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***CRIMINALIZATION OF CARTEL CONDUCT –
THE CHANGING LANDSCAPE***

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Criminalization of Cartel Conduct – The Changing Landscape

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I. Introduction

It is well known that the Antitrust Division has long ranked anti-cartel enforcement as its top priority. It is also well known that the Division has long advocated that the most effective deterrent for hard core cartel activity, such as price fixing, bid rigging, and allocation agreements, is stiff prison sentences. It is obvious why prison sentences are important in anti-cartel enforcement. Companies only commit cartel offenses through individual employees, and prison is a penalty that cannot be reimbursed by the corporate employer. As a corporate executive once told a former Assistant Attorney General of ours: “[A]s long as you are only talking about money, the company can at the end of the day take care of me . . . but once you begin talking about taking away my liberty, there is nothing that the company can do for me.”¹ Executives often offer to pay higher fines to get a break on their jail time, but they never offer to spend more time in prison in order to get a discount on their fine.

We know that prison sentences are a deterrent to executives who would otherwise extend their cartel activity to the United States. In many cases, the Division has discovered cartelists who were colluding on products sold in other parts of the world and who sold product in the United States, but who did not extend their cartel activity to U.S. sales. In some of these cases, although the U.S. market was the cartelists’ largest market and potentially the most profitable, the collusion stopped at the border because of the risk of going to prison in the United States.

Now, however, the landscape for anti-cartel enforcement is changing around the globe. The safe harbors for cartel activity are shrinking. In this decade, as described below, historic “firsts” in anti-cartel enforcement have occurred in numerous jurisdictions around the world. Soon, six continents will have criminal cartel enforcement. With criminalization, authorities have many advantages in the detection, prosecution, and deterrence of cartels. Thus, in coming years, many more cartels around the world will be detected, prosecuted, and put out of business.

II. Increased Emphasis on Individual Accountability by the Antitrust Division

When the Division began its wave of international cartel prosecutions in the mid-1990s, there was no consensus around the world as to the egregious nature of cartel

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¹ Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 705 (Oct./Dec. 2001).

activity, and hence cartels were not universally condemned. This lack of consensus stymied the Division's ability to investigate and prosecute international cartels affecting the United States. Assistance from foreign governments in U.S. cartel investigations was meager, impeding the Division's ability to obtain access to foreign-located evidence and witnesses. Extradition of cartelists to the United States was not a credible threat. Even the promise of a "no-jail" deal for a foreign cartelist was a hard sell because of the immigration consequences of a felony conviction. Under U.S. immigration law, such a conviction would have excluded the pleading defendant from entering the United States even for short business or personal trips. Thus, it was very difficult to persuade a foreign national to submit to U.S. jurisdiction and plead guilty to a cartel offense in the United States. Accordingly, cartelists were comfortable violating U.S. antitrust laws and hiding behind international borders.

In order to increase the incentives for foreign nationals to cooperate with the Division's investigations and to enter plea agreements, the Division negotiated a memorandum of understanding with the former Immigration and Naturalization Service in 1996 to allow defendants who were convicted of antitrust offenses but who cooperated with the Division's investigations to continue to travel to the United States. Because international businessmen needed to travel to the United States in order to maintain their careers, the INS MOU provided a huge incentive for defendants to cooperate with the Division.

At the same time, the Division worked to improve cooperation with foreign enforcers and the sharing of information about international cartels, which were affecting not just U.S. consumers but consumers in the foreign countries as well. Gradually, the attitude of other governments changed dramatically. Enforcers around the globe increasingly became more aggressive in the enforcement of anti-cartel laws, and the Division developed a cooperative "pick-up-the-phone" relationship with many foreign enforcement agencies. As a result, parallel criminal investigations on multiple continents have become commonplace. The Division also began using INTERPOL (International Criminal Police Organization) "red notices" (international wanted notices) in foreign countries to catch cartelists, in addition to border watches at U.S. borders, and extradition has become a credible threat. These developments shifted the leverage between enforcers and cartelists radically, with the result that more individuals are being held accountable.

