

# Cartel & Criminal Practice

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Promoting Competition  
Protecting Consumers

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## Message from the Chair

by Douglas M. Tween

The Cartel and Criminal Practice Committee is pleased to publish our second newsletter for the 2013-2014 year. On behalf of the Committee, we thank our newsletter editors, Jennifer Dixon, Joyce Choi, Adam Hemlock, Jeffrey Martino, Melissa Mahurin Whitehead, Nicholas Gaglio and John Briggs for their work on the Spring edition.\* We also thank our contributing authors. We are pleased to offer another issue touching upon a variety of current topics in the area of criminal antitrust practice in the U.S. and abroad.

Robert Connolly writes his final article in a two-part series about the history of criminal penalties for antitrust offenses in the U.S. Part Two focuses on the development of the Sherman Act penalties up to present day record setting sentences. Mark Krotoski offers insight on what would make a successful anti-cartel program. Eva Cole, Erica Smilevski, and Cristina Fernandez analyze the Antitrust Division's changes to the model plea agreement implemented by AAG William Baer. Adam Hemlock and Wendy Fu provide an overview of potential non-antitrust charges in cartel matters that may bolster the government's case and strengthen its negotiation position. Daniel Duk-ki Moon and Christine Ryu discuss what it takes for companies applying for amnesty to also qualify under ACPERA. Kirsten Donnelly and Verity Doyle explain the significant institutional and substantive cartel offense reforms that are now occurring in the U.K. Laura Cooper, Antonio Di Domenico, Eric Hochstadt, and Kaj Rozga highlight some procedural and substantive differences for indirect purchaser claims between the Canadian and U.S. legal systems and provide guidance on representing clients in cross-border cases in light of the widening gap between the two jurisdictions. Finally, Meghan Iorianni provides us with an international update on the Libor/Euribor matters.

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\* Jennifer Dixon and Jeffrey Martino are members of the ABA Antitrust Section's Cartel & Criminal Practice Committee in their personal capacities and this publication does not reflect any position of the Government or the U.S. Department of Justice.

You are invited to attend our many Committee Programs. All Committee events are posted on our website and on a new website for Section members, “Connect” that is available at <http://connect.abaantitrust.org>. If you are a Section member, we invite you to view the content we have made available through the Committee’s Connect site. Past program materials are also available there. Upcoming programs in 2014 include “Navigating the Globe: Cartel Enforcement Around the World – Chapter 15: Venezuela/Columbia/Peru” on April 17 (“Chapter 16: Bolivia/Chile/Argentina” on May 15, 2014), “Bi-Monthly Criminal Antitrust Enforcement Update” on April 25, “Slicing the Pie: Defining the Scope of an International Cartel” on April 28, “White Collar v. Antitrust: Issues Confronted in Global Investigations” on April 29, and “Getting to Yes: Cartel Settlements in the US and EU” on May 13. We hope you can join us! See page 86 for details.

Finally, we note the passing of Ray Hartwell last month. Ray was a former Chair of our Committee, and later served as our Council Representative. Words cannot fairly express how privileged I feel to have known and worked with Ray. He will be missed.

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# Milestones in Jail Sentences for Antitrust Violations—Part II

by Robert E. Connolly<sup>1</sup>



Part I of this article covered the period from the enactment of the Sherman Act in 1890 through the era of Thurman Arnold.<sup>2</sup> During this time, an individual convicted of an antitrust offense faced virtually no risk of being incarcerated.<sup>3</sup> Part II of this article will highlight important developments from the Great Electrical Equipment conspiracy up to today's recent record setting developments, which include a record five-year jail sentence for a single Sherman

Act count conviction.

## The Great Electrical Equipment Conspiracy

Criminal antitrust violations captured the nation's attention in 1960 with the Great Electrical Equipment conspiracy. The grand jury investigation uncovered a long-standing scheme among electrical equipment giants such as GE and Westinghouse to rig bids to public utilities nationwide. In the end, twenty-nine corporations and forty-four individuals entered guilty or nolo contendere pleas.<sup>4</sup> The winning bidder was determined based on a rotating system that coincided with the phases of the moon—one of the more memorable allocation schemes in antitrust history.<sup>5</sup> The

*After the Great Electrical Equipment cases, jail sentences still were not common and most were for 30 days.*

<sup>1</sup> Robert E. Connolly is Of Counsel with DLA Piper LLP and was with the Antitrust Division (“Division”) for 33 years, including 20 as Chief of the Middle Atlantic Office, before retiring from the Division in 2013.

<sup>2</sup> See Robert E. Connolly, *A History of Criminal Penalties for Antitrust Offenses, Part I*, Cartel & Criminal Practice Committee Newsletter, Fall 2013.

<sup>3</sup> Part I, incorrectly stated that no individual was sentenced to prison for a pure antitrust conviction during this time. In *United States v. Alexander & Reid Co.*, 280 F. 924, 927 (S.D.N.Y. 1922) four individuals were sentenced to prison. The next reported case of incarceration for a pure antitrust offense was *Las Vegas Merchant Plumbers Ass’n v. United States*, 210 F.2d 732 (9th Cir. 1954) (“three of the individual appellants were sentenced to terms of six months in the custody of the Attorney General”).

<sup>4</sup> See *Corporations: The Great Conspiracy*, Time Magazine (February 17, 1961); R. Smith, *The Incredible Electrical Conspiracy*, Part I, (Fortune at 133, April 1961).

<sup>5</sup> *Id.*

cartel included almost every electrical equipment manufacturer and directly or indirectly affected almost every dam, power generator and electrical system built in the United States in the previous decade. Seven individual jail sentences of 30 days were imposed, along with 24 suspended jail sentences.<sup>6</sup> During imposition of sentence, the judge called the conspiracy “a shocking indictment of a vast section of our economy, for what is really at stake here is the survival of the kind of economy under which this country has grown great, the free-enterprise system.”<sup>7</sup> National media coverage was extensive, including multiple front page stories in *Time* and *Fortune* magazines. Books were written detailing the workings of one of the nation’s early “white-collar” crime scandals.<sup>8</sup> Nonetheless, the offense remained a misdemeanor and in the next 15 years only 38 antitrust defendants were sentenced to jail and the term was usually 30 days.<sup>9</sup>

Just prior to the Electrical Equipment cases, and mostly forgotten to history, was the case of *United States v. McDonough Co.*<sup>10</sup> where four Ohio businessmen pled nolo contendere and were each sentenced to 90 days in prison for fixing the price of tools such as shovels and rakes.<sup>11</sup> By one account “[t]his news sent a chill through the electrical-equipment executives under investigation, and some agreed to testify about their colleagues under the security of immunity.”<sup>12</sup>

### Finally, a Felony

In 1975 the Sherman Act was elevated from a misdemeanor to a felony. One of the first nationwide price-fixing cases brought as a felony was *United States v. Continental Group*.<sup>13</sup> The grand jury indicted five companies and seven individuals for a nation-wide price-fixing conspiracy in the sale of consumer bags, such as,

*The judge told the first defendant he would have been given jail but for his advanced age, the next defendant was told he would have been given jail, except for his inexperience.*

<sup>6</sup> *Id.*

<sup>7</sup> See J. Herling, *THE GREAT PRICE CONSPIRACY: THE STORY OF THE ANTITRUST VIOLATIONS IN THE ELECTRICAL INDUSTRY* (1962) at 195.

<sup>8</sup> *Id.*; see also John G. Fuller, *THE GENTLEMEN CONSPIRATORS: THE STORY OF THE PRICE FIXERS IN THE ELECTRICAL INDUSTRY* (1962).

<sup>9</sup> See Donald Baker, Ass’t Att’y Gen., Antitrust Division, *To Make the Penalty Fit the Crime: How to Sentence Antitrust Felons*, Tenth New England Antitrust Conference, November 20, 1976 reprinted in 2 J. Clabault & M. Block, *Sherman Act Indictments: 1955-1980*, at 535 (1981).

<sup>10</sup> 180 F. Supp. 511 (S.D. Ohio 1959).

<sup>11</sup> One of the defendants died before reporting to prison.

<sup>12</sup> See *Corporations: The Great Conspiracy*, *Time Magazine* (February 17, 1961).

<sup>13</sup> 456 F. Supp. 704 (E.D. Pa. 1978), *aff’d*, 603 F. 2d 444 (3d Cir. 1979).

pet food bags.<sup>14</sup> After a long trial, the jury returned guilty verdicts against two corporations and two individuals. Both individuals convicted at trial were sentenced to four months' imprisonment.<sup>15</sup>

Despite the increase of the Sherman Act from a misdemeanor to a felony, prison sentences for a price fixer was by no means a certain thing, and substantial sentences were rare. The Middle Atlantic Office, for example, prosecuted a national conspiracy to fix the price of steel tubing in the early 1980's.<sup>16</sup> Four individual defendants were convicted but given suspended sentences.<sup>17</sup> At sentencing, the judge scolded the most senior member of the conspiracy and stated he would have sentenced him to jail but for his advance age. The next defendant, a more junior executive, was spared prison because of his relative inexperience.<sup>18</sup> No defendants were sentenced to prison.

### **Antitrust as a Fraud**

After the Sherman Act was made a felony, the Division began a long campaign that continues to this day to equate criminal antitrust violations to fraud. The Division began to charge fraud counts in conjunction with Sherman Act counts in indictments. In a case involving a bid-rigging scheme to allocate river bank stabilization projects awarded by the Army

Corps of Engineers, the indictment charged one Sherman Act count, twenty-nine counts of mail fraud, and twenty four counts of false statement.<sup>19</sup> Charging tag-along fraud counts became common practice in the 1980's during the nationwide road construction investigation.<sup>20</sup> The indictment in *United States v. Charles Knowlton and Central Asphalt Company*<sup>21</sup> was a typical road construction indictment; it included one Sherman Act count and two related mail fraud

*In one 1979 bid-rigging case, the Division charged one Sherman Act count and 29 mail fraud counts and 24 counts of false statements.*

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<sup>14</sup> 603 F. 2d at 447.

<sup>15</sup> *Id.*

<sup>16</sup> *United States v. Berger Industries Inc.*, Crim. No. 79-278 (ED Pa. 1979); available at [http://intelliconnect.cch.com/scion/secure/ctx\\_2647580/index.jsp?cpid=WKUS-Legal-IC#page\[8\]](http://intelliconnect.cch.com/scion/secure/ctx_2647580/index.jsp?cpid=WKUS-Legal-IC#page[8]).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* This paraphrasing is based on personal recollection; no transcript was available.

<sup>19</sup> See *United States v. Anthony J. Bertucci Construction Co.*, 624 F. 2d 1303 (5th Cir. 1980).

<sup>20</sup> See e.g., *United States v. Azzarelli Construction Co.*, 612 F. 2d 292 (7th Cir. 1979)(bid rigging and mail fraud counts; defendant sentenced to 90 days in prison); *United States v. Windsor Service*, Crim. No 83-0017 (MD Pa. 1983)(defendants convicted of one count of bid rigging and two counts of mail fraud; individuals sentenced to 90 days in jail), available at [http://intelliconnect.cch.com/scion/secure/ctx\\_2647580/index.jsp?cpid=WKUS-Legal-IC#page\[5\]](http://intelliconnect.cch.com/scion/secure/ctx_2647580/index.jsp?cpid=WKUS-Legal-IC#page[5]).

<sup>21</sup> Criminal No. 82-00016 (WD. Pa. 1982).

counts. The mail fraud counts were based on invoices mailed to the State for payment on the fraudulently-obtained contract. Knowlton was convicted by the jury and sentenced to six months in prison.<sup>22</sup>

A six-month jail sentence like the one imposed on Charles Knowlton was in part due to the Division's advocacy, but the nature of the road construction cases also played a role. The defendants in the road cases typically were small business owners operating in a regional market, not the large corporations in a nation-wide market found in conspiracies like the Electrical Equipment case. Perhaps more importantly, as owners of the company, if the bid rigging inflated prices, the ill-gotten gain went straight into the pocket of the defendant. Not long after the road construction cases, the Division went on to prosecute cartels in other "way-of-life" industries such as auction bid rigging rings.<sup>23</sup> These indictments generally also included charges of fraud.<sup>24</sup>

Division officials began to make more speeches equating price fixing and bid rigging to fraud. One example is this statement by James Rill when he was the Assistant Attorney General for the Division: "[p]rice fixing, bid rigging and all other variants of cartel behavior will be aggressively investigated and prosecuted. It is my firm belief that, no matter what its guise, cartel behavior constitutes no more than fraud and theft from consumers."<sup>25</sup>

### The United States Sentencing Guidelines

Another development in the history of criminal antitrust penalties was the passage of the Sentencing Reform Act in 1984 and the first federal Sentencing Guidelines in 1987. With respect to the antitrust guideline: "The Commission believes that the most effective method to deter individuals from committing this crime is through the imposition of short sentences coupled with large fines."<sup>26</sup> The new Guidelines began to take effect during the Division's "way of life" cases in road construction and other industries. These developments helped solidify the idea that a conviction for a "heartland [typical] violation" should result in some period of incarceration for an individual. The rigid

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<sup>22</sup> Knowlton was sentenced to six months in jail on the bid-rigging count, and five years' probation and two days of community service per month for the mail fraud counts. See [http://intelliconnect.cch.com/scion/secure/ctx\\_2647580/index.jsp?cpid=WKUS-Legal-IC#page\[9\]](http://intelliconnect.cch.com/scion/secure/ctx_2647580/index.jsp?cpid=WKUS-Legal-IC#page[9]).

<sup>23</sup> See e.g., *United States v. Walker*, 653 F. 2d 1343, 1351 (9th Cir. 1981)(defendants charged with bid rigging and conspiracy to defraud the United States); *United States v. Seville Industrial Machinery Corp.*, 696 F. Supp. 986,993 (D. N.J. 1988)(defendants charged with bid rigging and bankruptcy fraud).

<sup>24</sup> *Id.*

<sup>25</sup> James F. Rill, Ass't Att'y Gen., Antitrust Div., *Antitrust Enforcement: An Agenda for the 1990's*, Remarks of James F. Rill Before the 23rd Annual New England Antitrust Conference, Cambridge Massachusetts (November 3, 1989).

<sup>26</sup> USSG § 2R.1. comment (n.8)(1987 edition).

Guidelines, however, soon became advisory thanks to the Supreme Court case of *United States v. Booker*,<sup>27</sup> which held the mandatory Guidelines unconstitutional, but preserved them as advisory. Sentencing judges were still to consider the Guidelines, but only in the context of the sentencing goals set out in 18 U.S.C. § 3553(a), the general sentencing statute.

### The Era of the International Cartel

The first international indictment involving commerce well in excess of \$100 million was the case against Archer Daniels Midland (“ADM”) and two of its executives. While the two ADM executives were sentenced to prison after being convicted at trial, no foreign defendants were prosecuted. The international graphite electrodes cartel prosecutions came shortly after. In that investigation, the President of a U.S. based company was sentenced to 17 months in prison pursuant to a plea agreement.<sup>28</sup> One foreign defendant was prosecuted, but his plea agreement called for a fine of \$10 million, which was paid by his company.<sup>29</sup>

It wasn’t long however, before the Division understood that it had a significant amount of leverage over foreign defendants, and this leverage could be used to negotiate jail sentences. According to the Division, “[t]he most significant trend in the evolution of international anti-cartel enforcement since 1999 has been the more vigorous prosecution of foreign nationals who violate US antitrust laws.”<sup>30</sup> In May 1999, the Division filed an historic plea agreement with a Swiss vitamin executive that was the first that called for jail time [four months] for a foreign national who had participated in an international cartel.<sup>31</sup> While this was significantly below the sentence a comparably based U.S. executive would receive, it was a start. And Division officials emphasized that the goal was to obtain parity. “The Division now insists on jail sentences for all defendants domestic and foreign. We will not agree to a ‘no-jail’

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<sup>27</sup> 543 U.S. 220 (2005).

<sup>28</sup> *United States v. Robert P. Krass*, Crim No. 99-626 (ED Pa. 1999), see Government’s Rule 11 Memorandum, available at <http://www.justice.gov/atr/cases/f3800/3809.htm>.

<sup>29</sup> *United States v. Robert J. Koehler*, Crim. No. 99-244, (ED Pa. 1999), Plea Agreement available at <http://www.justice.gov/atr/cases/f3800/3829.htm>.

<sup>30</sup> See Scott D. Hammond, Dep. Ass’t Att’y Gen., Antitrust Div., *Charting New Waters in International Cartel Prosecutions*, National Institute on White Collar Crime at 1, (March 2, 2006), available at <http://www.justice.gov/atr/public/speeches/214861.htm>.

<sup>31</sup> Plea agreement, *United States v. Dr. Kuno Sommer*, Cr. No. 3:99-CR-201-R (N.D. Tex. 1999), available at <http://www.usodj.gov/atr/cases/f2400/sommer.pdf>.

sentence for any defendant, and our practice is not to remain silent at sentencing if a defendant argues for a no jail sentence.”<sup>32</sup>

The Division quickly realized that the need for a foreign executive to travel to the U.S. provided real leverage to negotiate jail sentences. The Memorandum of Understanding (MOU) between the Division and the Bureau of Immigration and Customs Enforcement<sup>33</sup> allows foreign executives to be able to freely travel in the United States upon completion of their sentence, if they agreed to plead and cooperate with the investigation. A fugitive, of course, could not travel to the U.S., which was often a career killer for foreign executives.<sup>34</sup>

*Immigration relief, red notices and extradition all gave the Division leverage to negotiate plea agreements with foreign defendants.*

Another card held by the Division when negotiating with foreign executives was the threat of extradition. In 2001, besides border watches, the Division adopted a policy of placing fugitives on a “red notice” maintained by Interpol. A fugitive may be provisionally arrested in a foreign country while the Division seeks extradition.<sup>35</sup> One Japanese executive was detained in India, and while the Indian government ultimately refused to extradite him, he spent time in a jail in India.<sup>36</sup> And in *United States v. Norris*, the defendant was extradited from the UK after a seven-year extradition fight.<sup>37</sup> The terms of Norris' extradition did not allow for him to be tried for the price-fixing count because price fixing was not a criminal offense in the UK at the time of the offense [but it is now].<sup>38</sup> Norris was extradited for conspiring to obstruct justice during the investigation.<sup>39</sup> He was tried, convicted and sentenced to 18 months in jail.<sup>40</sup>

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<sup>32</sup> See Hammond, *supra*, note 15 at 16.

<sup>33</sup> See Memorandum of Understanding Between the Antitrust Division United States Department of Justice and The Immigration and Naturalization Service United States Department of Justice (Mar. 15, 1996), *available at* <http://www.usdoj.gov/atr/public/criminal/9951.htm>.

<sup>34</sup> There are many foreign fugitive defendants in almost every international cartel case.

<sup>35</sup> See Scott D. Hammond, Dpt'y Ass't Att'y Gen. for Crim. Enforcement, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, National Institute on White Collar Crime, February 25, 2010 at 14, *available at* <http://www.justice.gov/atr/public/speeches/255515.htm>.

<sup>36</sup> See Dalip Singh, Japanese Held, THE TELEGRAPH (India), Dec. 22, 2002, *available at* [http://telegraphindia.com/1021222/asp/nation/story\\_1505528.asp](http://telegraphindia.com/1021222/asp/nation/story_1505528.asp) (discussing arrest of antitrust fugitive by Delhi Interpol).

<sup>37</sup> See *United States v. Norris*, 419 Fed. Appx. 190 (3d Cir. 2011); 2011 WL 1035723.

<sup>38</sup> *Id.* at 191.

<sup>39</sup> *Id.*



Another interesting development was the prosecution of three British nationals in the marine hose cartel. The plea agreements allowed the defendants to plead in both the UK and the US with the understanding that they would receive credit against their US sentence for any jail sentences they received in the UK.<sup>41</sup> With more countries enacting, and/or, enforcing criminal penalties for cartels, this type of agreement may become more common in international cartel cases.

### **The Antitrust Criminal Penalty Enhancement Act**

The biggest news in the history of criminal antitrust jail penalties was undoubtedly the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA). ACPERA more than tripled the maximum jail sentence from 3 years to 10 years. In 2005, the Sentencing Guidelines were amended to reflect the increase in the maximum jail penalty.<sup>42</sup>

There has been limited experience under the new antitrust penalty and Guidelines regime, but already there have been three notable ‘records’ for antitrust offenses that are worthy of mention. In an unusual case, *United States v. VanderBrake*,<sup>43</sup> the defendant received a four-year prison sentence—a significant *upward* departure from a recommended Guidelines sentence of between 21-27 months. VanderBrake had been convicted of three counts of bid rigging. The district court found the antitrust guidelines to be too lenient and handed down a sentence comparable to what the fraud guideline would have dictated.<sup>44</sup> The Eighth Circuit upheld the upward departure and

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<sup>40</sup> See *Former CEO of the Morgan Crucible Co. Sentenced to Serve 18 Months In Prison For Role In Conspiracy To Obstruct Justice*, available at [http://www.justice.gov/atr/public/press\\_releases/2010/265028.htm](http://www.justice.gov/atr/public/press_releases/2010/265028.htm).

<sup>41</sup> The defendants, Bryan Allison, David Brammar and Peter Whittle were sentenced to 36 months, 30 months and 30 months respectively. Because the UK prison sentence matched the U.S. prison sentence, the defendants served their time in the UK. *United States v. Bryan Allison, David Brammar and Peter Whittle*, Crim. No. H-07-2007, (SD. Texas 2007), plea agreement of Bryan Allison, available at <http://www.justice.gov/atr/cases/f228500/228588.htm>; plea agreement of David Brammar, available at <http://www.justice.gov/atr/cases/f228500/228585.htm>; plea agreement of Peter Whittle, available at <http://www.justice.gov/atr/cases/f228500/228582.htm>.

<sup>42</sup> The Division lobbied the Sentencing Commission to increase the base offense level and the volume of commerce adjustments to reflect the new 10-year maximum jail sentence. See Scott D. Hammond, Dep. Ass’t Att’y Gen. for Criminal Enforcement, Antitrust Div., Testimony before the United States Sentencing Commission, April 12, 2005 at 2 (“antitrust crimes are fraud. It is theft by well-dressed thieves.”), available at <http://www.justice.gov/atr/public/testimony/209071.htm>.

<sup>43</sup> 771 F. Supp. 2d 961 (N.D. Iowa 2011).

<sup>44</sup> *Id.* at 1003 (“[t]he penalties for Sherman Act violations are disproportionately lower than those for mail or wire fraud. Accordingly, the Court concludes that the antitrust guideline is deserving of less deference.”).

four-year sentence.<sup>45</sup> VanderBrake's record, however, was short-lived. In December 2013, Frank Peake received a 60-month jail sentence for his role in a cargo shipping cartel.<sup>46</sup> The five-year sentence was a record, but it was still a significant departure from the 87-month Guidelines sentence requested by the Division.<sup>47</sup> The AU Optronics case produced two sentencing records. The Division requested a record-breaking Guidelines sentence of 10 years for the two most senior AU Optronics executives convicted after trial.<sup>48</sup> And, the court made a record 7-year downward departure from the Guidelines, imposing jail sentences of three years on both defendants.<sup>49</sup>

### **Criminal Antitrust Penalties--Part III?**

The next chapter in criminal antitrust penalties is just being written. The cases the Division is now bringing, such as those in the massive auto parts investigation, are being sentenced under the new Sherman Act ten-year maximum and Sentencing Guidelines. It is clear that the days of no jail for antitrust offenders have passed. The era of very short sentences has also seemingly disappeared. It remains to be seen whether the sentences for an antitrust violation will ever approach or hit the ten-year statutory maximum.

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<sup>45</sup> *United States v. VanderBrake*, 679 F. 3d (8th Cir. 2012).

<sup>46</sup> See Peake Sentencing Press Release, December 6, 2013, available at [http://www.justice.gov/atr/public/press\\_releases/2013/302027.htm](http://www.justice.gov/atr/public/press_releases/2013/302027.htm)

<sup>47</sup> See *United States v. Peake*, Case No 3:11-cr-00512 (D. PR. 2011), United States' Sentencing Memorandum, filed September 9, 2013, p. 16 ("the government recommends that Peake be sentenced to 87 months, the bottom of the [87 to 108 months] Guidelines range.").

<sup>48</sup> The Division sought sentences of 10 years each for H.B. Chen and Hui Hsiung of AU Optronics. The Division calculated each defendants guidelines range to be 121-151 months; above the 10 year Sherman Act maximum penalty of ten years. See *United States v. AU Optronics Corporation*, Case 3:09-cr-00110-SI, United States' Sentencing Memorandum, filed September 20, 2012, pps. 30-35, available at <http://www.justice.gov/atr/cases/auopt.htm>.

<sup>49</sup> See AU Optronics Sentencing Press Release, September 20, 2012, *Former Top Executives Each Sentenced to Serve Three Years in Prison*, available at [http://www.justice.gov/atr/public/press\\_releases/2012/287189.htm](http://www.justice.gov/atr/public/press_releases/2012/287189.htm).

# Essential Elements For An Effective Anti-Cartel Program

by Mark L. Krotoski<sup>50</sup>



In the increasingly global economy, criminal antitrust enforcement remains essential to promote competition and protect consumers both domestically and internationally. From a law enforcement perspective, over time some elements have proven essential as part of an effective anti-cartel program. Some of these elements include the role of (1) transparency about applicable enforcement policies, (2) predictability and certainty in sentencing, (3) an effective leniency program to encourage early self-reporting at the risk of severe sanctions, and (4) international coordination and cooperation enforcement efforts. In combination, these elements help reinforce the primary objectives of antitrust laws. After a brief review of the Sherman Act and summary of some of the unique challenges in criminal antitrust enforcement, each of these elements is considered below in the context of how they promote anti-cartel efforts.

## Overview: Criminal Enforcement Under The Sherman Act

In the United States, the Sherman Act continues to provide a primary means to promote competition, protect consumers, and punish and deter *per se* criminal anticompetitive conduct. *See* 15 U.S.C. § 1. As the U.S. Supreme Court observed long ago:

The Sherman Act ... rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.<sup>51</sup>

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<sup>50</sup> Ass't Chief, National Criminal Enforcement Section, Antitrust Div., U.S. Dep't of Justice. This article is based on comments prepared for the Taiwan International Conference on Competition Policy and Law. The views expressed do not necessarily reflect those of the United States Department of Justice.

<sup>51</sup> *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).

Criminal antitrust enforcement focuses on *per se* (or so-called “hard core”) violations which are reserved for conduct without any societal benefit.<sup>52</sup> *Per se* unlawful conduct includes price fixing, market allocation, and bid rigging. For example, price fixing is well-recognized as *per se* unlawful because of its “pernicious effect on competition and lack of any redeeming virtue.”<sup>53</sup> Because of the adverse impact of price fixing on competition and consumers, justification evidence is considered irrelevant both at trial,<sup>54</sup> and at sentencing.<sup>55</sup>

The criminal penalties are reinforced with civil provisions which promote deterrence and compliance with the law. For example, a criminal conviction may be used as *prima facie* evidence of the anticompetitive conduct in a subsequent civil action.<sup>56</sup> Civil parties may seek treble damages.<sup>57</sup> These statutory policies reflect a

*By nature, the collusive conduct is secretive.... [I]n a number of cases, co-conspirators have planned their meetings outside the United States to evade detection by law enforcement.*

<sup>52</sup> As the Supreme Court has noted, “*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.” *National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma*, 468 U. S. 85, 103-04 (1984); see also *National Society of Professional Engineers*, 435 U. S. at 692 (agreements are *per se* illegal only if their “nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality”).

