DEPARTMENT OF JUSTICE

ANTI-CARTEL ENFORCEMENT: THE CORE ANTITRUST MISSION

R. HEWITT PATE
Acting Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the
British Institute of International and Comparative Law
Third Annual Conference on
International and Comparative Competition Law
The Transatlantic Antitrust Dialogue
London, England

May 16, 2003

I. Introduction

I am greatly honored to have been asked to address this prestigious conference, in the company of many distinguished friends and colleagues from the antitrust community. The British Institute of International and Comparative Law has organized a truly outstanding conference, and I appreciate the opportunity to take part in it.

My subject this afternoon is cartels. You may well ask, why is this fellow talking about that subject today, when it was on the agenda yesterday? There are two reasons. First, because I was told I could speak about what I thought was most important in the work of the Antitrust Division of the Department of Justice. Our sustained law enforcement effort against cartels, domestic and international, fits that description. And second, the topic is appropriate because this is a time when you in the United Kingdom have chosen – very soundly, in our view – to give Dr. John Vickers and his dedicated staff at the Office of Fair Trading both a mandate and the tools to implement an effective anti-cartel enforcement policy.

For decades, there were vigorous disputes in international fora about whether it made sense to prohibit cartel behavior by private firms. That debate has been resolved, in this country and elsewhere. As the Organization for Economic Co-operation and Development has recognized, cartels are "the most egregious violations of competition law."[1] Anti-cartel enforcement should therefore be a primary priority for every antitrust agency.

Cartels are an attack against free market economies. Modern history has shown the great economic harms and large-scale competitive disadvantages suffered by economies that are based

---

[1] OECD COUNCIL, RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS (1998).

on a cartel mentality. Cartels inflate prices, restrict supply, inhibit efficiency, and reduce innovation. Today, governments around the world accept the principle that "industrial progress [is] best . . . obtained in a free market, where prices are fixed by competition and where success depends on efficiency rather than market control."[2]

The antitrust laws act as the "most effective brake against the cartelization of industry."[3] Here, in the United Kingdom, the British government recently has taken significant steps to increase the braking power of its antitrust laws. The introduction of a new cartel offense, a leniency program, a new fining scheme, and expanded investigative powers under the 1998 Competition Act provide important tools to British antitrust enforcers in the fight against cartels in the United Kingdom. Moreover, in recognition of the pernicious effects of cartels, the 2002 Enterprise Act has criminalized cartel offenses for individuals – a very sound policy choice from our perspective. As Dr. Vickers recently explained: "Since hard-core cartels are like theft, criminalisation makes the punishment fit what is indeed a crime."[4]

As many of you know, the United States and the United Kingdom have not always seen eye-to-eye on the subject of cartels. But at this point in history, we can confidently say that we have come to share a common aversion to cartels and a common determination to eradicate them,

---

[2] THURMAN ARNOLD, FAIR FIGHTS AND FOUL 121 (Harcourt, Brace & World, Inc. 1951).

[3] *Id.* at 120.

[4] John Vickers, Policy for Markets and Enterprise, Speech Before the British Chamber of Commerce 4 (Mar. 31, 2003). The Office of Fair Trading has recently published a detailed consultation paper on how the criminal provisions of the Enterprise Act 2002 will work in practice. OFFICE OF FAIR TRADING, POWERS FOR INVESTIGATING CRIMINAL CARTELS (Apr. 2003). This paper and others relating to the Enterprise Act are available on the OFT's website at http://www.oft.gov.uk/enterpriseact.htm.

in the interest of our consumers and of keeping our respective economies competitive in this age of globalization.

II. Current Antitrust Division Anti-Cartel Enforcement Program

Since 1890, the Sherman Act has reflected the United States' "abiding faith that the elimination of competition in business [is] morally and economically wrong."[5] Today, all aspects of our enforcement program against cartels are robust. We currently have approximately 100 grand juries investigating suspected cartel activity, with about 40 of those investigating suspected international cartel activity.

Our rate of amnesty applications is at an all time high – in the first six months of this fiscal year, we have averaged three applications per month. With the increase in amnesty applications we have seen an increase in the quality and quantity of the evidence of a cartel and a corresponding increase in the rates of conviction in our cases. Cartel members who hope to get away with their illegal conduct increasingly are finding that the odds are against them.

