TRENDS IN THE INVESTIGATION AND PROSECUTION OF INTERNATIONAL CARTELS BY THE UNITED STATES

The Key to the United States' Success – Its Corporate Amnesty/Immunity Policy

By

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I.THE ENFORCEMENT ENVIRONMENT IN THE UNITED STATES AND AROUND THE WORLD

Around the world, international cartel prosecutions have been soaring. Competition authorities are targeting international cartel participants in unprecedented efforts to penalize conspirators to the fullest extent allowable. Within the last several years, authorities in countries all over the globe have brought enforcement actions against cartels in over 30 industries for activities in North America, Europe, and other regions, including lysine, graphite electrodes, bulk vitamins, chemicals, electric wiring, cement, transportation, carton board, gasoline, and seamless steel tubes. They are stepping up their efforts in every way: imposing stiffer and stiffer penalties, increasing staff and investigations, strengthening legislation, and creating or modifying amnesty or leniency policies to encourage cartel participants to turn themselves in.[1]

Enforcement in North America. For the last few years, senior officials of the United States Department of Justice's Antitrust Division have stated that the investigation and prosecution of international cartels is the An-

[1]For a fuller discussion of the international enforcement environment and the interplay between enforcement trends in the U.S. and other countries, see Julian M. Joshua, D. Martin Low, Q.C., and Gary R. Spratling, "International Cartels, International Exposure: How to Contain the Pain," *Global Competition Review* (February/March 2001).

titrust Division's highest criminal priority.[2] Assigning top priority to international cartels has resulted in a striking record of criminal prosecutions, convictions, fines, and jail sentences. In just the last fiscal year (ending September 30, 2001), the U.S. Department of Justice's Antitrust Division has brought charges stemming from international cartel activities against 14 corporations and 18 individuals, prosecuted cases in ten separate industries, and obtained over $280 million in fines. Currently, over 30 grand juries are investigating suspected international cartel activity, since FY 1998 roughly 50% of corporate defendants in criminal cases brought by the Antitrust Division have been foreign-based, and during the last several years over 90% of all fines obtained by the Antitrust Division resulted from international cartel prosecutions. The Antitrust Division has uncovered international cartels in a broad spectrum of industries, including auction houses, construction, vitamins, food and feed additives, chemicals, graphite electrodes (used in making steel) and marine construction and transportation services; has obtained over $1.5 billion in criminal fines, including fines of $10 million or more against U.S., Dutch, German, Japanese, Belgian, Swiss, British, and Norwegian-based companies.[3] As to the individuals participating in international cartels, the Division has convicted foreign executives from Germany, Belgium, the Netherlands, England, France, Switzerland, Italy, Canada, Mexico, Japan, Korea, and Spain with sentences imposing heavy fines, and, in an increasing number of cases, imprisonment.[4] Subjects and targets of the Division's international investigations are located on five continents and in over 20 different countries, and those investigations have uncovered meetings of international cartels in over 100 cities in 35 countries, including most of the Far East, and nearly every

[2]See "Lessons Common To Detecting And Deterring Cartel Activity," speech by Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, before the 3rd Nordic Competition Policy Conference, Stockholm, Sweden (September 12, 2000); "The War Against International Cartels: Lessons From The Battlefront," speech by Joel I. Klein, Assistant Attorney General, Antitrust Division, before the Fordham Corporate Law Institute Conference on International Antitrust Law and Policy (October 14, 1999); "Negotiating The Waters of International Cartel Prosecutions," speech by Gary R. Spratling, then Deputy Assistant Attorney General, Antitrust Division, before ABA National Institute on White Collar Crime (March 4, 1999); "Criminal Antitrust Enforcement Against International Cartels," speech by Gary R. Spratling, then Deputy Assistant Attorney General, Antitrust Division, before Advanced Criminal Antitrust Workshop, Phoenix, Arizona (February 21, 1997).

[3]Antitrust Division Status Report: International Cartel Enforcement (May 23, 2001); Antitrust Division Status Report: Criminal Fines (May 23, 2001).

[4]Antitrust Division Status Report: International Cartel Enforcement (May 23, 2001).

country in Western Europe.[5]

Canada has also been very active in the international cartel arena. Roughly three-quarters of the formal inquiries currently under way in Canada are focused on international cartels. In the last several years, the Competition Bureau has imposed fines of over $65 million and sentenced several executives, foreign and Canadian, to jail or a personal fine. In 2001, the Bureau's efforts led the imposition of fines in five separate international cartels, in the sorbates, sodium erythorbate, graphite electrodes, isostatic graphite and concrete base reinforcements industries.

Enforcement In Europe. European enforcement agencies have also been actively pursuing cartel activities, obtaining penalties that have been staggering, particularly compared to their numbers just a few years ago. For example, in 2000, the Italian Competition Authority levied a record $625 million in penalties. In the last two years, the German Bundeskartellamt has imposed fines of over $169 million for just one ongoing investigation, in the ready-mix concrete industry.

In 2000, the EU imposed fines of over $195 million against participants in just three cartels – in the seamless steel tube, lysine, and liner shipping industries. In 2001 the EU topped that figure with the fines against participants in the graphite electrodes and sodium gluconate industries, which together totaled almost $250 million. This included a total fine of $195 million against eight companies for their participation in a conspiracy to fix prices and allocate market shares in the graphite electrodes industry, the second largest cartel-wide set of fines imposed by the Commission.

Competition authorities are also dedicating increasing resources to their enforcement efforts. Several countries, including the UK, the Netherlands, Switzerland, and Ireland, have either adopted or are in the process of adopting legislation and policies that will provide greater resources for their international cartel enforcement arsenal. And the number of investigations of worldwide international cartel activity is increasing rapidly. The EU's caseload doubled within the last two years, while the UK has initiated over 80 price fixing and market sharing investigations since early 2000. In February of this year the UK launched a "cartel education campaign" in which it urged businesses to come forward and report their own or others' cartel activities.

Enforcement in the Rest of the World. Enforcement authorities outside of Europe and North America have also been increasing their enforcement efforts. Within the last several years, Brazil has shown an increasing commitment to antitrust enforcement. The government's investigatory

[5] Id.

arm, the SDE, has conducted over 200 cartel investigations into industries that are as diverse as orange juice, marine transportation, and steel, including some that have been vigorously investigated and prosecuted by a number of other jurisdictions around the globe, such as lysine and vitamins. Within the last year, Brazil adopted a corporate leniency/immunity policy and more forceful investigatory powers for the antitrust agencies, including the right to impose a daily fine for failure to comply with a request for information. SDE is seeking still broader investigatory powers, including the power to tap telephone lines. The government has also been considering a proposal that would fundmantally change enforcement in Brazil, by creating just one agency that would both investigate and adjudicate competition matters.

Japan has also increased its commitment to the pursuit of anticompetitive activity and the promotion of a free and competitive market.[6] For example, the JFTC has increased its staff substantially, to a total of approximately 270 investigators. Continuing a recent tradition of cooperation among enforcement authorities, the JFTC and the Japan International Cooperation Agency have conducted a training program on the Antimonopoly Act and Competition Policy for China's State Administration for Industry and Commerce.

The increased emphasis on cartel enforcement in countries around the world tremendously increases the chances that cartel participants will be caught and prosecuted in multiple jurisdictions. While not every jurisdiction imposes penalties as heavily as in what is now the most active jurisdiction, the United States, trends in current U.S. cartel enforcement herald similar advances in countries everywhere.

II. TRENDS IN INTERNATIONAL CARTEL ENFORCEMENT BY THE UNITED STATES

The Department of Justice's Master Plan – Three Elements. In the author's view, the U.S. Department of Justice has a three-part plan for detecting, prosecuting, and deterring cartel activity. The first part of the plan is simple: provide the ultimate reward – the opportunity to get "off the hook" – to a company and its directors, officers, and employees who confess their antitrust violations in an amnesty application. A second element is increasing

[6]See, e.g., "Grand-Design for Competition Policy in the 21st Century," Japan Fair Trade Commission, August 29, 2001; "Promotion of Regulatory Reform and The FTC's Position on Competition Policy At the Time of the Three Year Program for the Promotion of Regulatory Reform," Japan Fair Trade Commission, March 30, 2001.

the severity of the consequences for companies and their executives who fail to report violations and provide timely cooperation. A third element is enhancing the risk that antitrust violations will ultimately be detected.[7]

This paper discusses that plan, and also addresses nine trends in U.S. international enforcement activity that fit neatly into the plan: the rise in self-reporting under the United States' amnesty program, the race to qualify for the advantages offered by the amnesty program and the remarkable benefits available to the second to cooperate, the corresponding detriment to firms that are late, or worse, last to cooperate, increases in the size of financial penalties against corporate defendants, increases in the number of domestic and foreign executives sentenced to prison, the increased likelihood of detection as the government institutes still more tools to root out cartel behavior, and, as a result of all of these activities, the inexorable reduction of safe harbors for cartel participants as enforcement and cooperation efforts are stepped up by antitrust authorities worldwide.[8]

A. INCREASING THE VALUE AND CERTAINTY OF REWARDS TO INFORMANTS AND OTHERS WHO COOPERATE EARLY

[7]See "When Calculating The Costs And Benefits Of Applying For Corporate Amnesty, How Do You Put A Price Tag On An Individual's Freedom?" speech by Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, before ABA National Institute On White Collar Crime (March 8, 2001); "Lessons Common To Detecting and Deterring Cartel Activity," supra.