<sup>53</sup> *Northern Pacific Railway*, 356 U.S. at 5 (“[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use” including “price fixing, division of markets,” and bid rigging).

<sup>54</sup> See, e.g., *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 351 (1982) (“The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some.”) (footnote omitted); *Northern Pacific Railway*, 356 U.S. at 5 (noting the “principle of *per se* unreasonableness ... avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.”).

<sup>55</sup> See, e.g., U.S.S.G. § 2R1.1 cmt. Background (noting price fixing agreements are “so plainly anticompetitive that they have been recognized as illegal *per se*, i.e., *without any inquiry in individual cases as to their actual competitive effect*”) (emphasis added).

<sup>56</sup> See 15 U.S.C. § 16(a) (noting that a conviction in a “criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto”).

<sup>57</sup> 15 U.S.C. § 15 (permitting recovery of “threefold the damages ... and the cost of suit, including a reasonable attorney’s fee”); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (“The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.”).

balanced approach to discourage and deter *per se* anticompetitive conduct with substantial criminal and civil consequences.

### Policy Objectives Confronting Unique Challenges

Against the statutory framework, the prosecution of Sherman Act violations presents unique challenges. Cartels are normally difficult to detect. By nature, the collusive conduct is secretive. The information about the price fixing, bid rigging or market allocation is typically restricted to a few individuals among competitors. Many cases involve sophisticated actors and executives. Participants may take affirmative steps to evade detection by law enforcement. For example, in a number of cases, co-conspirators have planned their meetings outside the United States to evade detection by law enforcement.

Given these challenges, policies can focus on both prevention and detection. First, anti-cartel enforcement efforts can seek to prevent *per se* unlawful conduct at the inception. Steps can be taken to promote a better awareness of the laws and an understanding of the risks and consequences of violating it.

Second, policies can be implemented to facilitate the detection of *per se* anticompetitive conduct. For example, as noted below, the Antitrust Leniency Program has been designed to impose a “threat of severe sanctions,” heightened fear of detection, and to support transparency and predictability in enforcement. This approach provides incentives for an executive or decision-maker engaged in anticompetitive behavior to disclose unlawful conduct. Some significant international cartels have been exposed and busted based on these policies.

*The sentencing process serves a central role in promoting predictability and certainty in criminal antitrust enforcement.*

### Transparency Role

Transparency about governing policies serves a key role as part of any anti-cartel program. Transparency promotes an understanding about the law, the enforcement of the law, and the consequences of violating it. With this greater awareness about the process, predictability and certainty in enforcement encourages compliance with the law and cooperation with law enforcement officials.

Transparency promotes the criminal justice objectives of deterrence, retribution, rehabilitation, and incapacitation (as discussed below). Information about the enforcement program may avert unlawful conduct at its inception or may contribute to the termination of ongoing anticompetitive conduct by cooperating with law enforcement (such as by participating in the Leniency Program, described further

below). The Antitrust Division public website contains a wealth of information about recent cases, policies and speeches. Transparency is provided about each phase of the criminal justice process.<sup>58</sup>

Much of the information about the criminal program is publicly available online,<sup>59</sup> including applicable statutes and guidelines,<sup>60</sup> model plea agreements,<sup>61</sup> and criminal policy speeches.<sup>62</sup> Specific policies about the conditional requirements to qualify for the Leniency Program are provided.<sup>63</sup> The model letters used as part of the conditional leniency process are available online.<sup>64</sup> Press releases share information about case outcomes.<sup>65</sup> Public filings, including the case charges and plea agreements, are available for many cases online.<sup>66</sup>

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<sup>58</sup> This policy of transparency has been in place for many years. Deputy Assistant Attorney General for Criminal Enforcement Scott D. Hammond has stated:

The Division has sought to provide transparency in the following enforcement areas: (1) transparent standards for opening investigations; (2) transparent standards for deciding whether to file criminal charges; (3) transparent prosecutorial priorities; (4) transparent policies on the negotiation of plea agreements; (5) transparent policies on sentencing and calculating fines; and (6) transparent application of our Leniency Program.

<sup>59</sup> Criminal enforcement information is *available at* <http://www.justice.gov/atr/public/criminal/index.html>.

<sup>60</sup> Statutory provisions and guidelines of the Antitrust Division are *available at* <http://www.justice.gov/atr/public/divisionmanual/chapter2.pdf>.

<sup>61</sup> For the model corporate plea agreement, see <http://www.justice.gov/atr/public/criminal/302601.pdf>; for the model individual plea agreement, see <http://www.justice.gov/atr/public/criminal/302600.pdf>.

<sup>62</sup> Criminal policy speeches are regularly updated online at: <http://www.justice.gov/atr/public/speeches/speech-criminal.html>.

<sup>63</sup> Leniency Program policy documents are publicly *available at* <http://www.justice.gov/atr/public/criminal/leniency.html>.

<sup>64</sup> The model leniency letters include: (1) Model Corporate Conditional Leniency Letter; (2) Model Individual Conditional Leniency Letter; (3) Model Dual Investigations Leniency Letter used when the corporate leniency applicant is a subject, target, or defendant in another Antitrust Division investigation; and (4) Model Dual Investigations Acknowledgement Letter for Employees, which are available on the Leniency Program Page at <http://www.justice.gov/atr/public/criminal/leniency.html>.

<sup>65</sup> Press releases for twenty-two years are *available online at* [http://www.justice.gov/atr/public/press\\_releases/2014/index.html](http://www.justice.gov/atr/public/press_releases/2014/index.html).

<sup>66</sup> Case filings for many cases since December 1994 are *available at* <http://www.justice.gov/atr/cases/index.html#page=page-1>.

The public website also contains information about lodging a formal complaint about potential criminal conduct.<sup>67</sup> Transparency also includes outreach and education efforts which help promote awareness of the policies and consequences.

These transparency steps help promote both prevention and detection objectives. Information about enforcement policies and specific court and program documents is readily available. Consequently, an understanding about the risks and consequences is enhanced for criminal antitrust conduct.

### Sentencing Policies

The sentencing process serves a central role in promoting predictability and certainty in criminal antitrust enforcement. Individuals and companies should have a fair understanding about what punishment they are likely to face for criminal violations of the Sherman Act. This understanding provides context to the risk-reward calculus of decision makers who may contemplate price fixing, market allocation or bid rigging conduct. Sentencing predictability also advances the established criminal justice goals of deterrence, retribution, rehabilitation and incapacitation.<sup>68</sup>

Four primary questions are raised about sentencing in criminal antitrust enforcement: (1) What are the maximum criminal penalties and related trends toward higher sentences? (2) What is the position of the U.S. Department of Justice for Sherman Act violations in the sentencing process? (3) What policies guide the Court's discretion and decision in imposing the sentence? (4) What are the trends concerning the sentences imposed in criminal antitrust cases over the past few decades?

*[S]ince the early 1970s, there has been a consistent effort in the United States to increase the criminal penalties for Sherman Act violations.... These statutory increases have enabled significantly higher maximum prison terms and criminal fines.*

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<sup>67</sup> Information to lodge a complaint and how the report is handled is available at <http://www.justice.gov/atr/contact/newcase.html>.

<sup>68</sup> See, e.g., *Tapia v. United States*, 564 U.S. \_\_\_, 131 S.Ct. 2382, 2387–88, 180 L.Ed.2d 357 (2011) (listing “retribution, deterrence, incapacitation, and rehabilitation” as “the four purposes of sentencing generally”); see also *United States v. Dyer*, 216 F.3d 568, 570 (7th Cir. 2000) (“The principal objectives of criminal punishment that guide the design and application of the federal sentencing guidelines are retribution, deterrence, and incapacitation.”) (citing, *inter alia*, 18 U.S.C. §§ 3553(a), (b)).

### Trend To Increase The Maximum Penalties

On the first question, since the early 1970s, there has been a consistent effort in the United States to increase the criminal penalties for Sherman Act violations. One primary objective has been to promote greater deterrence in light of the serious nature of antitrust violations. These statutory increases have enabled significantly higher maximum prison terms and criminal fines.

During the thirty years between 1974 and 2004, the criminal fines under the Sherman Act were increased through a series of amendments from a maximum of \$50,000 to \$100 million for corporations, and from \$50,000 to \$1 million for individuals. The Alternative Fines Act further allowed for fines in excess of \$100 million based on twice the gross pecuniary gain or gross pecuniary loss from the offense (discussed further below). The maximum period of incarceration increased from one year, as a misdemeanor, to ten years, as a felony. These higher criminal penalties have allowed the Antitrust Division to prosecute and seek and courts to impose significantly stronger punishment for *per se* unlawful conspiracies.

Highest Criminal Corporate Fines for Sherman Act Violations To Date		
Defendant (FY)	Product	Fine (\$Millions)
AU Optronics Corporation of Taiwan (2012)	Liquid Crystal Display (LCD) Panels	\$500
F. Hoffmann-La Roche, Ltd. (1999)	Vitamins	\$500
Yazaki Corporation (2012)	Automobile Parts	\$470
Bridgestone Corporation (2014)	Automotive Anti-Vibration Rubber Parts	\$425
LG Display Co., Ltd LG Display America (2009)	Liquid Crystal Display (LCD) Panels	\$400
Société Air France and Koninklijke Luchtvaart Maatschappij, N.V. (2008)	Air Transportation (Cargo)	\$350
Korean Air Lines Co., Ltd. (2007)	Air Transportation (Cargo & Passenger)	\$300
British Airways PLC (2007)	Air Transportation (Cargo & Passenger)	\$300
Samsung Electronics Company, Ltd. Samsung Semiconductor, Inc. (2006)	DRAM	\$300
BASF AG (1999)	Vitamins	\$225
CHI MEI Optoelectronics Corporation (2010)	Liquid Crystal Display (LCD) Panels	\$220
Furukawa Electric Co. Ltd. (2012)	Automotive Wire Harnesses & Related Products	\$200
<i>Source:</i> <a href="http://www.justice.gov/atr/public/criminal/sherman10.pdf">http://www.justice.gov/atr/public/criminal/sherman10.pdf</a>		



### Summary Of Amendments Resulting In Higher Criminal Penalties During 1974 to 2004

In the Antitrust Procedures and Penalties Act of 1974, Congress elevated Sherman Act convictions from a misdemeanor to a felony.<sup>69</sup> In the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Congress increased the maximum corporate fine for Sherman Act criminal violations by tenfold, from \$10 million to \$100 million.<sup>70</sup> At the same time, fines for individuals were nearly tripled, from \$350,000 to a maximum of \$1 million. The maximum prison term for individuals was also increased from three years to ten years.

In response to the higher statutory penalties in 2004, the Sentencing Guideline Commission increased the recommended penalties for antitrust offenses under the Sentencing Guidelines in 2005.<sup>71</sup> The sentencing amendment was adopted in direct response to “congressional concern about the seriousness of antitrust offenses and provide[d] for antitrust penalties that are more proportionate to those for sophisticated frauds....”<sup>72</sup>

#### Alternative Fines Act: 18 U.S.C. § 3571(d)

Supplementing the higher penalties specified in the Sherman Act, the Alternative Fines Act, 18 U.S.C. § 3571(d),<sup>73</sup> permits criminal fines in excess of \$1 million dollars for individuals or \$100 million for companies. Under this section, an alternative maximum fine of twice the gross gain or gross loss from the offense may be imposed.<sup>74</sup> This federal provision, which was based on the Model Penal Code and other

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<sup>69</sup> See Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974) (establishing violations of the Sherman Act as felonies) (codified at 15 U.S.C. § 1); *see also* H. Rep. No. 93-1463, 93rd Cong., 2d Sess. 10 (1974) (noting purpose to “increase[] the maximum fine levels for all federal criminal offenses except petty offenses”), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6535, 6540; S. Rep. No. 93-298, 93rd Cong., 1st Sess. 4 (1973).

<sup>70</sup> Pub. L. No. 108-237, § 215, 118 Stat. 665, 665-66, 668 (2004) (codified at 15 U.S.C. § 1).

<sup>71</sup> The penalties included a higher base offense level and adjustments to the volume of commerce table. See 2005 Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary, 5-7 (April 29, 2005) (concerning U.S.S.G. app. C., amend. 678), [http://www.ussc.gov/Legal/Amendments/Official\\_Text/20050429\\_Amendments.pdf](http://www.ussc.gov/Legal/Amendments/Official_Text/20050429_Amendments.pdf).

<sup>72</sup> *Id.* at 7.

<sup>73</sup> Section 3571(d) provides:

ALTERNATIVE FINE BASED ON GAIN OR LOSS. - If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

<sup>74</sup> Section 3571(d) was enacted in the Criminal Fine Improvements Act of 1987, § 6, P.L. 100-185, 101 Stat. 1280 (Dec. 11, 1987). According to the House Report, the provision retained the standard under 18 U.S.C. § 3623(c)(1) (1984), and expanded the application to situations in which “the defendant knows or intends that his conduct will

statutes,<sup>75</sup> was originally enacted in 1984 as part of a congressional effort to “make criminal fines a tougher punishment.”<sup>76</sup> As noted in the House Report, “The most effective way to ensure that the wrongdoer does not profit is to base the fine upon the pecuniary gain of the defendant.”<sup>77</sup> Larger fines against organizations were recognized as necessary “since organizations generally have greater resources than individuals.” Since organizations cannot be incarcerated significant fines could deter criminal conduct by corporations.<sup>78</sup>

### *Southern Union Decision*

The Supreme Court recently considered Section 3571(d) and other criminal fine provisions which increase the fine above the statutory maximum.<sup>79</sup> The Court specifically noted that Section 3571(d) had “been used to obtain substantial judgments against organizational defendants,” including a \$400 million fine in a criminal antitrust case, along with other criminal fines.<sup>80</sup> The Court concluded that a district court may not impose a sentence “that enlarges the maximum

*To date, the Antitrust Division has used the Alternative Fines Act provision to obtain twenty-six corporate fines exceeding \$100 million dollars.*

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benefit another person financially.” H. Rep. No. 100–390, 100th Cong., 1st Sess. 6 (1987). The earlier version of the statute, under 18 U.S.C. § 3623(c)(1) (1984), provided:

If the defendant derives pecuniary gain from the offense, or if the offense results in pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process. (repealed Nov. 1, 1987).

<sup>75</sup> Model Penal Code (First), § 6.03(5) (fines above specified ceiling amounts may be in “any higher amount equal to double the pecuniary gain derived from the offense by the offender”); H. Rep. No. 98–906, 98th Cong., 2d Sess. 17 (1984) (citing other statutes that increase the criminal fine based on a multiple of the loss to the victim or gain to the offender), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5433; *see also Southern Union Company v. United States*, 567 U.S. \_\_\_, n.4, 132 S.Ct. 2344, 2351 n.4 (2012) (citing 18 U. S. C. § 645 (embezzlement fine by officers of United States courts up to twice the value of the money embezzled); § 201(b) (fine for bribery of public officials of up to three times the value of the bribe)).

<sup>76</sup> H. Rep. No. 98–906, 98th Cong., 2d Sess. 4 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5433.

<sup>77</sup> *Id.* at 17.

<sup>78</sup> *Id.*

<sup>79</sup> *See Southern Union Company v. United States*, 567 U.S. \_\_\_, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012).

<sup>80</sup> *See Southern Union Company*, 132 S.Ct. at 2351-52 (citing \$400 million corporate fine in the Amended Judgment in *United States v. LG Display Co., Ltd.*, No. 08–CR–803–SI (ND Cal.) (involving a Korean corporation)).

punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow.<sup>81</sup>

The *Southern Union* decision clarifies that a jury must find beyond a reasonable doubt that the facts support a higher fine imposed under Section 3571(d). In criminal antitrust cases, if a fine of more than the statutory maximum corporate fine of \$100 million or more than the statutory maximum individual fine of \$1 million is sought,<sup>82</sup> the Division must present evidence and a jury must first make a finding in support of the gross gain or gross loss. The statute then allows the court to impose a corporate fine that is “the greater of twice the gross gain or twice the gross loss.”

The form of proof will depend on the facts of the case. As the Supreme Court recognized, the evidence may include admissions by the defendant.<sup>83</sup> For example, statements by corporate officers may be sufficient to establish the gain or loss. In some cases, expert testimony might be appropriate.

As a recent criminal antitrust example, in the *AU Optronics* jury trial, which was decided before the *Southern Union* decision, the prosecutors presciently presented a Special Verdict Form which asked the jury to determine the amount of the gross gain from the offense. The jury determined that “the amount of combined gross gains derived from the conspiracy” was “\$500 million or more.”<sup>84</sup> Based on this jury finding, the court separately determined the sentence. A sentence of \$500 million was ultimately imposed on the corporation.<sup>85</sup> This case provides a useful example of how the evidence would be presented at trial and how the jury would be asked to make the required finding following the *Southern Union* decision.

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<sup>81</sup> *Southern Union Company*, 132 S.Ct. at 2352. The Court extended the holding in *Apprendi v. New Jersey* to criminal fines. See *Southern Union Company*, 132 S.Ct. at 2357 (concluding “the rule of *Apprendi* applies to criminal fines”); see also *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”). Consequently, “[t]he Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's maximum potential sentence.” *Southern Union Company*, 132 S.Ct. at 2348-49.

<sup>82</sup> Pub. L. No. 108-237, § 215, 118 Stat. 665, 665-66, 668 (2004) (codified at 15 U.S.C. § 1).

<sup>83</sup> *Southern Union Company*, 132 S.Ct. at 2352; see also *United States v. Day*, 700 F.3d 713, 731 (4th Cir. 2012) (the defendant’s admissions established the gain and loss as required under *Apprendi* and *Southern Union*).

<sup>84</sup> See *United States v. AU Optronics Corp.*, Special Verdict Form, Criminal Case No. CR-09-0110 (ND CA March 13, 2012) (Doc. No. 851). The *AU Optronics Corporation* case is presently pending on appeal before the Ninth Circuit Court of Appeals. See *United States v. Au Optronics Corp., et al.*, (9th Cir. 2013) (Nos. 12-10492, 12-10493, 12-10500, 12-10514).

<sup>85</sup> See *United States v. AU Optronics Corp.*, Judgment in a Criminal Case, Criminal Case No. CR-09-0110 (ND CA Oct. 2, 2012) (Doc. No. 976).

### Corporate Case Examples Applying Section 3571(d)

To date, the Antitrust Division has used the Alternative Fines Act provision to obtain twenty-six corporate fines exceeding \$100 million dollars.<sup>86</sup> These fines have been imposed over the past eighteen years.

A few case examples are noted. So far, the highest criminal fine of \$500 million has been imposed in two cases. The most recent case was the previously mentioned *AU Optronics Corporation* case, following a jury trial conviction involving a conspiracy to fix the prices of thin-film transistor LCD panels sold worldwide.<sup>87</sup>

The first \$500 million criminal fine was imposed fifteen years ago in the prosecution of the Swiss pharmaceutical company F. Hoffmann-La Roche, Ltd., which agreed to pay the fine for conspiring to raise and fix prices and allocate market shares for certain vitamins.<sup>88</sup> The same case resulted in a criminal fine of \$225 by German firm BASF Aktiengesellschaft for participating in the same vitamin conspiracy.<sup>89</sup>

More recently, this year, Bridgestone Corporation, based in Japan, agreed to pay a \$425 million criminal fine for conspiring to fix prices of automotive anti-vibration rubber parts.<sup>90</sup> Two years earlier, as part of the same investigation, the Antitrust Division obtained a \$470 million criminal penalty against Yazaki Corporation, a Japanese supplier of automotive electrical components.<sup>91</sup> Last September 2013, Attorney General Eric H. Holder, Jr. announced that nine companies

*The policy of the Antitrust Division is to request prison terms “for all defendants domestic and foreign.”*

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<sup>86</sup> See Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More (March 1, 2014), <http://www.justice.gov/atr/public/criminal/sherman10.pdf>.

<sup>87</sup> See *United States v. AU Optronics Corp.*, Criminal Case No. CR-09-0110 (ND CA June 10, 2010). For the superseding indictment alleging the charges, see **Error! Hyperlink reference not valid.**<http://www.justice.gov/atr/cases/f259800/259889.htm>; for the sentencing press release see [http://www.justice.gov/atr/public/press\\_releases/2012/287189.htm](http://www.justice.gov/atr/public/press_releases/2012/287189.htm).

<sup>88</sup> See *United States v. F. Hoffmann-La Roche, Ltd.*, Criminal Case No. 99-CR-184-R (ND Texas May 20, 1999). For the information alleging the charge, see <http://www.justice.gov/atr/cases/f2400/2452.pdf>; for the plea agreement see <http://www.justice.gov/atr/cases/f2400/hoffman.pdf>.

<sup>89</sup> See *United States v. BASF Aktiengesellschaft*, Criminal Case No. 3:99-CR-200-R (ND Texas May 20, 1999). For the information alleging the charge, see <http://www.justice.gov/atr/cases/f2400/2453.pdf>; for the plea agreement see <http://www.justice.gov/atr/cases/f2400/basf.pdf>.

<sup>90</sup> See *United States v. Bridgestone Corp.*, Criminal Case No. CR-14-CR-68-JZ. For the information alleging the charge, see <http://www.justice.gov/atr/cases/f303800/303808.pdf>; and for the case press release, see [http://www.justice.gov/atr/public/press\\_releases/2014/303743.pdf](http://www.justice.gov/atr/public/press_releases/2014/303743.pdf).

<sup>91</sup> See *United States v. Yazaki Corp.*, Criminal Case No. 2:12-cr-20064-DML-MKM (ED Michigan March 1, 2012). For the information alleging the three charges, see <http://www.justice.gov/atr/cases/f280000/280050.pdf>**Error!**

agreed to pay criminal fines totaling more than \$740 million.<sup>92</sup> To date, the ongoing investigation into price fixing and bid rigging in the automotive parts industry has resulted in 26 corporate plea agreements totaling more than \$2 billion in criminal fines.<sup>93</sup>

These cases demonstrate that the Antitrust Division can and will use the Alternative Fine Provision where it can establish twice the gain or loss resulting from the pecuniary gain of the offense. While most of the cases have involved corporate plea agreements, the Antitrust Division has also demonstrated that it can prove the gain or loss if necessary at trial.

### Summary

The congressional trend to increase the maximum penalties over the past few decades reflects the need to send a strong message that criminal anticompetitive conduct will be subject to strict punishment. As the maximum criminal penalties have increased under law, the criminal penalties have risen in criminal prosecutions.

It is generally recognized around the world that higher penalties promote deterrence and the other objectives of criminal antitrust enforcement. Increased penalties in other countries have been identified as a key factor in antitrust enforcement efforts.<sup>94</sup> These responses from other countries are consistent with the experience in the United States.

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**Hyperlink reference not valid.;** for the plea agreement *see* <http://www.justice.gov/atr/cases/f280600/280689.pdf>; and for the case press release, *see* [http://www.justice.gov/atr/public/press\\_releases/2012/279734.pdf](http://www.justice.gov/atr/public/press_releases/2012/279734.pdf).

<sup>92</sup> See Press Release, U.S. Dep't of Justice, Nine Automobile Parts Manufacturers And Two Executives Agree To Plead Guilty To Fixing Prices On Automobile Parts Sold To U.S. Car Manufacturers And Installed In U.S. Cars (Sept. 26, 2013), [http://www.justice.gov/atr/public/press\\_releases/2013/300969.pdf](http://www.justice.gov/atr/public/press_releases/2013/300969.pdf).

<sup>93</sup> See Press Release, U.S. Dep't of Justice, Bridgestone Corp. Agrees To Plead Guilty To Price Fixing On Automobile Parts Installed In U.S. Cars (Feb. 13, 2014), [http://www.justice.gov/atr/public/press\\_releases/2014/303743.pdf](http://www.justice.gov/atr/public/press_releases/2014/303743.pdf).

<sup>94</sup> *See, e.g.*, Trends and Developments in Cartel Enforcement Presented at the Ninth Annual ICN Conference in Istanbul, Turkey 5, 6 (April 29, 2010) (surveying 46 jurisdictions on enforcement issues) (43 of 46 countries listing "increased penalties" as one of the "changes/developments" in "competition law [that] have impacted" the country's "cartel enforcement program over the last 10 years"), <http://www.internationalcompetitionnetwork.org/uploads/library/doc613.pdf>. The 46 surveyed countries included: (1) Argentina; (2) Australia; (3) Austria; (4) Brazil; (5) Bulgaria; (6) Canada; (7) Chile; (8) Croatia; (9) Cyprus; (10) Czech Republic; (11) Denmark; (12) Egypt; (13) El Salvador; (14) Estonia; (15) European Union; (16) Finland; (17) France; (18) Germany; (19) Greece; (20) Hungary; (21) Ireland; (22) Israel; (23) Japan; (24) Jersey; (25) Korea; (26) Mexico; (27) Mongolia; (28) Netherlands; (29) New Zealand; (30) Norway; (31) Pakistan; (32) Panama; (33) Peru; (34) Poland; (35) Portugal; (36) Romania; (37) Russia; (38) South Africa; (39) Spain; (40) Sweden; (41) Switzerland; (42) Taiwan; (43) Turkey; (44) United States; (45) United Kingdom; and (46) Vietnam.

### Position of the Antitrust Division During the Sentencing Process for Individuals

A second important element advancing predictability and certainty in sentencing concerns how the Department of Justice will respond with respect to sentencing during a criminal prosecution. The Antitrust Division is committed to clear and consistent enforcement. The position of the Division is reinforced in a variety of public statements and in cases.

At sentencing, the government will be asked for its position on the recommended sentence. The policy of the Antitrust Division is to request prison terms “*for all defendants domestic and foreign.*”<sup>95</sup> While the final sentence imposed will ultimately be up to the court, the prosecutors will consistently urge the court to impose prison terms.

Significant prison terms have been imposed. For example, last year one executive recently received a five-year prison term in a conspiracy to fix rates for coastal water freight transportation between the continental U.S. and Puerto Rico.<sup>96</sup> Four-year prison terms have been imposed in other cases.<sup>97</sup> In the ongoing auto parts investigation, 28 individuals have been charged so far,<sup>98</sup> with the sentences ranging from one year and one day to twenty-four months.<sup>99</sup>

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<sup>95</sup> Scott D. Hammond, Dep. Ass’t Att’y Gen. for Criminal Enforcement, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, at 7 (Feb. 25, 2010) [hereinafter *Evolution of Criminal Antitrust Enforcement*] (emphasis in original); *id.* (“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.”); *see also* Scott D. Hammond, Dep. Ass’t Att’y Gen. for Criminal Enforcement, *Charting New Waters in International Cartel Prosecutions*, at 16 (March 2, 2006) (noting Division policy of “insist[ing] on jail sentences for *all defendants* – domestic and foreign”) [hereinafter “*Charting New Waters*”], <http://www.justice.gov/atr/public/speeches/214861.pdf>.

<sup>96</sup> See Press Release, U.S. Dep’t of Justice, *Former Sea Star Line President Sentenced to Serve Five Years in Prison for Role in Price-Fixing Conspiracy Involving Coastal Freight Services between the Continental United States and Puerto Rico* (Dec. 6, 2013), [http://www.justice.gov/atr/public/press\\_releases/2013/302027.htm](http://www.justice.gov/atr/public/press_releases/2013/302027.htm).