Once convicted, defendants are paying a heavy price for their illegality. Over the past six years, the Division has obtained more than $2 billion in fines against corporations convicted of engaging in cartel conduct. Individual cartelists also have paid a heavy price for their illegal conduct. In the last fiscal year, the average jail sentence imposed in Antitrust Division cases was over 18 months – a Division record.

---

[5] ARNOLD, *supra* note 2, at 129.

Our cooperation with foreign antitrust authorities in cartel matters has never been better or more effective. In February of this year, for the first time ever, coordinated searches and drop-in interviews were conducted in an international cartel investigation by enforcement authorities from the United States, the European Union, Canada, and Japan. I want to emphasize that, over the past decade or so, we have developed a particularly excellent cooperative relationship with British government agencies on antitrust policy issues. With the enactment of an international law enforcement cooperation provision in the Enterprise Act, and the May 2001 decision of our two governments to apply the U.S.-U.K. mutual legal assistance treaty to antitrust matters in appropriate situations,[6] we also look forward to creating a close cooperative relationship on enforcement matters. This relationship is based – as sustainable relationships must be – on the principle of reciprocal benefit.

III. Recent Antitrust Division Cartel Cases

I will take just a few moments to discuss some of our recent cartel cases. These prosecutions involve both individual and corporate defendants.

One of our more notable enforcement actions against an individual – at least one that has garnered a significant amount of media attention – is the prosecution of Alfred Taubman, the former chairman of Sotheby's auction house.[7] Taubman's trial was the first that involved testimony from a witness protected by amnesty, in this case, Christie's CEO. The defendant

---

[6] *See* OFFICE OF FAIR TRADING, THE OVERSEAS DISCLOSURE OF INFORMATION (Apr. 2003); DEPARTMENT OF TRADE AND INDUSTRY, CO-OPERATION WITH COMPETITION AUTHORITIES WORLDWIDE, *at* http://www.dti.gov.uk/ccp/ topics2/internationalpolicy.htm.

[7] *United States v. A. Alfred Taubman*, Cr. No. 01 CR 429 (S.D.N.Y. 2001), *aff'd*, 297 F.3d 161 (2d Cir. 2002).

fielded an antitrust "dream team" for the trial against our New York field office prosecution team. Mr. Taubman was convicted of fixing prices with Sotheby's supposed archrival Christie's. He was sentenced to serve a one-year jail term, which he currently is serving, and pay a $7.5 million fine.

We also have had several investigations and cases recently in which cartelists have taken advantage of government programs to aid disadvantaged areas. In the Cairo international waterworks construction case, the cartelists rigged bids for water treatment construction projects in Egypt that were funded by the U.S. Agency for International Development.[8] The defendants saw this humanitarian effort as an opportunity to fatten their own pockets by getting together to decide which company should win which project, to inflate bid amounts, and to pay cartel members "loser fees" to bid high or not bid at all on certain projects. Four companies ultimately pled guilty to participating in the cartel,[9] and fines of over $140 million were imposed. One cartel member was convicted after trial in February 2002 of bid-rigging and conspiring to defraud USAID and received a three year sentence.[10]

---

[8]The U.S. government agreed to fund Egyptian projects to improve the treatment of drinking and waste water as part of the Camp David Peace Accords in order to promote public health and foster stability in the Middle East.

[9] *United States v. Bilhar International Establishment*, No. CR-01-PT-302-S (N.D. Ala. 2001); *United States v. ABB Middle East & Africa Participations AG*, No. CR-01-N-0135-S (N.D. Ala. 2001); *United States v. Philipp Holzmann Aktiengesellschaft*, No. CR-00-N-0285-S (N.D. Ala. 2000); *United States v. American International Contractors, Inc.*, No. CR-00-N-0298-S (N.D. Ala. 2000).

[10] The Anderson conviction was recently affirmed by the Eleventh Circuit Court of Appeals. *United States v. Elmore Roy Anderson*, No. 01-00302-CR-PT-S, 2003 WL 1860516 (Apr. 11, 2003). Another individual defendant, Peter Schmidt, a member of the management board of cartel member Philipp Holzmann AG, also was indicted and remains an international fugitive. *United States v. Peter W. Schmidt*, No. CR-01-J-0303 (N.D. Ala. 2001).

