# DEPARTMENT OF JUSTICE

**ADVANCED CRIMINAL ANTITRUST WORKSHOP**

**A Practical Approach to Criminal Investigations**

# "CRIMINAL ENFORCEMENT IN A GLOBALIZED ECONOMY"

**By**

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As you already know, I had initially intended to speak today about the question of how we prove an "agreement in antitrust conspiracies." But I decided against that -- not just to be contrary or to mess up your program but because, as I began to think about the matter, I quickly concluded that the issue of agreement in antitrust law is far more complex than I had first imagined. I didn't want to talk about agreements in criminal cases as if they were unrelated to agreements in civil cases, where, of course, we deal with vertical as well as horizontal agreements and the issue is thus even more complex. Indeed, the issue has been raised in three civil cases that we are currently litigating: in Rhode Island where we are challenging a most-favored-nation clause between a health insurance plan and its participating dentists; in Montana, where we sued General Electric for restrictions that it put on horizontal competitors who used its software to service their own medical equipment; and in the Court of Appeals for the Tenth Circuit, which is currently considering this issue in the context of a tying arrangement where the seller insists that the buyers purchase tied products. Given all that litigation, I figured that if I were going to comment, I'd better be prepared for the consequences. So I have delayed that day of reckoning. But I put you on notice -- there's an agreement speech inside me and someday, in the not-too-distant future, I'm going to give it, consequences be damned. In the meantime, so as not to disappoint all of you who came thousands of miles only to hear me talk about

agreements, I will at least touch on that issue later in my comments today when I discuss the NASDAQ case.

Before I get to that, you'll have to bear with me as I travel through some other, more general, terrain about criminal enforcement. It's a subject that I've thought quite a bit about since I became Acting AAG last Fall. At the time, we were in the middle of negotiating the plea agreement with ADM, so I guess you could describe my initiation rites as a baptism by fire. In truth, I'd like to think that we'd never have resolved the case but for my appearance on the scene. But that would be wrong. On the contrary -- and this is what got me started thinking -- so much of what we do in criminal enforcement involves the application of settled law to the facts that have been turned up during our investigations. As a result, the AAG's role is really quite circumscribed. Sure, you have the ultimate responsibility for empaneling a grand jury and authorizing an indictment or an information, but the system is set up such that you almost never meet with counsel and your assessments are made on the basis of detailed, and in my experience, fair and balanced factual memoranda. But that is a very different role from the one the AAG plays in civil or merger enforcement, where almost invariably you meet with staff, usually several times, and with the parties at least once before you file a case.

What is the reason for the distinction and does it make sense? The answer to the first question, I believe, is that, in contrast to criminal cases, civil and merger cases often involve

complex economic and doctrinal arguments about the scope of the law, whereas criminal cases typically don't. I would also suppose, although here I suspect I'm on less secure ground, that keeping the AAG removed from direct involvement in criminal prosecutions, perhaps unless overriding policy issues are raised, tends to highlight the notion that career professionals are making routine criminal enforcement decisions.

Based on what I've seen so far, I think this approach makes sense, pretty much for the reasons I've just given. It may not be this way forever but, until now, the person who has been what might be called the Chief Operating Officer of the criminal program at the Division has always been a career prosecutor -- currently Gary Spratling, a person of extraordinary talent and integrity, and also someone who is part of a tradition of having such people in that position. I think doing it that way instills confidence in the bench and bar and adds an extra measure of credibility to our criminal program.

But there is a cost to this arrangement -- one well worth bearing but still deserving of express acknowledgment. And the cost, as I see it, is that, because an AAG tends to spend less time on criminal than on other enforcement matters, the criminal program concomitantly gets less attention in terms of public discussion and debate. In the four months that I've been doing this job I've made more than a dozen speeches, and this is the first on criminal enforcement. And I don't have a second one on my schedule yet.

Now, if everything were working out exactly as I wanted it, this paucity of public appearance probably wouldn't bother me -- and I'm certain it wouldn't bother anyone else. But there is a problem, a serious problem, and that's what I came here to speak to you about today. In a nutshell, the problem is that criminal antitrust enforcement is not taken nearly as seriously as it should be -- especially by the rest of the world, but even in our own country. In fact, as most of you know, the U.S. is almost unique in deeming cartel behavior to be criminal. In most other countries, even where such behavior is taken seriously, it is handled by competition agencies that are separate from the criminal enforcement agencies and often headed by economists or other non-lawyers. This can create some real problems -- both practical and perceptual -- that I want to come back to in a moment.

