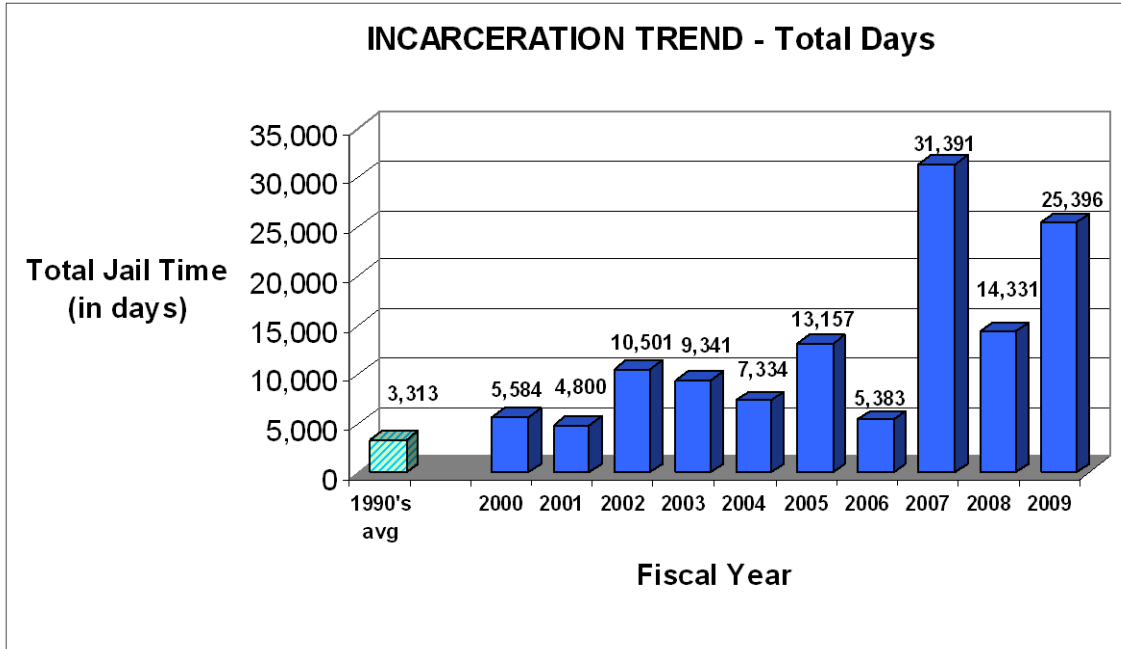
¹⁵ See Scott D. Hammond, "Charting New Waters in International Cartel Prosecutions," speech before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime (Mar. 2, 2006), available at <http://www.justice.gov/atr/public/speeches/214861.htm>.

United Kingdom are among those defendants. The antitrust bar and business community understand that the Division is serious about its policy of insisting on jail sentences for both U.S. and foreign defendants. This realization provides further incentive for corporations to apply for leniency so that their cooperating executives will receive non-prosecution coverage. And if leniency is no longer available in an investigation, the Division's insistence on jail terms encourages executives to come in early to cooperate to minimize their jail time and companies to come in early to minimize the number of individual carve outs who could be subject to jail sentences.

During the last decade, the Antitrust Division has made increased individual accountability a critical piece of its cartel enforcement program and the Antitrust Division's enforcement statistics demonstrate that individuals who violate U.S. antitrust laws are being sent to jail with increasing frequency and for longer periods of time. Since 2000, the Antitrust Division has seen a steady increase in the percentage of defendants sentenced to jail.



In addition, over the last decade the Antitrust Division has obtained successively greater jail sentences and set new deterrent marks, including the highest number of total jail days imposed in a fiscal year (31,391 in 2007) and the highest average jail sentence for all defendants in a fiscal year (31 months in 2007).