Ten years ago this Spring, in May 1999, the Division entered the first plea agreement that called for the imposition of jail time for a foreign national who had participated in an international cartel.² This plea agreement marked a turning point in the Division's prosecution of international cartels. Prior to the filing of this case, foreign defendants who had been prosecuted in international cartel investigations, such as the lysine and citric acid investigations, had all received no-jail deals. The plea agreement also foretold the Division's emphasis on individual accountability and hence on stiff prison sentences for all defendants that has highlighted the Division's first decade of enforcement in the 21st century. Since May 1999, approximately three dozen foreign

² Plea Agreement at 7-8, *United States v. Sommer*, Crim. No. 3:99-CR-201-R (N.D. Tex. 1999), available at <http://www.usdoj.gov/atr/cases/indx138.htm>.

defendants have served, or are serving, prison sentences in 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, and the United Kingdom are among those defendants.

The Division also began holding more culpable individuals from each corporate defendant accountable. In the Division's prosecutions of large-scale international cartels in the mid-1990s, it was typical for the Division to prosecute only a single employee from each foreign company prosecuted. Beginning in 1999-2000, the Division prosecuted three foreign executives each from Hoffmann-La Roche and BASF in the investigation of the vitamin cartel. Then it became routine for the Division to prosecute multiple individuals from each corporate defendant, and over time, the Division prosecuted greater numbers of individuals from each corporate defendant. For example, in 2006, the Division prosecuted six foreign executives from Samsung in its investigation of the DRAM cartel.

The Division further enhanced individual accountability in the early part of this decade by eliminating "no-jail" deals for any defendant, regardless of whether the defendant was a foreign national or a U.S. citizen or whether the cartel was international or domestic. The Division would no longer agree to recommend a no-jail sentence for any defendant, and would no longer remain silent at a sentencing hearing if a defendant argued for a no-jail sentence. In addition, the Division began to argue for steadily greater jail sentences. As a result, the Division obtained successively greater records in a number of categories involving jail sentences, including the highest number of total jail days imposed in a fiscal year (10,501 in 2002; 13,157 in 2005; and 31,391 in 2007); the longest jail sentence in a specific case that included an antitrust count (8 1/3 years for one multi-count antitrust, fraud, bribery, and money laundering case in 2005); the longest jail sentence for a single antitrust count (48 months for a single antitrust charge in 2009); the highest average jail sentence for all defendants in a fiscal year (15 months in 2001, 18 months in 2002, 21 months in 2003, 24 months in 2005, and 31 months in 2007); and the highest average jail sentence for foreign defendants in international cartel or cartel-related obstruction cases in a fiscal year (12 months in 2007, 18 months in 2008).

The Antitrust Division and the executive branch did not accomplish these results alone. First, new legislation aided the Division in achieving these results. In June 2004, in an effort to make antitrust sentences more consistent with sentences for other types of white-collar fraud, the U.S. Congress increased the maximum prison sentence for cartelists from three years to ten years and also increased maximum fines.³ As noted by one senator, "These changes . . . send the proper message that criminal antitrust violations, crimes such as price fixing and bid rigging, committed by business executives in a boardroom are serious offenses that steal from American consumers just as surely as does a street criminal with a gun."⁴

³ Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, Title 2, § 215, 118 Stat. 661, 668.

⁴ 150 CONG. REC. S3610-02 (daily ed. Apr. 2, 2004) (statement of Sen. Kohl).

Second, the U.S. Sentencing Commission, an independent agency within our judicial branch, enhanced the antitrust guideline in the U.S. Sentencing Guidelines in response to this increase in the maximum statutory prison sentence. In amendments effective November 2005, the Commission increased the length of jail sentences called for by the antitrust guideline by increasing the base offense level and volume of commerce enhancements in the guideline.⁵ In promulgating these amendments, the Sentencing Commission stated that “[t]he higher base offense level ensures that penalties for antitrust offenses will be coextensive with those for sophisticated frauds . . . and recognizes congressional concern about the inherent seriousness of antitrust offenses.”⁶ The new volume of commerce enhancements also recognized the significant increase in the financial magnitude of antitrust offenses.