But first I'd like to say a word about domestic perceptions as well. And that is, that even in this country, where we have a long history of criminal enforcement, I would still say that cartel behavior is not taken as seriously as it should be. I'm not just talking about the extremists -- like a couple of recent op ed pieces in the Wall Street Journal after the ADM pleas asserting that the Division's efforts were based largely on "prissy notions of commercial propriety" and that the "'crime' of price-fixing is one that exists mostly in the eye of the beholder." Even in less exalted quarters, there is an insufficient appreciation of the fact that cartels are the

equivalent of theft and should be met with unequivocal public condemnation. I've come to this conclusion based on views that I personally held as a private practitioner, as well as the fact that, since I've been at the Division, we've lost cases that we shouldn't have and I suspect that may have something to do with public perceptions. Indeed, even in the broad media coverage that greeted the ADM pleas, there was very little attention focused on the fact that these cartels involved nothing more than a simple hosing of the consuming public -- an involuntary and clandestine transfer of millions of dollars from buyers to sellers, based on a simple, unalloyed private agreement not to compete. For what it's worth, my own sense is that this lack of outrage is due to the fact that the harm resulting from cartels is probably somewhat more diffuse than in other economic areas, such as securities or tax fraud.

But whatever the reasons, this is a perception that must be changed. And let me explain why. Until quite recently, our criminal program was largely a domestic one -- the people, the events, the markets, and the evidence were all pretty much within our territorial borders. That is all changing now. As a result of the increasing rapidity with which the economy is becoming globalized, worldwide cartels are looming as a major enforcement concern for us. It's almost as if private arrangements are replacing governmentally imposed market barriers. Gary will talk about a lot of this tomorrow -- and I don't want to steal his thunder (as if I could) -- but there are a few points of overlap

that I do need to cover. In particular, as we sit here, the Division currently has grand juries looking at cartel behavior by companies in twenty different countries, spread over four continents. Some of the markets we are looking at involve hundred of millions, or even billions, of dollars. And lest there be any confusion about the point, I want to make clear that all of the cartels we're investigating directly affect U.S. consumers.

Now, why this is so important is because in these multi-jurisdictional cases we sometimes have a very difficult time getting evidence and extraditing defendants. To be candid, our inability in that regard cost us in the GE/DeBeers prosecution, where we sought evidence overseas, largely without success, and where the court directed a judgment of acquittal against us. And we're continuing to run into this practical problem in several other cases that we're currently investigating.

We are also aware of what meaningful cooperation can do for us in defeating worldwide cartels. We have a Mutual Legal Assistance Treaty with Canada that broadly covers criminal prosecutions, including antitrust violations, and we've had some very successful experiences under that agreement, not the least of which has been our ongoing fax paper case, where we already have secured eight guilty pleas and fines in excess of $10 million.

To put it bluntly, what we need to do is to internationalize our Canadian relationship, meaning we need bilateral agreements,

with as many countries as possible, that provide for comprehensive law-enforcement cooperation in cartel cases -- search and seizure power; subpoena power; access to witnesses, subjects and targets and, for good measure, we should also add in extradition power. There are significant impediments -- some real and some imagined -- to fulfilling this goal and, given the pace of international relations, it won't be done quickly. But I am committed to seeing this all happen and I suspect that anyone who holds my position in the future also will be.

In fact, as some of you may already know, this has been something I worked on as part of a larger set of issues when I became Anne Bingaman's Deputy in early 1995. In that capacity, both at the Organization for Economic Cooperation and Development and in bilateral meetings with our major trading partners, I immediately began to push for a new generation of cooperation agreements, ones that would allow for mandatory evidence gathering along the lines of the Canadian MLAT. We had just received IAEAA authority in the U.S. and so I had concluded that we could negotiate direct antitrust cooperation agreements, going beyond the so-called soft agreements that we had with several countries.

We immediately ran into opposition based on concerns over what our foreign colleagues refer to as U.S. extraterritoriality -- that is, foreign countries said they were concerned that, if they entered such agreements with us, we would use the evidence to bring market access cases against them, cases where the

principal harm to consumers was in their own country's market and the harm to the U.S. was largely to its exports. So, we responded to this concern by proposing that we would enter so-called positive comity agreements with those competition authorities that we believed had demonstrated a real commitment to unbiased antitrust enforcement, such as we have in the U.S. Along these lines, the Division has spent the past 15 months negotiating a detailed agreement with the competition agency of the European Union. It is a comprehensive, market access enforcement agreement, with referrals by one country to another and a report back and consultation mechanism. I expect that we will formally execute this agreement in the next few months and I hope that, ultimately, it will become a template for agreements throughout the world.