Consistent with the Antitrust Division's emphasis on promoting deterrence through individual accountability, the Antitrust Division also began prosecuting more culpable individuals from each corporate defendant. In the Antitrust Division's prosecutions of international cartels in the mid-1990s, it was typical for the Antitrust Division to prosecute only the single most culpable employee from each foreign company

prosecuted. However, beginning in 1999 with the prosecution of six foreign executives from F. Hoffmann-La Roche and BASF for their participation in the vitamin cartel, the Antitrust Division began a policy of greater accountability for culpable executives. During the last decade, the Antitrust Division has routinely prosecuted multiple individuals from each corporate defendant, and over time, the Antitrust Division has tended to prosecute greater numbers of individuals from each corporate defendant.¹⁶

The prosecution of the vitamin cartel was also important because it helped trigger a rethinking of the adequacy of competition laws around the world. The vitamin cartel was one of the most pervasive and harmful ever prosecuted by the Antitrust Division. The cartel was so sophisticated that its members were able to carve up the world's billion-dollar vitamin market among a few multi-national companies and fix prices on a country-by-country basis around the world for nearly ten years. The vitamin cartel operated with such precision and profit that it was called "Vitamins, Inc." by its members. The cartel impacted products that appeared not only in the cupboards of Americans, but in those of consumers worldwide.

The high-profile nature of the vitamin cartel and the nearly billion dollars in fines imposed against the vitamin cartel members in the United States¹⁷ grabbed the attention of the foreign press, as well as foreign businesses and consumers. Many foreign business and consumer groups then began asking whether their governments would be acting to protect their interests against cartel behavior. The vitamin cases helped fuel a movement to rethink the adequacy of competition laws and law enforcement powers that was already beginning to take place in many governments abroad as a result of the lysine and citric acid conspiracies. These governments began to consider whether they had sufficient penalties in place to deter cartel activity; whether cartel activity should be treated as an administrative or a criminal offense; and whether individuals as well as corporations should be sanctioned for cartel offenses. Twelve individuals, including six European executives, were sentenced to serve time in U.S. prisons for their role in the vitamin conspiracy. Ultimately, other jurisdictions including Canada, the European Union, Australia, and Korea imposed then-record fines against participants in the vitamin cartel,¹⁸ but no cartel member served a single day in jail outside the United States for their participation in the vitamin cartel.

¹⁶ For example, in the rubber chemicals investigation, Crompton, which began to cooperate within days after the issuance of grand jury subpoenas, had three individuals carved out from its plea agreement. The next company to plead in that investigation, Bayer, had five individuals carved out of its plea agreement. A similar crescendo occurred in our DRAM investigation: Infineon had four individuals carved out of its plea agreement; Hynix had five carve outs; and Samsung had seven. For a fuller discussion of the Division's carve-out policies see "Charting New Waters in International Cartel Prosecutions," speech by Scott D. Hammond before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime (Mar. 2, 2006), available at <http://www.justice.gov/atr/public/speeches/214861.htm>.

¹⁷ For a listing of corporate fines imposed against corporate vitamin cartel participants, see Antitrust Division Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More, available at <http://www.justice.gov/atr/public/criminal/sherman10.htm>.

¹⁸ On September 22, 1999, Canada announced then-record criminal fines totaling \$88.4 million against four participants in the vitamins cartel, see Press Release, Canadian Competition Bureau, Federal Court Imposes Fines Totalling \$88.4 Million For International Vitamin Conspiracies (September 22, 1999), available at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00607.html>; in December 2000, the Australian

The Antitrust Division has long emphasized that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences.¹⁹ That view is now gathering momentum around the world. In 2008, three executives were sentenced to lengthy jail terms in the United Kingdom for their participation in the marine hose conspiracy, marking the first jail sentences for a cartel offense under the 2002 Enterprise Act. In August 2008, the U.K.'s Office of Fair Trading continued its criminal prosecutions of individuals under the Enterprise Act when it announced charges against four British Airways executives in its investigation of price fixing of passenger fuel surcharges.²⁰ The Australian Parliament introduced a criminal cartel offence effective July 24, 2009.²¹ Other jurisdictions such as Chile,²² the Czech Republic,²³ Greece,²⁴ Mexico,²⁵ the Netherlands,²⁶ New Zealand,²⁷ Russia²⁸ and South