Lastly, judges are imposing tougher sentences and they are doing so in the face of a 2005 Supreme Court decision⁷ that made the U.S. Sentencing Guidelines advisory for judges rather than mandatory, as the Guidelines had been since their inception in 1987. In spite of the fact that judges now have more discretion at sentencing, they are imposing tougher sentences. Thus, there is a consensus among the three branches of our government that cartels are harmful crimes that should be dealt with severely.

III. Increased Focus on Individual Accountability by Enforcers Abroad

In the last decade, dramatic developments have occurred around the world in anti-cartel enforcement, drastically changing the landscape for members of cartels. Governments in Australia, Europe, South America, Asia, Africa, and North America have placed increased emphasis on individual accountability and have enacted, have enhanced, or have under consideration legislation criminalizing cartel conduct. Criminalization has many investigative and prosecutorial advantages. Criminalization results in enhanced domestic investigative powers, the use of Mutual Legal Assistance Treaties for investigative assistance between jurisdictions, greater possibilities for extradition, increased incentives for individuals to cooperate with investigations, and increased incentives for leniency applications. Criminalization, with its higher penalties and personal liability, accordingly introduces new challenges in enforcement, such as higher burdens of proof and protection of the rights of defense and in jurisdictions where the competition authority is not the prosecuting agency, coordination between these two authorities. In addition, it is critical that governments clearly define the conduct subject to criminal sanctions in order to provide guidance to the business community and to distinguish hard core cartels from less pernicious and more competitively ambiguous conduct.⁸

⁵ U.S. SENTENCING COMMISSION, AMENDMENTS TO THE SENTENCING GUIDELINES at 5-6 (Apr. 29, 2005), available at <http://www.ussc.gov/2005guid/2005cong.pdf>.

⁶ *Id.* at 7.

⁷ *United States v. Booker*, 543 U.S. 220 (2005).

⁸ See ICN Working Group on Cartels, *Building Blocks for Effective Anti-Cartel Regimes* vol. 1, *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties* (June 2005),

A. Australia

Criminalization has received a very thorough review in Australia since the Dawson Committee in 2003 recommended the introduction of criminal sanctions for hard core cartel conduct. Australia now appears poised to be the next jurisdiction to enact criminal penalties, including a maximum ten-year prison sentence, and criminal investigative powers, including wiretap authority, for cartel conduct.⁹ The recently issued Memorandum of Understanding between the Australian Competition & Consumer Commission (“ACCC”) and the Director of Public Prosecutions (“DPP”) provides valuable coordination between the ACCC and the DPP in the administration of the immunity policy for cartel conduct, assuring applicants that the DPP will grant immunity where the applicant meets the ACCC’s requirements for conditional immunity.

B. United Kingdom

In 2008, the United Kingdom Office of Fair Trading (“OFT”) achieved dramatic results in the first sentencing for a cartel offense under the Enterprise Act. Two defendants in the marine hose investigation were sentenced to prison terms of three years, and a third defendant was sentenced to a two-and-a-half-year prison sentence for what the sentencing judge characterized as “a very carefully planned and executed cartel fraud.”¹⁰ Although the Court of Appeal ultimately reduced the three sentences to two and one half years, two years, and 20 months, these terms are still significant prison sentences for the first cartel prosecutions under the Enterprise Act.¹¹ In August 2008, the OFT continued its criminal prosecutions of individuals under the Enterprise Act when it announced charges of four British Airways executives in its investigation of price fixing of passenger fuel surcharges.¹²

http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf.

⁹ See Roger Forbes & Barry Dean, Malleons Stephen Jaques, *Recent Developments in Australia: Advancing Towards Criminalisation of Cartels*, ABA SECTION OF ANTITRUST LAW CARTEL & CRIMINAL PRACTICE COMMITTEE NEWSLETTER, Dec. 2008, at 19, <http://www.abanet.org/antitrust/at-committees/at-crim/about-us/newsletters.shtml>.