But back to cartel enforcement. After extraterritoriality, the next problem we faced in seeking broad support for IAEAA agreements was concerns over sharing confidential business-sensitive information. This is the kind of evidence that is important in many civil and merger cases and the business community, in particular, expressed the view that, if shared between different competition authorities, it could be misused.

I think this concern is vastly overstated, especially when it comes to the U.S. and our procedures. Still, I'm a pragmatist and I have priorities to boot, so I decided that we would trim our sails even further. While we welcome broad IAEAA-type agreements -- and are hopeful of executing one soon-- we are also

open to a stepwise approach, one which will place primary focus on bilateral agreements for cartel enforcement -- i.e., IAEAA-authorized, MLAT-type agreements covering only hard-core cartels, which are the cases that we prosecute criminally in this country.

As I see it, there are two major advantages to this stepwise approach. First, the practices involved are generally prohibited by virtually all of our major trading partners. Consequently, we don't have to get into some of the tricky questions presented when countries with different legal requirements -- on vertical restraints or essential facilities, for example -- attempt to cooperate. And second, the evidence that we seek in cartel cases rarely, if ever, involves the kind of confidential business information that tends to cause concern in civil or merger cases. Rather, much of what we need is evidence concerning the existence of an agreement, which is hardly business sensitive.

This is not to say that all the problems have been solved and that I see nothing but clear sailing ahead. There is, as I said earlier, the criminal/non-criminal disparity that we will have to navigate. Traditionally, our cooperation agreements involve only competition authorities, but the kind of agreement we are now contemplating may also require the involvement of Ministries of Justice, which are often the agencies that have the kind of authority necessary to get the evidence we need. And, perhaps due to different national histories and experiences, even though hard-core cartels are generally prohibited, they are not

always subject to the same enthusiastic condemnation that we at the Department of Justice tend to express.

Still, I can't help but think that the Division's recent efforts in the food and feed additive cases -- uncovering worldwide cartels in lysine and citric acid -- will focus the international community on the importance of what we're doing here. It is not just the magnitude of the fines that should get the attention of our colleagues throughout the world, but also the fact that those fines are based only on the harm to the U.S. economy. Consequently, consumers of these products in every other country in which they're sold should be entitled to know what action their competition agencies are taking to redress the harm in their countries that may have been done by these cartels. That, it seems to me, is a critical question and I hope the answer is not merely deafening silence.

To further our efforts on cartel enforcement, the United States has begun to focus the OECD member states on the need for this kind of bilateral international cooperation. Last April, our delegation brought Gary Spratling to Paris (hardship duty for him) to describe in detail the Division's cooperative efforts with Canada pursuant to the MLAT. Then, at the next OECD meeting in October, we introduced a paper seeking support for the concept of these kinds of bilateral agreements. We recognized, of course, that any OECD action could only be advisory, since enforcement agreements can only be entered on a country-to-country basis. Nevertheless, we believe that the OECD presents

an excellent opportunity for education and debate, in the hope that we can later build on our experiences there to negotiate specific agreements with individual countries. And, after introducing the proposal in October, we then proposed a session at the February meeting, about ten days ago, where representatives from countries who already had similar cooperative relationships in international securities fraud and tax cases could discuss their experiences.

This all is as exciting as it is difficult. More importantly, it is absolutely essential. I am convinced that international cartels will be an ever-increasing problem and that effective international law enforcement techniques will be required to combat them. I have little doubt that we will eventually get where we need to be in this effort. My only concern is how long "eventually" will be.

In the meantime, which is always the time in which an AAG, much less an acting AAG, gets to act, there are certain things that we are doing and need to do more of at the Division. Aside from further educational efforts, which I will come back to shortly, we must remain vigilant in ensuring that we use the criminal sanction only when it is clearly appropriate. If we dilute its strength by trying to stretch it to address novel and less compelling cases, we will surely regret it. A few recent examples demonstrate how we have dealt with this question (and one of them, at least, honors my initial commitment to speak about agreements).

The first case I'd like to mention is one involving tampico fiber, a product grown in Mexico and, after it is processed, used worldwide to make brushes. Our investigation disclosed that two ostensibly competing Mexican tampico processors had entered into agreements fixing the prices at which tampico fiber was sold to their exclusive United States distributors, had agreed on resale prices with those distributors, and had further agreed to a percentage allocation of sales volume between their U.S. distributors, all for the purpose of maintaining prices at artificially high and non-competitive levels.