Competition and Consumer Commission announced that it was seeking then-record penalties of \$26 million against three international vitamins suppliers for price fixing, *see* Press Release, Australian Competition and Consumer Commission, Court hearing on vitamins price-fix case: ACCC seeks record \$26M penalty against international vitamin suppliers (December 5, 2000), *available at* <http://www.accc.gov.au/content/index.phtml/itemId/87582/fromItemId/378010>; in November 2001, the European Commission imposed then-record fines totaling €855.22 million against eight companies for their participation in the vitamins cartel, *see* Press Release, European Commission, Commission imposes fines on vitamin cartels (November 21, 2001), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1625&format=HTML&aged=0&language=EN&guiLanguage=en>; on April 18, 2003, the Korean Fair Trade Commission announced that it had imposed administrative fines totaling 3,916 million Won on six vitamin manufacturers for their participation in the vitamins cartel, *see* Korea Fair Trade Commission, KFTC News, Investigation results of the international cartel of 6 vitamin companies (April 29, 2003), *available at* <http://eng.ftc.go.kr/files/bbs/2008/news04.doc>.

¹⁹ For more information on Division policies and initiatives directed toward the prosecution of individual offenders, *see* “Charting New Waters in International Cartel Prosecutions,” speech by Scott D. Hammond before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime (Mar. 2, 2006), *available at* <http://www.justice.gov/atr/public/speeches/214861.htm>; and “When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?,” speech by Scott D. Hammond, before the Fifteenth Annual National Institute On White Collar Crime (March 8, 2001), *available at* <http://www.justice.gov/atr/public/speeches/7647.htm>.

²⁰ Press Release, U.K. Office of Fair Trading, OFT announces criminal charges in airline fuel surcharges cartel case (Aug. 7, 2008), *available at* <http://www.oft.gov.uk/news/press/2008/93-08>.

²¹ *See* Australian Competition and Consumer Commission, New Cartel Laws Introducing Criminal Sanctions, *available at* http://www.accc.gov.au/content/index.phtml/itemId/882220#h2_26.

²² *See* Rachel Bull, *Chile Establishes Tougher Antitrust Regime*, Global Competition Review, October 13, 2009, *available at* <http://www.globalcompetitionreview.com/news/article/19032/chile-establishes-tougher-antitrust-regime>.

²³ *See* Dagmar Bicková and Arthur Braun, *The European Antitrust Review* Section 4: Country Chapters Czech Republic (Global Competition Review, 2010), *available at* <http://www.globalcompetitionreview.com/reviews/19/sections/69/chapters/751/czech-republic/>.

²⁴ *See* Ron Knox, *Greece Overhauls Competition Law*, Global Competition Review, April 1, 2009, *available at* <http://www.globalcompetitionreview.com/news/article/13174/greece-overhauls-competition-law/>.

²⁵ *See* Sebastian Perry, *Mexican Antitrust Reform Bill Expected*, Global Competition Review, September 16, 2008, *available at* <http://www.globalcompetitionreview.com/news/article/18821/mexican-antitrust-reform-bill-expected/>.

²⁶ *See* Esther Glerum-van Aalst, Marleen de Putter and Andre Reznitchenko, *The European Antitrust Review* Section 4: Country Chapters, *Netherlands: Cartels* (Global Competition Review, 2010), *available at* <http://www.globalcompetitionreview.com/reviews/19/sections/69/chapters/769/netherlands-cartels/>.

Africa²⁹ have also recently adopted, or are considering, legislation that will criminalize cartel offenses. In addition, there have been major domestic criminal cartel prosecutions in a number of jurisdictions around the world. For instance, since making the prosecution of hard core cartels a top priority in Brazil in 2003, competition enforcers in Brazil have cooperated closely with State and Federal Public Prosecutor's Offices and the Federal Police to combat cartel conduct and to date more than 100 executives are facing criminal proceedings, at least ten executives have been sentenced to serve jail time, and another 19 executives have been sentenced to pay criminal fines for their participation in cartel conduct.³⁰ Similarly, competition enforcers in Denmark,³¹ Ireland,³² Israel,³³ Japan,³⁴ and Korea³⁵ have teamed with public prosecutors to bring criminal charges against cartel offenders.

The criminalization of cartel offenses will certainly be an area of continued evolution in cartel enforcement around the world in the years to come.