[8]Other papers in this area were presented by the author at the State Bar of California's Ninth Annual Golden State Institute (October 18, 2001); the American Bar Association conference "International Antitrust Issues – Pacific Rim and Beyond," Vancouver, BC, Canada (May 31-June 1, 2001); The George Washington Law Review's 2001 Symposium, Washington, D.C., (March 22, 2001); the American Bar Association's National Institute on White Collar Crime, San Francisco, California (March 8-9, 2000); the American Bar Association Advanced International Cartel Workshop, New York, New York (February 15-16, 2001); and the International Bar Association 2000 Conference, Amsterdam, The Netherlands (September 17-22, 2000). See Gary R. Spratling, "International Cartel Cases – The California Connection," (October 18, 2001); Gary R. Spratling, "United States Enforcement Against International Cartels – The Pacific Rim: The Next Frontier?" (May 31, 2001); Gary R. Spratling, "Detection and Deterrence – Rewarding Informants for Reporting Violations," (March 22, 2001) (publication forthcoming); Gary R. Spratling, "New Trends Create An Even Riskier Target Zone For International Cartel Participants," (March 8, 2001); Gary R. Spratling, "International Cartel Enforcement – The Revolution Continues" (February 15-16, 2001); and Gary R. Spratling, "The Criminalization of International Antitrust – The U.S. Perspective" (September 21, 2000).

"If someone in your company has been conspiring with competitors to fix prices, here's some sound advice: Get to the Justice Department before your co-conspirators do."[9]

The U.S. Department of Justice Antitrust Division's Corporate Leniency Policy[10] ("Amnesty Program") is the Department's most effective generator of cartel cases,[11] and is believed to be the most successful program in U.S. history for detecting large commercial crimes. Over the past five years, the Amnesty Program has been responsible for detecting and prosecuting more antitrust violations than all of the Antitrust Division's search warrants, consensual-monitored audio or video tapes, and cooperating informants combined.[12] "It is, unquestionably, the single greatest investigative tool available to anti-cartel enforcers."[13]

Trend:

Increasing Numbers of Cartel Participants Are Self-Reporting Under The U.S. Amnesty Program

The *majority* of the Antitrust Division's major international investigations have been advanced through the cooperation of an applicant to the Division's Amnesty Program.[14] And the number of applicants is on the rise.

Amnesty To The First In The Door. Amnesty is available to organizations that self-report before *and after* an investigation has begun under the Amnesty Program, but *only the first* organization to come forward to report illegal activity and offer cooperation in the investigation may qualify.[15] Counsel for an organization that detects involvement in cartel activity may decide it is not in the firm's best interest to self-report, or to cooperate in a government investigation. In such situations, the legal team will want to take steps to terminate the unlawful conduct and prevent its reoccurrence, mini-

[9]Janet Novak, "Fix and tell," *Forbes*, May 4, 1998, at 46.
[10]See U.S. Department of Justice, Antitrust Division Corporate Leniency Policy (August 1993).
[11]Antitrust Division Status Report: Corporate Leniency Program, supra.
[12]See "When Calculating the Costs and Benefits Of Applying For Corporate Amnesty, How Do You Put A Price Tag On An Individual's Freedom?" supra.
[13]Id.
[14]See Antitrust Division Status Report: Corporate Leniency Program, supra.
[15]See U.S. Department of Justice, Antitrust Division Corporate Leniency Policy (August 1993).

mize the chances that the violation will be disclosed to enforcement authorities, and prepare the firm and relevant employees for any covert or overt investigation that may be initiated by domestic or foreign authorities. On the other hand, counsel may decide, as is increasingly the case, that in today's enforcement environment the consequences of prosecution as a non-reporting, non-cooperating organization are too severe (see Section II, below) and the risk of government detection is too high (see Section III, below) to not attempt to be the first in the prosecutor's door. In these situations, counsel must move quickly to assess the situation; conduct a preliminary internal investigation; evaluate the risks, alternatives, and consequences; make a decision; and take action. Under the U.S. Amnesty Program, only the first qualifying firm through the prosecutor's door can ensure no criminal charges and no criminal fines whatsoever.

The Antitrust Division's Amnesty Program. In August 1993, the Division revised its Amnesty Program to make it easier and more attractive to companies to come forward and cooperate with the Division. Three major revisions were made to the program: (1) amnesty is automatic if there is no pre-existing investigation; (2) amnesty may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who cooperate are protected from criminal prosecution.[16] Under the Division's policy, only one company per investigation may receive amnesty, and that will be the first qualifying company in the door.

Case Generation. As mentioned above, the Amnesty Program is a huge generator of cartel prosecutions. In the last few years, cooperation from amnesty applications has resulted in dozens of convictions and well over $1 billion in fines.[17] Moreover, a number of other countries, observing the U.S. Amnesty Program's case generation, have followed with their own amnesty or leniency programs.[18]

Financial Benefits. The vitamin and graphite electrodes investigations and prosecutions[19] are leading examples of the striking financial benefits

[16]Id.; see "The Corporate Leniency Policy: Answers To Recurring Questions," speech by Gary R. Spratling, then Deputy Assistant Attorney General, Antitrust Division, before ABA Antitrust Section 1998 Spring Meeting (April 1, 1998).

[17]Antitrust Division Status Report: Corporate Leniency Program, supra.

[18]These jurisdictions include Canada, the European Union, the United Kingdom, Germany, Australia, and Brazil. As discussed in Section III, infra, on July 18, 2001 the European Union issued for public comment the Draft Commission Notice On Immunity From Fines and Reduction Of Fines In Cartel Cases. The comment period closed September 21, 2001.

[19]The Antitrust Division's policy is to treat as confidential the identity of amnesty applicants and any information obtained from the applicant. In these two cases, vita-

potentially available for successful amnesty applicants.[20] In the vitamin investigation, French-based Rhone-Poulenc SA came forward and reported its role in a worldwide vitamin cartel. The company, as well as all of its officers, directors, and employees who came forward with the company and cooperated, received a pass from prosecution and paid zero dollars in fines. Shortly after learning of their co-conspirator's approach to the Division, Swiss-based HLR and German-based BASF A.G. (BASF) agreed to plead guilty and cooperate with the government's investigation. The Department of Justice has stated that these companies provided very valuable cooperation. The companies received very significant reductions in their fines in exchange for their cooperation, although they still paid fines of $500 million and $225 million, respectively. (Discussed further in relation to the next Trend, below.)

In the graphite electrodes investigation, the cooperation of the amnesty applicant led to the execution of search warrants, the cracking of an international cartel, and shortly thereafter, a plea agreement with another cartel participant. The next company in the door after the amnesty applicant paid a $32.5 million fine, the third company in paid a $110 million fine, and the last company to accept responsibility and plead guilty paid a $135 million fine. (Discussed further in relation to the next Trend, below.)

Application Rate. The Department of Justice's revised corporate amnesty program has resulted in a dramatic increase in amnesty applications to the Antitrust Division. Under the old amnesty policy, the Division received roughly one amnesty application per year. Under the revised policy, the application is more than one per month.[21] As a result of this increased interest in seeking amnesty by firms involved in international violations, the Division frequently encounters situations where the second company approaches the government within days, and in some cases only a few hours, after one of its co-conspirators has secured its position as first in line for amnesty.[22] As stated above, only the first company to qualify receives amnesty.

Where to Apply First. The increasingly international scope of car-

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mins and graphite electrodes, the identity of the amnesty applicants is public because they issued press releases announcing their conditional acceptance into the corporate amnesty program.

[20]The Antitrust Division has coined a phrase to refer to the financial benefits accruing to an amnesty applicant: "a corporate super saver."

[21]Antitrust Division Status Report: Corporate Leniency Program, supra.

[22]See "When Calculating the Costs and Benefits Of Applying For Corporate Amnesty, How Do You Put A Price Tag On An Individual's Freedom?" supra, at 3; "Lessons Common To Detecting and Deterring Cartel Activity," supra, at 9.

tel enforcement – and the corresponding rise in the number of jurisdictions in which amnesty or leniency is available to cartel participants – means that cartel participants now have a number of jurisdictions in addition to the United States in which to seek leniency. However, approaching several jurisdictions simultaneously, which may seem to be the optimal procedure, has a cost: a company cannot prepare to go to three, or even two, jurisdictions as quickly as it can go to one. And because the "race to the prosecutor," discussed further below, is often won by a matter of days or even hours, the opportunity cost of simultaneous applications could be enormous – that is, coming in second, and therefore failing to qualify for amnesty, in a jurisdiction where the company could have come in first. Management and counsel should therefore follow this decision-making principle: determine the jurisdiction where it would hurt the firm most to come in second place, and approach that jurisdiction first, moving as quickly as possible. Then, using the same principle, approach seriatim those remaining jurisdictions where the risks justify an amnesty application.

Trend:When Another Firm Is First In The Door For Amnesty In the United States, Increasing Numbers of Cartel Participants Are Racing To Qualify For Second Place

The Race To Be First In The Door. There can be no doubt that, in the United States, the extremely beneficial prizes awarded to the first amnesty applicant in the door, in combination with the fact that the most important of those prizes are unavailable to the second arrival, have resulted in a race among amnesty applicants.

The Antitrust Division has made no secret – indeed officials of the agency have broadcasted – that its objective has been to set up a race to the prosecutor.[23] The Division emphasizes that only the first in the door gets amnesty, cites the adverse financial consequences of not being first in the door, and discloses that the difference between being first and second is often only a

[23]See "When Calculating the Costs and Benefits Of Applying For Corporate Amnesty, How Do You Put A Price Tag On An Individual's Freedom?" supra; "Lessons Common To Detecting And Deterring Cartel Activity," supra; "Making Companies An Offer They Shouldn't Refuse," speech by Gary R. Spratling, then Deputy Assistant Attorney General, Antitrust Division, before Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (February 16, 1999); Janet Novack, supra, at 46.

few days, and sometimes only a few hours.[24] Members of the private bar have heard this message and confirmed publicly that the Division has been successful in its invitation to counsel, and their multinational clients, to enter the race.[25]

However, this is one race that is not a winner-take-all competition. There remain valuable rewards for quick action available to the second-place finisher. To be sure, the successful amnesty applicant wins the three biggest prizes: (1) no criminal prosecution of the company (as well as the collateral benefits of not having a criminal conviction), (2) no criminal prosecution of cooperating individuals, and (3) zero dollars in fines. Yet, as to the last prize, the Division's practice in dealing with firms that come in seriatim in international investigations generally results in huge financial advantages for being second as compared to finishing later.