In light of my earlier discussion, I am sure it will come as no surprise that the Department charged the competing processors with criminal violations of the Sherman Act based on their horizontal price-fixing and market allocation agreements. On the other hand, we challenged the vertical price-fixing agreements by civil complaint, even though we had evidence that the use of resale price maintenance was designed to, and had the effect of, monitoring and enforcing the horizontal price-fixing and sales volume allocation agreements. We made this judgment despite the fact that resale price maintenance has been a per se violation since the Supreme Court's 1911 decision in the Dr. Miles case. Still, vertical arrangements have come under increasing scrutiny in the past few decades -- indeed, the Supreme Court just this week granted certiorari in a maximum RPM case -- and good arguments can be made that the effects of RPM agreements can be more economically ambivalent -- depending on the specific facts,

perhaps -- than classic horizontal cartel behavior. Moreover, the interests and culpability of the upstream and downstream players, and consequently the nature of the agreement, can be very different in an RPM case than in a traditional horizontal price fix. For these reasons, although the Tampico facts were strong, we decided not to start down the path of attempting to criminalize RPM violations.

By the same token, I should also make clear here that, Tampico notwithstanding, the mere existence of a vertical relationship between firms does not convert an agreement between them from criminal to civil. If one firm supplies a product to another and the two then conspire to rig bids on the installation of that product, we would proceed criminally. Similarly, the mere existence of a vertical relationship between firms does not convert an agreement between them from per se to rule of reason. This point is well illustrated in the civil case that we recently filed against General Electric, which I mentioned at the outset, where GE licensed software to upstream users of its medical equipment while imposing a condition on the license prohibiting its licensees from competing with GE for any equipment servicing business (regardless of whether the licensee used the software to service third parties). We claimed that the horizontal agreement with respect to the servicing market was per se illegal. This is an interesting area and, while I wanted to mention it here for the sake of completeness, it merits further discussion and either Gary or I will have more to say about it in the near future.

Now to the NASDAQ case that I also referred to earlier, where we entered a consent decree with 24 major securities dealers. There we found a horizontal agreement to maintain artificially wide spreads -- that is, the difference between the bid and ask prices -- in such a way as to benefit dealers at the expense of the purchasing public. The precise mechanism used to implement this scheme was a so-called "convention" among dealers not to bid in odd-eighths unless a dealer closed his own individual spread to below three-quarters. Since there were costs attached to going below three-quarters, dealers resisted doing so and the overall effect was to maintain market spreads (paid by investors) at one-quarter rather than at one-eighth, where the spread often would have ended up but for the convention.

Although this practice did involve a horizontal agreement, with dimensions of a traditional price fix, in our view it clearly didn’t merit criminal consideration. The principal reason for this conclusion was that the convention, while satisfying the traditional requirements for ripening into a section 1 agreement, nevertheless was different from the kind of agreement that we charge criminally. It was really an industry practice -- a way of life -- that traders followed as a matter of custom; and when it was violated, the reactions were varied: sometimes there was retaliation; sometimes there was annoyance; and sometimes nothing appeared to happen. All in all, we

concluded that the agreement was "thin" and therefore we weren't prepared to proceed criminally.

On the other side of the equation, several years ago we criminally charged three dentists in Tucson with fixing prices for dental services. A jury convicted, but the district court granted acquittals to two defendants and a new trial to the third. On appeal, the Ninth Circuit reversed the acquittal judgments and remanded the cases, expressing some qualified concerns about whether the evidence could support the necessary mens rea finding and whether there were explanations short of an agreement that would explain what happened. More generally, the court emphasized its views that "the relationship between individual health care providers and medical plans is not without sublety and complexity," and noted in closing that "this is the first criminal prosecution of health care professionals in half a century." 974 F.2d at 1214. In short, one can't help but conclude that, whatever else it was doing, the Ninth Circuit was also questioning our exercise of prosecutorial discretion in this case.

You needn't share the court's view of the exercise of our discretion here -- and many people whose judgment I respect disagree with it -- to take to heart the basic point that I'm trying to make here. And that is, we must be very careful in charging cases because our constituency for criminal enforcement needs to be strengthened, not weakened. And the Ninth Circuit's opinion certainly doesn't help in that regard.

This takes me to my final point, which is that we must take additional public steps to make the strong case that I believe exists for criminal antitrust enforcement, both within this country as well as elsewhere. I am committed to doing that and will put a lot of resources into the effort to build a worldwide consensus on, and enforcement network directed against, international cartels. I also know that Attorney General Reno is committed to this effort. Her involvement in and attention to the food and feed additive cases has been extensive, and I look forward to her leadership and support in this area as we go forward. I also believe that a responsible bar should get behind what we're trying to do, so I hope we can look to your help as well.