¹⁰ Press Release, Office of Fair Trading, Three imprisoned in first OFT criminal prosecution for bid rigging (June 11, 2008), <http://www.of.gov.uk/news/press/2008/72-08>; HHJ Geoffrey Rivlin QC, Sentencing Transcript at 14, R v. Whittle, Allison, and Brammar (Southwark Crown Ct. June 11, 2008).

¹¹ R v. Whittle, Allison, and Brammar, [2008] EWCA Crim. 2560, [2009] Lloyd’s Rep. FC 77, available at <http://www.bailii.org/ew/cases/EWCA/Crim/2008/2560.html>.

¹² Press Release, Office of Fair Trading, OFT announces criminal charges in airline fuel surcharges cartel case (Aug. 7, 2008), <http://www.of.gov.uk/news/press/2008/93-08>.

C. Brazil

Last year, the Brazilian government employed novel approaches to support its anti-cartel enforcement program. In 2008, the President of Brazil declared October 8 an annual “Anti-Cartel Enforcement Day.” In connection with that day, the Secretariat of Economic Law of the Ministry of Justice (“SDE”) launched a National Anti-Cartel Campaign and took an aggressive approach to attracting leniency applications. The SDE distributed 450,000 leniency brochures at seven airports and also sent its leniency brochure to the presidents of one thousand companies in Brazil.¹³ The letter described the SDE’s anti-cartel efforts, noting its cooperation with the Federal Police and Federal prosecutors, that more than 100 executives currently faced criminal proceedings in Brazil, and that ten executives had already been sentenced to serve prison sentences up to five and a half years. After stating that the benefits of leniency “*are only available to the first company or individual to come forward,*” the SDE noted in closing that the letter was being sent to 999 other companies in Brazil.¹⁴

D. Japan

In 2006, an amendment to Japan’s Antimonopoly Act became effective introducing criminal investigation procedures, including search and seizure powers. In 2006-2007, the Japan Fair Trade Commission (“JFTC”) filed multiple criminal accusations with the Public Prosecutors Office against individuals and companies for bid rigging on construction and road survey projects.¹⁵ In 2009, the JFTC proposed new amendments to the Antimonopoly Act, including increasing maximum jail terms for individual cartel members from three to five years.

¹³ Ana Paula Martinez, Head of the Competition Div., SDE, Innovative ways of detecting cartels: the Brazilian Experience, Presentation at ICN Workshop (Oct. 2008), *available at* <http://www.mj.gov.br/data/Pages/MJ34431BE8ITEMID3DAD7B1909B2482EB4A0C2456D06789DPTBRIE.htm>.

¹⁴ Scott D. Hammond, Dep’y Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, The Global Movement Towards Criminalizing Cartels, Presentation at ABA Section of Antitrust Law Fall Forum (Nov. 13, 2008).

¹⁵ Press Release, JFTC, The JFTC filed criminal accusations against 11 companies concerning the bid-riggings in the human waste disposal facilities constructions (May 23, 2006), <http://www.jftc.go.jp/e-page/pressreleases/2006/may/060525.pdf>; Press Release, JFTC, The JFTC filed additional criminal accusations against 11 individuals concerning the bid-riggings in the human waste disposal facilities constructions (June 12, 2006), <http://www.jftc.go.jp/e-page/pressreleases/2006/June/060612.pdf>; Press Release, JFTC, The JFTC filed a criminal accusation on the bid-rigging over subway construction procured by the City of Nagoya (Feb. 28, 2007), <http://www.jftc.go.jp/e-page/pressreleases/2007/February/070228.pdf>; Press Release, JFTC, The JFTC filed a criminal accusation on the bid-rigging over geological survey business and location survey planning business concerning main forest road projects procured by the Japan Green Resources Agency (May 24, 2007), http://www.jftc.go.jp/e-page/pressreleases/2007/May/070524_2.pdf.