Second In The Door Wins Valuable Consolation Prizes. In addition to showing the rewards of the United States' corporate amnesty program, the fine calculations in the vitamin and graphite electrodes cases also demonstrate the prizes available to the firms that come in second place, as compared to being the third or fourth, or an even later finisher.

In the vitamins investigation, HLR and BASF came forward to plead guilty and cooperate immediately after the amnesty applicant disclosed the scope of the conspiracy. Since the companies approached the government nearly simultaneously, they were treated for purposes of sentencing as having tied for second place in coming forward. As a result of each firm's quick actions in coming forward and the extraordinary level of cooperation and assistance each provided in the government's investigation, both companies received enormous downward departures from their Guidelines fine ranges. Specifically, HLR's Guidelines fine range was $1.312 billion to $2.624 billion; BASF's range was $409 million to $818 million. As mentioned above, the imposed fines were $500 million (over $800 million below the minimum Sentencing Guidelines fine) and $225 million (nearly $200 million below the minimum Sentencing Guidelines fine), respectively. Thus, in each case the imposed fine was roughly 15 percent of the firm's respective volume of commerce; significantly lower that the percentage typically paid by firms in international cartels who come in the door third, fourth, or further down the line.

[24]See "Lessons Common To Detecting And Deterring Cartel Activity," supra; "Making Companies An Offer They Shouldn't Refuse," supra; Antitrust Division Status Report: Corporate Leniency Program, supra.

[25]Jayne O'Donnell, "Company turncoats race to Justice for corporate amnesty," USA TODAY, June 1, 1999, at 1B; Janet Novak, supra, at 46.

What fine would the Division have sought from HLR and/or BASF if the firms had not been second, but instead had been third or fourth?

The "would have" fine is not subject to precise calculation because of the large number of variables considered by the Antitrust Division in determining a recommended fine.[26] These variables come into play whether the Antitrust Division is determining a recommended fine as a downward departure from the Sentencing Guidelines minimum or a fine within the Sentencing Guidelines range. The fine imposed on a firm is not instructive of the Antitrust Division's valuation of any one of these variables because, of course, the final fine reflects the cumulative valuation of all variables. However, the Antitrust Division states that it is very careful in tracking its valuations of these variables so as to ensure compliance with its publicly stated objective of proportionality – not only proportionality of sentences imposed on culpable firms in a particular conspiracy but also proportionality across all conspiracies prosecuted.[27]

Firms involved in international conspiracies that decide to plead guilty and cooperate, but are not the first or second firms in the door, typically pay fines ranging from 25 to 35 percent of their volume of affected commerce (i.e., their sales affected by the conspiracy). Put another way, being third or fourth in the door can cost the firm an additional 10 to 20 percent of their volume of commerce as a criminal fine, unless the percentage increase is even higher because the third or fourth place firm is very late to come in and/or is the last firm to resolve its exposure with the prosecutors (see Section II, be-

[26]In addition to the variables specified in the Guidelines – volume of commerce, number of employees, the level of personnel involved in or tolerating the criminal activity, prior history of misconduct, whether the firm engaged in obstruction, existence of an effective compliance program, cooperation in the investigation, affirmative acceptance of responsibility, and ability to pay – the Division considers, and ends up placing dollar values on, the timing of the cooperation; what place the firm was in or the order of firms coming in and how many firms were involved in the conspiracy (i.e., being the third firm in the door and therefore last in a three-firm conspiracy is different than being the third firm in a seven-firm conspiracy); the significance of the cooperation and assistance in the instant investigation; the significance of cooperation and assistance, or even possibly self-reporting, on another matter; and the relative seriousness of the conduct (length of the conspiracy, relative significance of the firm's role in the conspiracy, use of coercive tactics, "brazenness" of top management in flouting the law, extent of knowledge/tolerance throughout management of the firm, and the level and total amount of overcharge).

[27]See "Transparency In Enforcement Maximizes Cooperation From Antitrust Offenders," speech by Gary R. Spratling, then Deputy Assistant Attorney General, Antitrust Division, before the Fordham Corporate Law Institute Conference on International Antitrust Law & Policy (October 15, 1999).

low). Given the very large volumes of commerce affected in international cartel cases, this difference will generally translate into tens or hundreds of millions of dollars.

In the vitamins prosecutions, for example, two Japanese-based firms, Daiichi and Takeda, each agreed to plead guilty and cooperate after HLR and BASF had begun assisting the government. Their fines represented approximately 26 percent and 20 percent of their respective volumes of commerce. Takeda's fine fell below the 25 to 35 percent range only because it reported wrongdoing in a second, unrelated market not previously known to the government, a disclosure which resulted in an additional reduction in its fine. (See discussion of "Amnesty Plus" in text related to footnotes 52 through 55, infra.) Thus, by being second after the amnesty applicant and thereby avoiding the fine ranges representing 25 to 35 percent of their respective volumes of affected commerce, HLR and BASF each paid several hundreds of millions of dollars less in fines than each likely would have faced as the third or fourth company in the door.

In the graphite electrodes investigation, Japanese-based Showa Denko Carbon, Inc. (SDC) was the second firm in the door after the amnesty applicant. SDC came forward and offered to plead guilty and cooperate immediately after the investigation went overt with the issuance of search warrants. The $32.5 million fine imposed on SDC was 10 percent of its volume of affected commerce. In comparison, the German-based firm SGL Carbon AG (SGL), which was the last firm to come forward, was levied with a fine of $135 million, nearly 30 percent of SGL's volume of affected commerce. Moreover, SGL's fine would have been an even higher dollar amount (and, therefore, a higher percentage of the volume of affected commerce) but for a reduction based on the firm's inability to pay a higher fine, pursuant to U.S.S.G. § 8C3.3(b). If SDC and SGL's positions had been reversed, and SDC had been in last instead of second, then its fine may have been three times greater or, in this case, an additional $60 million, or more.

The Above Trends Are Complementary And Yield Cumulative Increased Incentives To Self-Report. The fact that increasing numbers of cartel participants are both self-reporting in order to qualify for amnesty *and* racing in to qualify for the benefits available for the second to cooperate, exacerbates the existing tension and mistrust among the cartel participants and, in turn, yields increased incentives for each participant to approach the government as soon as it learns of, or suspects, an investigation. At that point, each cartel participant knows that any of its co-conspirators, tempted by the rewards of being first or second, can go to the government and seal a frightful fate for the rest. Each individual acting on behalf of a company engaged in

cartel conduct must ask himself or herself: Can I trust my co-conspirators to be loyal, to look out for my company's well being and my personal freedom, by not disclosing our cartel activities?

The nondisclosure strategy depends upon complete solidarity among all the corporate members of a cartel and all the individuals who are potential targets of the investigation. It is a particularly unstable and strained equilibrium in an international cartel case because critical personal and corporate interests of numerous players in several countries are continuously in jeopardy. The statistics show that, more and more, such players seek relief from the pain.[28] If one of the players reports and cooperates with the government, the remaining participants who have been holding out can expect that the government will receive compelling evidence against them and that the government will escalate the severity of the consequences to them because they were late, or even worse, last to resolve their exposure.

B. ESCALATING THE SEVERITY OF THE CONSEQUENCES

The United States Treats Cartel Activity As A Crime And The Department Of Justice Seeks Tough Penalties

The United States Department of Justice prosecutes all hardcore cartel activity – such as price fixing, bid rigging, and customer, territorial, and volume allocation agreements – as criminal violations. Corporations and individuals, domestic or foreign, may be held criminally liable, irrespective of the legal treatment of cartel activity in the home jurisdiction of a foreign defendant, and all are subject to sentencing under the United States Sentencing Guidelines.

Firms. The Sentencing Guidelines instruct that for an antitrust offense by an organization, in lieu of pecuniary loss (the measure used to determine sentences for nearly all other types of offenses), courts should use 20 percent of the volume of commerce affected by the offense in establishing a base fine. The base fine is adjusted by minimum and maximum multipliers derived from a culpability score, the net result of upward and downward adjustments based on various factors in aggravation and mitigation. The guidelines fine range, i.e., the minimum fine and the maximum fine, is determined by multiplying the base fine by the applicable minimum and maximum multipliers. The guidelines fine ranges are at a level "appropriate to deter organizational criminal conduct and to provide incentive for organizations to maintain

[28]See "International Cartels, International Exposure: How to Contain The Pain," supra.

internal mechanisms for preventing, detecting, and reporting criminal conduct."[29] The bottom number in the range is typically one half the top number in the range, e.g., $200 million - $400 million, the range for UCAR International, Inc. in the graphite electrodes cartel. In the final analysis, the Sentencing Guidelines result in fines for organizations that can range from a minimum of 15 percent to a maximum of 80 percent of the affected volume of commerce. However, organizations can receive fines below, often substantially below, the minimum Guidelines fine by providing substantial assistance and cooperation in the government's investigation.

