

White Collar Crime - USA

Multinational Cooperation with the Investigation of International Cartels

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Over the past 10 years, the investigation and prosecution of cartels has gained momentum around the globe. The US Department of Justice Antitrust Division, in particular, has extended the scope of its enforcement by pursuing international antitrust violations. While the division continues to strengthen its dedication to the detection and prosecution of international cartels,⁽¹⁾ many foreign governments are assisting new and improved cooperation agreements, engaging in unprecedented coordinated investigations, and strengthening their own antitrust laws and enforcement programmes. This update reviews these developments and examines the practical impacts of international cooperation and coordination with US antitrust prosecutions of corporations and executives worldwide.

In recent years the Antitrust Division has committed to "move forcefully against hard-core antitrust violations such as price-fixing, bid rigging and market allocation".⁽²⁾ The division has "maintained a strong focus on international cartels because of the tremendous volume of commerce typically associated with such conspiracies".⁽³⁾ Currently, there are approximately 50 sitting grand juries in the United States investigating suspected international cartel activity.⁽⁴⁾

The subjects and targets of the division's international investigations are on six continents and in nearly 25 different countries.⁽⁵⁾ Since 1998, roughly half of the corporate defendants in cases brought by the division have been foreign-based.⁽⁶⁾ Markets where the division has prosecuted international cartels include vitamins, textiles, construction, food and feed additives, food preservatives, chemicals, graphite electrodes, ocean tanker shipping and fine arts auctions.⁽⁷⁾

Moreover, the increased focus on the prosecution of international cartels has led to a substantial increase in criminal fines. Of the \$1.7 billion dollars in criminal fines imposed in division cases from 1997 to 2001, well over 90% of those fines were obtained in connection with the prosecution of international cartel activity.⁽⁸⁾

However, prosecutions have not been limited to corporate cartel members, but have also included the individuals who create and operate the cartels. The division is convinced that the single best deterrent to cartel behaviour is the imposition of increasingly lengthy prison sentences.⁽⁹⁾ In 2002, defendants in cases prosecuted by the division were sentenced to a record amount of jail time: more than 10,000 days in all, with an average sentence of over 18 months.⁽¹⁰⁾ More individuals have been sentenced in division cases to one year's imprisonment or longer in the last four years than in the previous decade.⁽¹¹⁾ Moreover, it is not only executives in the United States who have faced prison terms; businesspeople from Canada, France, Germany, Sweden and Switzerland have now served time in US prisons for violating US antitrust laws.⁽¹²⁾

International cooperation on anti-cartel enforcement has reached new levels. One of the byproducts of the US war on terrorism has been the negotiation of new and improved mutual legal assistance treaties

and extradition treaties. Thus, in March 2003 the United States and the United Kingdom negotiated a new extradition treaty which, once implemented, will apply to all offences punishable under the laws of both the United States and the United Kingdom by at least one year in prison.⁽¹³⁾ Similarly, in June 2003 the United States and the European Union entered into their first mutual legal assistance treaty and extradition treaty.⁽¹⁴⁾

In the past few years the Antitrust Division has also entered into antitrust cooperation agreements with four foreign governments: those of Brazil, Israel, Japan and Mexico.⁽¹⁵⁾ These agreements will foster cooperation between the United States and those governments with respect to the investigation and prosecution of international cartels and other aspects of antitrust enforcement.⁽¹⁶⁾ Just over two years ago, the division also launched the International Competition Network (ICN), a global network of antitrust authorities from nearly 70 developed and developing countries representing nearly 90% of the world's gross domestic product.⁽¹⁷⁾ The organization participants consult frequently and informally throughout the year, and at its last conference in Merida, Mexico, agreed to explore the potential for work on cartel enforcement.⁽¹⁸⁾

In addition to treaties, agreements and organizations, international authorities are also helping the Antitrust Division to locate and obtain the surrender of foreign nationals who have been indicted in division cases. In 2001 the division adopted a policy of placing indicted fugitives on a 'red notice' list maintained by Interpol, the International Criminal Police Organization headquartered in Lyon, France.⁽¹⁹⁾ Many fugitive defendants have already been apprehended through this red notice process.⁽²⁰⁾