<sup>97</sup> See Press Release, U.S. Dep’t of Justice, *Executives Of Iowa-Ready Mix Concrete Companies Sentenced To Serve Prison Sentences For Price Fixing And Bid Rigging* (Feb. 8, 2011); *United States v. Steven Keith VandeBrake*, Criminal Case No. 10-CR-04025-MWB (ND Iowa 2011). For the information alleging the charge, *see* <http://www.justice.gov/atr/cases/f260100/260126.pdf>; for the plea agreement *see* <http://www.justice.gov/atr/cases/f260100/260124.pdf>. The *VandeBrake* sentence was affirmed on appeal. *United States v. VandeBrake*, 679 F.3d 1030 (8th Cir. 2012), *cert. denied*, 133 S.Ct. 1457 (2013); *see also* Press Release, U.S. Dep’t of Justice, *Former Shipping Executive Sentenced To 48 Months In Jail For His Role In Antitrust Conspiracy* (Jan. 30, 2009); *United States v. Peter Baci*, Criminal Case No. 08-CR-00350-JRK (MDFL 2008). For the information alleging the charge, *see* <http://www.justice.gov/atr/cases/f237900/237979.pdf>; for the plea agreement *see* <http://www.justice.gov/atr/cases/f238800/238829.pdf>.

<sup>98</sup> See Press Release, U.S. Dep’t of Justice, *Bridgestone Corp. Agrees To Plead Guilty To Price Fixing On Automobile Parts Installed In U.S. Cars* (Feb. 13, 2014), <http://www.justice.gov/atr/>

As Congress has recognized, strong criminal penalties are necessary to promote deterrence given the pernicious nature of the criminal *per se* unlawful violations. The Division focuses on decision makers “who we have reason to believe were involved in criminal wrongdoing and who are potential targets of our investigation.”<sup>100</sup>

As already noted, with regard to corporations, the Antitrust Division has a track record of seeking and obtaining large criminal fines. Since 2009, more than \$4.2 billion in criminal fines have been imposed in antitrust prosecutions.<sup>101</sup> In terms of predictability and certainty, potential violators of the Sherman Act can understand that the Antitrust Division will seek strong and appropriate punishment at sentencing.

### Judicial Sentencing Policies

On the third issue, what policies guide the courts in deciding a fair and appropriate sentence for criminal Sherman Act violations? For antitrust cases, the relevant sentencing policies provide a presumption for incarceration and significant fines given the serious nature of the offense.

### Sentencing Process Overview

As a threshold matter, to understand the sentencing policies, it is useful to consider the process under which sentences are imposed. In 2005, in a landmark ruling, the Supreme Court gave more discretion to district courts to determine a final criminal sentence.<sup>102</sup> Certain sentencing policies or guidelines have been established to guide the court’s discretion in imposing a sentence following an antitrust conviction.

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[public/press\\_releases/2014/303743.pdf](http://www.justice.gov/atr/public/press_releases/2014/303743.pdf);<sup>98</sup> See Press Release, U.S. Dep’t of Justice, Bridgestone Corp. Agrees To Plead Guilty To Price Fixing On Automobile Parts Installed In U.S. Cars (Feb. 13, 2014), [http://www.justice.gov/atr/public/press\\_releases/2014/303743.pdf](http://www.justice.gov/atr/public/press_releases/2014/303743.pdf).

<sup>99</sup> See, e.g., Press Release, U.S. Dep’t of Justice, Nine Automobile Parts Manufacturers And Two Executives Agree To Plead Guilty To Fixing Prices On Automobile Parts Sold To U.S. Car Manufacturers And Installed In U.S. Cars (Sept. 26, 2014) (“Fifteen individuals have been sentenced to pay criminal fines and to serve prison sentences ranging from a year and a day to two years each.”), [http://www.justice.gov/atr/public/press\\_releases/2013/300969.pdf](http://www.justice.gov/atr/public/press_releases/2013/300969.pdf); see also Press Release, U.S. Dep’t of Justice,

Yazaki Corp., Denso Corp. And Four Yazaki Executives Agree To Plead Guilty To Automobile Parts Price-Fixing And Bid-Rigging Conspiracies (Jan. 30, 2012) (noting four executives “will serve prison time ranging from 15 months to two years”), [http://www.justice.gov/atr/public/press\\_releases/2012/279734.pdf](http://www.justice.gov/atr/public/press_releases/2012/279734.pdf).

<sup>100</sup> Statement Of Ass’t Att’y General Bill Baer On Changes To Antitrust Division’s Carve-Out Practice Regarding Corporate Plea Agreements (April 12, 2013), [http://www.justice.gov/atr/public/press\\_releases/2013/295747.htm](http://www.justice.gov/atr/public/press_releases/2013/295747.htm).

<sup>101</sup> Bill Baer, Ass’t Att’y General, Antitrust Division, Reflections on Antitrust Enforcement in the Obama Administration, at 2 (Jan. 30, 2014), <http://www.justice.gov/atr/public/speeches/303269.pdf>.

<sup>102</sup> See *United States v. Booker*, 543 U.S. 220 (2005). Prior to 2005, criminal sentences were imposed within a sentencing range unless aggravating or mitigating circumstances were not adequately taken into account. Congress enacted the

Under current law, there are two primary parts to the sentencing process. Under the first part, the district court applies the U.S. Sentencing Guidelines to determine an initial sentence.<sup>103</sup> “As a matter of administration and to secure nationwide consistency,” the Supreme Court has held, “the [Sentencing] Guidelines should be the starting point and the initial benchmark.”<sup>104</sup>

After this threshold determination under the advisory Sentencing Guidelines, as part of the second sentencing phase, the court considers a number of specific sentencing factors.<sup>105</sup> During this phase, the sentencing court may exercise its discretion on whether to depart from the initial Guidelines sentence. The sentencing factors include the nature and circumstances of the offense, history and characteristics of the defendant, the need to reflect the seriousness of the offense, deterrence, the need to protect the public, the need to avoid unwarranted disparity in sentences, and the need for restitution.<sup>106</sup>

*For individuals, there is a clear trend for longer periods of incarceration. About half of the U.S. citizens convicted of antitrust violations have received a prison term of at least one year.*

### Sentencing Guideline Policies For The Courts

In the sentencing process, certain sentencing policies guide the court’s discretion in determining the sentence. First, the sentencing policies recognize the serious nature of criminal antitrust violations. As the Guidelines note on this point:

The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are

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Sentencing Guideline system to address the problem of sentencing disparity. As noted in the Senate Report, federal judges were imposing “an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of Probation, while another—convicted of the very same crime and possessing a comparable criminal history -- may be sentenced to a lengthy term of imprisonment.” S. Rep. No. 98-225, 98th Cong., 1st Sess. 38 (1983), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182.

<sup>103</sup> The Sentencing Guidelines were promulgated pursuant to the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 1995 (Oct. 12, 1984); *see also* 28 U.S.C. § 994(a). Amendments to the Sentencing Guidelines are submitted to the Congress not later than the first day of May each year under 28 U.S.C. § 994(p). Current and past proposed amendments are *available at*: [http://www.ussc.gov/Guidelines/Proposed\\_Amendments.cfm](http://www.ussc.gov/Guidelines/Proposed_Amendments.cfm).

<sup>104</sup> *Gall v. United States*, 552 U.S. 38, 41 (2007); *see also Kimbrough v. United States*, 552 U.S. 85, 108 (2007) (noting that “district courts must treat the Guidelines as ‘starting point and the initial benchmark’” in imposing sentence).

<sup>105</sup> 18 U.S.C. § 3553(a).

<sup>106</sup> *Id.*



so plainly anticompetitive that they have been recognized as illegal *per se*, i.e., without any inquiry in individual cases as to their actual competitive effect.<sup>107</sup>

Second, given the pernicious and anticompetitive nature of the antitrust offense, there is a presumption in favor of at least some period of incarceration for individuals. As noted by the Sentencing Commission, “terms of imprisonment are ordinarily necessary for antitrust violations because they ‘reflect the serious nature of and the difficulty of detecting such violations.’”<sup>108</sup> On this point, the commentary notes to the applicable sentencing provision for bid rigging, price fixing and market-allocation agreements, recognize: “Absent adjustments, the guidelines require some period of confinement in the great majority of cases that are prosecuted, including all bid-rigging cases.”<sup>109</sup> Other options to incarceration are disfavored, recommending that “alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.”<sup>110</sup>

As a practical matter, in criminal antitrust cases the sentence is largely driven by the volume of commerce.<sup>111</sup> The higher the volume of commerce, the greater the likelihood that a prison term may be imposed.<sup>112</sup>

<sup>107</sup> U.S.S.G. § 2R1.1 cmt. Background.

<sup>108</sup> Amendments to the Sentencing Guidelines for United States Courts, 56 Fed. Reg. 22,762, 22,775 (May 16, 1991) (quoted in *United States v. Vandebrake*, 771 F.Supp.2d 961, 1009 (N.D. Iowa 2011) (noting the applicable guideline “policy statements” support that the defendant be “sentenced to a period of incarceration”), *aff’d*, 679 F.3d 1030 (8th Cir. 2012).

<sup>109</sup> The commentary provides:

Under the guidelines, *prison terms for these offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice.* Absent adjustments, the guidelines require some *period of confinement in the great majority of cases that are prosecuted, including all bid-rigging cases.* The court will have the discretion to impose considerably longer sentences within the guideline ranges. Adjustments from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, *in very few cases will the guidelines not require that some confinement be imposed.* Adjustments will not affect the level of fines.

U.S.S.G. §2R1.1, note 7 (emphasis added); *see also* U.S.S.G. Ch.1, Pt. A (Introduction and Authority), introductory cmt. 4(d) (Probation and Split Sentences) (“Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, *antitrust offenses*, insider trading, fraud, and embezzlement, that in the Commission’s view are ‘*serious.*’”) (emphasis added).

<sup>110</sup> U.S.S.G. §2R1.1, note 5.

<sup>111</sup> Under U.S.S.G. § 2R1.1(b)(2), the volume of commerce used is “the volume of commerce done by him or his principal in goods or services that were affected by the violation.” The volume of commerce affected is that which the conspiracy “acts upon or influences negotiations, sale prices, the volume of goods sold, or other transactional terms” even when the conspirators fall short of their specific goals or targets. *United States v. SKW Metals & Alloys, Inc.*, 195 F. 3d 83, 90 (2d Cir. 1999); *see also United States v. Giordano*, 261 F.3d 1134, 1146 (11th Cir. 2001) (applying a rebuttable presumption that all sales during the conspiracy were affected by the conspiracy); *United States v. SKW*

Consistent with these sentencing policies, a number of courts have recognized that the Sentencing Commission policies warrant stronger punishment in criminal antitrust cases.<sup>113</sup> As further reflection of these sentencing policies, in many cases, the parties have recommended strong fines and prison terms to resolve the prosecution and which have been accepted by the court.

### Sentencing Trends In Antitrust Cases

Given the congressional and Sentencing Commission policies in support of higher punishment for antitrust criminal violations, what do the actual sentencing trends show since the 1990s?

For individuals, there is a clear trend for longer periods of incarceration. About half of the U.S. citizens convicted of antitrust violations have received a prison term of at least one year. Recent information shows that longer periods of incarceration have been imposed since the 1990s in terms of average prison sentenced by month or total prison days:<sup>114</sup>

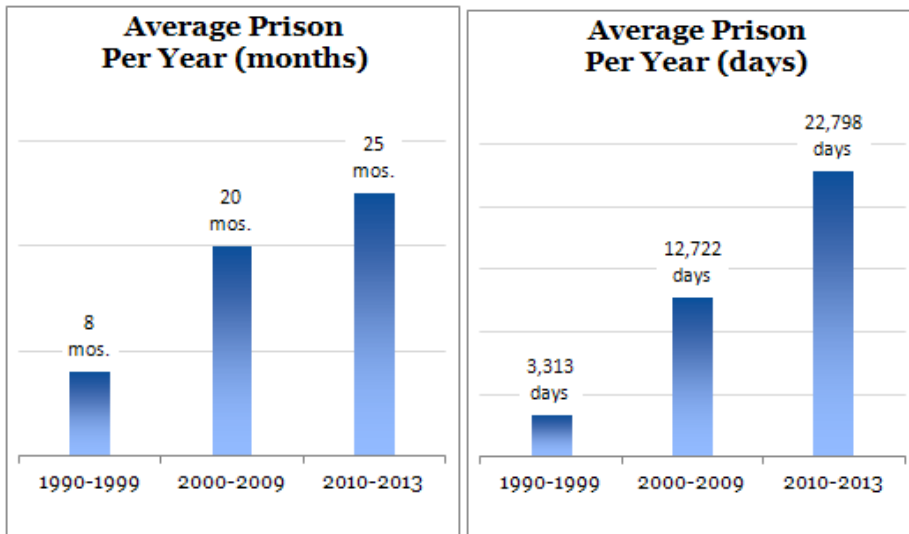
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*Metals & Alloys, Inc.*, 195 F.3d 83, 89-90 (2d Cir. 1999) (holding that a “price-fixing conspiracy can affect prices even when it falls short of achieving the conspirators’ target price”); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1273 (6th Cir. 1995) (concluding that all sales made within the conspiracy period affected commerce “without regard to whether individual sales were made at the target price”). Congress has indicated its continued support for the volume of commerce determination. 150 CONG. REC. H3658 (June 2, 2004) (“Congress does not intend for the Commission to revisit the current presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy.”) (Reps. Sensenbrenner and Conyers).

<sup>112</sup> See U.S.S.G. § 2R1.1(b)(2) (listing higher adjustments for different levels of volume of commerce).

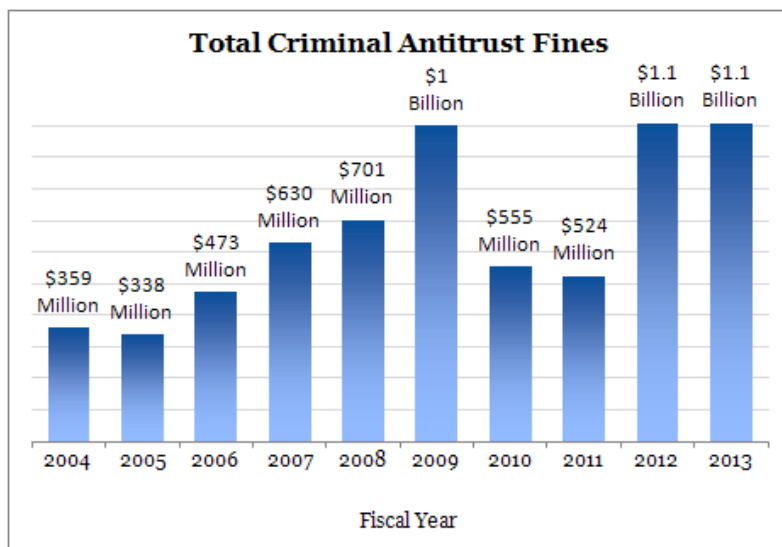
<sup>113</sup> See, e.g., *United States v. Rattoballi*, 452 F.3d 127, 135 (2d Cir. 2006) (“The Guidelines reflect a considered determination by the Commission that jail terms are the most effective deterrent for antitrust violations.”) (citing U.S.S.G. § 2R1.1 cmt. background) (reversing non-incarceration sentence for Sherman Act conviction); *United States v. Haversat*, 22 F.3d 790, 797 (8th Cir. 1994) (“The Sentencing Commission has emphasized that the sentencing court should impose some confinement in all but the rarest criminal antitrust cases.”) (citing U.S.S.G. § 2R1.1 cmt. background); *Vandebrake*, 771 F.Supp.2d at 1009 (“[T]he court takes into account the Sentencing Commission’s view ‘that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.’ U.S.S.G. § 2R1.1, cmt. n.5. The Guidelines reflect a considered determination by the Sentencing Commission that terms of incarceration are viewed as the most effective deterrent for antitrust violations. See *id.* § 2R1.1 cmt. background (stating that ‘in very few cases will the guidelines not require that some confinement be imposed’)); *Vandebrake*, 771 F.Supp.2d at 1009 (“The Guidelines reflect a considered determination by the Sentencing Commission that terms of incarceration are viewed as the most effective deterrent for antitrust violations.”).

<sup>114</sup> The charts are publicly available and updated at: <http://www.justice.gov/atr/public/criminal/264101.html>.



Since 2000, criminal antitrust fines have increased over the past eleven years. In the beginning of the decade, the total fines were around \$100 million per year. In recent years, the total fines have exceeded \$500 million each year since 2007, including \$1 billion or more in criminal fines in 2009, 2012, and 2013.

In sum, these trends in practice are consistent with congressional and sentencing policies for higher penalties to be imposed on individuals and corporations in criminal antitrust cases.



## Leniency Program

### Antitrust Division Leniency Program: Overview

The Corporate Leniency Program has been described as the Antitrust Division's "most effective investigative tool,"<sup>115</sup> and for good reason. In recent years, under the Leniency Program, "the Antitrust Division has seen a nearly twenty-fold increase in the leniency application rate." For example, during the period from fiscal year 1996 through early 2010, "[i]n the United States, companies have been fined more than \$5 billion for antitrust crimes ... with over 90 percent of this total tied to investigations assisted by leniency applicants," and more than half of the international cartel investigation "initiated" or "advanced" based on "information received from a leniency applicant."<sup>116</sup>

*These three core attributes foster a variety of races in criminal enforcement.*

The current Corporate Leniency Program was adopted in August 1993,<sup>117</sup> after the terms of the 1978 program were modified.<sup>118</sup> An Individual Leniency Policy was issued in August 1994.<sup>119</sup>

### Conditional Requirements

While the details of the Leniency Program are publicly available and fully described on the Antitrust Division website,<sup>120</sup> generally there are two conditional corporate leniency options. "Type A" Leniency

<sup>115</sup> Evolution of Criminal Antitrust Enforcement, *supra* note 46, at 3.

<sup>116</sup> *Id.*

<sup>117</sup> See U.S. DEP'T JUSTICE, ANTITRUST DIV., CORPORATE LENIENCY POLICY (Aug. 10, 1993) [hereinafter DOJ CORPORATE LENIENCY POLICY], <http://www.usdoj.gov/atr/public/guidelines/0091.pdf>.

<sup>118</sup> See *generally* Scott D. Hammond, Dep. Ass't Att'y Gen. for Criminal Enforcement, and Belinda A. Barnett, Sr. Counsel, Antitrust Div., Frequently Asked Questions Regarding The Antitrust Division's Leniency Program And Model Leniency Letters, (Nov. 19, 2008) [Hammond & Barnett, Frequently Asked Questions], <http://www.justice.gov/atr/public/criminal/239583.pdf>.

<sup>119</sup> See U.S. DEP'T JUSTICE, ANTITRUST DIV., INDIVIDUAL LENIENCY POLICY (Aug. 10, 1994), <http://www.justice.gov/atr/public/guidelines/0092.pdf>. Three conditions apply for individual applicants:

- (1) At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
- (2) The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and
- (3) The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

*Id.*; see also Hammond & Barnett, Frequently Asked Questions, *supra* note 69, at 21 (Question 24) (noting leniency criteria for individuals).

<sup>120</sup> For a discussion of the Leniency Program, see <http://www.justice.gov/atr/public/criminal/leniency.html>; see *generally* Hammond & Barnett, Frequently Asked Questions, *supra* note 69.

applies where there is no pre-existing investigation,<sup>121</sup> and is automatic upon satisfaction of six conditions.<sup>122</sup> The program imposes an obligation of candor and continuing and complete cooperation.

“Type B” Leniency covers those circumstances where (a) the requirements of Type A Leniency are not met, or (b) the Division may already be aware of the antitrust activity. Seven conditions must be satisfied to qualify for Type B Leniency.<sup>123</sup>

Under either type of leniency, only the first company to satisfy the conditions may be granted leniency.<sup>124</sup> Under both leniency options, the applicant must admit to core cartel conduct, among other requirements.<sup>125</sup>

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<sup>121</sup> See *generally id.* at 4 (Question 3) (describing Type A and Type B Leniency).

<sup>122</sup> The six conditions include:

- (1) At the time the corporation comes forward, the Division has not received information about the activity from any other source.
- (2) Upon the corporation’s discovery of the activity, the corporation took prompt and effective action to terminate its participation in the activity.
- (3) The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation.
- (4) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.
- (5) Where possible, the corporation makes restitution to injured parties.
- (6) The corporation did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

See DOJ CORPORATE LENIENCY POLICY 1-2 (August 10, 1993), <http://www.justice.gov/atr/public/guidelines/0091.pdf>; Hammond & Barnett, Frequently Asked Questions, *supra* note 69, at 4 (Q3) (conditions for Type A leniency).

<sup>123</sup> The seven conditions include:

- (1) The corporation is the first to come forward and qualify for leniency with respect to the activity.
- (2) At the time the corporation comes in, the Division does not have evidence against the company that is likely to result in a sustainable conviction.
- (3) Upon the corporation’s discovery of the activity, the corporation took prompt and effective action to terminate its part in the activity.
- (4) The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation that advances the Division in its investigation.
- (5) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.
- (6) Where possible, the corporation makes restitution to injured parties.
- (7) The Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing corporation’s role in the activity, and when the corporation comes forward.

See DOJ CORPORATE LENIENCY POLICY 2-3 (August 10, 1993), <http://www.justice.gov/atr/public/guidelines/0091.pdf>; Hammond & Barnett, Frequently Asked Questions, *supra* note 69, at 4 (Q3) (conditions for Type B leniency).

### Core Attributes Promoting Enforcement Objectives

The Antitrust Division Leniency Program is carefully designed to impose a “threat of severe sanctions,” heightened fear of detection, and transparency and predictability in enforcement.<sup>126</sup> These three core attributes foster a variety of races in criminal antitrust enforcement.

First there is the race among competitors to be the first to cooperate with prosecutors. The first company to report will be assured of its position through the “marker” system.<sup>127</sup> The marker system prevents “leapfrogging” and provides time for the applicant to obtain sufficient information to show that the conditions have been met.

Second, there is a race that may result in cooperation by the individual employee in advance of the company. The consequences of this race are significant to the leniency applicant, who may receive personal immunity from prosecution.

*The Leniency Program has proven to be an indispensable part of criminal enforcement. As noted, the Leniency Program has successfully led to the detection of some very large international cartels.*

<sup>124</sup> Hammond & Barnett, Frequently Asked Questions, *supra* note 69, at 5-6 (Q4) (“Under both Type A and Type B, only the first qualifying corporation may be granted leniency for a particular antitrust conspiracy.”).

<sup>125</sup> DOJ CORPORATE LENIENCY POLICY ¶¶ 3-4 (“The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials”), <http://www.justice.gov/atr/public/guidelines/0091.htm>; *see also* Hammond & Barnett, Frequently Asked Questions, *supra* note 69, at 6 (Q5) (noting “the applicant must admit its participation in a criminal antitrust violation involving price fixing, bid rigging, capacity restriction, or allocation of markets, customers, or sales or production volumes before it will receive a conditional leniency letter”); *id* at 21 (Q24) (“As with a corporate applicant, an individual leniency applicant is required to admit to his or her participation in a criminal antitrust violation.”) (citation omitted).

<sup>126</sup> Three cornerstones have been identified as part of a successful 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 seek leniency, and what the consequences will be if they do not.

Evolution of Criminal Antitrust Enforcement, *supra* note 46, at 3-4.

<sup>127</sup> Hammond & Barnett, Frequently Asked Questions, *supra* note 69, at 3-4 (describing marker process).

## Benefits and Efficiencies

The Leniency Program promotes a number of benefits and efficiencies in criminal enforcement. Anticompetitive conduct may be detected that otherwise would have not been uncovered. This detection applies not only to the reported conduct, but also related and further criminal activity. For example, cooperation under the Leniency Program has resulted in the identification of other unknown cartel investigations in a number of instances.

If the unlawful conduct is reported during an ongoing cartel, proactive investigative steps can be taken to gather further evidence. Recorded conversations may be possible to obtain current communications about the cartel activity. Broader access to documents and witnesses may result. This information may supplement historical evidence concerning the cartel activities.

Enforcement resources can be conserved and directed on the suspected hard core conduct. The investigation can determine who are the decision-makers in the anticompetitive conduct and learn how the cartel operates and implements the conspiracy agreements.

Significantly, detection of the cartel's activities clearly terminates the harm to consumers and promotes the objectives of the Sherman Act. The criminal justice process can be used to redress the harm through appropriate penalties and possible follow-on civil actions which may allow victims to seek civil recovery.<sup>128</sup>

*Foreign nationals are not  
beyond the reach of the U.S.  
antitrust laws.*

## Summary

The Leniency Program has proven to be an indispensable part of criminal enforcement. As noted, the Leniency Program has successfully led to the detection of some very large international cartels. Not surprisingly, leniency programs in other countries have also had a favorable impact on enforcement efforts.<sup>129</sup>

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<sup>128</sup> Under Section 5 of the Clayton Act, 15 U.S.C. § 16, a final criminal antitrust judgment provides “*prima facie* evidence against” the defendant “in any action or proceeding brought by any other party” and provides “an estoppel as between the parties thereto.” This is a unique public policy balance struck by the Congress. See *United States v. David E. Thompson, Inc.*, 621 F.2d 1147, 1150 n.4 (1st Cir. 1980) (Section 5 of the Clayton Act “makes a criminal judgment in an antitrust case *prima facie* evidence in a subsequent civil action.”); see generally *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 652 (1985) (“The unique public interest in the enforcement of the antitrust laws is repeatedly reflected in the special remedial scheme enacted by Congress. Since its enactment in 1890, the Sherman Act has provided for public enforcement through criminal as well as civil sanctions.”).

<sup>129</sup> See, e.g., Trends and Developments in Cartel Enforcement Presented at the Ninth Annual ICN Conference in Istanbul, Turkey 5, 6 (April 29, 2010) (surveying 46 jurisdictions on enforcement issues) (35 of 46 countries listing

## International Issues

Another important aspect in the enforcement of antitrust laws is the ability to reach across borders. This feature is essential given increasingly global markets. Cartelists should not feel that they have safe harbors to protect them.

Foreign nationals are not beyond the reach of the U.S. antitrust laws. Numerous 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.

The Antitrust Division remains committed to using a variety of tools to hold violators of the Sherman Act accountable even if they reside outside the United States. Some of the tools include (a) the use of red notices and border watches; (b) the extradition process; and (c) cooperation with our international partners.

### Use Of Red Notices and Border Watches

After an investigation, charges may be filed based on Sherman Act violations. Some individuals may already be outside the United States or may try to evade arrest by leaving the country.

The Antitrust Division uses international law enforcement channels to apprehend fugitives. For example, since 2001, the Division adopted a policy of placing indicted fugitives on a 'Red Notice' list maintained by INTERPOL,<sup>130</sup> which is comparable to an "international arrest warrant."<sup>131</sup> The International Criminal Police Organization (INTERPOL) now consists of 190 countries which assist one another on law enforcement issues.<sup>132</sup>

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leniency provisions as one of the "changes/developments" in "competition law [that] have impacted" the country's "cartel enforcement program over the last 10 years"), <http://www.internationalcompetitionnetwork.org/uploads/library/doc613.pdf>.