Another investigation involving taxpayer-funded projects was our prosecution of bid-rigging of typhoon repair projects in Guam. In December 1997, Super Typhoon Paka hit the island of Guam, leaving an estimated 5,000 persons homeless.[11] Instead of fulfilling his duties to get the best price for the projects, Austin "Sonny" Shelton, a government official responsible for overseeing the repair projects, orchestrated bid-rigging schemes and demanded bribes so that he and his co-conspirators could benefit personally from Guam's efforts to recover from Typhoon Paka. Five individuals ultimately pled guilty to rigging bids for these emergency repair contracts,[12] and Shelton was convicted and sentenced to serve ten years in prison, the longest jail sentence ever imposed in an Antitrust Division case.[13]

Cartels victimize not only disadvantaged groups but also frequently victimize large businesses. These victims have included some of the biggest names in business – Coca-Cola, Proctor & Gamble, Tyson Foods, Kellogg, and Nestle, just to name a few. Large manufacturers were some of the most directly impacted victims of cartels in the vitamins, sorbates, citric acid, graphite electrode, and lysine industries. Of course, these five international cartels likewise

---

[11] Steve Harris and Rob Philbrick, *Typhoon Paka*, ¶ 3 (Dec. 1997), *at* http://www.eqe.com/publications/paka/paka4pg.html; *see also Super Typhoon Paka*, ¶ 1, *at* http://www.npmoc.navy.mil/jtwc/atcr/1997atcr/ch3/05cw.htm.

[12] *United States v. Jessie S. Pendon*, Criminal Case No. 01-00071 (D. Guam 2001); *United States v. Il Young Cho*, Criminal Case No. 01-00008 (D. Guam 2001); *United States v. Primitivo Duque Carlos*, Criminal Case No. 00-00123 (D. Guam 2000); *United States v. Young Soo Yoon*, Criminal Case No. 00-00092 (D. Guam 2000); *United States v. Kenneth Koo Lee*, Criminal Case No. 00-00091 (D. Guam 2000).

[13] *United States v. Austin J. "Sonny" Shelton*, Criminal Case No. 01-00007 (D. Guam 2001).

cheated consumers in the U.S., U.K., and elsewhere out of hundreds of millions of dollars, and implicated over $10 billion in commerce.

IV. Increased International Prosecutions

Today reports of cartel prosecutions come not only from the United States but from authorities around the world. Governments are building up their antitrust programs to detect and prosecute cartels that collude in secret to set prices, allocate contracts, and cheat and defraud consumers, businesses, and government programs. Many of the international cartels prosecuted by the United States have been prosecuted by multiple enforcement authorities, including the EC, Canada, Australia, Korea, Brazil and Mexico. Recent headlines have noted the EC's imposition of fines on six associations for fixing beef prices,[14] the Korea Fair Trade Commission's prosecution of six vitamin producers for their participation in the international vitamin cartel,[15] the Canadian Competition Bureau's prosecution of Rhone-Poulenc for its role in an international conspiracy to fix prices of the chemical methylglucamine used to record X-ray images,[16] and the prosecution by the Netherlands Competition Authority of shrimp wholesalers and producers for fixing shrimp prices.[17]

---

[14] Press Release, Eur. Comm'n, "Commission Imposes Fine on French Federations for Unlawful Agreement in the Beef Sector" (Apr. 2, 2003), *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/479|0|RAPID&lg=EN&display=.

[15] Press Release, Korea Fair Trade Comm'n, "The KFTC Imposes Surcharges on the International Cartel of Vitamin Companies" (Apr. 25, 2003), *available at* http://ftc.go.kr/eng/.

[16] Press Release, Can. Competition Bureau, "Rhône-Poulenc Biochimie S.A. Sentenced to $500,000 Fine Following Competition Bureau Price Fixing Investigation" (Feb. 27, 2003), *available at* http://strategis.ic.gc.ca/SSG/ct02507e.html.

[17] Press Release, Neth. Competition Authority, "NMa Fines Shrimp Wholesalers and Shrimp Fishery Industry due to Price Agreements" (Jan. 14, 2003), *available at*

In light of this increased enforcement around the world, cartel members have come to recognize that the cost of getting caught is on the rise. Hopefully, this will result in the deterrence of cartel formation or continuation in many cases. In some other cases, however, we have seen cartel members taking a different approach to the threat of increased penalties – some have sought to obstruct our investigations.

