# RECENT DEVELOPMENTS IN INTERNATIONAL CARTEL ENFORCEMENT

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## Introduction

In February 2003, regulators from the Antitrust Division of the United States Department of Justice ("Antitrust Division"), the European Commission, the Canadian Competition Bureau, and the Japanese Fair Trading Commission conducted coordinated searches of suspected cartel participants in the plastic additives industry. This type of cartel investigation, spanning three continents and encompassing the world's leading economies, foreshadows the future for cartel enforcement. Moreover, as more nations adopt antitrust legislation prohibiting cartel behavior, cartel participants will find the world a very small place indeed. Today, nearly 100 jurisdictions around the world have enacted laws prohibiting cartels. Many of these jurisdictions have signed multilateral cooperation agreements with some or all of the foregoing agencies, and a number have already participated in recent bilateral and multilateral investigations.

In addition to increased international cooperation in the fight against cartels, the spread of leniency programs has created financial incentives for cartel members to betray their fellow conspirators even as regulators increase the level of fines assessed for cartel behavior. As fines increase, more companies are actively seeking immunity or leniency from regulators. In fact, members of international cartels have developed comprehensive strategies designed to tender leniency applications simultaneously in multiple jurisdictions.

## Recent Cartel Enforcement Activity in the United States

Recent cartel enforcement activity at the Antitrust Division of the U.S. Department of Justice has been characterized as much by its international scope as by the significant penalties sought by the Department of Justice. Since 1996, over 90 percent of the cartels prosecuted by the Antitrust Division operated internationally. The fines in many of these actions have been significant. To date, the Antitrust Division has secured more than 38 fines exceeding $10 million and six fines exceeding $100 million. Over the past six years, the Antitrust Division has obtained more than $2 billion in fines.

The Antitrust Division has also increased its efforts to secure prison sentences for executives convicted of cartel activity. In its last fiscal year, the Antitrust Division obtained prison sentences exceeding 10,000 days in the aggregate, with the average defendant receiving a

sentence of more than 18 months. To date, more than 30 defendants, including some foreign executives, have received sentences exceeding one year.

The Sarbanes-Oxley Act has given the Antitrust Division yet another weapon to combat cartels by providing for sentences of up to 20 years for obstructing the Antitrust Division's investigation into potential Sherman Act violations. As such, Sarbanes-Oxley significantly enhances the potential maximum prison term, which is only three years under the Sherman Act.

At present, approximately 100 grand juries are investigating alleged cartel activity. The Antitrust Division launched many of these investigations as a result of information received through its leniency program, which averages approximately three applications per month. Many of these applications have come from foreign companies. Indeed, approximately 50 investigations involve alleged international cartels located in nearly 25 different countries throughout Asia and Europe. Many of these cartels are also under investigation in other jurisdictions, such as the European Union, Canada, Australia, Korea, Brazil and Mexico. It is likely that regulators from these various jurisdictions have at least shared the fruits of their investigations with each other, and it is possible that they have also coordinated their investigations on either a bilateral or multilateral basis.

Finally, as the Antitrust Division's caseload increasingly reflects the international nature of present-day cartels, its discovery efforts have required the assistance of many governments worldwide. For example, in the Antitrust Division's investigation into carbon fiber manufacturers, the Antitrust Division secured the assistance of the Japanese government in discovering documents that had been removed from the United States to avoid production to the grand jury. The eventual production of these documents directly led to the successful prosecution of two companies and one individual for obstruction of justice. International cooperation of this sort can be expected to increase in the future.

Recent Cartel Enforcement Activity in Europe

Since 1998, the European Commission has rendered 29 cartel decisions, nearly half of its lifetime total of 66 decisions. Reflecting this trend, over the last two years, the Commission has issued 19 decisions, which resulted in nearly €3 billion in fines to the companies concerned, including the €462 million fine entered against Hoffman-LaRoche in the *Vitamins* cartel and the €250 million fine entered against Lafarge in the *Plasterboard* investigation. The Commission's new Leniency Notice has facilitated new investigations. Since the Notice was published in February 2002, the Commission has received approximately 30 applications.

Cartel enforcement is also likely to increase under the Commission's modernization package, as set forth in Council Regulation 1/2003, which will enter into force on May 1, 2004. Under this system, national competition authorities ("NCAs") in the various EU Member States will assume a greater share of responsibility for the enforcement of EC competition law. While the details of how this system will work have yet to be made clear, it is expected that the nascent European Competition Network, which is comprised of representatives from the

European Commission and each of the NCAs, will play a major role in the allocation of investigatory responsibility.

Even as the Commission begins sharing its investigatory burden with the Member States, the new Council Regulation will also greatly expand the Commission's own powers. Now, in addition to its authority to conduct dawn raids, the Commission will be empowered to conduct interviews of particular individuals during these inspections. Further, as the Commission's authority to conduct inspections is limited by the normal business hours of the target, the Commission will gain the power to unilaterally seal the target's premises to ensure the security of the site overnight. Finally, and most controversially, the new Regulation will authorize the Commission to seek applications to search the private residences of company executives.