<sup>130</sup> Evolution of Criminal Antitrust Enforcement, *supra* note 46, at 14 ("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."); *see also* Charting New Waters, *supra* note 46, at 9 (describing policy of using Interpol Red Notices).

<sup>131</sup> U.S. Department of Justice, Criminal Resource Manual 611 ("An Interpol Red Notice is the closest instrument to an international arrest warrant in use today."), [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00611.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00611.htm).

<sup>132</sup> Connecting Police For A Safer World, INTERPOL Annual Report 5 (2011) (noting "in 2011, INTERPOL also grew in size and strength, reaching 190 members with the addition of three new countries - Curaçao, Sint Maarten and South Sudan"); *see also* INTERPOL Website, <http://www.interpol.int/About-INTERPOL/Overview>.



As another tool, the Antitrust Division places foreign witnesses and defendants on border watches.<sup>133</sup> The border watch alerts the government about the entry of particular individuals into the United States.

These tools allow the Antitrust Division to be notified about the travel of criminal defendants abroad or at the U.S. border. Once the individuals are detected, they may be subject to arrest and brought to the United States to face the charges.

### **Extradition Process**

Supplementing red notices or border watches, the extradition process provides an established avenue to bring defendants abroad to the criminal justice system in the United States. Extradition is permitted under the specific terms of a treaty entered by the United States and the country where the individual is found.

The Antitrust Division has successfully used the extradition process to extradite individuals abroad on charges filed in the United States. These extraditions have been accomplished based on extradition treaties between the United States and Israel and the United Kingdom.<sup>134</sup>

In February 2012, an owner of an insulation service company based in New York City was extradited from Israel based on charges of conspiring to rig bids on contracts for re-insulation services to New York Presbyterian Hospital (NYPH), conspiring to defraud the Internal Revenue Service (IRS) and filing a false tax return. In July 2012, he pled guilty to these charges.<sup>135</sup>

In March 2010, a former chief executive officer of a publicly-held corporation based in the United Kingdom was extradited to the United States based on obstruction of justice charges related to a federal grand jury investigation into the price fixing of carbon brushes and other carbon products. The defendant was convicted at a jury trial and sentenced to serve 18 months in prison.<sup>136</sup> His conviction was affirmed on appeal.<sup>137</sup>

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<sup>133</sup> Charting New Waters, *supra* note 46, at 7.

<sup>134</sup> See *generally* Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 2011, United States Department of State, <http://www.state.gov/documents/organization/169274.pdf>.

<sup>135</sup> See Indictment filed in *United States v. David Porath and Andrzej Gosek*, No. 10-CR-120 (SDNY Feb. 18, 2010), <http://www.justice.gov/atr/cases/f257600/257638.pdf>; Plea Agreement in *United States v. David Porath*, No. 10-CR-120 (SDNY Feb. 18, 2010); see also Press Release: Owner Of Insulation Service Company Pleads Guilty To Million Dollar Bid-Rigging And Fraud Conspiracies At New York City Hospital (July 11, 2012), [http://www.justice.gov/atr/public/press\\_releases/2012/285024.docx](http://www.justice.gov/atr/public/press_releases/2012/285024.docx); see *generally* Charting New Waters, *supra* note 46, at 10-12 (discussing extradition steps taken in the United Kingdom in the *Norris* case).

<sup>136</sup> See Second Superseding Indictment filed in *United States v. Ian P. Norris*, No. 03-632 (EDPA Sept. 28, 2004), <http://www.justice.gov/atr/cases/f206000/206064.pdf>; see also Press Release: Former CEO Of The Morgan Crucible Co. Sentenced To Serve 18 Months In Prison For Role In Conspiracy To Obstruct Justice (Dec. 10, 2010),

These recent cases demonstrate the ability and commitment of the Antitrust Division to use the extradition process to hold individuals to account in the criminal justice process in the United States on charges.

### International Coordination

The United States will continue to cooperate with our international partners to the fullest extent possible in criminal antitrust enforcement. A number of avenues will be pursued.

Many countries have recognized the importance of bilateral agreements. In 1994, Congress enacted the International Antitrust Assistance Act of 1994 ("IAEAA"),<sup>138</sup> which authorizes the Antitrust Division and the Federal Trade Commission to enter into bilateral antitrust mutual assistance agreements with foreign governments. Under these agreements, the countries will commit to use their investigative powers (such as subpoenas) to obtain evidence for use by foreign antitrust authorities.

Where possible, the Antitrust Division will continue to pursue joint enforcement opportunities with our foreign partners. For example, this has included the execution of simultaneous search warrants in multiple jurisdictions to obtain a substantial amount of evidence. These coordinated efforts have proven effective in seizing cartel evidence that may have otherwise been difficult to obtain.

While there are more than 50 countries with Leniency Programs, most have confidentiality provisions which are honored. We have seen a number of instances in which the leniency applicant has elected to waive the confidentiality provisions which has permitted enforcement agencies to discuss common issues.

In sum, international cooperation has proven effective in past cases to address international cartels. The Antitrust Division remains committed to pursuing cooperative efforts where possible to maximize enforcement efforts.

*There are a variety of components that contribute to successful antitrust enforcement.... Collectively, these elements reinforce one another and facilitate successful investigations and prosecutions of per se anticompetitive conduct.*

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[http://www.justice.gov/atr/public/press\\_releases/2010/265028.pdf](http://www.justice.gov/atr/public/press_releases/2010/265028.pdf); Press Release: Former CEO Of The Morgan Crucible Co. Found Guilty Of Conspiracy To Obstruct Justice (July 27, 2010), [http://www.justice.gov/atr/public/press\\_releases/2010/260826.pdf](http://www.justice.gov/atr/public/press_releases/2010/260826.pdf).

<sup>137</sup> See *United States v. Norris*, No. 10-4658 (3d Cir. March 23, 2012), <http://www.justice.gov/atr/cases/f268800/268813.pdf>.

<sup>138</sup> Pub. L. No. 103-438, 108 Stat. 4597 (Nov. 2, 1994) (codified at 15 U.S.C. §§ 6201-6212).

## Conclusion

There are a variety of components that contribute to successful antitrust enforcement. Certainly, these elements can be tailored appropriately to any enforcement program to take into account other policy considerations. The goal is to advance the public policy objectives of preventing and detecting cartel activity.

Transparency about the program and relevant policies promotes awareness about the risks and consequences of anticompetitive conduct. This information may help prevent cartel conduct before it starts or lead to early detection of cartel activity. Awareness about sentencing policies provides greater predictability and certainty. Leniency programs have proven to be among the most effective tools to detect cartels. The cartelists are encouraged to self-report promptly or risk severe sanctions after the cartel is uncovered. Finally, international coordination and cooperation, where possible, is necessary to reach conduct and defendants outside the country. Collectively, these elements reinforce one another and facilitate the successful investigations and prosecutions of *per se* anticompetitive conduct.

# Criminal Statutes Potentially Violated by Cartel Activity

by Adam C. Hemlock and Wendy Fu<sup>139</sup>



Cartel practitioners are necessarily focused on whether or not there has been a criminal violation of the Sherman Act. However, cartel activity can violate other criminal statutes, and private practitioners need to investigate and be prepared to defend prosecution based on these statutes. According to the DOJ's Antitrust Division Manual, "In addition to the Division's criminal enforcement activities under the Sherman Act, the Division investigates and prosecutes offenses that arise from conduct accompanying antitrust violations or otherwise impact the competitive process, as well as offenses that involve the integrity of the investigative process."<sup>140</sup> These other charges can bolster the

government's case and can strengthen its negotiation position vis-à-vis defendants in plea negotiations.

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<sup>140</sup> Department of Justice, Antitrust Division Manual (November 2012), *available at* <http://www.justice.gov/atr/public/divisionmanual/chapter2.pdf>.

## Conspiracy

18 U.S.C. § 371 is the general conspiracy statute, and prohibits (1) conspiring to violate a law or regulation or (2) defrauding the United States or one of its agencies. The maximum penalty is five years in prison and/or fines. The required elements are (1) an agreement to commit an illegal act, (2) specific intent, and (3) an overt act to further the conspiracy.<sup>141</sup>

An express or formal agreement is not necessary to satisfy the “agreement” requirement of Section 371.<sup>142</sup> According to the Eighth Circuit in *United States v. Andrade*, this requirement can be satisfied with nothing more than a tacit understanding, which can be established by circumstantial evidence, such as the conduct of the conspirators and attending circumstances.<sup>143</sup>

*Andrade* also held that whether a single overall conspiracy or several exist is a question of fact, but that it is possible to have a single conspiracy even if the agreement includes the performance of many transactions or if parties join or leave the conspiracy.<sup>144</sup> In *Andrade*, the defendants were charged with a conspiracy to defraud commercial airlines by purchasing tickets with stolen credit cards. The Eighth Circuit upheld a conviction, holding that the evidence supports the conclusion that there was a single overall conspiracy with a common goal even though the individuals performed different tasks, because the tasks were all interrelated and interdependent.<sup>145</sup>

The fact that a participant in the conspiracy was not the instigator or principal actor is not a strong defense in conspiracy cases. 18 U.S.C. § 2 provides that those who aid, abet, counsel, command, induce, or procure commission of an offense against the United States is punishable as a principal. However, because conspiracy is a specific intent crime, there must be evidence that the defendant knew about the conspiracy and knowingly joined and participated in it.<sup>146</sup> Defendants whose acts unwittingly further a conspiracy cannot be guilty of conspiracy. In *United States v. Falcone*, the defendants sold materials that they knew would be used to illegally distill and sell alcohol. The defendants were convicted of conspiring with the distillers but the Second Circuit reversed and the Supreme Court affirmed. The Supreme Court held that agreement among the conspirators is central to the definition of conspiracy and those who have no knowledge of the conspiracy and those who, without more, furnish supplies to conspirators are not guilty of conspiracy even though their actions may have furthered the object of the conspiracy.<sup>147</sup>

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<sup>141</sup> See *United States v. Falcone*, 311 U.S. 205 (1940); *Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Andrade*, 788 F.2d 521 (8th Cir. 1986); *United States v. Jobe*, 101 F.3d 1046 (5th Cir. 1996); *United States v. Nall*, 949 F.2d 301 (10th Cir. 1991).

<sup>142</sup> *Andrade*, 788 F.2d 526.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 526 – 27.

<sup>145</sup> *Andrade*, 788 F.2d 526.

<sup>146</sup> *United States v. Copland, et al.*, 703 F.3d 46, 62 (2d Cir. 2012).

<sup>147</sup> *Falcone*, 311 U.S. 207.

Unlike some other inchoate crimes, the doctrine of merger does not apply to conspiracy, meaning that a conspiracy charge does not merge with that for the underlying substantive offense.<sup>148</sup> In other words, a defendant can be liable for both conspiracy and the underlying offense for which the conspiracy was formed. Furthermore, conspiracy members are liable for all substantive crimes their co-conspirators commit in furtherance of the conspiracy, even if they did not take any actions to complete the substantive crimes themselves.<sup>149</sup>

The first possible conspiracy charge, conspiring to commit an offense against the United States, must be brought in conjunction with a substantive underlying offense such as mail fraud, tax evasion, or violations of other substantive statutes. However, it cannot be combined with only a Sherman Act charge because the Sherman Act already requires concerted action.<sup>150</sup>

Unlike conspiracy to commit an offense against the United States, conspiracy to defraud the United States is an independent crime and the charge does not need to be brought in conjunction with a charge of another substantive crime.<sup>151</sup> Courts have held that to “defraud the United States” means that the defendant either acted to cheat the government out of property or money, impaired, obstructed or defeated the lawful functions of an agency through trickery or deceit, or made wrongful use of governmental policies or programs.<sup>152</sup> The word “defraud” is interpreted broadly and includes acts that undermine the integrity of the United States or its agencies, even if no pecuniary harm was suffered.<sup>153</sup> To obtain a conviction for obstructing agency function, the government must show that the defendant entered into an agreement to obstruct a lawful function of government by deceitful or dishonest means and that there was at least one overt act by a conspirator in furtherance of the conspiracy.<sup>154</sup>

The DOJ brings § 371 conspiracy charges in conjunction with antitrust charges in cartel cases. For example, the DOJ charged New York advertising executives with conspiracy to rig bids and allocate contracts in 2002 in connection with supplying retouching and separation services. Court One charged violation of Section 1 of the Sherman Act, and Courts Two – Six charged violation of 18 U.S.C. § 371. The indictment alleged that the defendants “unlawfully, willfully, and knowingly did combine, conspire, confederate, and agree together and with each other to commit an

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<sup>148</sup> *Pinkerton*, 328 U.S. 643 (“It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses.”).

<sup>149</sup> *Id.* at 646.

<sup>150</sup> Department of Justice, Grand Jury Manual (Nov. 1, 1991), available at <http://www.justice.gov/atr/public/guidelines/207021.htm#VIIB6> [hereinafter Grand Jury Manual] (“Because the Sherman Act itself requires concerted action on the part of the defendants, it is not possible on double jeopardy grounds to charge a conspiracy to commit a conspiracy.”).

<sup>151</sup> *Id.*

<sup>152</sup> See e.g., *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957); *United States v. Coplan*, 703 F.3d 46, 60-61 (2d Cir. 2012) (quoting *Hammerschmidt v. United States*, 265 U.S. 182 (1924)).

<sup>153</sup> *United States v. Ballistrea*, 101 F.3d 827, 831 (2d Cir. 1996).

<sup>154</sup> *United States v. Coplan, et al.*, 703 F.3d 46, 60-61 (2d Cir. 2012) (quoting *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996)).

offense against the United States of America.”<sup>155</sup> Specifically, the defendants allegedly conspired to commit mail fraud and to deprive others of the intangible rights of honest services.<sup>156</sup>

### Mail and Wire Fraud

Cartel conduct may involve mail and/or wire fraud in violation of 18 U.S.C. § 1341 (mail fraud) and § 1343 (wire fraud). The mail and wire fraud statutes punish those who devise or intend to devise “a scheme or artifice” to defraud or obtain money or property under fraudulent pretenses or promises, and use the U.S. Postal Service, a commercial interstate carrier, or interstate telephone or electronic communication to carry out the scheme. The mail and wire fraud statutes carry with them maximum prison sentences of 20 years and/or fines. The elements of mail and wire fraud are (1) the defendant devises or intends to devise a scheme or artifice to defraud another; and (2) the defendant uses the mail (or telephones or electronic communication) in furtherance of the scheme.<sup>157</sup> It is not necessary that the scheme was successful or that the intended victim suffered a loss or that the defendant secured a gain.<sup>158</sup> In *Schreiber Distribution Co. v. Serve-Well Furniture Co., et al.*, the Ninth Circuit explained that the specific intent requirement is satisfied if there was a scheme that was reasonably calculated to deceive persons of ordinary prudence and comprehension and this intention is shown by examining the scheme itself.<sup>159</sup> According to the court, this interpretation of the specific intent requirement is consistent with the purpose of the mail and wire fraud statutes, which is “to proscribe the use of the mails or wires in any situation where it is closely entwined with fraudulent activity.”<sup>160</sup>

In *United States v. Washita*, the defendants, convicted of conspiring to rig state highway construction contract bids and mail fraud, tried to argue that collusive bidding accomplished through mail fraud is not a “scheme or artifice to defraud” under the mail fraud statute because the government simply lost its intangible right to have its laws obeyed.<sup>161</sup> The Tenth Circuit disagreed, holding that the mail fraud statute reaches fraudulent schemes that deprive citizens of their right to have allocations of public funds made fairly, honestly and free of corruption.<sup>162</sup> Additionally, “a scheme or artifice to defraud” is a plan or pattern of conduct that is intended to or reasonably calculated to deceive, so that even if the defendant joins a scheme devised by someone else, he is guilty so long as he has the intent to defraud. In this case, the defendants’ collusive bidding deprived citizens of the monetary advantages of a competitive bidding process and deprived the government of its right to have its highway construction contracts

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<sup>155</sup> *United States v. Mossallem, et al.*, Superseding Indictment (Dec. 12, 2002), available at <http://www.justice.gov/atr/cases/f200500/200571.htm>.

<sup>156</sup> *Id.*

<sup>157</sup> 18 U.S.C. § 1341; 18 U.S.C. § 1343; *Pereira v. United States*, 347 U.S. 1, 8 (1954).

<sup>158</sup> *Schreiber Distrib. Co. v. Serve-Well Furniture Co., et al.*, 806 F.2d 1393, 1400 (9th Cir. 1986)

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> 789 F.2d 809 (10th Cir. 1986).

<sup>162</sup> *Id.* at 817.

awarded fairly and on a competitive cost basis<sup>163</sup>. The court held that this was sufficient to constitute a “scheme or artifice” to defraud in violation of § 1341.<sup>164</sup>

In 2013, two Alabama real estate investors and their companies were sentenced for participating in conspiracies to rig bids and commit mail fraud at public real estate foreclosure auctions, each receiving 20 month sentences and were ordered to pay restitution.<sup>165</sup> The DOJ charged them each with one count of bid rigging and one count of conspiracy to commit mail fraud.<sup>166</sup> According to the DOJ, the defendants conspired not to bid against each other at the public auction and after one bidder won the property, the defendants held a secret, second auction in which each participant bid above the public auction price he was willing to pay.<sup>167</sup> The highest bidder of the second auction won the property.<sup>168</sup> The mail fraud charge alleged that the defendants conspired to use the U.S. mail to carry out their fraudulent scheme to acquire titles to rigged properties at artificially suppressed prices, to make payoffs to and receive them from co-conspirators, and to cause financial institutions, homeowners and others with a legal interest in the properties to receive less than the competitive price.<sup>169</sup>

### **Hindering the Investigative Process: False Statements, Perjury, and Obstruction of Justice**

Acts relating to the concealment of cartel activity from the authorities can jeopardize the integrity of the investigative process and lead to criminal charges. The DOJ pursues these collateral charges aggressively in cartel investigations and has stated repeatedly that it takes these violations seriously.<sup>170</sup>

#### **False Statements**

18 U.S.C. § 1001 prohibits making false statements to the federal government. Specifically, the statute is used to prosecute those who knowingly and willfully (a) falsify, conceal or cover up a material fact, (b) make materially false, fictitious or fraudulent representations or statements, or (c) make or use false writings or documents knowing that the document contains materially false, fictitious or fraudulent portions. Violators can be fined and/or imprisoned for up to five years.

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 818.

<sup>165</sup> Press Release, Department of Justice, Two Alabama Real Estate Investors and their Companies Sentenced for their roles in Bid-Rigging and Mail Fraud Conspiracies Involving Real Estate Purchased at Public Foreclosure Auctions (May 20, 2013), *available at* [http://www.justice.gov/atr/public/press\\_releases/2013/297007.htm](http://www.justice.gov/atr/public/press_releases/2013/297007.htm).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See *e.g.*, Press Release, Department of Justice, Northern California Real Estate Investor Indicted on Additional Charge (May 8, 2013), *available at* [http://www.justice.gov/atr/public/press\\_releases/2013/296523.htm](http://www.justice.gov/atr/public/press_releases/2013/296523.htm), (“Obstruction of a grand jury investigation is a crime the Antitrust Division takes seriously’ . . . . ‘We will prosecute those who subvert the competitive process, as well as those who attempt to conceal their illegal actions by destroying evidence.’” (quoting Assistant Attorney General Bill Baer)).

Section 1001 does not apply to statements and submissions by a party or counsel to a judge or magistrate, and also does not apply to certain matters within the jurisdiction of the legislative branch. The purpose of § 1001 is to promote the smooth functioning of government by ensuring that it receives reliable information.<sup>171</sup> The statute covers two separate actions, false representations and concealment. For a case of false representation, the defendant must have knowingly made a false or fraudulent statement.<sup>172</sup> For concealment, there must be proof that of willful nondisclosure by means of a trick, scheme or device.<sup>173</sup> Concealment generally relates to nondisclosure of information required by statute or regulation.<sup>174</sup>

### Perjury

Perjury is dealt with in 18 U.S.C. § 1621 and § 1623. Section 1621, the general perjury section, states that those who take an oath before a court, officer or person to speak truthfully or submit a true document, but who willfully and contrary to the oath states or writes a material matter he does not believe to be true, can be imprisoned up to five years and/or fined.<sup>175</sup> In order to be guilty of perjury, the defendant must have been under oath authorized by U.S. law when he made the affidavit or declaration.<sup>176</sup> Furthermore, the defendant must have willfully or knowingly made the false statement, and the false statement must be material to the proceedings, meaning it has a tendency to influence the decision maker, or is capable of such influence.<sup>177</sup> However, actual influence over the decision maker is not required.<sup>178</sup>

Section 1623 deals with proof of false declarations before a grand jury or court and states that falsity is established sufficiently for conviction purposes if the defendant made irreconcilably contradictory material declarations under oath in a proceeding before a court or grand jury. The defendant must have known at the time of his testimony that his statements were untrue.<sup>179</sup> If the defendant makes a false declaration and then recants in the same proceeding, the recantation bars prosecution if the false statement has not substantially affected the proceeding or it has not become manifest that the falsity has been or will be exposed.<sup>180</sup>

### Obstruction of Justice

Cartel participants can face a variety of obstruction of justice charges under 18 U.S.C. § 1503, § 1505, 1512, as well as the Sarbanes-Oxley Act of 2002. 18 U.S.C. § 1503 prohibits threatening or using force to impede officers and jurors of the court from performing their official duties or attempting to use force or threat to impede, influence or obstruct

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<sup>171</sup> See *United States v. Arcadijane*, 41 F.3d 1 (1st Cir. 1994)

<sup>172</sup> *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983)

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Some unsworn statements can also be punished under penalty of perjury. 28 U.S.C. § 1746.

<sup>176</sup> See *United States v. Hvas*, 335 U.S. 570 (1958).

<sup>177</sup> *United States v. Masters*, 484 F.2d 1251 (10th Cir. 1973).

<sup>178</sup> *Id.*

<sup>179</sup> *United States v. Crippen*, 570 F.2d 535 (5th Cir. 1978), *United States v. Morelli*, 373 F.Supp. 458 (S.D. Ohio 1973).

<sup>180</sup> *United States v. Fornaro*, 894 F.2d 508 (2d Cir. 1990).



the due administration of justice. To obtain a conviction for interfering with the due administration of justice, the government must show that judicial proceedings are pending, the defendant knew of the pending proceedings, and the defendant intended to obstruct those proceedings.<sup>181</sup>

18 U.S.C. § 1505 states that those who avoid or obstruct compliance with civil investigative demands, willfully withhold or remove evidence subject to such demands, or who impede or obstruct due and proper administration of law in any pending proceeding can be imprisoned up to five years and/or fined. Courts have held that agency investigative activities are within the definition of “proceedings.”<sup>182</sup>

18 U.S.C. § 1512 prohibits “corruptly” altering, mutilating, or destroying records, documents or other objects with the intent to impair the integrity or availability of the record, document or other object for official proceedings. Unlike Sections 1503 or 1505, it does not require proceedings to be pending, and therefore can be used to prosecute document destruction done in contemplation of future proceedings.<sup>183</sup> However, one significant hurdle the government must overcome in using Section 1512 is the requirement that document destruction be done “corruptly.”<sup>184</sup> This language proved to be a problem for the government in its prosecution of Arthur Andersen during the Enron scandal because after the government obtained a conviction for obstruction of justice and successfully defended an appeal, the Supreme Court reversed the lower courts and held that the inclusion of “corruptly” in the statute means that there must be nexus between the defendant’s actions and a proceeding, and that the defendant have known that his actions were likely to impede a proceeding or investigation.<sup>185</sup>

In the wake of the Supreme Court’s decision in *Arthur Andersen*, Congress enacted the Sarbanes-Oxley Act of 2002, which expanded the definition of obstruction and increased possible penalties. Section 802 of the Act, codified as 18 U.S.C. § 1519, provides that whoever knowingly alters, destroys, conceals, covers up, or falsifies a document with the intent to impede, obstruct or influence the investigation or proper administration of a matter with the jurisdiction of the United States shall be fine and/or imprisoned for 20 years. Because of its expansive nature, Section 1519 has become an additional tool, or in some cases, an alternative to Sections 1503 and 1505, for the government in prosecutions for obstruction of justice.

Unlike other obstruction of justice statutes, Section 1519 does not require a government investigation to be pending at the time of the act.<sup>186</sup> Unlike the mental state requirement in Section 1512, Section 1519 does not require the government to show that the defendant knew his actions were likely to affect a federal matter.<sup>187</sup> As the Eighth Circuit held in *United States v. Yielding*, Section 1519 does not require nexus between the wrongdoing and a federal

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<sup>181</sup> *United States v. Ruggiero*, 934 F.2d 440, 445 (2d Cir. 1991).

<sup>182</sup> *United States v. Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994).

<sup>183</sup> 18 U.S.C. § 1512(f).

<sup>184</sup> *Arthur Andersen v. United States*, 544 U.S. 696 (2005).

<sup>185</sup> See *id.*

<sup>186</sup> See *United States v. Gray*, 642 F.3d 371 (2d Cir. 2011) (“[Section 1519] is specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter.”) (emphasis removed).

<sup>187</sup> *United States v. Yielding*, 657 F.3d 688, 712 (8th Cir. 2011).

matter, and only requires the government to show that the accused knowingly committed an act and did so with the intent to impede, obstruct or influence the investigation or proper administration of a federal matter.<sup>188</sup> The required knowledge and intent can be present even if the defendant lacked knowledge that he is likely to succeed in obstructing a matter.<sup>189</sup>

In 2013, a grand jury in the Eastern District of California issued an indictment charging a real estate investor with obstruction of justice under 18 U.S.C. § 1519. The charge was related to a federal investigation into conspiracies to rig bids and commit mail fraud at real estate foreclosure auctions.<sup>190</sup> The mail fraud and bid rigging charges alleged that the defendant, along with co-conspirators, fraudulently acquired titles to properties sold at public options and diverted money to co-conspirators that should have gone to beneficiaries.<sup>191</sup> The obstruction of justice charge dealt with the defendant's alleged deletion of electronic records related to the conspiracy after receiving a subpoena and with his alleged use of software to prevent the deleted files from being recovered.<sup>192</sup>

In late 2012, Japanese manufacturer Tokai Rika pled guilty to charges of obstruction of justice related to an investigation into price fixing of heater control panels.<sup>193</sup> According to the plea agreement, after the company became aware that the FBI had a search warrant for the U.S. subsidiary, an executive knowingly and corruptly persuaded employees to destroy documents that evidenced the conspiracy in violation of 18 U.S.C. § 1512.<sup>194</sup>

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Press Release, *supra* note 30.

<sup>191</sup> *Id.*

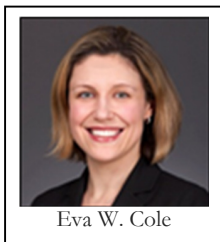
<sup>192</sup> *Id.*

<sup>193</sup> Press Release, Department of Justice, Japanese Automobile Parts Manufacturer Agrees to Plead Guilty to Price Fixing and Obstruction of Justice (October 30, 2012), *available at* [http://www.justice.gov/atr/public/press\\_releases/2012/288353.htm](http://www.justice.gov/atr/public/press_releases/2012/288353.htm).