An Example. A review of the fine calculation for F. Hoffmann-La Roche, Ltd. (HLR) in the vitamins cartel will illustrate the methodology of the Sentencing Guidelines. First, the Antitrust Division calculated the volume of affected commerce (the firm's sales in the United States) to be $3.28 billion. Then, the base fine was determined – 20 percent of the volume of affected commerce, or, here, $656 million. Next, the Division calculated the culpability score. Every firm starts with a culpability score of 5 points.[30] In the case of HLR, there was a 5-point upward adjustment because the unit of the organization within which the offense was committed had 5,000 or more employees and high-level personnel participated in the cartel;[31] a 2-point upward adjustment because the firm had a prior history of misconduct;[32] a 3-point upward adjustment because the firm obstructed the government's investigation;[33] a zero-point downward adjustment for an effective program to prevent and detect violations of law,[34] because HLR did not have an effective program; and a 2-point downward adjustment for affirmatively accepting responsibility and fully cooperating in the investigation.[35] This resulted in a net culpability score of 13, and the highest minimum and maximum multiplier range (reached at culpability score 10) of 2.0 to 4.0.[36] Multiplying the base fine ($656 million) by the minimum (2.0) and maximum (4.0) multipliers yields a Sentencing Guidelines fine range of $1.3 billion to $2.6 billion.[37] As a result of HLR's extraordinary cooperation and assistance in the investigation, it received an enormous downward departure from the Sentencing Guidelines minimum to a

[29]U.S. Sentencing Guidelines Manual § 8C2.4, cmt. background (2000).
[30]U.S. Sentencing Guidelines Manual § 8C2.5(a) (2000).
[31]U.S. Sentencing Guidelines Manual § 8C2.5(b) (2000).
[32]U.S. Sentencing Guidelines Manual § 8C2.5(c) (2000).
[33]U.S. Sentencing Guidelines Manual § 8C2.5(e) (2000).
[34]U.S. Sentencing Guidelines Manual § 8C2.5(f) (2000).
[35]U.S. Sentencing Guidelines Manual § 8C2.5(g)(2) (2000).
[36]U.S. Sentencing Guidelines Manual § 8C2.6 (2000).
[37]U.S. Sentencing Guidelines Manual § 8C2.7 (2000).

fine of $500 million.

Fines Imposed in International Cartels. Based on the U.S. Sentencing Guidelines, the Department of Justice has obtained the following fines of $20 million or more against organizations that participated in international cartels:

Defendant (FY)	Product	Fine (In Millions)	Country
F. Hoffmann-La Roche, Ltd. (1999)	Vitamins	$500	Switzerland
BASF AG (1999)	Vitamins	$225	Germany
SGL Carbon AG (1999)	Graphite Electrodes	$135	Germany
Mitsubishi Corporation (2001)	Graphite Electrodes	$134	Japan
UCAR International, Inc. (1998)	Graphite Electrodes	$110	U.S.
Archer Daniels Midland Co. (1997)	Lysine & Citric Acid	$100	U.S.
Takeda Chemical Industries, Ltd. (1999)	Vitamins	$72	Japan
ABB Middle East & Africa (2001) (2001 Participations	Construction	$53	Switzerland (Hdq. Italy)
Daicel Chemical Industries, Ltd. (2000)	Sorbates	$53	Japan
Haarmann & Reimer Corp. (1997)	Citric Acid	$50	German Parent
HeereMac v.o.f. (1998)	Marine Construction	$49	Netherlands
Sotheby's Holdings Inc. (2001)	Fine Arts Auctions	$45	U.S.
Eisai Co., Ltd. (1999)	Vitamins	$40	Japan
Hoechst AG (1999)	Sorbates	$36	Germany
Showa Denko Carbon, Inc. (1998)	Graphite Electrodes	$32.5	Japan

Defendant (FY)	Product	Fine (In Millions)	Country
Philipp Holzmann AG (2000)	Construction	$30	Germany
Daiichi Pharmaceutical Co., Ltd. (1999)	Vitamins	$25	Japan
Nippon Gohsei (1999)	Sorbates	$21	Japan
Fujisawa Pharmaceuticals Co. (1998)	Sodium Gluco-nate	$20	Japan
Pfizer Inc. (1999)	Maltol/Sodium Erythorbate	$20	U.S.

Individuals. The maximum penalty for a Sherman Antitrust Act offense for an individual is three years imprisonment and the greatest of $350,000, twice the pecuniary gain the individual derived from the crime, or twice the pecuniary loss caused the victims of the crime. The Sentencing Guidelines result in jail sentences for individuals of 6 to 12 months for single-count, base level antitrust violations. However, if the crime involves bid-rigging, the base level sentencing range is 8 to 14 months. The jail sentences are increased based on factors in aggravation, and can go up to 33 months based on volume of commerce affected by the violation alone. The Sentencing Guidelines require a fine, in addition to prison, of one percent to five percent of the volume of commerce attributable to the individual's organization.

Trend:The United States Is Obtaining Higher Fines Against Organizations Involved In International Cartels

Fines above $10 million have become commonplace sanctions in the United States for organizations involved in cartel activity. Note, however, that the overwhelming majority of large fines have been against organizations involved in *international* cartels. For example, in *every* case where the U.S. Department of Justice has secured a fine above $20 million for cartel activity, the cartel has been international in scope, as opposed to domestic. In 16 of the 20 instances in which the fine was $20 million or greater, and in 29 of the 35 instances in which the fine was $10 million or greater, the organizations were foreign-based.

These statistics reflect several factors: (1) international cartels typically affect larger volumes of commerce in the United States (the measure on which U.S. fines are based) than do U.S.-domestic cartels; (2) international cartels typically consist of a U.S. company and three or four of its competitors that are market leaders in Europe, Asia, and throughout the world; and (3) the U.S. Department of Justice is continuing its efforts to "up the ante" in international cartel cases to ensure that potential sentences are sufficiently punitive so as not to be viewed merely as a cost of doing business.[38]

Trend:The United States Is Now Seeking To Obtain Jail Sentences More Frequently Against Foreign Individuals Involved In International Cartels

The U.S. Department of Justice's treatment of the criminal liability of foreign individuals involved in international cartels affecting the United States has been evolving over the past six years, with some of the most important developments occurring in the last two years.

Stage One: One Foreign Executive From Each Foreign Firm Involved In The Cartel Must Plead Guilty In The United States.

In the mid-1990s, as the U.S. Department of Justice was ramping up its investigations of international cartels and looking ahead to many prosecutions, senior officials thought hard about how to ensure that foreign-located executives would receive treatment comparable to the treatment given U.S. executives in international cartel prosecutions. The Department of Justice wanted to insist that at least one culpable individual from each foreign firm involved in a cartel accept responsibility in the U.S. and plead guilty alongside his/her employer.

At that time, cooperation among antitrust authorities in the pursuit of international cartel participants was more concept than reality. Until March 1996 (see below), the Department often could not offer sufficient incentives to an executive outside U.S. jurisdiction to induce that individual to come to the United States and plead guilty to violating U.S. law. The situation was that alien defendants could escape prosecution so long as they forfeited their ability to travel into the United States, or into any other country with whom the United States had an extradition treaty applicable to antitrust offenses. It was (is) true, for foreign executives who have international responsibilities and place a high premium on their ability to travel without fear of being detained

[38]See "Lessons Common To Detecting and Deterring Cartel Activity," supra.

or arrested, that this often was (is) an unacceptable alternative. On the other hand, cooperating aliens could not be assured that they would receive the benefit of immigration relief by agreeing to cooperate with U.S. antitrust authorities and pleading guilty, even though the promise of immigration relief may have been the foremost, even only, incentive from the alien's perspective for entering into such an agreement.

The Department of Justice was able to eliminate that uncertainty and achieve its initial objective of obtaining convictions (guilty pleas in the United States) against foreign individuals through a memorandum of understanding (MOU) that the Antitrust Division entered into with the United States Immigration and Naturalization Service (INS) in March 1996. The MOU lays out a protocol whereby the Antitrust Division may petition the INS to preadjudicate the immigration status of a cooperating alien witness before the witness enters into a plea agreement or pleads to a crime. It allows the Antitrust Division to petition for a range of relief which would allow the alien to continue or resume travel into the United States. Because the Division submits its petition to the INS during plea negotiations, it is able to include written assurances in the plea agreement of the way in which the INS will treat the alien's convictions. In simple terms, the MOU allows the Antitrust Division to offer the foreign national contemplating cooperation an assessment of his exact post-conviction immigration status *before* he enters into plea agreement and pleads guilty – to know, in other words, that a felony conviction in the United States would not affect his ability to travel to the United States in the future.

That MOU has been instrumental in inducing foreign executives to plead guilty and to cooperate in Division cases.[39] Since the MOU's inception, the Antitrust Division, in nearly every international cartel prosecution, has brought criminal charges, and generally obtained convictions, against at least one culpable executive from each foreign firm involved in the cartel.

Stage Two: Increasing Numbers of Foreign Executives Must Plead Guilty And Agree To Serve Jail Time In A United States Prison.

[39]The MOU also facilitates the Antitrust Division's ability to enter into companion agreements with foreign corporations. In the lysine investigation, for instance, the MOU was crucial in securing the 1996 plea agreements of the three Asian firms involved. The Division would not enter a plea agreement with the corporations without securing a guilty plea from at least one culpable executive at each company. The individual and corporate defendants would not enter into plea agreements without the promise of immigration relief. The MOU provided the solution, and all three firms and several individual defendants ultimately pled guilty.

Now, with increasing frequency, the Antitrust Division is insisting not only that foreign executives agree to plead guilty in the United States, but also that they agree to serve a prison sentence in the United States as part of any plea agreement to resolve completely their exposure for violating U.S. law. In fact, in some cases the Antitrust Division has begun to seek dispositions that include a prison sentence against multiple executives from the same foreign firm.