Continued Development of Leniency Programs

Following the success of the U.S. Department of Justice's corporate leniency program, many other jurisdictions have adopted similar programs or modified existing programs. The European Commission has recently amended its leniency program. Under the new Commission Notice,[1] the first cartel participant to cooperate with the Commission is eligible to receive complete immunity from fines provided that it: (a) does not coerce other companies to join the cartel, (b) immediately ends its involvement with the cartel, and (c) cooperates completely with the Commission. Subsequent leniency applicants may receive a reduction in fines assessed against the cartel members, but only if the evidence submitted by such companies provides "significant added value" to the investigation.[2]

Elsewhere, the development of corporate leniency programs has continued. Besides the United States and the European Union, there are currently at least 11 jurisdictions that have enacted such programs, including Australia, Canada, Brazil, the United Kingdom, Germany, France, Ireland, the Czech Republic, the Netherlands, New Zealand and South Korea. Critically, however, these programs provide companies with immunity solely from regulatory fines, not from private litigation. Thus, if the cartel members are subject to personal jurisdiction in the U.S., where successful plaintiffs are entitled to treble damages and defendants are subject to joint and several liability, immunity from regulatory fines, while valuable, may address only a fraction of a company's overall financial exposure.

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1 *See* Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002/C 45/03.

2 The first company to provide additional evidence meeting this standard will benefit from a reduction ranging between 30% and 50%. The second such company can receive a reduction ranging from 20% to 30%. Subsequent whistleblowers providing evidence that meets this standard can receive a reduction of fines up to 20%.

The Effect of U.S. Private Litigation on Non-U.S. Leniency Programs

Susceptibility to private lawsuits in the U.S. can affect the decision on whether and how to apply for leniency outside of the U.S. U.S. civil plaintiffs will undoubtedly attempt to obtain, through the extensive pre-trial discovery procedures available in U.S. courts, copies of the proffers of proof or "corporate confessions" made by companies in furtherance of their leniency applications. Indeed, in the *Vitamin* cartel case, U.S. plaintiffs successfully compelled corporate defendants to turn over copies of statements made to several foreign regulators. Those statements then became the outline of the plaintiffs' U.S. private actions. Despite protests from non-U.S. regulators that compelled disclosure of these statements in U.S. courts interfere with their ability to secure cooperation to reduce cartel behavior in their local markets, U.S. courts have routinely granted this discovery.

The European Commission has taken steps to limit disclosure of witness statements in U.S. private litigation by, for example, maintaining the sole copies of witness statements in its files. However, U.S. plaintiffs have often still gained access to the substance of this evidence by compelling the deposition of witnesses who have provided statements to the Commission.

International Cartels Are Increasingly Exposed to Private Litigation

Private litigations seeking money damages have long been an important part of the U.S. antitrust enforcement regime. Private plaintiffs have been approvingly described as "private attorneys general" and, as a matter of antitrust policy, are encouraged to use damage actions to deter anticompetitive conduct. Specifically, Section 4 of the Clayton Act provides for a private right of action, either for damages or injunctive relief, for any person injured as a result of a violation of the federal antitrust laws. As a further inducement to bring private actions, Section 4 automatically trebles any damage award and provides that the attorneys' fees of successful antitrust plaintiffs, unlike the attorneys' fees in nearly all other litigation, are paid by defendants. Further, all participants in a cartel are jointly and severally liable for all overcharges of the cartel conspiracies, irrespective of which cartel member actually overcharged the claimant.

U.S. procedure is also very favorable to private plaintiffs. U.S. law provides for the aggregation of multiple claims into class action actions. Potentially, thousands of claims can be brought in one action (in the recently settled *Visa/MasterCard* litigation the plaintiff class consisted of over one million retailers), simultaneously reducing the costs to each plaintiff while magnifying the exposure for each defendant.

Perhaps not surprisingly, no jurisdiction outside the U.S. has fostered a litigation environment as conducive to private antitrust actions. Although many non-U.S. antitrust laws provide for private rights of action of some sort, none provides for the breadth of procedural rights afforded to potential litigants under U.S. law.

Most prominently, Articles 81 and 82 of the EC Treaty may be enforced by private litigants in the national courts of the various Member States. The European Court of Justice has required that each Member State now provide for judicial procedures sufficient to accommodate private litigants seeking to enforce EC competition law. These new European private rights conflict with the policy decisions of certain Member States whose antitrust regimes do not provide for private damage actions, and in these states private litigants still lack the procedural means to enforce their rights. Even where private rights of action do exist within Europe, the practical impact of these rights varies greatly. Very few damage claims have been commenced. Indeed, even in Germany, where private rights of action are well established under competition law, actual instances of successful private actions for damages even against cartel members are virtually nonexistent.