²⁷ See Ron Knox, *New Zealand Criminalisation Papers Due In November*, Global Competition Review, August 25, 2009, available at <http://www.globalcompetitionreview.com/news/article/18612/new-zealand-criminalisation-papers-due-november/>.

²⁸ See *Russian Authority Backs Criminal Enforcement*, Global Competition Review, July 31, 2008, available at <http://www.globalcompetitionreview.com/news/article/9609/russian-authority-backs-criminal-enforcement/>.

²⁹ See Rosalind Donald, *Zuma Signs Competition Bill*, Global Competition Review, August 28, 2009, available at <http://www.globalcompetitionreview.com/news/article/18634/zuma-signs-competition-bill/>.

³⁰ See Ministry of Justice, Secretariat of Economic Law, Brazil's Anti-Cartel Program, available at <http://www.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID=%7BE7E2725E-A848-4706-BA0A-5CF0C695EA35%7D&ServiceInstUID=%7B2E2554E0-F695-4B62-A40E-4B56390F180A%7D>.

³¹ The Danish Competition Authority has referred matters to the Public Prosecutor for Serious Economic Crime for criminal prosecution. See Danish Competition Authority, Annual Report 2006, available at <http://www.konkurrencestyrelsen.dk/en/service-menu/publications/publication-file/publications-2007/annual-report-2006/978-87-7029-366-2pdf/>.

³² For example, the Director of Public Prosecutions in Ireland criminally prosecuted a number of defendants involved in two cartel cases in the motor retail trade industry. See The Competition Authority, Criminal Court Cases, Motor Vehicle Cartel Cases, available at <http://www.tca.ie/EN/Enforcing-Competition-Law/Criminal-Court-Cases/Motor-Vehicles.aspx>.

³³ For example, in 2008 the Israel Antitrust Authority filed criminal charges against corporate officers of three large amplification and lighting companies for their participation in cartel conduct. See Press Release, Israel Antitrust Authority, Indictment Filed against Members of the Amplification and Lighting Cartel (December 16, 2008), available at <http://eng-archive.antitrust.gov.il/files/167/65-2008English.pdf>.

³⁴ For example, in FY 2008, the Japan Fair Trade Commission filed criminal accusations with the Prosecutor General against three manufacturers and distributors and six individuals in a case concerning the price-fixing cartel of hot-dip galvanized steel sheets. See Japan Fair Trade Commission, Annual Report of FY 2008, available at http://www.jftc.go.jp/e-page/pressreleases/2009/October/091027_Annual_Report_FY2008.pdf.

³⁵ For example, in 2008, the Korean Fair Trade Commission filed complaints with the Prosecutor's Office against five resin manufacturing firms for participating in a price-fixing cartel. See Press Release, Korea Fair Trade Commission, KFTC imposes a cease & desist order and fines amounting to KRW105.1 billion (\$ 112 million) on ten synthetic resin makers (July 3, 2008), available at [http://eng.ftc.go.kr/files/bbs/2008/Price-fixing%20of%20ten%20synthetic%20makers\(07.%203.\).doc](http://eng.ftc.go.kr/files/bbs/2008/Price-fixing%20of%20ten%20synthetic%20makers(07.%203.).doc).

IV. The Chase: Creating a Fear of Detection Through the Use of Increased Investigative Tools

If executives perceive little risk of being caught by cartel enforcers, then stiff statutory penalties alone will not be sufficient to deter cartel activity. During the last two decades, cartel enforcers around the world have utilized an increasingly robust arsenal of investigative tools to instill a genuine fear of detection among executives. The covert tape recordings of the lysine cartel that were used to convict cartel participants, and have since been shown by the Antitrust Division around the world as an example of a cartel in action, show the cartel participants brazenly mocking enforcers in the U.S., Europe, and Asia.³⁶ The lysine cartel members who were caught in the act clearly demonstrated a consciousness of guilt, but continued to meet because they had no fear of detection. Perhaps that is because such a large, global cartel had never before been detected and criminally prosecuted.