Plea agreements with firms typically "carve out" one or more executives for separate treatment, which means that such executives neither are subject to the cooperation requirement of the plea agreement nor are the beneficiaries of the protection provision. Put another way, no matter how much cooperation is offered by such executives, the U.S. Department of Justice will not agree not to bring criminal charges against them. If foreign executives are carved out of the organization's plea agreement, and thereby face separate treatment as individuals for their participation in the international cartel, then it remains in the Department of Justice's prosecutorial discretion whether to seek a disposition that would involve only a guilty plea and the payment of a fine, or a prison sentence in addition to the plea and fine. Increasingly, the U.S. Department of Justice seeks the latter.

Many people are familiar with the prosecutions in the vitamins cartel, discussed above, including the convictions of HLR and BASF and the payment of fines of $500 million and $225 million, respectively. What many people do not know is that at the time HLR and BASF agreed to plead guilty and pay nearly three-quarters of a billion dollars in fines, four HLR executives and four BASF executives were carved out of the cooperation and protection provisions of their plea agreements with the U.S. Department of Justice. The carve-out language in the protection provision in the BASF plea agreement, similar to the language in the HLR provision, reads:

Subject to the exceptions noted in Paragraph 14(d),[40] the United States will not bring criminal charges against any current or former director, officer, or employee of BASF or its subsidiaries (except for Dr. Reinhard Steinmetz, former Head of Fine Chemicals Division; Dr. Dieter Suter, Head of Fine Chemicals Division; Dietz Kaminski, former Head of Marketing; and Hugo Strotmann, Head of Marketing; who are all specifically excluded from each and every term of paragraphs 12, 13 and 14 of this Plea Agreement[41]). [42]

[40]The provision that addresses failure to cooperate.
[41]The provisions that address cooperation and protection against prosecution.

The HLR plea agreement excluded Roland Bronnimann, at the time of the agreement the President of the Vitamins and Fine Chemicals Division, Andreas Hauri, a former Executive Vice President and Head of Global Marketing, and Kuno Sommer, also a former Executive Vice President and Head of Global Marketing. In addition, it excluded a fourth, unidentified individual, named in a sealed addendum to the plea agreement.

Thus, at the time the plea agreements with the two firms became public, one could deduce that the U.S. Department of Justice refused to give these eight executives a pass from individual prosecution. As a result of proceedings since then, one can deduce that, with respect to six of those eight executives, the United States insisted that they serve prison terms to settle their criminal exposure; that is, the Department of Justice would not agree to a no-jail, fine-only disposition against those individuals. Three individuals from each company entered into plea agreements in which they admitted to conspiring to fix prices and allocate sales volume of vitamins sold in the United States and elsewhere, submitted to U.S. jurisdiction, agreed to pay fines ranging from $75,000 to $150,000, and agreed to serve prison time in a U.S. jail for periods ranging from 3 to 5 months. One, Kuno Sommer, also agreed to plead guilty to a separate criminal violation for his role in attempting to cover up the vitamins conspiracy.

In February 2001, Takesha Takagi, an executive of Toyo Tanso USA, Inc., became the first Japanese executive to agree to face possible time in a United States jail for an antitrust violation (the plea agreement provided for a range of zero to three months confinement). Ultimately, however, the Court did not sentence Takagi to a term of incarceration, but fined him $10,000 and put him on three years probation for his role in an international conspiracy to fix prices and allocate market shares and customers in the isostatic graphite industry. His employer, Toyo Tanso, an American subsidiary of Toyo Tanso Co. Ltd. of Japan, pled guilty and paid a fine of $4.5 million for its role in the conspiracy.

Not all foreign executives conclude that "getting the matter behind them" and putting an end to the United States' pursuit of them is worth the price of a guilty plea, fine, and prison in the U.S. This is the situation that developed in the prosecution of Daicel Chemical Industries and its executives over a six-month period in 2000-2001. In July of 2000, the Division entered into a plea agreement with Daicel that called for the firm to plead guilty to

[42]Plea Agreement, United States of America v. BASF A.G. (N.D. Texas May 19, 1999).

participating in an international conspiracy to fix the prices and sales volume of sorbates, a food additive. The agreement carved out for separate treatment four executives: Kunio Kanai, the Managing Director of Daicel's Organic Chemicals Division, Hirohisa Ikeda, General Manager for the Organic Chemicals Division, Takayasu Miyasaka, first the General Sales Manager and later the Deputy General Manager of the Organic Chemicals Division, and one additional unnamed individual. The plea agreement protected all other directors, officers, and employees of the company from criminal charges. Based on related criminal proceedings, one can make two assumptions about the positions of the U.S. Department of Justice and the Daicel executives, respectively. First, the Department insisted that the executives plead guilty, pay a fine, *and* serve a prison sentence to settle their criminal exposure in the United States. Second, the Daicel executives were unwilling to serve time in a United States jail, and therefore refused to enter into a plea agreement with the Department. Therefore, on the same day that the charges against, and an agreed-upon disposition with, Daicel were filed pursuant to a plea agreement with the firm, three of the four executives – Ikeda, Kanai and Miyasaka – were indicted by a Federal Grand Jury for their participation in the cartel. In January 2001, the fourth individual, Hitoshi Hayashi, a salesman in Daicel's Organic Chemicals Division, was also indicted by a Federal Grand Jury for his participation in the cartel. Because the four executives have refused to submit to the jurisdiction of the United States for criminal proceedings, they have been placed on border watches and warrants have been issued for their arrest. These individuals are now subject to the full range of criminal sanctions discussed earlier, as well as arrest and the threat of extradition from Japan to the United States.

Hayashi was indicted alongside three top executives of another participant in the sorbates conspiracy, Ueno Fine Chemicals Industry Ltd. (Ueno). Ueno, a Japanese company, agreed to pay an $11 million fine (reduced from the fine that would have been sought by the government, based on the company's inability to pay any higher fine and remain a viable organization). However, four of the company's executives, Yuji Komatsu, a member of the Board of Directors, Yoshihiko Katsuyama, general manager of the Chemical Division Sales Department, Wakao Shinoda, a sales manager in the Chemical Division (the three indicted individuals), along with a fourth, as yet unindicted individual, Yushiyuki Ebara, were carved out of the plea agreement with the company. As with the Daicel executives, one can assume both that the U.S. Department of Justice insisted that the Ueno executives plead guilty, pay a fine, *and* face a prison sentence in the United States, and that the individual executives refused. Like the Daicel executives, they are on border watches, are the subjects of arrest warrants, and will remain international fugi-

tives until they submit to the jurisdiction of the United States.

This scenario appears to have repeated itself in July 2001 in the isostatic graphite prosecutions[43] and again in August 2001 in the nucleotides prosecutions.[44]

Trend: The United States Is Increasing The Penalties For Firms And Their Executives That Come In Late

Firms. The Antitrust Division is getting tougher all the time on firms that come in very late in an investigation and/or are the last firms to reach a disposition in an investigation.

The recent criminal proceedings against Daicel Chemical Industries, Ltd. and Ueno Fine Chemicals Industry Ltd. and each company's executives, discussed above, provide the most striking examples yet of the costs of being a late finisher. Daicel was fifth in the prosecutor's door, trailing behind an amnesty applicant and three earlier finishers in seeking to resolve its criminal exposure. Daicel reached a disposition 22 months after Eastman Chemical Co. pled guilty and cooperated in the investigation. The other firms, in order, that entered into plea agreements – Eastman Chemical Co., Hoechst AG, and Nippon Gohsei – paid fines of $11 million, $36 million, and $21 million, respectively. Daicel paid a fine of $53 million. But more important than the fine amounts are the proportionality comparisons. Compared to Eastman, for example, Daicel paid a fine that was 10 percent higher as a percentage of volume of affected commerce; if Daicel had paid Eastman's percentage, it would have paid a fine nearly $20 million lower. In addition to fine as a percentage of volume of affected commerce, the Antitrust Division relies on another measure to ensure its objective of proportionality: fine as a percentage of the

[43] U.S. v. Masaru Endo, Shigeo Yasuda, and Akira Hashimoto, (E.D. Pa. 2001). A Federal Grand Jury indicted Endo, Yasuda, and Hashimoto, each an executive at Ibiden Co. Ltd., a firm that agreed to plead guilty in July 2001 to participating in an international cartel to fix the prices of non-machined and semi-machined isostatic graphite (a carbon product with unique properties used in electrical discharge machinery, metal casting, and the semi-conductor industry). All three are Japanese citizens.

[44] U.S. v. Tamon Tanabe, (N.D. Tex. 2001). A Federal Grand Jury indicted Tanabe, a Japanese citizen and an executive of Ajinomoto Co. Inc., which agreed to plead guilty in August 2001 to participating in a worldwide conspiracy to fix the prices of, and allocate customers for, nucleotides (a food flavor enhancer). Ajinomoto agreed to a fine of $6 million for its role in the conspiracy.

Sentencing Guidelines minimum. Looking to that measure, in the sorbates investigation, each of the three higher-placed finishers that offered their cooperation before Daicel received fines significantly below the Sentencing Guidelines minimum, whereas Daicel paid the full (100 percent) Sentencing Guidelines minimum.

The prosecution against Philipp Holzmann AG in the construction industry provides another example of the costs to a firm of reaching a disposition very late in the investigation, even if not very far down in the sequence of firms coming in. Holzmann was only number three in the prosecutor's door, but the company came in several months after number two and over four years after it was on notice of the criminal investigation. Holzmann paid a fine of $30 million, which was 48 percent of the volume of affected commerce and 135 percent of the Sentencing Guidelines minimum – high percentages reflecting the Division's tough stance regarding firms that come forward very late.

Officials from the Antitrust Division addressed these fine measures in connection with a hypothetical exercise at the ABA Advanced International Cartel Workshop in New York City in February 2001.[45] The Division has used hypothetical exercises at previous ABA Workshops to provide general guidance to the antitrust bar on its current practices.[46] In the hypothetical at the Advanced International Cartel workshop, the Division insisted on a fine that was 126 percent of the Sentencing Guidelines minimum for the third firm in the prosecutor's door, behind an amnesty applicant and one firm that entered into an earlier plea agreement; and for the fourth firm, insisted on a fine that was 150 percent of the Sentencing Guidelines minimum.