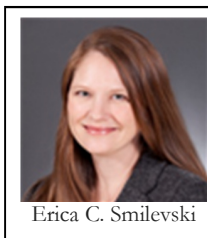
<sup>194</sup> *Id.*

# The Antitrust Division's New Model Corporate Plea Agreement

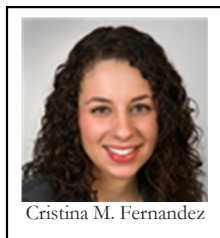
by Eva W. Cole, Erica C. Smilevski, and Cristina M. Fernandez<sup>195</sup>



Eva W. Cole



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Cristina M. Fernandez

In April 2013, the Department of Justice Antitrust Division announced a notable shift in its policy regarding employees carved out of corporate plea agreements. This first significant change announced since AAG William Baer assumed his post in January 2013 received substantial media attention. However, Baer explained that this change was only one “part of a thorough review of the Division’s approach to corporate dispositions.”<sup>196</sup> On December 20, 2013, without any public announcement, the Division published a new corporate model plea agreement, which underwent a more extensive transformation, along with a parallel model plea agreement for individual defendants.<sup>197</sup> The revisions follow in the wake of prominent cartel decisions—in particular *United States v. VandeBrake*, 679 F.3d 1030 (8th Cir. 2012), *cert. denied* 133 S. Ct. 1457 (2013), and one of the *Air Cargo*

cases, *United States v. Florida West*, 853 F. Supp. 2d 1209 (S.D. Fla. 2012)—and reflect the Division’s desire to clarify arguably ambiguous language from the previous model plea agreement that was at issue in those cases. In addition,

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<sup>196</sup> Press Release, Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division’s Carve-Out Practice Regarding Corporate Plea Agreements (Apr. 12, 2013) available at <http://www.justice.gov/opa/pr/2013/April/13-at-422.html>.

<sup>197</sup> Justice Department, Antitrust Division, Model Annotated Corporate Plea Agreement, last updated Dec. 20, 2013, available at <http://www.justice.gov/atr/public/criminal/302601.pdf> [hereinafter “New Model Plea”]. In addition to the changes described in this article and minor, non-substantive edits, the New Model Plea includes a new paragraph 5 entitled Elements of the Offense which lists the elements of the charged antitrust offense for any case involving interstate commerce as follows:

- “(a) the conspiracy described in the Information existed at or about the time alleged;
- (b) the defendant knowingly became a member of the conspiracy; and
- (c) the conspiracy described in the Information either substantially affected interstate commerce in goods or services or occurred within the flow of interstate commerce in goods and services.”

*Id.* ¶ 5.

several modifications suggest a growing concern by the Division about obstructive conduct by corporations entering into plea agreements. These changes signal to defendant corporations in cartel investigations that the Division is interested in protecting its right to prosecute obstructive conduct, even after a plea agreement is signed for the underlying antitrust offense.

### Parties' Ability to Support an Outside-the-Guidelines Sentence

Whereas the previous model plea agreement provided that the “parties agree not to seek or support any sentence outside the Guidelines range,”<sup>198</sup> the New Model Plea removes “or support” and adds “at the sentencing hearing” to read as follows: “The parties agree not to seek at the sentencing hearing any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement.”<sup>199</sup> Thus, the New Model Plea makes clear that although a party may not seek a different sentence *at the sentencing hearing*, it may later participate in an appeal in which it advocates a sentence outside of the Guidelines range. While the Government has always taken the position that it may participate in an appeal concerning a plea agreement unless the agreement expressly bars the Government from doing so, the defendant in *VandeBrake* argued that the language in the previous model plea did in fact preclude the Government from defending a sentence outside the Guidelines range on appeal.<sup>200</sup> The New Model Plea attempts to crystalize the Government’s rights in this regard.

### United States v. VandeBrake

In May 2010, Steven VandeBrake pled guilty to two counts of price fixing and one count of bid rigging in the ready-mix concrete industry.<sup>201</sup> The plea agreement recommended a \$100,000 fine and a sentence of 19 months of imprisonment.<sup>202</sup> The district court subsequently imposed a fine of \$829,715.85 and sentenced VandeBrake to a record 48 months of imprisonment followed by three years of supervised release.<sup>203</sup>

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<sup>198</sup> Justice Department, Antitrust Division, Model Annotated Corporate Plea Agreement ¶ 8, last updated July 13, 2009, *available at* 2 MATERIALS ON ANTITRUST COMPLIANCE § 22:9 (2014) [hereinafter “2009 Model Plea”].

<sup>199</sup> New Model Plea ¶ 9.

<sup>200</sup> While *VandeBrake* involved an individual defendant rather than a corporate defendant, the New Model Plea clearly reflects this concern in the corporate arena as well. The Division simultaneously updated the model plea agreement for individual defendants with the same language: “The parties agree not to seek at the sentencing hearing any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement.” Justice Department, Antitrust Division, Model Annotated Individual Plea Agreement ¶ 9, last updated Dec. 20, 2013, *available at* <http://www.justice.gov/atr/public/criminal/302600.pdf>.

<sup>201</sup> *United States v. VandeBrake*, 771 F. Supp. 2d 961, 967 (N.D. Iowa 2011).

<sup>202</sup> Plea Agreement ¶ 9, *United States v. VandeBrake*, No. 5:10-cr-04025 (N.D. Iowa May 27, 2010), *available at* <http://www.justice.gov/atr/cases/f260100/260124.htm> [hereinafter “VandeBrake Plea Agreement”].

<sup>203</sup> *VandeBrake*, 771 F. Supp. 2d at 1018-19. The variance was largely based on the district court’s belief that the antitrust sentencing Guidelines are too lenient and that VandeBrake lacked remorse. *Id.* at 1001-03, 1007-08.

VandeBrake appealed the sentence to the Eighth Circuit on a number of grounds, including that the district court abused its discretion when it varied upward from the Guidelines range.<sup>204</sup> In connection with this argument, in a footnote of his opening brief, VandeBrake asserted that “[t]he [G]overnment cannot, without breaching this [plea] agreement, defend the district court’s above-Guidelines sentence in this appeal.”<sup>205</sup> In making this argument, VandeBrake relied on the language in the plea agreement that the Government had agreed “not to seek or support any sentence outside of the Guidelines range.”<sup>206</sup>

In its opposition to VandeBrake’s appeal, the Government argued that nothing in the plea agreement precluded it from defending the higher sentence on appeal and that the restriction on seeking or supporting any sentence outside of the Guidelines range applied only to the sentencing phase.<sup>207</sup> Among other things, the Government argued that the only provisions in the plea agreement discussing appeals related to the conditions under which *the defendant* could appeal, and did not apply to the Government.<sup>208</sup> Without an express limitation, the agreement could not be read to implicitly prohibit the Government from contesting VandeBrake’s appeal.<sup>209</sup> The Government also contended that when the parties amended the plea agreement prior to the sentencing hearing, they did not agree to any limitation on the Government’s ability to participate in an appeal of the sentence.<sup>210</sup> In addition, according to the Government, the language at issue should be read in the context of the agreement as a whole, which also provided that the sentence would be determined by the court in its discretion and that the court was not bound to impose a sentence within the Guidelines range.<sup>211</sup> Accordingly, the agreement expressly permitted the Government to argue on appeal that the district court did not abuse its discretion in imposing an above-Guidelines sentence.

In an interesting procedural move, instead of addressing the Government’s arguments in his appellate reply brief, VandeBrake concurrently filed a motion to enforce the plea agreement (Motion to Enforce), in which he asserted that the Government’s “support for the district court’s sentence on appeal breach[ed] its promise in the Plea Agreement

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<sup>204</sup> Br. for Appellant Keith VandeBrake, *United States v. VandeBrake*, No. 11-1390, 2011 WL 2003117, at \*23-24 (8th Cir. May 13, 2011).

<sup>205</sup> *Id.* at \*23 n.7.

<sup>206</sup> *Id.* (citing VandeBrake Plea Agreement ¶ 9).

<sup>207</sup> Corrected Br. for Appellee United States of America at 29-32, *United States v. VandeBrake*, No. 11-1390 (8th Cir. July 8, 2011), available at <http://www.justice.gov/atr/cases/f273200/273299.pdf>.

<sup>208</sup> *Id.* at 30 (citing *United States v. Winters*, 411 F.3d 967, 975 (8th Cir. 2005)).

<sup>209</sup> *Id.* at 30-31 (citing *United States v. Howard*, 894 F.2d 1085, 1091 (9th Cir. 1990)).

<sup>210</sup> VandeBrake had originally entered guilty pleas pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), under which the district court could either accept or reject the pleas but not impose a sentence higher than the recommended sentence and that VandeBrake could withdraw his pleas if the court did not accept the recommendation. When the district court indicated it would likely reject the agreement because the recommended sentence was too lenient, however, VandeBrake voluntarily converted his plea agreement to an agreement under Rule 11(c)(1)(B), so the recommended sentence was no longer binding on the district court, and VandeBrake was no longer free to withdraw his pleas if the court imposed a higher sentence. *VandeBrake*, 679 F.3d at 1033.

<sup>211</sup> *Id.* at 32.

not to ‘support’ an above-Guidelines sentence.”<sup>212</sup> To remedy this alleged breach, VandeBrake asked the Eighth Circuit to strike the portions of the Government’s appellate brief in which it sought to defend the district court’s sentence.<sup>213</sup> The Government opposed VandeBrake’s motion, reasserting the arguments it had previously made.<sup>214</sup>

The Eighth Circuit affirmed the district court’s sentence, but did not explicitly address VandeBrake’s breach argument.<sup>215</sup> Rather, the Court denied VandeBrake’s Motion to Enforce in a short footnote in its decision on the appeal.<sup>216</sup>

Despite the fact that the Eighth Circuit did not address whether the parties’ agreement “not to seek or support any sentence outside the Guidelines range” impacted the Government’s rights on appeal, the language was hotly contested by the parties in *VandeBrake*. Thus, the purpose of the revision in the New Model Plea is to clarify that the restriction on supporting alternate sentences is not intended to limit the positions the Government can take in connection with an appeal of a sentence.<sup>217</sup> However, the revised language may in fact introduce a new uncertainty—the New Model Plea arguably permits the parties to seek a different sentence not only on appeal, but also at any juncture other than during the sentencing hearing. For example, the New Model Plea could be read to permit either party to seek a different sentence just before the sentencing hearing. Of course, it remains to be seen whether the Government or a defendant would ever make this argument under the New Model Plea language.

### **New Definition of “Related Entities” Protected by a Corporate Plea Agreement**

Apparently prompted by the Government’s experience in one of the *Air Cargo* cases, the New Model Plea also clarifies the definition of “subsidiaries” that can receive the benefit of nonprosecution protection in exchange for providing ongoing cooperation pursuant to a parent company’s plea agreement.<sup>218</sup> Under the 2009 Model Plea, parties could use the term “subsidiaries” to identify the type of entities covered by a parent company’s plea agreement without specifically identifying the companies at issue or defining the term “subsidiary.”<sup>219</sup> The New Model Plea provides two methods for specifying which subsidiaries are covered by the agreement. The agreement may either specifically name all covered subsidiaries, or, if they are too numerous to name, the agreement must define covered subsidiaries as “entities that the defendant had greater than 50% ownership interest in as of the date of signature of

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<sup>212</sup> Mot. to Enforce the Plea Agreement at 2, *United States v. VandeBrake*, No. 11-1390 (8th Cir. July 22, 2011).

<sup>213</sup> *Id.*

<sup>214</sup> Opp’n to Mot. to Enforce the Plea Agreement at 2-7, *United States v. VandeBrake*, No. 11-1390 (8th Cir. Aug. 1, 2011).

<sup>215</sup> However, the Eighth Circuit did note in passing that it agreed with the Government on other issues. *VandeBrake*, 679 F.3d at 1037-38.

<sup>216</sup> *Id.* at 1036 n.5.

<sup>217</sup> See New Model Plea, *supra* note 3, ¶ 9.

<sup>218</sup> *Id.* ¶ 13 n.22; 2009 Model Plea, *supra* note 5, ¶ 14 n.27.

<sup>219</sup> 2009 Model Plea ¶ 14. The 2009 Model Plea explains that previous Division plea agreements included “affiliates” in the definition of related entities, but that the Division’s practice at that time was to require any covered affiliates to be specifically named rather than including such a broad term in the plea agreement. *Id.* at n.28.

this Plea Agreement.”<sup>220</sup> In addition, all other types of related entities, such as corporate parents of the defendant, must be specifically named if they are to be included in the protections offered by the company’s plea agreement.<sup>221</sup>

*Only “entities that the defendant had greater than 50% ownership interest in” as of the date of the plea agreement, or those that are specifically named are protected from prosecution under the New Model Plea.*

### United States v. Florida West Int’l Airways

The Division confronted the issue of which entities are properly considered covered “subsidiaries” under 2009 Model Plea language in the recent *Florida West* case. In 2010, the Government indicted Florida West International Airways, Inc. (Florida West) and its Vice President, Hernan Hidalgo, for conspiring to fix certain air cargo rates.<sup>222</sup> Florida West and Hidalgo moved to dismiss the indictment, arguing that they were immunized under a 2009 plea agreement executed by LAN Cargo, S.A., which covered LAN Cargo and its subsidiaries.<sup>223</sup> As the Court noted, the LAN Cargo Plea Agreement left the term “subsidiary” undefined.<sup>224</sup> Florida West and Hidalgo asserted that because LAN Cargo owned 25% of Florida West and exerted control over it, Florida West was a covered subsidiary under the LAN Cargo plea, and it and Hidalgo were thus immunized by the plea.<sup>225</sup> The Government contended that a majority ownership was a prerequisite to qualifying as a covered subsidiary.<sup>226</sup>

The Court ultimately found that the plea agreement’s use of “subsidiary” was unambiguous, notwithstanding the fact that the term was undefined.<sup>227</sup> It held that the Government offered the only reasonable interpretation of the definition of a subsidiary as “a corporation in which a parent corporation owns a controlling share.”<sup>228</sup> The language of the New Model Plea now tracks the Government’s position, and the Court’s holding, in *Florida West* by defining subsidiaries as entities that are majority owned by the defendant as of the signing of the agreement.<sup>229</sup>

### New Provisions Relating to Obstructive Conduct

The Division also significantly revised the language of the New Model Plea relating to obstruction. Under the 2009 Model Plea, the Government agreed that it would “not bring further criminal charges against the defendant . . . for any act or offense committed before the date of [the] Plea Agreement that was undertaken in furtherance of [the

<sup>220</sup> New Model Plea ¶ 13.

<sup>221</sup> *Id.*

<sup>222</sup> Indictment, *United States v. Florida West*, No. 1:10-cr-20864-RNS (S.D. Fla. Dec. 2, 2010), available at <http://www.justice.gov/atr/cases/f265300/265329.htm>.

<sup>223</sup> *United States v. Florida West*, 853 F. Supp. 2d 1209, 1214-16 (S.D. Fla. 2012).

<sup>224</sup> *Id.* at 1215.

<sup>225</sup> *Id.* at 1215-16.

<sup>226</sup> *Id.* at 1216.

<sup>227</sup> *Id.* at 1233.

<sup>228</sup> *Id.* at 1235.

<sup>229</sup> New Model Plea, *supra* note 3, ¶ 13.

underlying] antitrust conspiracy.”<sup>230</sup> The only limitations on the nonprosecution provisions were with respect to civil matters, violations of tax or securities law, and crimes of violence.<sup>231</sup>

*Counsel representing companies in cartel investigations should be aware that nonprosecution protections in the New Model Plea Agreement do not cover obstructive conduct unless that conduct is specifically described in the agreement.*

The New Model Plea expands the limitations to also exclude from the nonprosecution protection “any acts of subornation of perjury (18 U.S.C. § 1622), making a false statement (18 U.S.C. § 1001), obstruction of justice (18 U.S.C. § 1503, *et seq.*), contempt (18 U.S.C. §§ 401-02), or conspiracy to commit such offenses” unless such conduct is specifically described in a new optional insert.<sup>232</sup>

The Division’s modifications should serve as a signal to companies and employees involved in cartel investigations that the Division has taken a greater interest in overtly exposing obstructive conduct, and that the Division is adverse to any even implicit limitations on its ability to later prosecute companies or individuals for obstruction-related offenses.

### Comparison of Plea Agreements in the Auto Parts Investigation

Although the Division has long applied sentencing enhancements for obstructive conduct, it previously did so without denying nonprosecution protection for such conduct or identifying the conduct in the public plea agreement when there was no separate count for obstruction. In March 2012, DENSO Corporation (Denso) pled guilty to two counts of bid rigging and price fixing relating to two different automotive parts.<sup>233</sup> Denso’s plea agreement, which was based on the 2009 Model Plea, did not contain a separate count for obstruction and, in fact, made no explicit mention of any obstructive conduct. The transcript of Denso’s sentencing hearing, however, makes clear that Denso received an upward adjustment to its culpability score “for the fact that there was behavior on behalf of the corporation to obstruct or impede justice, including the destruction of some documents.”<sup>234</sup>

The nonprosecution provision of Denso’s plea agreement included the standard language from the 2009 Model Plea which immunized Denso from any further criminal charges for conduct in furtherance of the underlying antitrust conspiracies to which it pled, which could include obstructive conduct. The provision also included language pursuant to which the Government agreed not to prosecute Denso for any acts “undertaken in connection with any

<sup>230</sup> 2009 Model Plea, *supra* note 5, ¶ 16.

<sup>231</sup> *Id.*

<sup>232</sup> New Model Plea ¶ 15. The New Model Plea includes language similarly limiting the nonprosecution provisions for employees who are covered by the corporate plea agreement. *Id.* ¶ 16(f) (also including perjury).

<sup>233</sup> Plea Agreement, *United States v. DENSO Corp.*, No. 2:12-cr-20063 (E.D. Mich. Mar. 5, 2012), *available at* <http://www.justice.gov/atr/cases/f280800/280837.pdf> [hereinafter “Denso Plea Agreement”].

<sup>234</sup> Hr’g Tr. 24:11-14, *United States v. DENSO Corp.*, No. 2:12-cr-20063 (E.D. Mich. Mar. 5, 2012). Indeed, the DOJ announced on February 20, 2014 that a former Denso executive agreed to plead guilty to obstruction of justice charges in connection with the Division’s investigation. Press Release, Former Denso Corp. Executive Agrees to Plead Guilty to Obstructing Automotive Parts Investigation (Feb. 20, 2014), *available at* <http://www.justice.gov/opa/pr/2014/February/14-at-177.html>.



investigation” of the underlying conspiracies.<sup>235</sup> It did not, however, list any obstruction-related exceptions to the nonprosecution protections, nor did it explicitly describe the obstructive conduct in which Denso had engaged.

In contrast, Hitachi Automotive Systems, Ltd. and Mitsubishi Electric Corporation, which also received sentencing enhancements for obstruction but had no separate obstruction counts, subsequently entered into plea agreements based on the New Model Plea. Each of those agreements contains the new optional insert detailing the companies’ respective obstructive conduct.<sup>236</sup> These companies’ plea agreements provide no protection from prosecution for any obstructive conduct beyond that specifically described in their plea agreements. The New Model Plea leaves no room for defendants to argue that they are immunized for obstructive conduct if such conduct is not specifically described in the plea.

### **The New Obstruction Provisions Provide Less Certainty for Defendants Entering Plea Agreements**

Given the number of companies involved in the auto parts investigation that have pled guilty to obstruction or received sentencing enhancements for obstructive conduct, it is not surprising that the Division is increasingly concerned with the issue. From the Division’s perspective, it does not want to foreclose the possibility of pursuing obstructive conduct that may not be discovered by the time a plea agreement is negotiated and entered. However, explicitly excluding obstruction related offenses from nonprosecution protection diminishes the certainty and finality of plea agreements. While perhaps only a theoretical concern, under the New Model Plea, if the Division declined to include a separate count or sentencing enhancement for obstruction in a company’s plea agreement, it could later bring obstruction charges for pre-plea conduct based in part on information the Division knew at the time that the plea agreement was executed. In order to address this concern, the Division could instead finalize obstruction investigations prior to entering into plea agreements and give formal assurances to defendants that they will not be prosecuted for the conduct that was the subject of the Division’s obstruction investigation. Alternatively, the Division could amend the language of the New Model Plea’s limitation on nonprosecution for obstructive conduct to relate only to any acts which occur *after* the date that the plea agreement is signed. Either solution would achieve the Division’s goals of publicizing and punishing obstruction offenses, while providing defendants with the certainty that ought to correspond to a finalized plea agreement.

### **A New and Improved Model Plea Agreement?**

The changes to the New Model Plea show that the Division is concerned both with clarifying ambiguous language and preserving its right to continue to investigate and prosecute obstructive conduct. While the addition of “at the sentencing hearing” that followed from the *VandeBrake* case may actually give rise to some new uncertainties, the more specific definition of “subsidiaries” from *Florida West* does clarify the model plea agreement. The new limitation

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<sup>235</sup> *Denso* Plea Agreement ¶ 13.

<sup>236</sup> Plea Agreement ¶ 4(e), *United States v. Hitachi Automotive Sys., Ltd.*, No. 2:13-cr-20707 (E.D. Mich. Nov. 6, 2013), available at <http://www.justice.gov/atr/cases/f301600/301614.pdf>; Plea Agreement ¶ 4(e), *United States v. Mitsubishi Electric Corp.*, No. 2:13-cr-20710 (E.D. Mich. Nov. 6, 2013) available at <http://www.justice.gov/atr/cases/f301600/301629.pdf>.

on the nonprosecution protection for obstructive conduct that is not expressly detailed in the agreement is arguably the most significant change which could have real repercussions and could give corporate defendants greater pause before agreeing to enter into a plea agreement which arguably does not dispose of all related offenses.

## Cooperation or Compliance? *In re Aftermarket Automotive Lighting* and the Denial of ACPERA Protection for Unsatisfactory Cooperation

by Daniel Dukki Moon<sup>237</sup> and Christine Ryu<sup>238</sup>



Daniel Dukki Moon



Christine Ryu

Long the lesser-known sibling of the DOJ's corporate amnesty program, the Antitrust Criminal Penalty Enhancement and Reform Act – more commonly known as ACPERA – briefly seized the spotlight last August, when a federal judge ruled that corporate amnesty candidates did not qualify for ACPERA's protection from treble damages. ACPERA provides an additional incentive for amnesty applicants to self-report by limiting their exposure in civil actions to actual (single) damages and taking away as to qualifying companies the threat of joint and several liability. However, few courts have interpreted ACPERA. In *In re Aftermarket*

*Automotive Lighting Products Antitrust Litigation*,<sup>239</sup> Judge George H. Wu denied ACPERA benefits to two defendants in the civil litigation for their failure to provide “satisfactory cooperation” to civil plaintiffs. And while the decision sheds light on the requirements under ACPERA, it also underscores the reality that there are still a host of unanswered questions about what it takes to comply and hence obtain ACPERA's substantial benefits.

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<sup>239</sup> 09 MDL 2007-GW(PJWs), 2013 U.S. Dist. LEXIS 125287 (C.D. Cal. Aug. 26, 2013).

## The Antitrust Criminal Penalty Enhancement and Reform Act of 2004

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004<sup>240</sup> (“ACPERA”) provides illegal cartel participants with an added incentive to apply for amnesty with the DOJ. Prior to its enactment in 2004, the DOJ’s Corporate Leniency Policy only provided amnesty from criminal liability but did not alleviate the exposure to treble damages in civil actions.<sup>241</sup> Amnesty applicants inevitably face subsequent private litigation the moment their applications become public, whether as a result of securities law disclosures or disclosures made by third parties.<sup>242</sup> For this reason, private litigation had been viewed as at least a partial disincentive for companies to enter the DOJ’s corporate amnesty program. This disincentive hindered the DOJ’s efforts to detect cartel activity, which relies heavily on self-reporting. ACPERA was designed to eliminate this disincentive to seek amnesty. “The central purpose of [ACPERA] is to bolster the leniency program already utilized by the Antitrust Division so that antitrust prosecutors can more effectively go after antitrust violators . . . cognizant of the needs of victims.”<sup>243</sup>

*ACPERA requires that applicants provide a “full account” of “all facts known” “that are potentially relevant to the civil action.” But how much is enough?*

ACPERA limits the civil damages that can be obtained from successful amnesty applicants to: “...that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.”<sup>244</sup> The statute provides two benefits to an amnesty applicant: 1) the detrebling of private damages; and 2) the removal of joint and several liability. As a practical matter, cartel victims do not lose their right to full recovery, but the recovery comes instead from parties other than the amnesty applicant: ACPERA does not “affect, in any way, the joint and several liability of any party to a civil action described in section 213(a), other than that of the antitrust leniency applicant and cooperating individuals as provided in section 213(a) of this title.”<sup>245</sup>

However, the benefits of ACPERA are not automatic. The string attached comes in the form of “satisfactory cooperation” with the private litigants, which is satisfied by:

- 1) “providing a full account of all facts known to the applicant . . . that are potentially relevant to the civil action; 2) furnishing all documents or other items that are potentially relevant to the civil action that are in the applicant’s or cooperating individual’s possession or control wherever they are located;

<sup>240</sup> Pub. L. No. 108-237, § 213, 118 Stat. 661, 665 (June 22, 2004) (hereinafter, ACPERA).

<sup>241</sup> *Oracle Am., Inc. v. Micron Tech., Inc., et al.*, 817 F. Supp. 2d 1128, 1132 (N.D. Cal. 2011).

<sup>242</sup> Michael D. Hausfeld, Michael P. Lehmann, & Megan E. Jones, OBSERVATIONS FROM THE FIELD: ACPERA’S FIRST FIVE YEARS, 10 *The Sedona Conference Journal* 95, 98 (2009).

<sup>243</sup> *Id.* (citing 150 Cong. Rec. S3614 (Apr. 2, 2004)).

<sup>244</sup> ACPERA, § 213(a).

<sup>245</sup> *Id.*, § 214(3).

and 3) using its best efforts to secure and facilitate from cooperation individuals covered by an agreement.”<sup>246</sup>

The court where the civil action is pending determines whether such satisfactory cooperation has occurred.<sup>247</sup> The statute’s fairly broad language still leaves open a number of questions for the courts: to whom is the duty to cooperate owed? When is this duty triggered? How much cooperation is necessary to satisfy the standard of “satisfactory cooperation?” The existing case law has addressed these questions only to a limited extent.<sup>248</sup>

In regard to the extent of cooperation necessary, ACPERA requires that applicants provide a “full account” of “all facts known” “that are potentially relevant to the civil action.”<sup>249</sup> But how much is enough? The statute’s language suggests a wide scope for cooperation.<sup>250</sup> With only one prior reported determination, court decisions provide little in the way of practical instruction on the adequacy of cooperation.<sup>251</sup> However, *In re Aftermarket Automotive Lighting* has now provided at least some guidance on the high level of cooperation that ACPERA requires: Despite an applicant’s efforts to provide plaintiffs with extensive cooperation through voluminous responses to discovery, the omission of certain key facts known to it can put its ACPERA status in jeopardy.