In one recent investigation, we uncovered an elaborate plot to obstruct not only our investigation of price fixing in the carbon brush industry but also a potential EC investigation. Executives of Morgan Crucible gave the Division false information in an attempt to convince us that their price-fixing meetings with competitors were legitimate business meetings. They provided their co-conspirator with a written "script" containing this false information, requested that it follow the script when questioned by the Division, and warned its co-conspirator that if the U.S. investigation proceeded, the price-fixing investigation would spread to the EC. The Division charged The Morgan Crucible Company PLC, a British firm, with obstruction of justice arising from this witness tampering. Morgan Crucible pled guilty to the obstruction charges and its U.S. subsidiary, Morganite, Inc., pled guilty to price fixing. The companies were fined a total of $11 million.

---

http://www.nmanet.nl/en/nieuws_en_publicaties/persberichten/03-02.asp.

V. International Cooperation

Cooperation among antitrust authorities will remain an essential means of detecting and prosecuting international cartel activity. The key evidence of international cartels often is located abroad, and thus the investigation of such cartels requires investigative assistance from foreign authorities. Many of our recent cartel prosecutions were substantially aided by international investigative assistance. In the Cairo investigation, German authorities devoted over 100 German police officers to search multiple locations in Germany. The searches induced cooperation from subjects of the investigation, which previously had been lacking. This was critical to the cases we later brought. In our carbon fiber investigation, the Japanese government conducted searches for us, and discovered a document in Tokyo regarding pricing contacts among carbon fiber manufacturers that had been removed from the United States in order to conceal the documents from the grand jury. The discovery of this document and others ultimately resulted in our prosecution of two companies and one individual for obstruction of justice.[18]

As I mentioned at the beginning of my remarks, earlier this year the Antitrust Division, the EC Directorate-General for Competition, the Canadian Competition Bureau, and the Japanese Fair Trade Commission coordinated searches and drop-in interviews in an unprecedented level of cooperation in an international cartel investigation in the plastic additives industry.[19] It is no longer uncommon for international antitrust authorities to discuss

---

[18] *United States v. Toho Carbon Fibers, Inc.; Toho Tenax Co. f.k.a. Toho Rayon Co.; and Jinnosuke Takeda*, Cr. No. 02-281 (C.D. Cal. 2001).

[19] *See* Press Release, Eur. Comm'n, "Statement on Inspections at Producers of Heat Stabilisers as well as Impact Modifiers and Processing Aids - International Cooperation on

investigative strategies and to coordinate searches, service of subpoenas, drop-in interviews, and the timing of filing of charges in order to avoid the premature disclosure of an investigation and the possible destruction of evidence. We in the U.S. appreciate this international assistance with our efforts, and likewise hope wherever possible to assist our colleagues abroad with their own important efforts.

VI. International Jurisdictional Issues

Before concluding today, I would like to discuss an important legal issue involving international cartels that may have particular resonance in this country: whether foreign plaintiffs can obtain treble damages in private lawsuits in United States courts for damages suffered solely in foreign markets. As many of you know, the availability of treble damages in U.S. private antitrust cases has long been a subject of horrified fascination in some circles in Britain. This is so despite the fact that – or perhaps *because* of the fact that – Congress' decision to permit such damage recoveries in antitrust cases traced its roots to a long tradition of multiple-damage statutory remedies in English law, dating at least as far back as the reign of King Edward I in the late thirteenth century.[20]

In any event, this issue has arisen precisely because of the successful detection and prosecution of international cartels by the Division and other antitrust agencies in recent years. With some frequency, foreign plaintiffs have sued in United States courts to recover treble damages arising out of foreign purchases of conspiratorially price-fixed items. They have sought

---

Inspections" (Feb. 13, 2003), *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/33|0|RAPID&lg=EN&display=.

[20] *See* MICHAEL PRESTWICH, EDWARD I 271-272 (Yale University Press 1988).

to base jurisdiction on other sales to other victims by other conspirators that had an effect on United States commerce. These cases raise the issue of whether our Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), which is an amendment to the Sherman Act, allows such suits.