Not only are Antitrust Division prosecutors seeking fines that are a higher percentage of the Sentencing Guidelines minimum for firms coming in late, they have now begun a practice that increases the minimum. This is accomplished by giving less credit in the Sentencing Guidelines calculation for cooperation received late in an investigation, which is, of course, worth less to the Division – an approach that conforms with instructions in the Sentencing Guidelines.

As a reminder, for antitrust offenses the Sentencing Guidelines use 20 percent of the volume of affected commerce to establish a base fine. The

[45]American Bar Association Section of Antitrust Law, Advanced International Cartel Workshop, New York, New York, February 15-16, 2001.

[46]American Bar Association Section of Antitrust Law, Advanced Criminal Antitrust Workshop, Phoenix, Arizona, February 20-21, 1997; American Bar Association Section of Antitrust Law, Advanced Criminal Antitrust Workshop, New York, New York, April 30-May 1, 1998.

base fine is adjusted by minimum and maximum multipliers derived from a culpability score, the net result of upward and downward adjustments based on various factors in aggravation and mitigation. One factor in mitigation is "if the organization fully cooperated in an investigation and clearly demonstrated recognition and affirmative acceptance of responsibility," and calls for a two-point reduction in culpability score.[47] However, the Sentencing Guidelines place a qualifier on that two-point reduction: "To qualify for a reduction under [the cooperation factor], cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation."[48] If the firm offering to cooperate later in an investigation does not meet this standard, then the Division may give it credit only for "clearly demonstrat[ing] recognition and affirmative acceptance of responsibility," which calls for a one-point reduction in the culpability score.[49] Of course, the cooperation of such a firm may still have value, in which case the Division will factor that into its recommendation as to the appropriate fine within the Sentencing Guidelines range. But, such a firm will still receive only a one-point reduction in its culpability score in determining the base fine multiplier.

What difference does one point make? Plenty. Every point in culpability is worth 0.2 in the minimum multiplier and 0.4 in the maximum multiplier (e.g., a culpability score of 7 equates to a 1.4 minimum multiplier and 2.8 maximum multiplier; 8 equates to a 1.6 minimum multiplier and a 3.2 maximum multiplier).[50] Thus, in practical application, a one-point higher culpability score results in an increase of 20 percent of the base fine as a minimum and 40 percent of the base fine as a maximum. So, on an affected volume of commerce of, say, $250 million, the base fine would be $50 million, and the difference between qualifying for a 2-point reduction for timely cooperation, versus only getting credit for acceptance of responsibility, would be a $10 million increase in the minimum fine and a $20 million increase in the maximum fine.

The Division gave only a one-point reduction to Phillip Holzmann AG, which increased its culpability score one point (from 8 to 9), its multiplier from 1.6 to 1.8, and the minimum Sentencing Guidelines fine by $2.5 million. Obviously, determining the increase in the minimum fine is only the first step in computing the cost of being late; the second step is multiplying

[47]U.S. Sentencing Guidelines Manual § 8C2.5(g)(2) (2000).
[48]U.S. Sentencing Guidelines Manual § 8C2.5(g)(2), cmt. n.12 (2000).
[49]U.S. Sentencing Guidelines Manual § 8C2.5(g)(3) (2000).
[50]U.S. Sentencing Guidelines Manual § 8C2.5(g)(3) (2000).

the higher minimum fine by a higher percentage (here, 135 percent) – also for being late – to arrive at the fine paid.

Similarly, at the Advanced International Cartel Workshop hypothetical exercise, discussed above, the Division was willing to credit the third and fourth place firms to deal with the prosecutors with only a one-point reduction, instead of a two-point reduction for timely cooperation.

Executives. The greatest cost to the company and its executives, as a group, for coming in late in an investigation has nothing to do with money: it is the treatment of their culpable executives.

In the sorbates prosecutions, each of the first three finishers after the amnesty applicant was required to carve out just one individual, and the individuals were offered *fine-only, no-jail* dispositions. In stark contrast, as discussed in Section II above, the government carved out four individuals from the plea agreement with fifth-place finisher Daicel, and, since none entered plea agreements and all four were indicted, one can assume that the government is seeking prison sentences for some or all of them.

The executives from sixth-place Ueno, even though it had a far lower volume of affected commerce than Daicel, received similarly harsh treatment: four of its top executives were carved out of the company's plea agreement with the government and three have been indicted thus far, suggesting that the Division is also seeking jail sentences rather than fine-only dispositions for them as well.

C. ENHANCING THE RISK OF DETECTION

This third element of the Department of Justice's plan for detecting and deterring cartel activity is based on the premise that reporting by participants, and therefore cartel detection, is a function of the risk and fear of being caught. If that risk is perceived as small, then severe penalties will not be sufficient to deter cartel activity. Likewise, if cartel participants do not fear detection, they will not be incentivized to report their wrongdoing to authorities in exchange for leniency. Therefore, antitrust authorities must in fact enhance the likelihood of cartel detection in order to promote increased self-reporting.[51] The Antitrust Division implemented four strategies to further enhance the risk of detection, and those strategies have become trends: application of an "Amnesty Plus" Program, coupled with the "omnibus question" practice; the "Penalty Plus" practice; proactive investigations; and increasing cooperation among antitrust authorities worldwide.

[51]See "Lessons Common To Detecting and Deterring Cartel Activity," supra, at 7-8.

Trend: The "Amnesty Plus" Program, Coupled With The "Omnibus Question" Practice, Are Significantly Increasing The Risk Of Detection

As the Antitrust Division gained experience in international cartel investigations and developed a docket of international prosecutions in the last half of the 1990s, a pattern emerged: roughly one-half of the investigations were initiated as a result of evidence developed during an investigation of a completely separate market. The pattern remains, as the Division continues to initiate approximately one-half of its international cartel investigations as spin-offs of ongoing investigations.[52]

This pattern, and the potential for generating even more spin-off investigations, led the Division to take a proactive approach to attracting amnesty applications by encouraging subjects and targets of investigations to consider whether they may qualify for amnesty in other markets where they sell. The Division established and implemented a program referred to as "Amnesty Plus."

Amnesty Plus results when a company is negotiating a plea agreement in a current investigation and seeks to obtain more lenient treatment in its plea agreement by offering to disclose the existence of a second, unrelated conspiracy. In such a case, the company that reports the second conspiracy and cooperates in the resulting investigation will receive amnesty for and pay no criminal fines in connection with the second offense, and none of its officers, directors, or employees who cooperate will be prosecuted criminally in connection with that offense. Plus, the company will receive a substantial additional discount from the Division in the calculation of the fine for its participation in the first conspiracy. Many of the Division's international cartel investigations have resulted from such Amnesty Plus spin-offs of ongoing investigations of international cartels.[53]

The Amnesty Plus program's objective of encouraging disclosure of other cartels is bolstered by another significant generator of leads to additional cartel activity. This cartel detection device is the result of the now-standard practice of Antitrust Division attorneys to employ the "omnibus question" at the conclusion of a witness interview or grand jury interrogation.

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[52]See Antitrust Division Status Report: Corporate Leniency Program, supra.

[53]"Status Report on International Cartel Enforcement," speech by Belinda A. Barnett, Senior Counsel to the Assistant Attorney General, Antitrust Division, before the Antitrust Law Section, State Bar of Georgia (November 30, 2000).

Division attorneys pose the omnibus question after examining a witness about anticompetitive activities in connection with a specific product(s) in the subject industry. The question goes something like this: "Do you have any information whatsoever, direct or indirect, relating to [description of conduct: *e.g.*, price fixing, bid rigging, market allocation] with respect to other products in this industry or in any other industry?" The witness must answer the question, and must answer it truthfully, or he/she not only would lose whatever protection he/she would otherwise have had for his/her statements, but also would be subject to the penalties of perjury or making false statements or declarations.

In the international cartel context, the omnibus question comes up most commonly in three situations: a cooperating director, officer, or employee being interviewed pursuant to the Antitrust Division's conditional amnesty agreement with his/her firm; a cooperating director, officer, or employee being interviewed pursuant to the cooperation provisions of the Antitrust Division's plea agreement with his/her firm; or, an executive being interviewed pursuant to the cooperation provisions of his/her separate plea agreement with the Antitrust Division.[54] Conditional amnesty agreements and plea agreements have iron-clad, unambiguous requirements regarding a director's, officer's, or employee's obligation to respond fully and truthfully to all inquiries of the United States. There is no wiggle room and no basis for not answering the question, no matter what the collateral implications are to the firm sponsoring the witness pursuant to the cooperation requirements of a conditional amnesty agreement[55] or plea agreement.

The omnibus question has uncovered many cartels and spawned many investigations. Government prosecutors, private practitioners, and company counsel alike know from experience that executives who have colluded on one product are more likely to have colluded on another or at least have knowledge of collusion. The omnibus question is a no-cost method to test the odds and is often a winner for the government.

[54]The omnibus question is also asked in grand jury interrogations, but to date that has been a less common method of developing evidence of cartel activity in the subject investigation and in spin-off investigations.

[55]However, it is the Antitrust Division's policy to protect amnesty applicants if, as a result of the company's good faith efforts to make knowledgeable employees available, their executives disclose additional antitrust offenses that were not reported in the original amnesty application. The scope of coverage of the conditional amnesty agreement will be expanded, as long as the company can meet the amnesty criteria and its cooperation obligations, to extend the amnesty protection for the company and the executive(s) to the newly revealed activity.