### ***In Re Aftermarket Automotive Lighting’s* Strict Standard for Satisfactory Cooperation**

In *In re Aftermarket Automotive Lighting Products Antitrust Litigation*, direct purchaser plaintiffs filed a complaint against TYC and Genera (collectively, “the Companies”) alleging a conspiracy to fix prices in aftermarket automotive lighting products. The direct purchaser plaintiffs moved for an order that the Companies were not entitled to the benefits of ACPERA and that the Companies should be liable to the plaintiffs for the full amount of treble damages. In granting the motion, the court held that the applicants failed to provide a “full account” of “all facts known” “that are potentially relevant to the civil action.”<sup>252</sup> Giving full meaning to the language of the statute, the Court held that the omission of potentially relevant known facts was sufficient to deny ACPERA protection.

The court recognized that the defendants had cooperated with plaintiffs: they provided the plaintiffs with numerous proffers, responded promptly to their requests for information, arranged depositions, responded quickly to discovery requests without the need for motion practice, offered interviews of witnesses, secured the voluntary appearance of an employee located overseas, and produced over 13 years of transactional data and over 50,000 relevant documents.<sup>253</sup>

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<sup>246</sup> Hausfeld, Lehman, & Jones, at 100 (internal quotations omitted); See ACPERA Section 213(b)(1)-(3).

<sup>247</sup> See 150 Cong. Rec. H3658 (June 2, 2004).

<sup>248</sup> *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775(J6)(VVP) (E.D.N.Y. June 27, 2006); See also Hausfeld, Lehman, & Jones, at 102 (“[T]he Amnesty Applicant’s cooperation inures to the benefit of all plaintiffs and all members of any class, all of whom have a collective and indivisible interest in receiving the benefits of such cooperation.”)

<sup>249</sup> ACPERA, § 213(b).

<sup>250</sup> Hausfeld, Lehman, & Jones, at 109.

<sup>251</sup> *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320 (N.D. Ill. 2005).

<sup>252</sup> *In re Aftermarket Auto. Lighting*, 2013 U.S. Dist. LEXIS 125287, at \*11.

<sup>253</sup> *Id.* at \*10.

The Companies performed much of the aforementioned at their own expense. Nonetheless, the court held that the Companies' efforts did not amount to "satisfactory cooperation." According to the court, the cooperation amounted merely to compliance with discovery, but ACPERA "requires more."<sup>254</sup>

The Companies' downfall was their failure to disclose "all facts (much less potentially relevant facts) known to them suggesting that the conspiracy began in 1999."<sup>255</sup> In particular, in the course of discovery, plaintiffs obtained a copy of a DOJ memorandum summarizing interviews with Drue Hsia, the President of Genera, discussing a number of facts relevant to the alleged conspiracy.<sup>256</sup> The memorandum contained information disclosed to the DOJ regarding price-fixing arrangements as early as 1999, the participants' decision to bring Eagle Eyes and E-Lite into the conspiracy, the conspirators treatment of competitors and new entrants, their policing of the conspiracy, and the identity of key participants.<sup>257</sup> Further, defense counsel was present at the interview that was used as a basis for the memorandum, and thus were aware – or should have been aware – of these key facts. Despite this knowledge, the Companies never disclosed these known facts to the plaintiffs in the course of their cooperation. As a result of this failure timely to disclose, the Plaintiffs did not learn that the conspiracy began as early as 1999 until it was too late for them to amend their complaint to encompass this fact and add new cartel participants as defendants.<sup>258</sup>

The court found unpersuasive the Companies reasons for not disclosing these facts. For instance, the Companies argued that they did not intentionally mislead the Plaintiffs but had focused on the earliest meetings that involved specific pricing proposals.<sup>259</sup> But the court observed that the judgment calls on which meetings were potentially relevant were not up to the Companies to make: "The Committee Report indicates that ACPERA's use of the term potentially relevant is intended to preclude a parsimonious view of the facts or documents to which a claimant is entitled."<sup>260</sup> Accordingly, ACPERA required the Companies to disclose Mr. Hsia's early meetings with co-conspirators to discuss an end to price wars – regardless of whether they included pricing proposals – as potentially relevant.<sup>261</sup>

The court further distinguished the case from the only other reported determination of ACPERA benefits, *In re Sulfuric Acid Antitrust Litig.*,<sup>262</sup> in which the amnesty applicants (a) provided plaintiffs with a detailed account of all known facts relevant to the litigation through interviews with current employees, former employees and outside counsel; (b) furnished plaintiffs with 35,000 pages of documents; (c) furnished plaintiffs with interrogatory responses;

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<sup>254</sup> *Id.* at \*11.

<sup>255</sup> *Id.* at \*12 (internal quotations omitted).

<sup>256</sup> *Id.* at \*12. Plaintiffs had obtained the memorandum after the DOJ filed it in relation to the criminal proceedings against Eagle Eyes' Vice Chairman Hsu.

<sup>257</sup> *Id.* at \*13.

<sup>258</sup> *Id.* at \*15; See also *In Re: Aftermarket Automotive Lighting Products Antitrust Litigation*, 276 F.R.D. 364, 367 (C.D. Cal. 2011) (Plaintiffs had previously alleged that the conspiracy began in 2002).

<sup>259</sup> *Id.* at \*14.

<sup>260</sup> *Id.* at \*11-12 (citing Second Hartley Decl., Ex. 30, 150 Cong. Rec. H3658 (June 2, 2004) (statement of Rep. Sensenbrenner)) (internal quotations omitted).

<sup>261</sup> *Id.* at \*14.

<sup>262</sup> *Supra.*

(d) provided plaintiffs with numerous documents and information regarding the DOJ's investigation of the sulfuric acid industry; and (e) used their best efforts to locate witnesses with knowledge of the factual underpinnings of this litigation.”<sup>263</sup> From a purely quantitative standpoint, it would appear that the Genera and TYC's cooperation was in line with *Sulfuric Acid*. However, there were qualitative differences, including the finer level of detail described above, as well as the fact that in *Sulfuric Acid* the parties entered into a settlement cooperation agreement, whereas no such agreement existed in this case.<sup>264</sup> Given this lack of a settlement cooperation agreement, the omission of potentially relevant facts, and the resulting deficiency of the plaintiffs' complaint, the court held that the Companies were not entitled to ACPERA's benefits.

## Conclusion

*In re Aftermarket Automotive Litigation* leaves open more questions than it ultimately answers. At a minimum, the ruling clearly shows that courts are willing to challenge accept a plaintiffs' challenge to a defendants' entitlement to ACPERA's benefits where there are facts suggesting a lack of complete or full cooperation. Companies seeking these substantial benefits must recognize the higher bar that “satisfactory” cooperation presents, and take added care to ensure that all facts and documents in their possession are provided to plaintiffs. Where possible, the terms and scope of cooperation should be agreed with plaintiffs in a suitable writing. *In re Aftermarket Automotive Litigation* has highlighted at least one court's emphasis on the distinction between “satisfactory cooperation” and mere “compliance” with discovery obligations. As the DOJ's corporate amnesty program continues to evolve – and courts make further ACPERA determinations – this distinction is likely to become more refined. In the meantime, and given the very high stakes for any amnesty candidate, erring on the side of over cooperation is the only acceptable error.

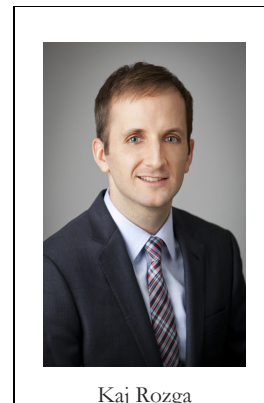
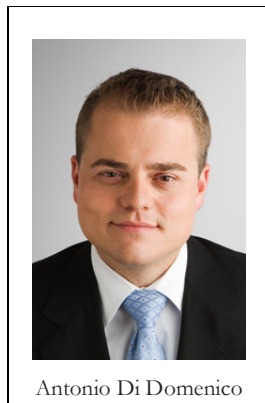
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<sup>263</sup> Hausfeld, Lehman, & Jones, at 111.

<sup>264</sup> *In re Aftermarket Auto. Lighting*, 2013 U.S. Dist. LEXIS 125287, at \*17-18.

# Indirect Purchaser Antitrust Claims in Canada and the United States: Strategic Considerations for Cross-Border Class Action Litigation

by Laura F. Cooper, Antonio Di Domenico, Eric S. Hochstadt, and Kaj Rozga<sup>265</sup>



The Supreme Court of Canada recently issued three decisions that make it easier for indirect purchasers to bring antitrust class action claims. The legal landscape south of the Canadian border in the United States, however, is far more restrictive for indirect purchasers. This article highlights some procedural and substantive differences between the Canadian and U.S. legal systems and provides guidance on representing clients in cross-border cases in light of the widening gap between the two jurisdictions.

## The Canadian Landscape

### Indirect Purchasers May Bring Antitrust Actions Under Canadian Law

On October 31, 2013, the Supreme Court of Canada released a trilogy of long-awaited decisions in proposed class proceedings brought by purchasers of products alleging antitrust law violations.<sup>266</sup> The Supreme Court concluded that

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<sup>266</sup> *Pro-Sys Consultants Ltd v. Microsoft Corp.*, 2013 SCC 57, [2013] SCJ No 57 (certification granted); *Sun Rype Products Ltd v. Archer Daniels Midland Co.*, 2013 SCC 58, [2013] SCJ No 58 (certification denied); *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59, [2013] SCJ No 59 (certification granted).

indirect purchasers have a cause of action, resolving a conflict in appellate jurisprudence in Canada.<sup>267</sup> The Supreme Court held that while defendants cannot rely on a “passing-on defense,” indirect purchasers could sue for an overcharge that was passed on to them.

Traditionally, a party responsible for an overcharge invoked the passing-on defense against a direct purchaser who passed that overcharge on to its own customers. The defense is based on the proposition that a direct purchaser suffers no loss when it passes on an overcharge. However, the Supreme Court of Canada rejected this defense, finding it inconsistent with restitutionary law and “economically misconceived.”<sup>268</sup>

*The Supreme Court of Canada recently issued three decisions that make it easier for indirect purchasers to bring antitrust class action claims. The legal landscape south of the Canadian border in the United States, however, is far more restrictive for indirect purchasers.*

At the same time, the Supreme Court of Canada held that its rejection of the passing-on *defense* does not lead to a corresponding rejection of the *offensive* use of passing on.<sup>269</sup> Accordingly, indirect purchasers are not foreclosed from claiming losses that have been passed on to them.<sup>270</sup>

### Canadian Class Action Standards

The Supreme Court of Canada also made a number of salient findings regarding class certification and jurisdiction, several of which illuminate differences with U.S. antitrust law and class action procedures:

- The standard of proof on class certification motions (other than motions testing whether the pleadings disclose a cause of action) is the “some basis in fact test.”<sup>271</sup> It is not the higher and more traditional balance of probabilities (i.e., “more probable than not”) civil standard of proof.<sup>272</sup>
- A single mixed class of direct and indirect purchasers is permitted.<sup>273</sup>
- Resolving conflicts between experts is not an issue for a certification judge to decide on a certification motion, but for the trial judge in the common issues trial. The Supreme Court confirmed that plaintiffs

<sup>267</sup> The Supreme Court of Canada’s conclusion is applicable to claims commenced under both provincial and federal class action legislation.

<sup>268</sup> *Pro-Sys Consultants*, 2013 SCC 57, *supra* note 2 at paras. 22-23.

<sup>269</sup> *Id.* at paras. 34 and 60.

<sup>270</sup> Interestingly, in its decision, the Supreme Court of Canada referred to an Antitrust Modernization Commission report issued to the U.S. Congress in 2007 recommending that U.S. law be changed in this regard. See *id.* at para 51 (citing ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, at vi-vii (2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf) (“AMC REPORT”)).

<sup>271</sup> *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158.

<sup>272</sup> *Pro-Sys Consultants*, 2013 SCC 57, *supra* note 2 at para. 99.

<sup>273</sup> *Sun Rype Products*, 2013 SCC 58, *supra* note 2 at para. 18.



generally must use expert evidence to show that loss can be established on a class wide basis. The Supreme Court also confirmed that the expert methodology cannot be theoretical or hypothetical but must be sufficiently credible or plausible to establish a realistic prospect of establishing loss on a class-wide basis.<sup>274</sup>

- The aggregate damages provisions of class action legislation are procedural only.<sup>275</sup> They cannot be used to establish liability.<sup>276</sup>
- The class must be “identifiable.” Prospective class members must be able to prove whether they are part of the class based on available evidence. In particular, putative indirect purchaser class members must be able to show that the end product they purchased actually contained the price-fixed part or product at issue. In *Sun-Byte*, the majority of the Supreme Court denied certification for the indirect purchaser claims on the grounds that no evidence was offered showing that two or more persons could prove that they purchased a product containing high-fructose corn syrup made by a defendant during the class period.<sup>277</sup>

## The U.S. Landscape

### The Ability of Indirect Purchasers to Seek Damages

Similar to Canadian law, in *Hanover Shoe, Inc. v. United Machinery Corp.*, the U.S. Supreme Court barred a defendant overcharger from asserting a defense against a direct purchaser that the plaintiff had passed on the overcharge to an indirect purchaser.<sup>278</sup> However, unlike Canadian law, in *Illinois Brick Co. v. Illinois*, the U.S. Supreme Court barred indirect purchasers from recovering damages for federal claims.<sup>279</sup> The Court gave three reasons: to avoid double recovery in light of *Hanover Shoe*; apportioning damages between direct and indirect purchasers is complex and burdensome; and indirect purchasers’ damages are too remote. Some important exceptions to *Illinois Brick* exist, however, that permit indirect purchasers to bring a Sherman Act claim where:

- they are seeking injunctive relief;
- the direct purchaser is almost certain to have passed on an overcharge due to a pre-existing “cost-plus” contract; or

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<sup>274</sup> *Pro-Sys Consultants*, 2013 SCC 57, *supra* note 2 at paras. 114-26.

<sup>275</sup> Generally, aggregate damages provisions of class action legislation permit the court in prescribed circumstances to determine the aggregate or part of a defendant’s liability to class members.

<sup>276</sup> *Pro-Sys Consultants*, 2013 SCC 57, *supra* note 2 at paras. 127-35.

<sup>277</sup> *Sun Byte Products Ltd v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] SCJ No 58, *supra* note 2 at paras. 52-79.

<sup>278</sup> 392 U.S. 481 (1968).

<sup>279</sup> 431 U.S. 720 (1977). As a result, the proper characterization of a plaintiff as either an indirect or direct purchaser remains a contentious issue. For example, in *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 533 F.3d 1, 4-5 (1st Cir. 2008), the First Circuit affirmed dismissal of Sherman Act claims for damages because plaintiffs, who leased allegedly price-fixed cars imported from Canada into the U.S., were found to be “indirect purchasers.” The First Circuit concluded that car dealers were the direct purchasers since the only alleged conspirators in the horizontal conspiracy were car manufacturers.

- the direct purchaser is a conspirator or is owned or controlled by a conspirator.<sup>280</sup>

In addition, the District of Columbia and at least 36 states, including some of the largest, have so-called “*Illinois Brick* repealer” laws that permit indirect purchasers to recover damages under state antitrust or consumer protection laws that are analogous to the Sherman Act.<sup>281</sup> Moreover, antitrust plaintiffs have attempted to use other state laws, such as unjust enrichment, consumer protection, and unfair competition claims, to seek redress as well.

Finally, state Attorneys General can bring *parens patriae* lawsuits on behalf of individual purchasers from their respective states and, to date, these suits have not had to overcome the hurdles of class certification discussed below.<sup>282</sup> Although *parens patriae* suits can seek all of the federal remedies otherwise available to private plaintiffs, due to *Illinois Brick*, these suits are typically brought under state laws and often in state courts, where they can remain under a recent Supreme Court ruling.<sup>283</sup>

### Class Certification Requirements

For the last decade, the U.S. Supreme Court and federal appellate courts have increasingly scrutinized plaintiffs’ attempts to seek recovery through class action lawsuits in several respects:

- The Third Circuit in *In re Hydrogen Peroxide Antitrust Litigation* held that class certification requirements under Federal Rule of Civil Procedure 23 require more than a mere “threshold showing;” plaintiffs must show by a preponderance of the evidence – including expert testimony if necessary – that the Rule’s requirements have been met, and the court may have to weigh conflicting expert opinions.<sup>284</sup>
- The Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* reiterated that trial courts must conduct a “rigorous analysis” of all elements of Rule 23 and that such an analysis may “overlap with the merits of the plaintiff’s underlying claim” and include consideration of a defendant’s affirmative defenses.<sup>285</sup>
- Most recently, in *Comcast Corp. v. Bebrend*, the Supreme Court held that a plaintiff’s common proof for damages cannot be disconnected from the theory of liability.<sup>286</sup>

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<sup>280</sup> See, e.g., *Howard Hess Dental Labs v. Dentsply Int’l*, 602 F.3d 237, 258-60 (3rd Cir. 2010); *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326-27 (9th Cir. 1980).

<sup>281</sup> See, e.g., CAL. BUS. & PROF. Code § 16720 (California Cartwright Act); N.Y. GEN. BUS. LAW § 340(6) (New York Donnelly Act); AMC REPORT, *supra* note 4, at vi-vii.

<sup>282</sup> 15 U.S.C. §§ 15c-15h. These suits can only be brought on behalf of individuals, not corporations.

<sup>283</sup> *Mississippi ex rel. Hood, Attorney General v. AU Optronics Corp., et al.*, 134 S. Ct. 736, 737 (2014) (holding that the Class Action Fairness Act of 2005 does not require removal of *parens patriae* suits).

<sup>284</sup> 552 F.3d 305, 307, 320, 324 (3rd Cir. 2008); see also *In re Initial Public Offering Securities Litig.*, 471 F.3d 24, 40-41 (2d Cir. 2006) (“disavowing” the “some showing” standard as being the test for satisfying Rule 23’s requirements).

<sup>285</sup> 131 S. Ct. 2541, 2551 (2011).

<sup>286</sup> 133 S. Ct. 1426, 1433 (2013) (“a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to [plaintiffs’] theory” in order for it to “establish that damages are susceptible of measurement across the entire class”).

- Courts continue to grapple with whether motions to exclude expert testimony, brought under *Daubert v. Merrell Dow Pharmaceuticals*,<sup>287</sup> should be permitted at the class certification stage.<sup>288</sup>

These evolving standards for class certification have played out inconsistently in recent antitrust cases. For example, the D.C. Circuit vacated a pre-*Comcast* grant of class certification because the lower court did not properly consider that the plaintiffs may have failed to show class-wide injury because their expert's damages model indicated injury from the alleged conspiracy to purchasers who in fact had never paid an overcharge.<sup>289</sup> By contrast, in another post-*Comcast* ruling, a federal trial court certified a damages class on the basis of an expert's "aggregate damages" model that included "uninjured class members" who suffered no "economic injury."<sup>290</sup> These illustrative decisions suggest that class certification standards will continue to evolve in the courts over time.

### Cross-Border Implications and Strategic Considerations

There are a number of cross-border implications and strategic considerations arising from the Supreme Court of Canada's decisions and the divergent approaches between the U.S. and Canada regarding indirect purchasers.

*Continuing efforts will be made by plaintiffs facing class certification in Canada proceedings to access discovery materials from parallel proceedings in the United States.*

### More Antitrust Class Action Filings in Canada

The most immediate impact in Canada is that a number of cases put on hold pending the release of the Supreme Court's decisions will now proceed. But additionally, the finding that indirect purchasers have a cause of action, together with an arguably low standard of proof for plaintiffs to meet on certification motions, will likely result in more class action filings – and possible certifications. In contrast, indirect purchasers in the U.S. have faced significant barriers to bringing federal damages actions for almost 50 years, and class certification has increasingly become a more difficult hurdle to clear. As a result, plaintiffs' lawyers confronting challenges under U.S. law may be inclined to consider working with Canadian lawyers to commence national indirect purchaser class actions in Canada.

<sup>287</sup> 509 U.S. 579 (1993).

<sup>288</sup> See, e.g., *In re Polyurethane Foam Antitrust Litig.*, No. 10-MD-2196, Preliminary Comments by Court Prior to Class Certification Hearing, at \*2-3 (N.D. Ohio, Jan. 14, 2014) ("In a case of this magnitude, it makes little sense to grant class certification if the 'critical' expert testimony supporting that decision is so flawed or unreliable as to be inadmissible at trial.").

<sup>289</sup> *In re: Rail Freight Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) (summarizing a trial court's obligation to scrutinize expert testimony: "No damages model, no predominance, no class certification.").

<sup>290</sup> *In re: Nexium (Esomeprazole) Antitrust Litig.*, No. 12-MD-02409, Memorandum and Order, at \*20, \*27 (D. Mass. Nov. 14, 2013) ("[The] Court determines that the incidence of uninjured consumers and TPPs are insufficient to overcome the showing of common antitrust impact to the putative class, but the Court preserves the Defendants' right to challenge individual damage claims at trial.").

## Double Recovery

It remains unclear how U.S. and Canadian courts will resolve the potential double or multiple recovery that can arise from permitting purchasers at multiple levels of the distribution chain to file claims on the same overcharges. In its trilogy of decisions, the Supreme Court of Canada noted that Canadian courts have practical tools at their disposal to avoid these risks at the distribution stage after a judgment or settlement. In the U.S., the multi-district litigation process typically consolidates these issues before one judge but only for pre-trial purposes, and even then *parens patriae* actions can avoid consolidation.

## Cooperation Between U.S. and Canadian Plaintiffs' Counsel

Continuing efforts will be made by plaintiffs facing class certification in Canada proceedings to access discovery materials from parallel proceedings in the United States. Canadian plaintiffs have done this with some success in the last decade.<sup>291</sup> The ability to access such documents at an early stage is potentially a significant advantage for plaintiffs because there is no pre-certification right to discovery in Canada.

## Extensive Coordination Between U.S. and Canadian Defense Counsel

Defendants are likely to face a potentially-increasing number of contemporaneous class actions in Canada and the United States based on different substantive legal standards and running on different procedural tracks in each jurisdiction. Coordination between U.S. and Canadian defense counsel is especially important in these circumstances, in particular:

*Defendants are likely to face a potentially increasing number of contemporaneous class actions in Canada and the United States based on different substantive legal standards and running on different procedural tracks in each jurisdiction.*

- monitoring and managing the pace at which one class action proceeds in one jurisdiction vis-à-vis the other. For example, plaintiffs may try to push the Canadian class actions ahead of the contemporaneous U.S. proceedings with the hope of achieving a good result in Canada and using that success in the United States.
- overseeing parallel class proceedings within the two jurisdictions. Unlike the United States, Canada has no equivalent to the multi-district litigation procedure and it is very common for antitrust class actions arising from the same alleged collusive activity to be commenced – and remain throughout the course of the litigation – in multiple provinces. Now that *parens patriae* actions can avoid multi-district consolidation in federal court before a single judge and remain in state court, a similar level of oversight is needed in the United States.
- the availability of national indirect purchaser class actions in Canada means that the number of persons who can pursue claims has increased significantly. Accordingly, the outcome of U.S. and Canadian criminal proceedings that typically precede class action litigation will now have even larger implications for class action

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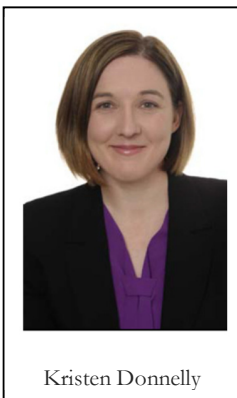
<sup>291</sup> See, e.g., *In re Baycol Products Litig.*, 2003 U.S. Dist. LEXIS 28398, at \*9-10 (D. Minn., May 6, 2003); *In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 333, 342 (E.D. Pa. 2004).

defendants. For example, decisions to plead guilty and, if so, to what, may have greater significance to the scope of damages that plaintiffs may seek in Canadian and U.S. class actions.

The Supreme Court of Canada has made it easier for indirect purchasers to bring class action lawsuits. This development deepens a growing divergence between Canada and the United States in this important area of antitrust litigation. Practitioners need to be mindful of these differences and how to exploit them to their client's advantage, especially when advising clients that are facing cross-border litigation.

## Reforms to the Criminal Cartel Regime in the UK: Lame Duck No More?

by Kirsten Donnelly & Verity Doyle<sup>292</sup>



Kristen Donnelly



Verity Doyle

Following years of consultation and debate, amendments to the Enterprise Act<sup>293</sup> will come into force in the UK on 1 April 2014. In addition to reform at an institutional level,<sup>294</sup> April will herald significant amendments to the criminal cartel offence. These amendments considerably expand the scope of the offence and lower the evidential test for bringing a prosecution, in particular by the removal of the 'dishonesty' element. In addition, the new Competition and Markets Authority ("CMA") will have vastly expanded powers of, which will allow, amongst other things, compulsory interview of individuals on civil dawn raids, with the

possibility of personal financial penalties for uncooperative employees.

Since its introduction in 2003, only three individuals have been convicted under the existing criminal cartel offence,<sup>295</sup> all of whom pled guilty. The high-profile failure of the OFT's first contested prosecution in the BA/Virgin Case<sup>296</sup> in 2010 exposed manifold flaws in the existing regime. The reforms are intended to make it easier for the CMA to bring successful prosecutions against individuals who engage in serious cartel conduct, but—at least in the absence of clear

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<sup>293</sup> Reforms are contained in the Enterprise and Regulatory Reform Act 2013.

<sup>294</sup> The reforms abolish the Office of Fair Trading (OFT) and the Competition Commission (CC), replacing them with a single body, the Competition and Markets Authority.

<sup>295</sup> In *R v. Whittle, Allison, Brammar*, [2008] EWCA Crim. 2560, the defendants entered into a plea agreement with U.S. prosecutors that they would not seek a lesser penalty than that imposed by the U.S. courts and nor would they seek to appeal any such penalty.

<sup>296</sup> *R v. George, Crawley and Others*, [2010] EWCA Crim. 1148.

prosecutorial guidance—criminalise a number of forms of legitimate business conduct that would not amount to an infringements under the civil regime.

Against this backdrop, it will be important for all practitioners advising clients in relation to arrangements that may affect supply to or production in the UK to be familiar with the exceptions and defences available under the new regime to ensure that they can apprise their clients of the necessary steps to protect individuals from criminal liability. Clients will also require advice about balancing their own commercial interests against those of their employees in circumstances where, for example, publishing details of a new agreement may be commercially difficult.

This article first considers the scope of the new offence; second examines in more detail the effect of removal of the dishonesty element; and third, considers what this will mean for both individuals and corporates in practice.

### Scope of “New” Offence

The revised offence retains the same types of prohibited arrangements and would catch behaviour that amounts to price fixing, market or customer sharing, agreements to restrict production or supply, and bid rigging.<sup>297</sup> In this respect, the new offence remains narrower than the Sherman Act. In all cases, a nexus to the UK is required (*i.e.*, the arrangements, operating as intended, would affect production or supply within the UK for jurisdiction to accrue).<sup>298</sup>

For an individual to be guilty of the offence, they must “agree with one or more persons to make or implement, or to cause to be made or implemented” a prohibited arrangement.<sup>299</sup> The concept of “agreement” under the criminal cartel offence is narrower than that taken under, for example, Article 101 of the Treaty on the Functioning of the European Union, which captures “concerted practices” that could arise in the absence of a clear agreement.