The lysine tapes provided a striking visual tour inside an actual cartel. As the Antitrust Division took the tapes around the world, members of the bar and business community witnessed the inner-working of a cartel with their own eyes. Members of this same cartel were sentenced to lengthy jail sentences and then-record fines were imposed against the corporate defendants. The successful detection and prosecution of the lysine cartel led to increased awareness in the international business community of the risks and the consequences of engaging in cartel activity.

The lysine tapes themselves also had a monumental impact on how many foreign governments viewed the efficacy of their investigative powers and sanctions. After the case, the Antitrust Division showed the tapes to enforcers at meetings of the OECD and the inaugural International Cartel Workshop held in Washington D.C. in October 1999, and also met individually with many foreign government officials and played the tapes for them. In many of those jurisdictions, the antitrust officials were already well aware of the harm caused by cartel activity, and they were already pushing for reform in their laws or in their investigative powers. Foreign enforcers arranged for Antitrust Division personnel to meet with key government policy makers such as treasury officials who held the purse strings for additional funding to fight cartels, legislative members who were contemplating changes in the law, and representatives of influential trade or business groups in an effort to help gain their support for increased enforcement. These stakeholders watched the tapes and saw with their own eyes how their businesses and their consumers had been victimized. Simply put, the lysine tapes caused some foreign governments to question, if not rethink, how they investigated and treated cartel offenses. Thereafter, numerous governments around the world began making cartels a top priority, devoting additional resources to cartel enforcement, and utilizing more traditional law

³⁶ For a more detailed discussion of the content of the lysine tapes, *see* “Caught in the Act: Inside an International Cartel,” speech by Scott D. Hammond at the OECD Competition Committee Public Prosecutors Program (October 18, 2005), *available at* <http://www.justice.gov/atr/public/speeches/212266.htm>. Copies of the tapes and transcripts are available at no charge by contacting the Antitrust Documents Group by phone: (202) 514-2481, Fax: (202) 514-3763, or e-mail: atrdocs.grp@usdoj.gov.

enforcement tools such as search warrants and wire taps in cartel investigations. The global utilization of all available law enforcement powers in cartel investigation has helped to ensure that, in a growing number of countries, “crime in the suites” is treated the same as crime in the streets.

In the United States, since the 1990’s the Antitrust Division has increased our arsenal of investigative tools in international cartel investigations to include the use of border watches, INTERPOL Red Notices, and extradition requests. In 2001, the Division adopted a policy of placing indicted fugitives on a "Red Notice" list maintained by INTERPOL. A red notice watch is essentially an international "wanted" notice that, in many INTERPOL member nations, serves as a request that the subject be arrested, with a view toward extradition. Multiple fugitive defendants have been apprehended through a Division INTERPOL red notice. The Division has sought, and will continue to seek, the extradition of fugitive defendants apprehended through the INTERPOL red notice watch wherever possible. The Division's use of red notices clearly raises the stakes for foreign executives who hope to avoid prosecution by simply remaining outside of the United States. With the stiffening resolve that foreign governments are taking toward punishing cartel activity and their increased willingness to assist the United States in prosecuting cartel activity, the safe harbors for antitrust offenders are rapidly shrinking. The use of these tools also assists the Antitrust Division in gathering evidence and provides strong incentives for those executives to accept responsibility and cooperate with Antitrust Division investigations.

V. The Global Network of Cartel Enforcement: Increased International Cooperation

In today’s global economy, cartels do not stop at national borders, so cartel investigations cannot either. There is a growing worldwide consensus that international cartel activity is harmful, pervasive, and is victimizing businesses and consumers everywhere. The shared commitment of competition enforcers to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world in order to more effectively investigate and prosecute international cartels.

One of the interesting developments in international cartel cooperation can be found in the work of the International Competition Network’s (ICN) Cartel Working Group. Initiated in 2004, this working group is an important forum for agencies to share expertise regarding the challenges of cartel enforcement. Informed by input and experiences of the participating agencies, the working group seeks to identify the best investigative techniques and policy approaches from around the world. A main focus of ICN work in the cartel area is assisting agencies in honing their operational and practical skills. In this vein, the Cartel Working Group organizes the annual ICN Cartel Workshop, a continuation of the successful series of agency-led International Cartel Conferences initiated by the U.S. Department of Justice in 1999. This annual event – hosted in 2009 by the Egyptian Competition Authority – provides a venue for anti-cartel

enforcers from around the world to come together, learn from each other, and develop close working relationships that serve as the basis for future cooperation.