There is a synergy between the Amnesty Plus program and the omnibus question practice that reinforces the potential of each to uncover cartel activity. For example, assume counsel for the firm sponsoring an executive pursuant to the cooperation provisions of its plea agreement on the subject product becomes aware that the executive participated in, or has knowledge of, cartel activity in a second product. Since that information will necessarily be disclosed in any event by the executive when the Antitrust Division attorneys pose the omnibus question, counsel will often decide to formally make an amnesty application on the second product in order to obtain an additional discount from the fine on the subject product pursuant to the Amnesty Plus program.

Trend: The United States Has Instituted A "Penalty Plus" Factor, Further Enhancing The Risk of Detection

The Antitrust Division now takes the position that, if a company has the opportunity for an amnesty-plus disclosure and rejects it in favor of nondisclosure, it will seek a substantial increase in the penalty against the company for its failure to report the second offense. This increases the incentive for each company in this situation to report the second offense and, therefore, enhances the risk that the cartel will be detected. This increase in penalty is referred to as "Penalty Plus," and results when a company was knowledgeable about a second offense, elected not to report it, the Antitrust Division later detects the second offense, discovers the company's nondisclosure election, and successfully prosecutes the company for that offense. Then the Division will urge the sentencing court to consider the company's and any culpable executive's failure to report as an aggravating sentencing factor. The Antitrust Division will request the court impose a term and conditions of probation and will pursue a fine or jail sentence *at or above the upper end of the Guidelines range*. For a company, the failure to self-report under amnesty-plus circumstances could mean the difference between no fine at all on the second product under Amnesty Plus and a fine as high as 80 percent of the volume of affected commerce under Penalty Plus. For the executives, if could mean the difference between no jail and a lengthy jail sentence.[56]

[56]See discussion of Penalty Plus in "When Calculating The Costs And Benefits Of Applying For Corporate Amnesty, How Do You Put A Price Tag On An Individual's Freedom?", supra, at 7.

Trend: The United States Is Increasing Its Use Of Proactive Investigations, Still Further Enhancing The Risk Of Detection

At the aforementioned Advanced International Cartel Workshop, the Department of Justice's Antitrust Division revealed, for the first time publicly, that the enforcement agency has proactive efforts underway to detect international cartels.[57] The proactive efforts are a targeted and focused undertaking, directed at markets in industries where the Division has information that collusion has occurred or where the Division has had leads or prosecutions in adjacent industries.[58] The proactive efforts generally take advantage of the Division's experience in the subject or adjacent industries and its knowledge about how collusion occurred and where to look for evidence.[59]

The Division announced it was willing to disclose one industry in which it has proactive efforts underway to detect international cartel activity: commodity chemicals – an industry where the Division has been so active in international cartel prosecutions that the disclosure is not likely to jeopardize any covert investigations. Active, indeed. To date, the Division has prosecuted cases involving 16 commodity chemicals, brought criminal charges against 31 corporations and over 35 individuals, and obtained $1.2 billion in corporate fines and jail sentences for 14 executives.

The Division has learned that, structurally, international cartels occur in highly concentrated industries with few significant competitors, that small firms on the fringes do not destabilize an effective cartel, that the cartels sell standardized products where price competition is more important than other forms of competition, and that cartels prosper even in the face of large, sophisticated customers.[60]

The bedrock agreements of these cartels are volume- or market-share allocation agreements, price-fixing agreements around the world, and perhaps bid rigging on individual accounts. Other common characteristics include the involvement of very high level executives, meetings outside the United States, cartel "budgets," "scorecards" and other detailed schemes for reporting and tracking sales volumes in order to police the agreement, "com-

[57]Remarks by Phillip H. Warren, Assistant Chief, San Francisco Office, Antitrust Division, U.S. Department of Justice at the panel on "Detection of International Cartels," Advanced International Cartel Workshop, supra.
[58]Id.
[59]Id.
[60]Id.

pensation" schemes to deal with firms being "over or under budget" or cheating, and elaborate measures to prevent evidence from being created.[61]

Phillip Warren, an Antitrust Division official with extensive experience prosecuting international cartels, shared a few of the Division's proactive activities in the organic chemicals industry: subscribing to industry trade publications, including the *Chemical Marketing Reporter* (a weekly newspaper that reports on price movements, changes in capacity, mergers and acquisitions), used in some cartels as a way for one firm to announce price increases to other firms which they were to follow; pursuing every lead in the industry, even thin leads, very aggressively; rolling investigations in one market to other markets, such as when a firm involved in cartel activities in one market also is a significant player in a related market, or when an executive who has been involved in cartel activity on one product also has had marketing responsibilities within the same firm for another product; and working with representatives of large purchasers of products where there is reason to suspect those products could have been subject to cartel agreements.[62]

Mr. Warren stated that, although the Antitrust Division was willing at this time to make public just this one example of a proactive investigation, it would be a mistake to think the Division was not doing proactive work in many different industries. For firms around the world wondering if they are targets of proactive investigations, the Division's experience, as noted by Mr. Warren at another point in his presentation, is that the greater number of firms involved in international cartel activity are located in Europe and Asia.

Trend:The Increasing Cooperation Among Antitrust Authorities Worldwide Means Cartel Participants Have Fewer Safe Places To Hide And Face A Greater Likelihood of Prosecution

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[61] Id.; see also "An Inside Look At A Cartel At Work: Common Characteristics of International Cartels," speech by James M. Griffin, Deputy Assistant Attorney General, Antitrust Division, before the ABA Antitrust Section 2000 Spring Meeting (April 6, 2000); "International Cartels: The Intersection Between FCPA Violations and Antitrust Violations," speech by Gary R. Spratling, then Deputy Assistant Attorney General, Antitrust Division, before American Conference Institute National Conference on Foreign Concept Practices Act (December 9, 1999).

[62] Mr. Warren pointed out that large purchasers, as potential victims, are anxious to cooperate, given the billions of dollars awarded to victims of international cartels in civil settlements in the last few years; and that such firms' purchasing agents typically are very sophisticated and can provide records and analyses of their purchases, descriptions of interactions with sellers, anomalous pricing patterns, and suspicious comments made by sellers' sales and marketing personnel.

Over 80 countries now have antitrust laws – most of them enacted during the past five or ten years – and nearly 25 other countries are in the process of drafting such laws. There are many differences in the purposes and provisions of these laws. There are also enormous disparities in the enforcement resources and priorities in these various countries. But there is nearly universal agreement among antitrust authorities that hard-core international cartels are harmful to every affected country and should be stopped.

This common commitment to stamping out international cartels has resulted in a sea change in the level of cooperation among antitrust authorities. The current level of international cooperation far exceeds even the most optimistic expectations of enforcers two or three years ago. Signaling the sea change was an unprecedented, two-day International Anti-Cartel Enforcement Workshop hosted by the U.S. Department of Justice Antitrust Division on September 30-October 1, 1999. The attendees included anti-cartel investigators and litigators from across the United States and nearly 50 anti-cartel enforcers from 28 other jurisdictions on six continents. The panelists, from over a dozen different enforcement agencies, led discussions on topics ranging from leniency (amnesty) policies, to investigatory and prosecutorial mechanisms and policy, to methods of building an anti-cartel enforcement program, to cooperation among antitrust authorities in cartel investigations and prosecutions. Friendships were formed, professional relationships enhanced, improved methods of communication discussed, and new procedures for cooperation established. The effects were immediate, including an enormous increase in the frequency of communication among the most active antitrust authorities. The second anti-cartel enforcement workshop, modeled on the first, was held on November 21 and 22, 2000 in Brighton, England and hosted by the U.K's Office of Fair Trading, and was attended by enforcers from 27 other jurisdictions. The enforcers will meet for the third time next week in Ottawa, this time hosted by the Canadian Department of Justice and the Canadian Bureau of Competition.

In addition to these private, enforcers-only conferences, there has been a sharp rise in bar association programs on anti-cartel enforcement. A year ago, in September 2000, the 3rd Nordic Competition Policy Conference in Stockholm had as its theme, "Fighting Cartels – Why and How?", reflecting "the growing concern in Sweden, as well as internationally, for the detrimental effects of cartels on society."[63] The ABA's Advanced International Cartel Workshop in February 2001 confirmed the extraordinary interest in anti-cartel

[63]Conference Brochure, The 3rd Nordic Policy Conference: "Fighting Cartels – Why and How?", Stockholm, Sweden (September 11-12, 2000).

enforcement among enforcers, private practitioners, and corporate counsel from around the globe. The Workshop drew 165 participants, nearly 50 from outside the United States, including enforcement officials from 11 countries on five continents and private practitioners with similar geographic diversity.

III. THE CONVERGENCE BETWEEN THE CARTEL ENFORCEMENT POLICIES OF NORTH AMERICAN AUTHORITIES AND THE EUROPEAN UNION

As explained in connection with the trend discussed above, "Increasing Numbers of Cartel Participants Are Self-Reporting Under the U.S. Amnesty Program" (beginning at page 5), the United States revised its amnesty policy in 1993 to make it easier and more attractive to self-report. There were three major revisions made to the amnesty program: (1) amnesty is automatic if there is no pre-existing investigation; (2) amnesty may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who cooperate are protected from criminal prosecution.[64] At the time, these features distinguished the U.S. amnesty/immunity policy for antitrust offenses from not only any other amnesty/immunity policy in the United States, but, continuing until 2000, any other amnesty/immunity in the rest of the world as well.

In 2000, Canada adopted its own revised immunity policy that has virtually the same features as the United States' policy: automatic amnesty, the availability of amnesty even after the government has begun its investigation, and protection for officers, directors, and employees who cooperate.

Countries outside of North American have also developed or are developing amnesty or immunity policies that provide guarantees analogous to those in the United States' policies (except for provisions protecting individuals from prosecution in those jurisdictions where there is no liability for individuals who participate in a cartel). Countries outside of North America with existing policies include the EU, the UK, Germany, Australia, and Brazil, and more are on the way.