### Creation of a “strict liability” offence

Under the previous law, the prosecution had to prove that the defendant entered the relevant arrangements “dishonestly”. This requirement is removed from the new offence and has not been replaced by another *mens rea* element.<sup>300</sup>

Rather, the new offence introduces a series of exceptions and defences, which aim to cushion the hard edge of what is now essentially a strict liability offence. In practice, this amendment has the effect of reversing the burden of proof with respect to the *mens rea* and forcing the defendant to prove he or she did not intend to participate in clandestine cartel behaviour.

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<sup>297</sup> Enterprise Act, § 188(2).

<sup>298</sup> *Id.* §§ 188(3) and 188(4).

<sup>299</sup> *Id.* § 188(1).

<sup>300</sup> It has been argued, however, that the new offence’s requirement “for individuals to make or implement and ‘arrangement’, and the intention as to how it should operate” establishes a *mens rea* element even in the absence of proof of dishonesty. Ali Nikpay, Senior Director, Cartels and Criminal Enforcement Group, OFT, Speech to the Law Society Anti-Trust Section (Dec. 11, 2012), at 17-18, [http://www.of.gov.uk/shared\\_of/speeches/2012/1112.pdf](http://www.of.gov.uk/shared_of/speeches/2012/1112.pdf).

The cartel offence finds itself in unfamiliar company as a strict liability criminal offence which can be committed by an individual, with strict liability more frequently used under English law for regulatory offences or offences which are committed by commercial organisations rather than individuals.<sup>301</sup>

### Introduction of ‘exceptions’

The new Section 188A carves out three exceptions to the offence, which intend to ensure that the offence will not be committed where agreements are entered into openly.<sup>302</sup> The exceptions provide that an individual will not commit the offence where “relevant information” is (1) given to customers (in the UK), (2) in the case of bid-rigging, provided to the person calling for bids, and/or (3) published before the agreements are implemented in an order made by the Secretary of State. Relevant information is defined to be the names of the entities making the arrangements, a description of the arrangements, identification of the products or services to which they relate and any other information specified in an order made by the Secretary of State. These exceptions are intended to provide an “objectively measurable way of determining whether the offence has been committed” and to give parties contemplating commercial arrangements (*e.g.*, a research and development joint venture) “absolute comfort” that if they follow the procedure set out, they are not committing the offence.<sup>303</sup>

A number of commentators<sup>304</sup> have also noted that the emphasis on publication may lead to a conflict of interest between employees (who want to have arrangements published to protect themselves from criminal prosecution) and their employers (who may have commercial reasons for not wanting to publish details of agreements which are clearly allowed under the civil cartel laws). Such publication, moreover, will not protect companies from civil penalties under UK or foreign law.

### Introduction of new ‘defences’

In addition, three new defences are introduced by the reforms. First, it will be a defence (where the arrangements would take effect in the UK) that at the time of making the agreement, the defendant did not intend that the nature of the arrangements would be concealed from customers.<sup>305</sup> A second defence exists if an individual is able to show that at the time of the making of the agreement, he or she did not intend the agreement would be concealed from the CMA.<sup>306</sup> Finally, it will also be a defence for the defendant to show that, before making the agreement, he or she took

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<sup>301</sup> For example, contrast with the Bribery Act 2010, which contains a strict liability offence for commercial organisations where they fail to prevent bribery by their associated persons acting on their behalf (section 7), but the strict liability standard does not apply to offences which can be carried out by individuals (sections 1, 2 and 6).

<sup>302</sup> Department of Business Innovation and Skills, *A Competition Regime for Growth: A Consultation on Options for Reform* (2011).

<sup>303</sup> Nikpay, *supra* note 10 at 24-25.

<sup>304</sup> *See, e.g.*, Confederation of British Industry, *Memorandum on Enterprise and Regulatory Reform Bill to the Public Bill Committee* (ERR 01), (2012) ¶ 38.

<sup>305</sup> Enterprise Act, § 188B(1).

<sup>306</sup> *Id.* § 188B(2).

reasonable steps to ensure the nature of the arrangements would be disclosed to professional legal advisers for the purpose of obtaining advice before their making or implementation.<sup>307</sup>

### Potential penalties

The maximum penalty will remain five years' imprisonment and/or a fine (which is not capped) for a conviction on indictment and six months' imprisonment and/or a fine not exceeding the statutory minimum for a summary conviction.<sup>308</sup>

### Effect of Removal of the 'Dishonesty' Element

As explained above, the new regime removes the dishonesty element and does not replace it with another positive element, but with exceptions and defences. Commentators have widely speculated that the prior offence's requirement that conduct must be carried out "dishonestly" was one of the key reasons why there have been so few successful prosecutions under the prior cartel offence, making it "considerably harder to bring cases than originally anticipated."<sup>309</sup>

In particular, the OFT as prosecutor struggled with the fact that overt deception is often not necessary to achieve anticompetitive aims and that the need for the prosecutor to prove the dishonesty element allowed the defendant to choose from many arguments to seek to cast doubt on the charge (*e.g.*, that the defendant was acting under orders, had other meritorious intentions, or received no personal benefit).<sup>310</sup> By contrast, under the new regime there are three specific defences afforded to a defendant (outlined above), and if he or she cannot prove one of these defences, there will be no latitude to rely on other arguments.

The dishonesty element was included in the original cartel offence primarily to signal the seriousness of the offence and to remove defendants' ability to argue that their conduct was not reprehensible and/or that it was justified under the civil standard.<sup>311</sup> In practice, removal of the dishonesty element means that there are a number of arrangements that would be exempt or justifiable under the civil regime, but will technically be criminalised under the criminal cartel offence. Among such arrangements are crisis cartels, cooperation agreements between horizontal competitors (such as commercialisation and standardisation agreements that include a price-fixing element or that limit output), and research and development agreements that restrict exploitation of the results, allocate territories/customers, or limit the production/supply of competing products.

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<sup>307</sup> *Id.* § 188B(3).

<sup>308</sup> *Id.* § 190(1).

<sup>309</sup> Nikpay, *supra* note 10 at 22.

<sup>310</sup> *Id.* at 21.

<sup>311</sup> SIR ANTHONY HAMMOND KCB QC AND ROY PENSROSE OBE QPM, REPORT PREPARED FOR THE OFT, PROPOSED CRIMINALISATION OF CARTELS IN THE UK (November 2001), [http://www.of.gov.uk/shared\\_of/reports/comp\\_policy/of365.pdf](http://www.of.gov.uk/shared_of/reports/comp_policy/of365.pdf). Note also the explanatory notes to the un-amended Enterprise Act 2002 provide that the "civil regime applies to a much wider range of anti-competitive activities than are targeted by the criminal offence."



The fact that such arrangements may be caught by the criminal offence has been recognised by the government department responsible for the legislation (Department for Business Innovation and Skills (BIS)), as has the fact that businesses may inadvertently fail to publish “relevant information” or take steps necessary to establish one of the defences.<sup>312</sup> BIS suggested that “undue prosecutions” arising from such inadvertent failures could be avoided by clear prosecutorial guidance, but such clarity did not appear in the draft prosecutorial guidance issued by the CMA in late 2013.<sup>313</sup>

Notwithstanding the potentially broad scope of the offence and the limited guidance available, it does seem clear that the intention of BIS and the CMA is that the offence will, in practice, be deployed against those who have engaged in serious cartel conduct. The CMA’s Draft Prosecutorial Guidance indicates that the objective is to criminalise and deter “hardcore cartels”,<sup>314</sup> those cartels that have reached agreements between competitors to fix prices, share markets, rig bids, or limit output at the expense of the interests of customers and without any countervailing customer benefits.<sup>315</sup> The CMA is likely to look, as the OFT has previously, to the U.S.’ much more established regime for inspiration and guidance, including as part of ongoing international cooperation on enforcement.

### **Will the Cartel Offence Continue To Be a ‘Lame Duck’?**

When it was introduced in 2003, it was anticipated that the cartel offence would provide both US-style prosecutorial muscle and enhance civil leniency programmes, encouraging whistleblowing in relation to unlawful cartel activity. But 10 years later, debate continues over its effectiveness. Between 2003 and 2012, only two criminal cartel prosecutions (one unsuccessful) were brought in the UK, compared to 345 in the U.S. and 50 in neighbouring Ireland.

A striking feature of the new regime is that while the offence itself significantly widens the scope of criminalised conduct, the available defences (particularly the legal advice defence) will be extremely easy to access if a defendant is familiar with the regime. The legal advice defence is extremely broad, in that it requires only a “genuine attempt” and that “reasonable steps” are taken to seek legal advice and, but does not require that advice actually be received, makes no specification about the content of the advice, nor does it require that parties follow the recommendations of their legal advisers. This defence could, in time, prove a significant loophole for those who are well advised.

With removal of ‘dishonesty’ requirement, clear prosecution guidance and judicial interpretation will be vital. The CMA released a consultation in late 2013 on its draft prosecution guidance, which left many questions unanswered. At the date of writing, final guidance is yet to be issued. Businesses and practitioners are also likely to have a substantial wait for any judicial guidance on the scope and interpretation of the new offence, as it will only apply to conduct from 1 April 2014.

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<sup>312</sup> BIS, A Note on the Application of the Amended Cartel Offence to Certain Types of Restrictive Agreements (June 20, 2012).

<sup>313</sup> CMA, CARTEL OFFENCE PROSECUTION GUIDANCE: CONSULTATION DOCUMENT (2013), *available at* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243709/5-cartel-offence-prosecution-guidance-consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243709/5-cartel-offence-prosecution-guidance-consultation.pdf).

<sup>314</sup> *Id.* ¶ 2.1. Note: this term does not appear in the enabling legislation.

<sup>315</sup> *Id.* ¶ 2.2, Draft Guidance.

In the meantime, more prosecutions can be expected under the ‘old’ rules. In January 2014, the OFT announced its first new criminal prosecution since its failed British Airways case<sup>316</sup> and the OFT has announced it is pursuing three further cases under the existing rules.<sup>317</sup>

## Recent Updates in the LIBOR/EURIBOR Cases

by Meghan Iorianni<sup>318</sup>



From as early as 2005, traders at some of the world’s largest financial institutions have engaged in practices that resulted in the manipulation of key benchmark interest rates that serve as the reference rates for numerous financial instruments worldwide. Individuals from these institutions often communicated with competitors to falsify these rates in order to increase personal and institutional profit. This article provides background into the LIBOR and EURIBOR interest rates and their manipulation, reviews the cases and settlements to date, and discusses the competition enforcement measures employed by national and regional antitrust authorities.

### The LIBOR and EURIBOR

The London InterBank Offered Rate (LIBOR) is a benchmark interest rate used in financial markets throughout the world.<sup>319</sup> Swaps, options, over-the-counter derivative contracts and other financial instruments traded on exchanges worldwide are settled based on the LIBOR.<sup>320</sup> In 2009, the Bank of International Settlements estimated the notional amount of over-the-counter derivative contracts to be valued at roughly \$450 trillion.<sup>321</sup> The LIBOR is also used as a reference rate for various consumer-lending products, including student loans, credit cards, and mortgages.<sup>322</sup>

<sup>316</sup> Press Release, Office of Fair Trading, Man Faces Charge in Criminal Cartel Investigation (Jan. 27, 2014), *available at* <http://www.of.gov.uk/news-and-updates/press/2014/04-14>.

<sup>317</sup> Lewis Crofts, UK Authority Is Pursuing Four Criminal Cartel Cases, Chairman Says, MLEX MARKET INTELLIGENCE, Feb. 21, 2014.

<sup>318</sup> Meghan Iorianni is a Legal Consultant in the Office of International Affairs at the Federal Trade Commission. The views expressed here are her own and do not purport to represent the views of the Commission or any of its Commissioners.

<sup>319</sup> Deferred Prosecution Agreement, Attachment A: Statement of Facts, *United States v. Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.*, Oct. 29, 2013, *available at* [http://www.justice.gov/atr/public/press\\_releases/2013/index.html](http://www.justice.gov/atr/public/press_releases/2013/index.html) (Rabobank Deferred Prosecution Agreement Statement of Facts).

<sup>320</sup> *Id.*

<sup>321</sup> Barclays Bank PLC Non-Prosecution Agreement, Appendix A: Statement of Facts, June 26, 2012, *available at* <http://www.justice.gov/iso/opa/resources/9312012710173426365941.pdf> (Barclay’s Non-Prosecution Agreement Statement of Facts).

<sup>322</sup> *Id.*

The LIBOR rates are calculated for ten different currencies, including the U.S. dollar, the British pound sterling, and the Japanese yen, using submissions from a panel of banks for the respective currency (“Contributing Panel”) selected by the British Bankers Association (BBA). Every day before 11:10 a.m. London time, each member bank sitting on the panel submits the rate at which the bank could borrow funds from another bank.<sup>323</sup> The BBA requires that each Contributor Panel bank submit its rate without reference to the rates of other contributing banks and without regard to the impact on the bank’s own trading positions. Thomson Reuters, acting as an agent for the BBA, calculates the LIBOR by ranking the submitted rates, discarding the highest and lowest quartiles, and averaging the middle two quartiles.<sup>324</sup> Thomson Reuters then publishes the LIBOR by 11:30 a.m. along with the name and submitted rates for each Contributor Panel bank. This information is disseminated worldwide.

The Euro InterBank Offered Rate (EURIBOR), like the LIBOR, is a benchmark interest rate used in financial markets worldwide. It is managed by the European Banking Federation (EBF), and it is “the rate at which Euro interbank term deposits within the Euro zone are expected to be offered by one prime bank to another at 11:00 a.m. Brussels time.”<sup>325</sup> Thomson Reuters, serving as an agent of the EBF, calculates the EURIBOR by ranking each EURIBOR Contributing Panel bank’s submission, discarding the highest and lowest 15% of the submissions, and averaging the remaining rates. Thomson Reuters then publishes the EURIBOR rates daily along with the names of each Contributing Panel bank and their respective submissions.

The significance of the LIBOR and EURIBOR stems from their use as reference rates for financial instruments and products worldwide. The daily adjustment of these two rates directly affects consumers and financial markets and the profits and losses appreciated by each. The fallacy in the calculation of these rates is that those in charge of the submissions are also among the ones most highly affected. These rates not only directly affect the trading positions of each bank’s traders but they also reflect the financial strength and reputation of the individual banking institutions. The quoted rate at which an institution can borrow funds from another demonstrates the reliability and ability for the institution to repay the borrowed funds. As these rates are published along with the names of the submitting banks, these rates readily became an indicator to consumers and other financial institutions of each bank’s market strength.

This twofold incentive, to bolster the trading positions of the individual traders and to preserve the reputation of the banking institutions, led to the widespread manipulation of benchmark interest rates by financial institutions worldwide and the resulting breakdown of the perceived integrity in the global financial market.

### **Investigations of Financial Institutions: United States and Europe**

The first prominent indications that the benchmark interest rates had been manipulated came during the period from late 2007 to 2008 when Barclays PLC employees alerted the British Bankers’ Association, the United Kingdom

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<sup>323</sup> Rabobank Deferred Prosecution Agreement Statement of Facts, *supra* note 2. The British Bankers Association defines LIBOR as: “The rate at which an individual Contributor Panel bank could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size, just prior to 11:00 [a.m.] London time.”

<sup>324</sup> Rabobank Deferred Prosecution Agreement Statement of Facts, *supra* note 2.

<sup>325</sup> *Id.*

Financial Services Authority (FSA)<sup>326</sup>, the Bank of England, and the Federal Reserve Bank of New York that the LIBOR rates submitted by Barclays and fellow banks did not accurately reflect the market.<sup>327</sup> Since this time, more than fourteen authorities over three continents have commenced investigations into the coordinated manipulation of the benchmark interest rates among financial institutions.

The investigations led to the discovery of three major methods by which traders from financial institutions attempted to manipulate the benchmark interest rates. First, investigations showed that individual traders placed pressure on those within their firms responsible for setting the LIBOR to make submissions beneficial to the traders' trading positions.<sup>328</sup> The second method involved colluding with other banks. Traders from the Contributing Panel banks coordinated submissions and aligned their positions for shared benefit.<sup>329</sup> The third major method employed was the bribing of interdealer brokers. Interdealer brokers align buyers and sellers of securities, and they engage in significant communication with both parties. Traders bribed these interdealer brokers to persuade their contacts at other financial institutions to make favorable submissions.<sup>330</sup> Investigations by prominent authorities in both the United States and Europe have found that traders have been employing these methods from as early as 2005.<sup>331</sup>

### Cases To Date: United States and Europe

The United States and European antitrust authorities have benefited from continued cross-border cooperation during their respective investigations. This coordinated effort has led to fines ranging from a fraction of a million dollars to over a billion dollars against 10 financial institutions. These are only the first few waves of investigations underway worldwide.

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<sup>326</sup> In 2013, the FSA was replaced by two new regulatory bodies, the Prudential Regulation Authority (the PRA) and the Financial Conduct Authority (the FCA). The FCA is currently responsible for regulating conduct in financial markets. In discussing the actions that take place after March 2013, I will switch to designating the FCA as the regulatory authority in the article as it was the operating regulatory body in the United Kingdom after March 2013. See *Regulatory Reform – Background*, U.K. FINANCIAL SERVICES AUTHORITY, available at [http://www.fsa.gov.uk/about/what/reg\\_reform/background](http://www.fsa.gov.uk/about/what/reg_reform/background) (last updated Feb. 24, 2012).

<sup>327</sup> Press Release, U.S. Department of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty (June 27, 2012), <http://www.justice.gov/opa/pr/2012/June/12-crm-815.html>.

<sup>328</sup> Liam Vaughan & Gavin Finch, *Libor Lies Revealed in Rigging of \$300 Trillion Benchmark*, BLOOMBERG (Jan. 28, 2013), <http://www.bloomberg.com/news/2013-01-28/libor-lies-revealed-in-rigging-of-300-trillion-benchmark.html>; Rabobank Deferred Prosecution Agreement Statement of Facts, *supra* note 2.; Barclay's Non-Prosecution Agreement Statement of Facts, *supra* note 4.; Deferred Prosecution Agreement, Attachment A: Statement of Facts, *United States v. The Royal Bank of Scotland*, Feb. 5, 2013, available at <http://www.justice.gov/atr/cases/f292500/292555.pdf> (RBS Deferred Prosecution Agreement Statement of Facts).

<sup>329</sup> Vaughan & Finch, *Libor Lies Revealed*, *supra* note 11.

<sup>330</sup> *Id.*

<sup>331</sup> Press Release, U.S. Department of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty (June 27, 2012), <http://www.justice.gov/opa/pr/2012/June/12-crm-815.html>.

## United States

The prominent authorities in the United States include the United States Department of Justice (USDOJ) and the United States Commodity Futures Trading Commission (CFTC). To date the USDOJ has achieved agreements with four multi-national banks and has charged eight individuals with conspiracy, wire fraud, and antitrust violations in the context of the benchmark rate manipulations.

### Barclays

Barclays Bank PLC was the first financial institution to reach a settlement with the USDOJ. The June 26, 2012 settlement required the bank to pay a \$160 million penalty for its manipulation of its LIBOR and EURIBOR submissions.<sup>332</sup> This relatively low penalty takes into account Barclays' extensive and continued cooperation with United States authorities and the fact that it was the first institution to come forward with valuable information relating to the widespread misconduct.<sup>333</sup> As required by the United States CFTC, Barclays has imposed numerous compliance measures and will implement internal controls to ensure the integrity of its LIBOR and EURIBOR submissions.<sup>334</sup> The CFTC brought false reporting and attempted manipulation charges against Barclays. Barclays agreed to settle, and the CFTC imposed a \$200 million penalty in addition to the required compliance measures.<sup>335</sup>

### UBS

UBS Securities Japan Co. Ltd. (UBS Securities Japan) entered into a settlement agreement with the USDOJ on December 19, 2012 and agreed to pay a \$100 million penalty for its manipulation of the yen LIBOR and for committing felony wire fraud.<sup>336</sup> UBS Securities Japan is a wholly-owned subsidiary of UBS AG. UBS AG has entered into a non-prosecution agreement with the United States government and has agreed to pay a \$400 million penalty for its misconduct in the benchmark interest rate setting scandal. This non-prosecution agreement takes into account UBS's continued cooperation in investigating LIBOR misconduct and the bank's agreement to a set of internal controls to prevent future corruption. The CFTC has also levied a \$700 million fine against UBS for its conduct.<sup>337</sup>

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<sup>332</sup> Barclay's Non-Prosecution Agreement Statement of Facts, *supra* note 4.

<sup>333</sup> Press Release, U.S. Department of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty (June 27, 2012), <http://www.justice.gov/opa/pr/2012/June/12-crm-815.html>.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> Press Release, U.S. Department of Justice, UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-Running Manipulation of Libor Benchmark Interest Rates (Dec. 19, 2012), [http://www.justice.gov/atr/public/press\\_releases/2012/290478.htm](http://www.justice.gov/atr/public/press_releases/2012/290478.htm).

<sup>337</sup> *Id.*

## RBS

RBS Securities Japan Limited, a wholly owned subsidiary of The Royal Bank of Scotland PLC (RBS), entered into a plea agreement with the USDOJ on February 5, 2013.<sup>338</sup> RBS Securities Japan admitted in the agreement to its participation in manipulating the yen LIBOR and pled guilty to felony wire fraud.<sup>339</sup> On January 6, 2014, RBS Securities Japan was sentenced for its manipulation of the yen LIBOR and agreed to pay a \$50 million penalty.<sup>340</sup> In addition, RBS parent company entered into a deferred prosecution agreement and agreed to pay a \$100 million penalty for its misconduct in manipulating benchmark interest rates, including both the yen LIBOR and the Swiss franc LIBOR. The deferred prosecution agreement takes into consideration RBS's continued cooperation with the United States authorities and the bank's implementation of internal controls to prevent future corruption.<sup>341</sup> The CFTC levied an additional \$325 million fine against RBS.<sup>342</sup>

## Rabobank

Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank) entered into a deferred prosecution agreement with the USDOJ on October 29, 2013 in which it agreed to pay a \$325 million penalty for its manipulation of the EURIBOR and LIBOR rates for the U.S. dollar, the yen, and the pound sterling.<sup>343</sup> The monetary penalty takes into consideration that Rabobank has no history of similar misconduct and Rabobank's expanded compliance programs. The CFTC levied an additional \$475 million fine against Rabobank for the same conduct.<sup>344</sup>

## Individual Charges

The USDOJ has brought charges against eight (8) individuals to date in connection with the manipulation of the LIBOR and EURIBOR.

In December 2012, former senior UBS traders Tom Alexander William Hayes of England and Roger Darin of Switzerland were charged with conspiracy.<sup>345</sup> In addition, Hayes was charged with wire fraud and a price-fixing

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<sup>338</sup> Press Release, U.S. Department of Justice, RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates (Feb. 6, 2013), [http://www.justice.gov/atr/public/press\\_releases/2013/292421.htm](http://www.justice.gov/atr/public/press_releases/2013/292421.htm).

<sup>339</sup> *Id.*

<sup>340</sup> Press Release, U.S. Department of Justice, RBS Securities Japan Ltd Sentenced for Manipulation of Yen Libor (Jan. 6, 2014), [http://www.justice.gov/atr/public/press\\_releases/2014/302785.htm](http://www.justice.gov/atr/public/press_releases/2014/302785.htm).

<sup>341</sup> Press Release, U.S. Department of Justice, RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates (Feb. 6, 2013), *available at* [http://www.justice.gov/atr/public/press\\_releases/2013/292421.htm](http://www.justice.gov/atr/public/press_releases/2013/292421.htm).

<sup>342</sup> *Id.*

<sup>343</sup> Press Release, U.S. Department of Justice, Rabobank Admits Wrongdoing in Libor Investigation, Agrees to Pay \$325 Million Criminal Penalty (Oct. 29, 2013), *available at* [http://www.justice.gov/atr/public/press\\_releases/2013/301368.htm](http://www.justice.gov/atr/public/press_releases/2013/301368.htm).

<sup>344</sup> *Id.*

<sup>345</sup> Press Release, U.S. Department of Justice, UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-Running Manipulation of Libor Benchmark Interest Rates (Dec. 19, 2012), <http://www.justice.gov/>

violation for his conduct in colluding with another financial institution to manipulate the LIBOR rates.<sup>346</sup> Hayes, if convicted, could face a 30-year prison sentence. On December 17, 2013, Hayes pleaded not guilty to conspiring to manipulate the LIBOR.<sup>347</sup> Hayes is also facing conspiracy charges brought by UK authorities for his conduct in manipulating the LIBOR.<sup>348</sup>

In September 2013, the USDOJ charged former Intercapital PLC (ICAP)<sup>349</sup> derivatives brokers Darrell Read and Daniel Wilkinson and former ICAP cash broker Colin Goodman with conspiracy to commit wire fraud and two counts of wire fraud.<sup>350</sup> The CFTC has fined ICAP \$65 million for “disseminating false and misleading information” in relation to the yen LIBOR.<sup>351</sup>

In January 2014, the USDOJ charged former Rabobank Japanese yen derivatives traders Paul Thompson and Tetsuya Motomura and the trader responsible for setting Rabobank’s yen LIBOR, Paul Robson, with conspiracy to commit wire fraud and bank fraud and substantive counts of wire fraud.<sup>352</sup>

## Europe

The authorities in Europe that have taken action to date include the European Commission, the United Kingdom Financial Services Authority<sup>353</sup>, the Swiss Financial Market Supervisory Authority, and the Openbaar Ministerie (Netherlands). These authorities have benefited from continued cross-border cooperation in their investigations.

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atr/public/press\_releases/2012/290478.htm; Complaint, *United States v. Tom Alexander William Hayes and Roger Darin*, Dec. 12, 2013, available at <http://www.justice.gov/ag/Hayes-Tom-and-Darin-Roger-Complaint.pdf>.

<sup>346</sup> *Id.*

<sup>347</sup> Suzi Ring, *Ex-UBS Trader Hayes Pleads Not Guilty Over Libor Rigging*, BLOOMBERG (Dec. 17, 2013), available at <http://www.bloomberg.com/news/2013-12-17/ex-ubs-trader-hayes-pleads-not-guilty-in-first-libor-prosecution.html>.

<sup>348</sup> Mark Thompson & James O’Toole, *Ex-trader charged with Libor rigging in U.K.*, CNN MONEY (June 18, 2013, 6:38 AM), available at <http://money.cnn.com/2013/06/18/news/libor-trader/>.

<sup>349</sup> Intercapital PLC (ICAP) is a “leading markets operator and provider of post trade risk mitigation and information services.” The company offers brokerage services for asset classes, including rates, FX, commodities, emerging markets, credit, and equities. See, ICAP, <http://www.icap.com/what-we-do.aspx>.

<sup>350</sup> Press Release, U.S. Department of Justice, *ICAP Brokers Face Felony Charges for Alleged Long-Running Manipulation of Libor Interest Rates* (Sept. 25, 2013), available at [http://www.justice.gov/atr/public/press\\_releases/2013/301029.htm](http://www.justice.gov/atr/public/press_releases/2013/301029.htm); Kirstin Ridley, Clare Hutchison & Aruna Viswanatha, *ICAP Fined \$87 Million Over Libor, Three Former Staff Charged*, REUTERS (Sept. 25, 2013), available at <http://uk.reuters.com/article/2013/09/25/us-icap-libor-idUSBRE98O0BX20130925>.