E. Ireland

In 2006, the Irish government obtained the first prison sentence in Europe for a cartel offense in its investigation of price fixing in the heating oil industry.¹⁶ Though the sentence was suspended, it marked an important first step in the criminal prosecution of individual cartelists in Europe. Also in 2006, the Irish government set another milestone in obtaining the first criminal conviction by jury trial for a cartel offense in Europe in the same investigation.¹⁷ In 2007-2008, the Irish Director of Public Prosecutions prosecuted a steady stream of criminal cases, and additional jail sentences, also suspended, were imposed in investigations of price fixing of motor vehicles in Ireland.¹⁸ In imposing a jail sentence in a 2007 case, Mr. Justice McKechnie discussed the reasons a custodial sentence should be considered in cartel cases:

Firstly, such a sentence can operate as an effective deterrent in particular where if fines were to have the same effect they would have to be pitched at an impossibly high figure. Secondly, fines on companies may not always guarantee an adequate incentive for individuals within those firms to act responsibly. . . . Thirdly, a knowledge within undertakings that courts will regularly make use of a custodial sentence may act as an incentive to people to offer greater co-operation in cartel investigations Fourthly, prison, in particular . . . for those who are unlikely to re-offend can be a very powerful deterrent and finally, the imposition of a sentence for the type or category of persons above described can carry a uniquely strong moral message. Accordingly the[re] are, in my view, some very powerful reason[s] to custodise an individual who has been found guilty under the 2002 Act. In this context I would like to state clearly and categorically that I see no room for a lengthy lead in period before jailing convicted persons becomes commonplace under this legislation.¹⁹

F. Additional Jurisdictions

Over the last decade, multiple executives have served prison sentences in Israel for cartel offenses. In the Netherlands, once known as “Europe’s ‘cartel paradise,’”²⁰ the Parliament in 2008 called for the introduction of criminal sanctions against individuals for cartel offenses. A revised draft bill is expected this year. In South Africa, legislation

¹⁶ THE COMPETITION AUTHORITY, 2006 ANN. REP., at 9. The Competition Authority’s annual reports are available at <http://www.tca.ie/NewsPublications/AnnualReports/AnnualReports.aspx>.

¹⁷ *Id.* at 6-8.

¹⁸ THE COMPETITION AUTHORITY, 2007 ANN. REP., at 6-10; THE COMPETITION AUTHORITY, 2008 ANN. REP., at 5-6, 8-14.

¹⁹ THE COMPETITION AUTHORITY, 2007 ANN. REP., at 8-9.

²⁰ NETH. COMPETITION AUTHORITY, NMA AGENDA 2008, at 5; NETH. COMPETITION AUTHORITY, NMA ANN. REP. 2007, Foreword. The agenda and annual report are available at <http://www.nmanet.nl/engels/home/brochures/index.asp>.

introducing criminal sanctions for cartel offenses, including ten-year prison sentences, is under consideration. In Mexico, the head of the Federal Competition Commission has called on the Congress to enact legislation introducing prison sentences for cartel offenses. In Russia, a new Anti-Cartel Department was created in 2008 within the Federal Antimonopoly Service to investigate cartels and coordinate with other Russian enforcement authorities. Pending draft legislation in Russia would amend the Criminal Code of the Russian Federation for more effective criminal enforcement against cartels and would provide for lengthy prison sentences. In 2009, the Canadian government enhanced its anti-cartel enforcement. In amendments that became effective on March 12, 2009, the government increased the maximum prison sentence from five years to 14 years for bid rigging. In amendments that will become effective in March 2010, the government adopted a *per se* criminal offense for price-fixing and allocation agreements and collusive agreements regarding production or supply and also raised the maximum sentence for these offenses to a 14-year prison term and a \$25 million fine.²¹

IV. Conclusion

Enforcers around the world are becoming more vigilant in detecting, prosecuting, and deterring cartel behavior that robs consumers of the lower prices, better service, and innovation provided by competition and in holding accountable the individual executives who commit cartel crimes. As a result, safe havens for cartel activity will become relics of the past.

²¹ The Amendments to the Competition Act are available at http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=40&Ses=2&Mode=1&Pub=Bill&Doc=C-10_3&File=578. Canadian law already provided a *per se* standard for bid rigging.