At present, the class action is virtually unique to U.S. civil procedure. For example, while group action claims may be brought under U.K. law, the absence of the attendant contingency fee arrangements provided for under U.S. law[3] limits the ability of U.K. solicitors to prosecute complex antitrust cases on behalf of thousands of claimants. Moreover, since losing U.K. litigants are liable for the legal costs of the prevailing party, some measure of financial risk is present for group action claimants in the U.K., despite the ability to purchase insurance to help offset these future costs.

Elsewhere in Europe, representative actions, in which associations may bring civil suits on behalf of consumers, are becoming more common. For example, in France, consumer associations may bring claims to protect the interests of French consumers. Similar representative claims may be brought under Belgian, German and Spanish law. Elsewhere, class actions may be prosecuted under, among others, Australian, Brazilian, Canadian and Israeli law.

Expanding Jurisdiction in the U.S. and the U.K. to Hear Damage Suits Brought by Foreign Plaintiffs

New avenues may now be available to foreign plaintiffs seeking redress for cartel behaviour in U.S. courts under the U.S. Foreign Trade Antitrust Improvements Act ("FTAIA"). Specifically, the FTAIA provides that a foreign plaintiff can proceed in a U.S. court if it can establish (a) the conduct complained of has a direct, substantial and reasonably foreseeable effect on U.S. commerce and (b) such effect on U.S. commerce gives rise to the plaintiff's claim.

There has been little debate concerning the first prong of the FTAIA. There is, however, a significant split in U.S. courts regarding the proper interpretation of the second prong.

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[3] While U.K. law does provide for Conditional Fee Arrangements, such fees are capped at a recovery of the solicitor's costs, plus a "success fee" of up to 100% of costs. As such, the multi-million dollar fees recovered by class action lawyers in the U.S. are not possible under U.K. law.

The Court of Appeals for the Fifth Circuit was the first to address this issue, and held that the plaintiff must establish that its cause of action arose due to the harmful effects on U.S. commerce caused directly by the defendant's conduct. *See Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001) (holding that foreign plaintiffs may not bring suit in U.S. courts where the effects of the complained of conduct occurred solely in foreign markets).

This view of the FTAIA was rejected by the Second Circuit, which held that a non-U.S. plaintiff had standing to bring a U.S. antitrust claim for injuries suffered in non-U.S. commerce, so long as the alleged conspiracy caused injury to U.S. commerce. *See Kruman v. Christie's Int'l*, 284 F.3d 384 (2d Cir. 2002) (holding that a class of non-U.S. buyers and sellers at non-U.S. auction houses could maintain their U.S. action, despite the fact that their injuries arose from non-U.S. auctions, because the conspiracy had an effect on U.S. commerce). In the most recent examination of this issue, the D.C. Circuit concurred with much of the reasoning behind the Second Circuit's opinion in *Kruman*, holding that the FTAIA permits suits by non-U.S. plaintiffs who are injured solely by the effect on non-U.S. commerce caused by the defendant's conduct, so long as the conspiracy also had an effect on U.S. commerce that by itself would give rise to a claim under the Sherman Act by an injured party. *See Empagran S.A. v. F. Hoffman-LaRoche*, 315 F.3d 338 (D.C. Cir. 2003) (holding that jurisdiction for injuries suffered outside the U.S. was proper so long as one private person in the U.S. could bring a claim under the Sherman Act concerning the challenged conduct). Taken together, *Kruman* and *Empagran* have dramatically expanded the subject matter jurisdiction of the U.S. courts to hear claims brought by non-U.S. plaintiffs alleging antitrust injuries suffered in non-U.S. markets, so long as the challenged conduct both violated U.S. antitrust law and caused some antitrust injuries in U.S. markets even if the plaintiffs did not suffer any injury in the U.S.

It should be noted that the U.S. agencies do not support the extension of U.S. jurisdiction adopted in *Kruman* and *Empagran*, and submitted an *amicus curiae* brief to the D.C. Circuit court in *Empagran*. The agencies argued that the FTAIA was never intended to alter the fundamental principle that American antitrust laws do not regulate the economies of foreign nations. Moreover, the Antitrust Division has expressed some concern that an overly broad reading of the FTAIA could adversely affect its leniency program by creating disincentives for companies to report antitrust violation for fear of being exposed to treble damage suits brought by their foreign customers. The U.S. Supreme Court granted *certiorari* in the *Empagran* case, which will have the final say on the limits of U.S. civil jurisdiction under the FTAIA this term.

Interestingly, just as *Empagran* and *Kruman* have expanded the jurisdiction of U.S. courts, the *Provimi* case in the U.K. has expanded the jurisdiction of English courts to hear claims brought by non-English claimants against non-English defendants regarding products purchased at inflated cartel prices across Europe. *See Provimi Ltd. v. Roche Products Ltd.*, 2003 WL 21236491 (QBD 2003). In *Provimi*, two English companies and a German company sued some of the various corporate entities within Roche and Aventis. The Court ruled that since some of the claimants and defendants were domiciled in England, the Court had jurisdiction

over the entire matter. Thus, the Court allowed a claim brought by a German claimant against a German defendant regarding transactions that took place outside of England to proceed to trial.