<sup>351</sup> Michael Ovaska & Margot Patrick, *The Libor Settlements*, THE WALL STREET JOURNAL, <http://online.wsj.com/news/articles/SB10001424127887324616604578302321485831886> (last visited Feb. 1, 2014).

<sup>352</sup> Complaint, *United States v. Paul Robson, Paul Thompson, and Tetsuya Motomura*, Jan. 13, 2014, available at <http://www.justice.gov/atr/cases/f303100/303136.pdf>.

<sup>353</sup> Now the U.K. Financial Conduct Authority.

## European Commission

On December 4, 2013, the European Commission (EC) fined eight “international financial institutions a total of €1,712,468,000 for participating in illegal cartels in markets for financial derivatives covering the European Economic Area (EEA).”<sup>354</sup> The EC categorized the institutions into two groups. The first group included those institutions that “participated in cartels relating to interest rate derivatives denominated in the euro currency,”<sup>355</sup> the Euro interest rate derivatives (EIRD) cartels. The second group included those institutions that “participated in one or more bilateral cartels relating to interest rate derivatives denominated in Japanese yen,”<sup>356</sup> the Yen interest rate derivatives (YIRD) cartels.

Investigations opened against these institutions as early as October 2011. The EC founds that each institution involved in the EIRD or YIRD cartels was in violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the EEA Agreement, which prohibits collusion among competitors.<sup>357</sup>

### EIRD

The EIRD cartel consisted of Deutsche Bank, Société Générale, Barclays, and RBS.<sup>358</sup> According to the Commission, between September 2005 and May 2008, traders from each of these institutions coordinated submissions for the EURIBOR and discussed their trading and pricing strategies.<sup>359</sup> Proceedings against these institutions began in March 2013. The EC did not fine Barclays as the Commission granted the institution “immunity under the EC’s 2006 Leniency Notice for revealing the existence of the cartel.”<sup>360</sup> Barclays avoided a fine of about €690 million for its participation in the cartel.<sup>361</sup> The remaining three participants received reduced fines under the EC’s Leniency Notice for settling and for their effective cooperation with the Commission’s investigations.

The Commission opened proceedings against Crédit Agricole, HSBC, and J.P. Morgan and is continuing to investigate these institutions for their participation in the same conduct.<sup>362</sup>

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<sup>354</sup> Press Release, European Commission, Antitrust: Commission Fines Banks € 1.71 Billion for Participating in Cartels in the Interest Rate Derivatives Industry (Dec. 4, 2013), *available at* [http://europa.eu/rapid/press-release\\_IP-13-1208\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1208_en.htm).

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* European Commission, Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (2006), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF> (European Commission 2006 Leniency Notice).

<sup>361</sup> Press Release, European Commission, Antitrust: Commission Fines Banks € 1.71 Billion for Participating in Cartels in the Interest Rate Derivatives Industry (Dec. 4, 2013), *available at* [http://europa.eu/rapid/press-release\\_IP-13-1208\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1208_en.htm).

<sup>362</sup> *Id.*



## YIRD

The institutions that participated in YIRD cartels included UBS, Deutsche Bank, RBS, Citigroup, JPMorgan, and the broker RP Martin. The Commission uncovered seven (7) total infringements of Article 101 that took place between 2007 and 2010.<sup>363</sup> Traders from the participating institutions discussed their institutions' yen LIBOR submissions, potential future yen LIBOR submissions, and sensitive information relating to trading positions.<sup>364</sup> One of the infringements also involved discussions relating to the Euroyen Tokyo InterBank Offered Rate (TIBOR).<sup>365</sup>

Proceedings against the institutions began in February 2013, and the Commission granted UBS full immunity under its 2006 Leniency Notice for divulging the existence of the infringements to the Commission.<sup>366</sup> UBS avoided a fine of about €2.5 billion for its participation in five of the seven infringements of Article 101.<sup>367</sup> The Commission granted Citigroup full immunity for one infringement, and the Commission reduced the fines against Citigroup, Deutsche Bank, RBS, and RP Martin for settling and for their cooperation with the Commission's investigations.

The Commission opened proceedings against ICAP and is continuing to investigate the cash broker for its role in the YIRD cartels.<sup>368</sup>

### Total Fines

The total fines levied by the EC against financial institutions for their participation in the EIRD and the YIRD cartels are as follows:

Barclays:	€ 0	\$0
Deutsche Bank:	€ 725,360,000	\$983.7 million
Société Générale:	€ 445,884,000	\$604.7 million
RBS:	€ 391,060,000	\$530.6 million
UBS:	€ 0	\$0
J.P. Morgan:	€ 79,897,000	\$108.4 million
Citigroup:	€ 70,020,000	\$95.0 million
R.P. Martin:	€ 247,000	\$0.2 million

### United Kingdom

The United Kingdom (UK) Financial Conduct Authority is currently responsible for the regulation of conduct in financial markets. The UK Financial Services Authority, which operated until April 2013, was the predecessor to the

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

U.K. Financial Conduct Authority. Since June 2012, the authorities have imposed fines on five (5) financial institutions for their participation in the manipulation of the benchmark interest rates.

### **Barclays**

In June 2012, the UK Financial Services Authority imposed a penalty of £59,500,000 (\$93.6 million) against Barclays Bank PLC for its participation in the manipulation of the EURIBOR and the LIBOR.<sup>369</sup>

### **UBS**

In December 2012, the UK Financial Services Authority imposed a penalty of £160,000,000 (\$259 million) against UBS AG for its participation in the manipulation of the EURIBOR and the LIBOR for the pound sterling, the yen, the Swiss franc, and the U.S. dollar.<sup>370</sup>

### **RBS**

In February 2013, the UK Financial Services Authority imposed a penalty of £85,700,000 (\$137 million) against RBS for its participation in the manipulation of the LIBOR.<sup>371</sup>

### **ICAP**

In September 2013, the UK Financial Conduct Authority imposed a penalty of £14,000,000 (\$22.4 million) against the broker ICAP for its participation in the manipulation of the LIBOR.<sup>372</sup> This is the first broker to be fined in the context of the LIBOR manipulation scandal.

### **Rabobank**

In October 2013, the UK Financial Conduct Authority imposed a penalty of £105,000,000 (\$170 million) against Rabobank for its participation in the manipulation of the LIBOR.

### **Individuals Charged**

In June 2013, UK Serious Fraud Office charged former UBS trader Tom Hayes with eight (8) counts of conspiracy for his participation in the manipulation of the LIBOR.<sup>373</sup> The UK Serious Fraud Office also charged two former

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<sup>369</sup> Final Notice, U.K. Financial Services Authority to Barclays Bank PLC, June 12, 2012, *available at* <http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf>.

<sup>370</sup> Final Notice, U.K. Financial Services Authority to UBS AG, Dec. 19, 2012, *available at* <http://www.fsa.gov.uk/static/pubs/final/ubs.pdf>.

<sup>371</sup> Press Release, U.K. Financial Services Authority, RBS Fined £87.5 million for Significant Failings in Relation to LIBOR (Feb. 6, 2013), *available at* <http://www.fsa.gov.uk/library/communication/pr/2013/011.shtml>.

<sup>372</sup> Mark Scott & Julia Werdigier, *U.S. and British Officials Fine ICAP in Libor Case*, THE NEW YORK TIMES (Sept. 25, 2013, 9:13 AM), *available at* [http://dealbook.nytimes.com/2013/09/25/icap-to-pay-87-million-fine-in-libor-fixing-case/?\\_php=true&\\_type=blogs&\\_php=true&\\_type=blogs&\\_php=true&\\_type=blogs&\\_hp=true&\\_type=blogs&\\_r=4](http://dealbook.nytimes.com/2013/09/25/icap-to-pay-87-million-fine-in-libor-fixing-case/?_php=true&_type=blogs&_php=true&_type=blogs&_php=true&_type=blogs&_php=true&_type=blogs&_hp=true&_type=blogs&_r=4).

<sup>373</sup> Mark Thompson & James O'Toole, *Ex-trader charged with Libor rigging in U.K.*, CNN MONEY (June 18, 2013, 6:38 AM), <http://money.cnn.com/2013/06/18/news/libor-trader/>.

R.P. Martin brokers, Terry Farr and James Gilmour, for conspiring with Hayes.<sup>374</sup> All three pleaded not guilty to the charges on December 17, 2013.<sup>375</sup>

On February 3, 2014, the UK Financial Conduct Authority sent warning notices to “two people allegedly involved in LIBOR rate fixing.”<sup>376</sup>

### Switzerland

The Swiss Financial Market Supervisory Authority concluded its proceedings against UBS AG in December 2012 for the financial institution’s false submissions of benchmark interest rates, including the LIBOR.<sup>377</sup> The Swiss authority “ordered UBS AG to disgorge CHF 59 million (\$64 million) in profits to the Swiss Confederation” and to implement measures to prevent future manipulation of the rates.<sup>378</sup>

### The Netherlands

In October 2013, Rabobank paid a € 70 million (\$96 million) penalty to the Openbaar Ministerie, the Dutch Public Prosecutor’s Office, to settle investigations into the bank’s LIBOR and EURIBOR submissions.<sup>379</sup> Further, the financial institution has agreed to implement measures to protect against future corruption.

### Projected Investigations

The cases and settlements to date have focused predominantly on the manipulation of the EURIBOR and the U.S. dollar, the pound sterling, and the yen LIBOR. While these are significant benchmark interest rates in the global financial market, there are numerous other rates on which financial instruments depend. The USDOJ has continued to emphasize that its probe into cornerstone interest rates are ongoing and investigations into corruption by financial institutions are of high priority.<sup>380</sup>

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<sup>374</sup> Suzi Ring, Ex-UBS Trader Hayes Pleads Not Guilty Over Libor Rigging, BLOOMBERG (Dec. 17, 2013), *available at* <http://www.bloomberg.com/news/2013-12-17/ex-ubs-trader-hayes-pleads-not-guilty-in-first-libor-prosecution.html>.

<sup>375</sup> *Id.*

<sup>376</sup> *Libor Warning from Regulator for Two Bankers*, BBC NEWS (Feb. 3, 2014), *available at* <http://www.bbc.co.uk/news/business-26014897>.

<sup>377</sup> Press Release, Swiss Financial Market Supervisory Authority FINMA, LIBOR: FINMA Concludes Proceedings Against UBS and Orders Disgorgement of Profits (Dec. 19, 2012), *available at* <http://www.finma.ch/e/aktuell/Documents/mm-ubs-libor-20121219-e.pdf>.

<sup>378</sup> *Id.*

<sup>379</sup> Press Release, Openbaar Ministerie, Rabobank Pays Dutch Public Prosecutor € 70 million to Settle LIBOR- Investigation (Oct. 29, 2013), *available at* <http://www.om.nl/@161679/rabobank-pays-dutch/>.

<sup>380</sup> Press Release, U.S. Department of Justice, Rabobank Admits Wrongdoing in Libor Investigation, Agrees to Pay \$325 Million Criminal Penalty (Oct. 29, 2013), *available at* [http://www.justice.gov/atr/public/press\\_releases/2013/301368.htm](http://www.justice.gov/atr/public/press_releases/2013/301368.htm); Press Release, U.S. Department of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty (June 27, 2012), *available at* <http://www.justice.gov/opa/pr/2012/June/12-crm-815.html>; Press Release, U.S. Department of Justice, UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-

The EC has issued a press release indicating that it has initiated proceedings against Cr dit Agricole, HSBC, J.P. Morgan, and ICP for their respective participation in influencing the LIBOR and EURIBOR.<sup>381</sup> In addition, the EC has been investigating UBS, RBS, and Credit Suisse for suspected manipulation of interest rates associated with the Swiss franc.<sup>382</sup> Therefore, it appears the investigations into the LIBOR manipulations will continue against both financial institutions and individual traders.

### Foreign Exchange Market

The second major sweep of investigations into the rigging of global benchmark rates to follow the LIBOR/EURIBOR scandal has already commenced on an international scale as a result of probes into benchmark rates in the foreign exchange market. UK regulators launched investigations in June 2013.<sup>383</sup> By October 2013, United States, Swiss, European Union, and Hong Kong competition authorities had opened investigations into foreign exchange (Forex) benchmark rates.<sup>384</sup> Banks bound by cooperation agreements have continued to be a leading source of information to investigating authorities.<sup>385</sup> At least fifteen (15) banks have cooperated with U.S., UK, and EU authorities, and some have commenced their own internal investigations.<sup>386</sup> Seven of the world's largest foreign exchange dealers have dismissed or suspended over seventeen (17) of their own traders suspected of being involved in misconduct relating to the Forex rates.<sup>387</sup>

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Running Manipulation of Libor Benchmark Interest Rates (Dec. 19, 2012), *available at* [http://www.justice.gov/atr/public/press\\_releases/2012/290478.htm](http://www.justice.gov/atr/public/press_releases/2012/290478.htm).

<sup>381</sup> Press Release, European Commission, Antitrust: Commission Fines Banks € 1.71 Billion for Participating in Cartels in the Interest Rate Derivatives Industry (Dec. 4, 2013), *available at* [http://europa.eu/rapid/press-release\\_IP-13-1208\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1208_en.htm).

<sup>382</sup> Foo Yun Chee, *UBS, RBS, Credit Suisse in EU Swiss Franc Interest Rate Probe: Source*, REUTERS (Jan. 22, 2014, 1:18 PM), *available at* <http://www.reuters.com/article/2014/01/22/us-eu-banks-swissfranc-idUSBREA0L1PL20140122>.

<sup>383</sup> Emily Cadman, *Timeline of the Growing Currency Probe*, FINANCIAL TIMES, (Jan. 15, 2014, 11:55 AM), *available at* <http://www.ft.com/intl/cms/s/0/f727cd5c-453c-11e3-997c-00144feabdc0.html#axzz2sONYSPwj>.

<sup>384</sup> *Id.*

<sup>385</sup> Tom Schoenberg & David McLaughlin, *Banks Aid U.S. Forex Probe, Fulfilling Libor Accords*, BLOOMBERG (Jan. 23, 2014, 11:28 AM), *available at* <http://www.bloomberg.com/news/2014-01-23/banks-aid-u-s-forex-probe-fullfilling-libor-accords.html>.

<sup>386</sup> Delphine Strauss & Daniel Sch fer, *Forex Claims 'as bad as Libor', Says FCA*, FINANCIAL TIMES (Feb. 4, 2014, 4:57 PM), *available at* <http://www.ft.com/intl/cms/s/0/6d2f697a-8da8-11e3-bbe7-00144feab7de.html#axzz2sONYSPwj>.

<sup>387</sup> Tom Schoenberg & David McLaughlin, *Banks Aid U.S. Forex Probe, Fulfilling Libor Accords*, BLOOMBERG (Jan. 23, 2014, 11:28 AM), *available at* <http://www.bloomberg.com/news/2014-01-23/banks-aid-u-s-forex-probe-fullfilling-libor-accords.html>.

This probe into Forex benchmark rates will most likely result in another wave of fines by competition authorities worldwide. Many banks, including RBS and Barclays, have already set aside millions of dollars in funds for projected legal costs.<sup>388</sup>

### Other Rates to Watch

Other rates under investigation by national authorities include the ISDAfix and the Platts oil benchmark.<sup>389</sup> The “ISDAfix is used to determine the value of interest-rate derivatives.”<sup>390</sup> United States and European authorities are looking into how the Platts oil benchmark is set as there have been allegations of collusion in the biofuels and crude oil markets.<sup>391</sup> European and German national authorities have also opened up investigations into the price setting of precious metals, including gold and silver, by banks.<sup>392</sup>

## Effective Competition Enforcement and Preventative Measures

### Leniency Policies

Prior to the LIBOR and EURIBOR investigations, the USDOJ Antitrust Division and the EC had instituted leniency policies in an effort to encourage the breakup of cartels by offering full or partial penalty reductions to the first participant to disclose the cartel’s existence and provide valuable information.

The Antitrust Division’s Corporate Leniency Policy accords immunity to corporations who report “their illegal antitrust activity at an early stage.”<sup>393</sup> This means that the Antitrust Division will not charge the corporation criminally for the reported activity. The policy requires that the corporation meet certain conditions prior to granting immunity, including that the corporation provides continued and complete cooperation throughout the investigation and that the corporation makes restitution to injured parties.<sup>394</sup> In some cases, the Corporate Leniency Policy can extend to “directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession.”<sup>395</sup>

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<sup>388</sup> Delphine Strauss & Daniel Schäfer, *Forex Claims ‘as bad as Libor’, Says FCA*, FINANCIAL TIMES (Feb. 4, 2014, 4:57 PM), available at <http://www.ft.com/intl/cms/s/0/6d2f697a-8da8-11e3-bbe7-00144feab7de.html#axzz2sONYSWj>.

<sup>389</sup> Tom Schoenberg & David McLaughlin, *Banks Aid U.S. Forex Probe, Fulfilling Libor Accords*, BLOOMBERG (Jan. 23, 2014, 11:28 AM), available at <http://www.bloomberg.com/news/2014-01-23/banks-aid-u-s-forex-probe-fullfilling-libor-accords.html>.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> Eric Onstad, *UPDATE 2- Deutsche Quits Gold Price-Setting as Regulators Investigate Fix*, REUTERS (Jan. 17, 2014, 8:32 AM), <http://www.reuters.com/article/2014/01/17/deutsche-gold-fix-idUSL5N0KR19G20140117>.

<sup>393</sup> U.S. Dep’t Justice, Antitrust Div., Corporate Leniency Policy (Aug. 10, 1993), available at <http://www.justice.gov/atr/public/guidelines/0091.pdf>.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

The EC Leniency Notice provides full and partial reduction of fines for “undertakings which are or have been party to secret cartels affecting” the European community.<sup>396</sup> The EC will grant immunity from any fine if the undertaking is the first to reveal the existence of the cartel and if it submits evidence that enables the Commission to carry out an inspection of the alleged cartel.<sup>397</sup> The Leniency Notice also provides for the reduction of fines if the undertaking provides evidence that offers “significant added value with respect to the evidence already in the Commission's possession.”<sup>398</sup> The degree of reduction of the fine depends on the extent that the evidence strengthens the Commission’s ability to prove the infringement.

These two leniency policies have been established with the hope that they create an incentive for participants in cartels to divulge either the existence of the cartel or additional information relating to the cartel activities. There is debate over the effectiveness of these policies in providing such incentive.

While the EC and competition authorities in many European Union Member States can only fine corporations for their participation in cartels, the United States adds a second level of enforcement by imposing prison sentences on individuals found to have contributed significantly to the fraudulent activity. Prison sanctions have been adopted in the United Kingdom and Ireland, and there are a number of criminal penalties for individuals in other member states.<sup>399</sup>

### **Oversight Measures to Restore Confidence in the Integrity of Benchmark Interest Rates**

Prior to the opening of LIBOR investigations, international financial institutions were operating with very few internal oversight measures to prevent corruption by employees considering the significant impact misconduct could have on the global financial market. The settlement agreements thus far have included provisions requiring such internal measures to be put in place.

Additionally, there was ineffective external oversight of the calculation of the LIBOR and EURIBOR prior to benchmark rate investigations. The British Bankers’ Association was stripped of its administration of the LIBOR in 2012 following investigations.<sup>400</sup> The UK Financial Conduct Authority authorized ICE Benchmark Administration Ltd (IBA) to administer the LIBOR in January 2014, and on February 3, 2014, IBA officially took over the administration of the LIBOR.<sup>401</sup> This shift in administration was in part in furtherance of the effort to restore confidence in the integrity of the LIBOR.

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<sup>396</sup> European Commission 2006 Leniency Notice.

<sup>397</sup> *Id.* para. 8

<sup>398</sup> *Id.* para. 24

<sup>399</sup> Wouter P.J. Wils, *Leniency in Antitrust Enforcement: Theory and Practice*, 30 *WORLD COMPETITION* 25, 55 (2007).

<sup>400</sup> *Libor Warning from Regulator for Two Bankers*, BBC NEWS (Feb. 3, 2014), available at <http://www.bbc.co.uk/news/business-26014897>.

<sup>401</sup> *Id.*

On September 18, 2013, the EC proposed draft legislation in another effort to restore confidence in the integrity of benchmark interest rates.<sup>402</sup> The objective of the provisions in the draft is “ensure the integrity of benchmarks by guaranteeing that they are not subject to conflicts of interest, that they reflect the economic reality they are intended to measure and are used appropriately.”<sup>403</sup>

The restoration of confidence in the integrity of financial institutions and in the benchmark interest rates these institutions help to set will be a continuous battle.

### **Conclusion**

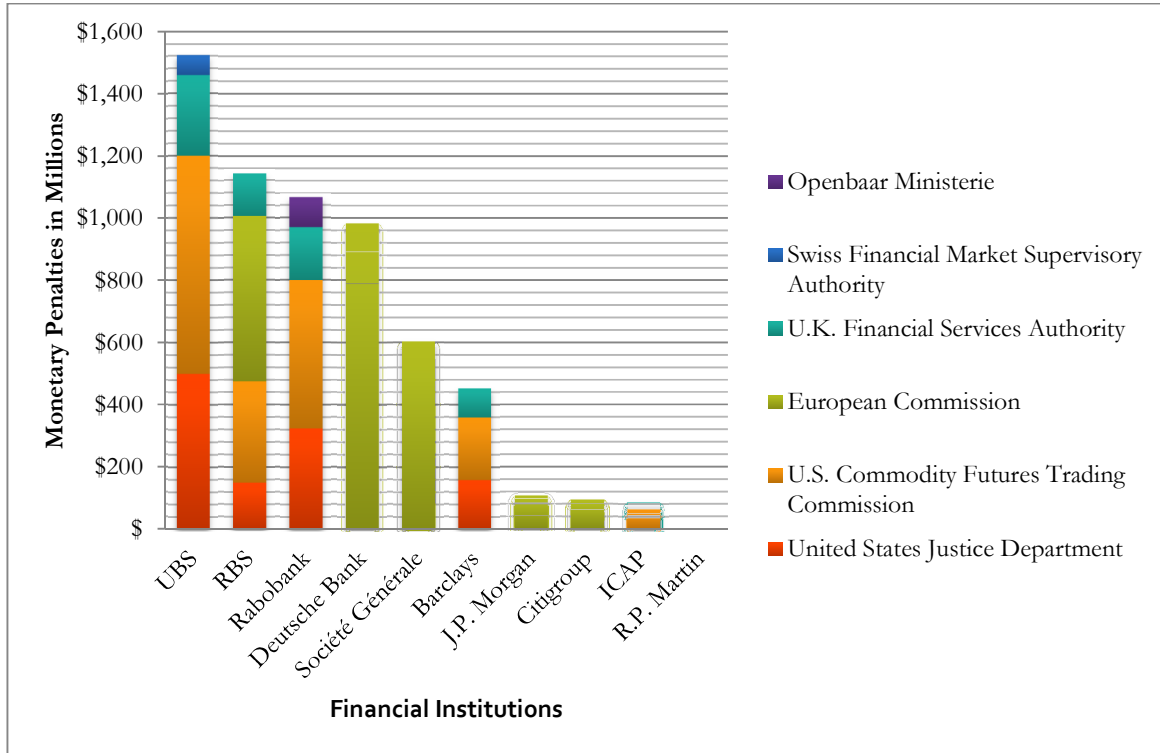
The manipulation of the LIBOR and EURIBOR was the first large-scale corruption to hit global financial markets in the twenty-first century. Unfortunately, investigations in the months and years to follow may show that this is just the first wave of many benchmark interest rates that have been manipulated in financial markets throughout the world. Those institutions that partook in the rigging of the benchmark interest rates will continue to face fines from regional and national competition authorities, and individuals who served as primary players will face monetary fines and prison sentences. In the meantime, financial institutions will be working to restore confidence in the integrity of both their institution and in their employees.

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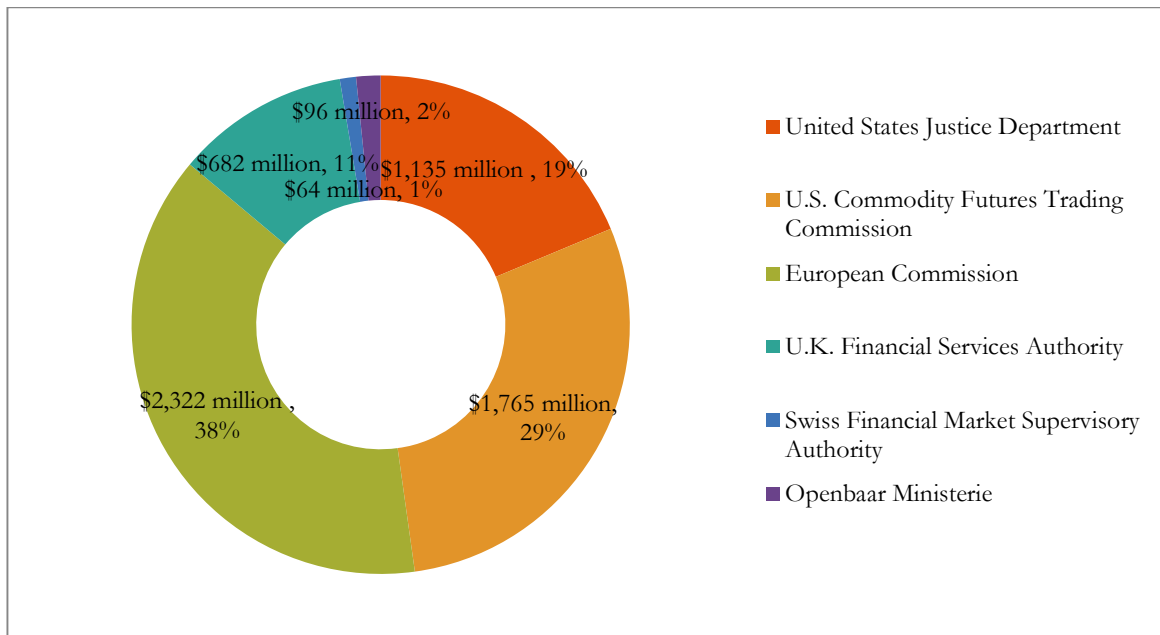
<sup>402</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on Indices Used as Benchmarks in Financial Instruments and Financial Contracts (Sept. 18, 2013) *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0641:FIN:EN:PDF>.

<sup>403</sup> Press Release, European Commission, New Measures to Restore Confidence in Benchmarks Following LIBOR and EURIBOR Scandals (Sept. 18, 2013), *available at* [http://europa.eu/rapid/press-release\\_IP-13-841\\_en.htm](http://europa.eu/rapid/press-release_IP-13-841_en.htm).

**Total Monetary Penalties**



**Percentage of Total Fines Levied by Competition Authorities**



Note: These two charts are based on all settlements entered to date.



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If you are interested in writing an article for a future edition of our newsletter, please contact Jennifer Dixon at [Jennifer.Dixon@usdoj.gov](mailto:Jennifer.Dixon@usdoj.gov), or Jeffrey Martino at [Jeffrey.Martino@usdoj.gov](mailto:Jeffrey.Martino@usdoj.gov) \*

*\*Ms. Dixon and Mr. Martino are members of the Antitrust Section of the American Bar Association’s Cartel and Criminal Practice Committee in their personal capacities and this message does not reflect any position of the Government or the U.S. Department of Justice.*

## Notes

<sup>1</sup> **This is Not Legal Advice:** Nothing contained in this newsletter is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This newsletter is intended for educational and informational purposes only.

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