The ICN has assisted cartel enforcers in developing cross-border relationships that have resulted in real-time coordination among enforcers conducting parallel investigations of the same cartel. In addition, the proliferation of effective leniency programs has resulted in an increasing number of applicants seeking leniency simultaneously in multiple jurisdictions. Enforcers can then coordinate investigative steps, share – with the applicant’s consent – information provided by a mutual leniency applicant, and coordinate searches. Coordinated searches and other investigative steps are becoming more prevalent.

Two recent high-profile examples of successful cooperation and coordination are the air transportation investigation where the United States cooperated with authorities on five continents in order to coordinate the executions of search warrants on multiple subject locations in the United States and abroad. The filing of the Antitrust Division’s plea agreement with British Airways calling for a \$300 million criminal fine coincided with the announcement by the U.K.’s Office of Fair Trading that the airline also agreed to pay a record fine of 121.5 million British pounds (roughly \$250 million) for its role in the passenger fare conspiracy.³⁷ To date, a total of 15 airlines and four executives have pled guilty in the Antitrust Division’s ongoing investigation into price fixing in the air transportation industry. Collectively, the companies have paid or agreed to pay criminal fines totaling more than \$1.6 billion and four executives have been sentenced to jail time.

In addition, recent Antitrust Division coordination with the U.K.’s Office of Fair Trading and the European Commission regarding cartel conduct in the marine hose industry is a model of international coordination and the monumental results it can achieve. On the same day that the Antitrust Division and the FBI conducted multiple searches in the United States and arrested eight foreign executives in Houston and San Francisco for their roles in the marine hose conspiracy, the United Kingdom and European antitrust authorities searched locations in Europe.³⁸ The marine hose investigations also resulted in an international cooperation milestone when the Antitrust Division filed plea agreements with three British nationals in 2007, calling for lengthy jail sentences. For the first time, the Antitrust Division plea agreements anticipated and addressed the criminal prosecution of, and imposition of a jail sentence upon, the

³⁷ See Press Release, U.S. Justice Department, Antitrust Division, British Airways Plc and Korean Air Lines Co. Ltd. Agree to Plead Guilty and Pay Criminal Fines Totaling \$600 Million for Fixing Prices on Passenger and Cargo Flights (Aug. 1, 2007), available at http://www.justice.gov/atr/public/press_releases/2007/224928.htm; Press Release, U.K. Office of Fair Trading, British Airways to pay record £121.5m penalty in price fixing investigation (Aug. 1, 2007), available at <http://www.oft.gov.uk/news/press/2007/113-07>; Press Release, U.K. Office of Fair Trading, OFT response to U.S. Department of Justice statement (Aug. 1, 2007), available at <http://www.oft.gov.uk/news/press/2007/114-07>.

³⁸ See Press Release, U.S. Justice Department, Antitrust Division, Eight Executives Arrested On Charges Of Conspiring To Rig Bids, Fix Prices, And Allocate Markets For Sales Of Marine Hose (May 2, 2007), available at http://www.justice.gov/atr/public/press_releases/2007/223037.htm; Press Release, OFT launches criminal investigation into alleged international bid rigging, price fixing, and market allocation cartel (May 3, 2007), available at <http://www.oft.gov.uk/news/press/2007/70-07>.

defendants for a cartel offense in another jurisdiction. The resulting charges in the United Kingdom against the defendants were the first criminal cartel offenses charged under the U.K.'s Enterprise Act since it came into force in 2003. The unparalleled level of cooperation in the marine hose cases not only made history, but it raised the stakes and provides a strong deterrent message for would-be cartel participants who seek to victimize consumers in multiple jurisdictions.

VI. Conclusion

As we see the next generation of jurisdictions adopt criminal sanctions or leniency programs, join in simultaneous coordinated raids on target companies around the world, or impose a record sanction, it is worth noting that the DNA for these developments dates back to policies and practices that were put in place by the Antitrust Division in the 1990s and proliferated and flourished through the dedicated efforts of global cartel enforcers over the last two decades.