This improved cooperation between the United States and foreign law enforcement authorities has also provided the Antitrust Division with increased access to foreign-located evidence and witnesses which have been used to crack a number of international cartels.⁽²¹⁾ For example, the investigation of bid-rigging on wastewater treatment plant construction contracts in Egypt, which were funded by the US Agency for International Development, was assisted by the execution of search warrants by foreign authorities on the division's behalf in order to seize evidence abroad.⁽²²⁾ Most notably, in February 2003 the division, joined by the European Commission, the Canadian Competition Bureau and the Japanese Fair Trade Commission, coordinated the initiation of an industry-wide investigation. The Japanese authorities raided Japanese companies while US Federal Bureau of Investigation agents visited the homes of several US senior executives in the east coast of the United States, and the European Commission executed dawn raids on European businesses (using over 100 German police officers), culminating in document requests being served in Canada.⁽²³⁾ In approximately 15 hours, four investigations were underway on three continents resulting in the collection or subpoena of documents and witness interviews.⁽²⁴⁾ The Antitrust Division has repeatedly publicized this effort - the first time that an international cartel investigation had taken place simultaneously in four jurisdictions - as an example of the degree of international cooperation available to it.⁽²⁵⁾ On a regular basis, antitrust authorities around the world are rapidly enacting new antitrust laws, creating new cartel investigation units or obtaining record antitrust fines.⁽²⁶⁾

Global efforts at curtailing international cartels may be expected to continue to improve and increase, with the participation of more nations. The US Department of Justice, in particular, shows no signs of moderating its efforts or easing up on fines and prison sentences. Hence, companies and their executives around the world must understand that the US government, with the cooperation of other foreign governments, is determined to eradicate international cartels and take steps to ensure compliance with all applicable antitrust laws. In essence, the notion that a company or its executives can find a 'safe harbour' from which to violate the antitrust laws will soon become antiquated and unattainable.

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Endnotes

(1) R Hewitt Pate, assistant attorney general, Antitrust Division, "The Department of Justice International Antitrust Programme - Maintaining Momentum", address before the American Bar Association Section of the Antitrust Law 2003 Forum on International Competition Law, New York City (February 6 2003), available at www.usdoj.gov/atr/public/speeches/200736.htm.

(2) Pate, before the Committee on the Judiciary US House of Representatives concerning Antitrust Enforcement Oversight, presented on July 24 2003, available at www.usdoj.gov/atr/public/testimony/201190.htm.

(3) *Id.*

(4) *Id.*

(5) Scott D Hammond, director of criminal enforcement, Antitrust Division, US Department of Justice, "An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Programme", www.usdoj.gov/atr/public/speeches/200686.htm.

(6) Hammond, "The Fly on the Wall has Been Bugged - Catching an International Cartel in the Act", address before the International Law Congress 2001 EU Competition Law (May 15 2001), available at www.usdoj.gov/atr/public/speeches/8280.htm.

(7) See Hammond, *supra* note 5.

(8) See Hammond, *supra* note 6.

(9) See Pate, *supra* note 1.

(10) *Id.*

(11) See Hammond, *supra* note 5.

(12) See Pate, *supra* note 1.

(13) Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, United States 1 (2003) (March 31 2003).

(14) See Council of the European Union, Agreements on Extradition and on Mutual Legal Assistance between the European Union and the United States of America, Legislative Acts and Other Instruments, 0153/03, CATS 28 (June 3 2003).

(15) See Hammond, *supra* note 5.

(16) *Id.*

(17) See Pate, *supra* note 1.

(18) See Pate, *supra* note 2.

(19) See Pate, *supra* note 1.

(20) *Id.*

(21) See Hammond, *supra* note 5.

(22) See Hammond, *supra* note 5.

(23) Donald C Klawiter, "Global cartel enforcement in 2004: penalties, leniency considerations and coordination", *The Antitrust Review of the Americas 2004*, at 26.

(24) *Id.*

(25) See Hammond, *supra* note 5.

(26) Pursuant to the division's Corporate Lenience Policy, a corporation that reports its illegal antitrust

activity at an early stage will not be charged criminally for this activity if the company meets the requirements of the leniency programme (eg, full cooperation). For a corporation that comes forward after an investigation has begun to be eligible for leniency, the division must not yet have evidence against the company that is likely to result in a sustainable conviction. Executives of the company who cooperate with the investigation are also covered.

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