The U.S. Supreme Court has not yet ruled on this issue, and federal appellate courts are divided. Our Fifth Circuit, in the *Statoil* case,[21] read the FTAIA as requiring that the plaintiff's injury arise from the conspiracy's domestic anticompetitive effects. It dismissed the lawsuit because the plaintiff Norwegian oil corporation was injured in its North Sea operations, while the anticompetitive effect on U.S. commerce was felt in the Gulf of Mexico. But the Second Circuit, in *Kruman v. Christie's*,[22] and a panel of the District of Columbia Circuit in *Empagran v. Hoffman-LaRoche*,[23] ruled for the plaintiffs in comparable situations. In these two cases, involving foreign purchases from the fine arts and vitamin cartels respectively, the appellate courts held that if the global conspiracy has the necessary "direct, substantial, and reasonably foreseeable effect" on the U.S. domestic market under the statute, then the defendants fall within the reach of the antitrust laws without any requirement that the particular plaintiff actually suffered any injury from the conspiracy's effect in the U.S.

As the split among our appeals courts shows, this question of statutory construction is not easy. The Department of Justice and Federal Trade Commission, while recognizing this difficulty, nonetheless believe that the Fifth Circuit in *Statoil* got the better of the debate. In

---

[21] *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 427-28 (2001).

[22] *Kruman v. Christie's International PLC*, 284 F.3d 384, 399-401 (2002), *petition for cert. pending*, No. 02-340 (filed Sept. 3, 2002).

[23] *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 315 F.3d 338, 357 (D.C. Cir. 2003).

March, we and the FTC filed a brief *amicus curiae* before the D.C. Circuit in *Empagran*. We stated our view that the correct reading of the text and history of the statute, as well as concepts of antitrust injury and standing that Congress incorporated into the FTAIA, require that the particular plaintiff must have a "claim" under the Sherman Act. That is, the plaintiff's claim must arise from the domestic effects of the challenged conduct. We are also very sensitive to the admonition of our Supreme Court that "American antitrust laws do not regulate the competitive conditions of other nations' economies."[24] In our view, the FTAIA was never intended to alter that fundamental principle.

We also believe that an overly broad reading of the FTAIA could adversely affect the Division's leniency program and hence adversely affect U.S. criminal law enforcement against foreign cartels. Permitting suits for treble damages by foreign plaintiffs whose injuries arise from foreign conduct could well create a disincentive for corporations and individuals to report antitrust violations and seek leniency from the Antitrust Division, out of a fear that voluntary disclosure of wrongdoing would expose them to unbounded and unpredictable civil liability. We say this not out of sympathy for the cartelists. To the contrary, we use leniency grudgingly. But we are also realistic about the considerations that make our program work. Our leniency program is a critical component of our criminal enforcement program and our greatest source of leads regarding international cartels. We appreciate the additional deterrent value provided by civil lawsuits. But we must guard against the possibility that broader civil remedies might diminish the effectiveness of our public mission of detection and enforcement.

---

[24] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986).

This debate over the jurisdictional reach of antitrust laws has spilled over onto this side of the Atlantic. In the just the past few days, I have read with some interest press accounts of a recent English High Court decision that declined to dismiss on jurisdictional grounds private antitrust claims relating to the ongoing vitamin cartel litigation. The proceeding apparently includes claims, based on Article 81 of the European Treaty, that have been made on behalf of a German subsidiary that purchased vitamins from a German subsidiary of one of the cartel members. The defendants argued that the U.K. courts had no jurisdiction to decide any claims relating to transactions between these two German subsidiaries. The Court, however, ruled that plaintiffs could sue a U.K. subsidiary of the defendant cartel member for the damages alleged to have been suffered in Germany, even though the damages relate to trade with the German subsidiary of the defendant. It appeared to do so on the grounds that the plaintiffs had sufficiently alleged that the defendant English subsidiary helped operate the cartel in England. I am sure many competition lawyers will follow the case with interest as they have been following our own FTAIA line of cases.

I thank you for providing me with this opportunity to discuss the important topic of anti-cartel enforcement. I am confident that the commitment of the Antitrust Division and authorities around the world to vigorous anti-cartel enforcement will result in continued successful prosecutions of this harmful conduct and deterrence of cartel activity.