The EU's current leniency policy, adopted in 1996, provides for fine reductions or even a complete exemption from fines for the first cartel partici-

[64]See U.S. Department of Justice, Antitrust Division Corporate Leniency Policy (August 1993).

pant to inform the Commission of a cartel's existence.[65] In order to qualify for such a reduction, the reporting entity must meet certain conditions: (1) it must notify the Commission before the Commission begins an investigation, so long as it does not already possess sufficient information to establish the existence of the cartel; (2) it must provide decisive evidence of the cartel's existence; (3) it must not have compelled another entity to take part in the cartel, have acted as an instigator, or have played a determining role in the cartel's activities; (4) it must have terminated its involvement at or earlier than the time it reports its activities; and (5) it must fully cooperate and provide all of the relevant evidence in its possession.

The Commission's two international cartel decisions in 2001 suggest that it is placing greater reliance on the price-reduction provisions of the Leniency Notice to aid in its prosecutions, and cartel participants are beginning to be successful in obtaining the potential benefits under the Notice. In the graphite electrodes decision earlier this year, the Commission granted Showa Denko a 70 percent reduction in its fine for its cooperation after the Commission executed its "dawn raids," the first time any company received a substantial fine reduction under the leniency notice. And just recently, one of the defendants in the sodium gluconate prosecution, Fujisawa, received an 80 percent reduction in its fine – the largest reduction yet granted by the Commission under its current Notice. Fujisawa came forward to cooperate and provide evidence after the Commission issued a request for information but before it conducted a "dawn raid." All of the other defendants in the sodium gluconate prosecution received fine reductions of either 20 or 40 percent for their cooperation. However, the fact remains that the EU has not yet granted a total exemption from (or 100 percent reduction in) fines to even one firm!

Approximately four months ago, the European Union issued for comment a draft Notice of a revised leniency policy, one that moves toward the United States and Canadian policies by providing immunity from fines to the first entity to report illegal activities and reduced fines for the second, third, and subsequent entities that report such activities.[66] The key provisions of the policy include:

- *Immunity from fines* for the first entity that reports activities of which the Commission was previously unaware. The reporting entity must meet certain requirements in order to qualify for immunity: terminate its in-

[65]Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases (July 18, 1996).

[66]Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases, July 18, 2001.

volvement in the illegal activities, provide evidence sufficient to support a "dawn raid," and fully cooperate with enforcement authorities, including providing all information and evidence in its possession. The policy also requires that the applicant not have coerced other parties into participating in the illegal activities through economic strength or other means. The revised policy would allow a party to first present information about the cartel activities (description of the activities, geographic market, participants, size of the market) in hypothetical terms. It also allows the Commission, after determining that the party meets the requirements of the Notice, to provide in writing a conditional grant of immunity from fines. The EU will not provide a final grant of immunity until it issues its decision at the completion of the matter.

- *Reduction in fines* of up to fifty percent for the parties that follow the immunity applicant in the door. The reduction will be granted on a sliding scale according to when the parties meet the requirements of the Notice: the first entity is eligible for a fine reduction of 30 to 50 percent, the second a reduction of 20 to 30 percent, and subsequent entities a reduction of up to 20 percent. In order to qualify for a reduction, parties must offer evidence that provides "significant added value" to the evidence that the Commission already possesses, as well as terminate their involvement in the activities. Parties will not receive notice of any reduction until the Commission issues its final decision.

The proposed revisions represent a significant step forward by the Commission toward encouraging parties to report their illegal activities, particularly by providing for full immunity from fines for the first entity in the door, as well as more significant reductions for subsequent cooperators. The revised policy, in ways that the previous policy did not, provides a measure of transparency and certainty – prerequisites to self-reporting and cooperation by antitrust offenders.[67] However, as the American Bar Association's Sections on Antitrust Law and International Law and Practice noted in their comments on the draft Notice, there are aspects of the new policy that will blunt the positive impact of the changes and, in some instances, may actually have the effect of discouraging parties to self-report:

- The Commission provides no opportunity for parties to receive full immunity if they report activities after the Commission has already begun

[67]See "Transparency in Enforcement Maximizes Cooperation from Antitrust Offenders," supra.

an investigation. This will obviously discourage entities from reporting their activities if they know, or *believe*, an investigation has begun, and, because other enforcement authorities do provide such an opportunity, it will leave companies open to disparate treatment by various jurisdictions. Enforcement authorities in the United States have found that entities who report after the opening of an investigation are a prolific source of information that have greatly aided their prosecution efforts. The cartel investigations that have generated the largest fines, including the vitamins and graphite electrodes prosecutions, all began before – sometimes years before – the first entity came in to self-report.

- The requirement that immunity applicants provide sufficient evidence to support a "dawn raid" is too ambiguous and provides too few incentives to assure applicants that the benefits of self-reporting outweigh the risks. The draft Notice provides no guidance as to what constitutes sufficient information, nor does it promise that an entity that provides information that the Commission ultimately decides is insufficient will not be prosecuted based on the very evidence it provides. The policy incentivizes waiting, investigating, and gathering evidence, as opposed to prompt reporting. The United States and Canada have no such minimum evidentiary requirement. Those jurisdictions require only that an applicant make a full disclosure of all of the evidence in its possession, even where that information, while useful and even essential, would not be sufficient to support a search warrant, for example.

- The requirement that an entity not have coerced others by using its economic strength could have the effect of discouraging larger, stronger entities, often those with the most information, from reporting for fear that their success could be held against them in the immunity process. The United States and Canada have found that economic markers such as profitability or size of the relevant market share are not predictive enough to support a presumption that economic strength necessarily equals coercion, and that other factors frequently enable one company to coerce others.

- With respect to the proposed fine reductions, the Commission does not take into account the possibility that subsequent cooperators will provide information of tremendous value to a case – cooperation that is worth more than a fifty percent reduction. The immunity applicant may provide information to support a dawn raid, but no more; in the United States' experience, however, subsequent cooperators often provide the kind and quality of evidence needed to actually prosecute the case.

- The provision that the Commission will wait until it issues a final decision before it determines the amount of an entity's fine reduction creates the kind of uncertainty that will cause many entities to pause – and per-

haps permanently retreat – before reporting their conduct. Written and timely notice of the conditional amount of the reduction, akin to the conditional notice of immunity provided for in this revised Notice, will more likely provide the certainty that a Board of Directors will demand before reporting their company's behavior.

The Commission may modify the final version of the Notice, based on the comments it receives, to remove the disincentives to self-reporting. Such modifications would lead to a convergence between the European and North American leniency/immunity policies and would ensure consistent treatment of cooperating parties across jurisdictions, further increasing the likelihood that cartel behavior will be detected and prosecuted.

Very recently, enforcement authorities from around the world took an even more concrete step toward continued, effective cooperation by creating the International Competition Network (ICN). The purpose of the ICN is to provide a means for antitrust officials to "work to reach consensus on proposals for procedural and substantive convergence in antitrust enforcement."[68] The ICN is intended to help developing and developed countries create effective means of addressing cross-jurisdictional issues in the civil and criminal arenas, with the goal of promoting and protecting competition in all countries. The interim steering committee of the group gives some indication of the breadth of its membership: Australia, Canada, the EU, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the UK, the U.S., and Zambia. The first meeting is scheduled in Italy in the Spring of 2002. While the group will have no binding authority, it does intend to provide recommendations to be considered by the enforcement agencies of individual jurisdictions. It is anticipated that the group would likely recommend substantive convergence among even more countries on amnesty/immunity and fine reduction policies for self-reporting and cooperation.

CONCLUSION

The U.S. cartel enforcement trends addressed above, some now sev-

[68]See "Reconciling Divergent Enforcement Policies: Where Do We Go From Here?" speech by Charles A. James, Assistant Attorney General, Antitrust Division, before Fordham Corporate Law Institute Conference on International Law and Policy (October 25, 2001); "U.S. and Foreign Antitrust Officials Launch International Competition Network," U.S. Department of Justice Press Release (October 25, 2001).

eral years old and others revealed only recently, have coalesced into an evolving, fully integrated master plan on the part of the U.S. Department of Justice to detect, investigate, and prosecute international cartels. The plan would appear to be very effective in rooting out cartel activity. On one end of the spectrum, the Antitrust Division is continuing to increase the incentives for early reporting and cooperation, promising a greater likelihood of detection through both proactive efforts and methods to encourage reporting in multiple product areas, and providing a means to reduce penalties in one product area in return for cooperation in another. At the other end of the spectrum, the Division has made the consequences for cartel behavior even more significant than they have been in the recent past: making penalties for corporations more severe, seeking jail sentences against foreign as well as domestic executives, ratcheting up the sanctions for firms and executives that come in late, and dramatically increasing the penalties for firms and executives that are latest in the door.

The key to the United States' success in detecting and prosecuting international cartels has been its amnesty/immunity policy,[69] coupled with its policy of significantly reduced penalties for subsequent cooperators. The story is the same in Canada. And now the EU, and other authorities, appear to be following suit, or at least moving in that direction. This convergence, and the promise of consistent treatment across jurisdictions, particularly if the EU removes the disincentives to self-reporting in the final version of the Notice, will result in ever-greater numbers of cartel participants self-reporting. It will also increase the challenges to general counsel and private practitioners – to general counsel to develop compliance programs that will prevent cartel activities; and, in the event a cartel infringement still occurs, to private practitioners to provide guidance to cartel participants, whether before or after detection of the cartel by an antitrust authority, on an integrated international strategy and the course of action in each country that will minimize overall exposure for the firm and its executives.

[69]See text related to footnotes 10 through 13, supra.