DEPARTMENT OF JUSTICE

CARTEL ENFORCEMENT IN THE UNITED STATES (AND BEYOND)

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I. Introduction

I am greatly honored to participate in this cartel conference. I would like to thank the Hungarian Competition Authority and President Zoltan Nagy for inviting me to talk to you today about cartel enforcement in the United States.

In the words of the United States Supreme Court, cartels are "the supreme evil of antitrust."[1] Prosecuting cartel offenses continues to be the highest priority of the United States Department of Justice's Antitrust Division.[2] The Antitrust Division places a particular emphasis on combating international cartels that target U.S. markets because of the breadth and magnitude of the harm that they inflict on U.S. companies and consumers.

The Antitrust Division has sole authority for federal criminal antitrust enforcement in the United States. Our anti-cartel enforcement program has been built through many years of dedicated effort. We have separated criminal antitrust enforcement from civil enforcement, and have created a specialized criminal enforcement team. We also have focused our criminal enforcement only on hard core violations — price fixing, bid rigging and market allocation. This helps us conserve prosecutorial resources by reducing the number of potential cases and the complexity of proof, and establishes clear, predictable boundaries for companies, which can more easily determine whether their own conduct will form the basis of a criminal case.

The title of my remarks today is "Cartel Enforcement in the United States (and Beyond)." I would like to start by discussing cartel enforcement in the United States: first, the development of our anti-cartel enforcement program over the last several years, and second, our leniency program, which we view as an invaluable part of detecting and prosecuting cartels. And because I am the Deputy for international matters, I could not resist adding "and beyond": I would like to close my remarks by discussing the importance of global cooperation among competition agencies, and the movement of competition agencies around the world toward aggressive anti-cartel enforcement.

II. Anti-Cartel Enforcement at the Antitrust Division

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[1] *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

[2] To be sure, we continue vigorously to protect competition in the areas of mergers and non-merger civil conduct, but we give special emphasis to cartel enforcement because cartels are *always* harmful to consumers, whereas mergers and non-merger civil conduct are sometimes harmful but other times will lead to greater efficiencies that enhance consumer welfare.

The United States has long experience prosecuting cartels, and our efforts have yielded solid results. In the fiscal year that ended September 30, 2006, the Division brought thirty-three cases involving violations of the Sherman Act and related federal statutes, and obtained total fines of more than $473 million, restitution of more than $2 million, and criminal sentences for nineteen individual defendants totaling 5,383 days of jail time. Before I discuss some of the reasons for the strength of our program, let me tell you some facts about our investigations and prosecutions, and the penalties we have sought.

Investigations: Currently, there are approximately 130 sitting grand juries investigating suspected cartel activity. International cartel investigations account for almost half of the Antitrust Division's grand jury investigations. The subjects and targets of the Antitrust Division's international investigations have been located on six continents and in roughly twenty-five different countries. But the geographic scope of the criminal activity is even broader than these numbers reflect. Our investigations have uncovered meetings of international cartels in well over a hundred cities in more than thirty-five countries, including most of the Far East and nearly every country in Western Europe.

Cartels Prosecuted: The Antitrust Division has prosecuted international cartels — in sectors including vitamins, textiles, construction, food and feed additives, food preservatives, chemicals, graphite electrodes, fine arts auctions, ocean tanker shipping, marine construction, marine transportation services, rubber chemicals, synthetic rubber and dynamic random access memory — that have cost firms and individuals billions of dollars annually.[3]

Fines Imposed: Of the nearly $1.38 billion in criminal fines imposed in Antitrust Division cases during the past five years, more than ninety percent were imposed in connection with the prosecution of international cartel activity. In forty-five of the fifty-four instances in which the Antitrust Division has secured a corporate fine of $10 million or greater, the corporate defendants

[3]When the lysine cartel was discovered in the early to mid-1990s, the cartel was the largest, most serious cartel the Antitrust Division had ever prosecuted, involving a volume of commerce of more than $450 million. Since then we have prosecuted numerous international cartels affecting far greater volumes of commerce. For example, the rubber chemicals cartel involved more than $1 billion in commerce; the graphite electrode cartel more than $1.6 billion in commerce; the DRAM cartel more than $4.5 billion in commerce; and the vitamin cartel more than $5 billion in commerce. While these amounts are staggering, they take into account only the U.S. commerce affected by these global cartels.

were foreign-based.[4] These numbers reflect the fact that the typical international cartel likely consists of a U.S. company and three or four of its competitors that are market leaders in Europe, Asia and throughout the world.

Jail Sentences: The Antitrust Division has long believed that the most effective way to deter and punish cartel offenses is to impose jail sentences on the individuals who commit them.[5] In June 2004 the United States increased the Sherman Act maximum jail term from three years to ten years. In the 1990's, the average jail sentence for defendants prosecuted by the Antitrust Division was eight months. In recent years this has doubled, rising to an average of sixteen months. During the past five years more than 125 years of imprisonment have been imposed on Antitrust Division offenders, with more than forty-one defendants receiving jail sentences of one year or longer. Foreign defendants from Canada, France, Germany, Japan, South Korea, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom have been prosecuted for engaging in cartel activity and have served, or are currently serving, prison sentences in U.S. jails for violating U.S. antitrust laws.

In short, our anti-cartel enforcement program is far-reaching. We believe that there are a number of developments in recent years that have helped us to strengthen our cartel program. Among them are the following:

First, we have implemented new methods of tracking down international fugitives. In international cartel investigations, the Antitrust Division's practice is to put foreign witnesses and subjects of investigation on border watches to detect their entry into the United States. In 2001, the Antitrust Division raised the stakes for fugitive defendants even further by adopting a policy of placing fugitives on a Red Notice list maintained by the International Criminal Police Organization (Interpol). A Red Notice is essentially an international wanted notice that many of Interpol's member countries recognize as the basis for a

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[4] *See, e.g.,* United States Department of Justice, Antitrust Division, "Sherman Act Violations Yielding a Corporate Fine of $10 Million or More," *available at* http://www.usdoj.gov/atr/public/criminal/220752.htm.

[5] The Antitrust Division has uncovered first-hand accounts from cartel members of how international cartels that operated profitably and illegally in Europe, Asia and elsewhere around the world did not expand their collusion to the United States solely because the executives decided it was not worth the risk of going to jail. For more information on Antitrust Division policies and initiatives directed toward the prosecution of individual offenders, *see generally* Scott D. Hammond, Charting New Waters in International Cartel Prosecutions, Presented at the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime (March 2, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/214861.htm; Gary R. Spratling, Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies Relating to Plea Agreements in International Cases, Presented at the ABA Criminal Justice Section's Thirteenth Annual National Institute on White Collar Crime (March 4, 1999), *available at* http://www.usdoj.gov/atr/public/speeches/2275.htm.

provisional arrest, with a view toward extradition. The Antitrust Division will seek to extradite any fugitive defendant apprehended through the Interpol Red Notice Watch. Thus, even if a fugitive resides in a country that would not extradite the defendant to the United States for an antitrust offense, the fugitive still runs the risk of being extradited if he travels outside of his home country to a third country where he is on a Red Notice list. These restrictions on a foreign national's travel to the United States are often a significant and unacceptable burden on his business and personal life, and have contributed to the decision of many individuals to accept responsibility for their cartel offenses, plead guilty, and negotiate plea agreements with the Antitrust Division that include a preadjudication of their immigration status and ability to travel to the United States.[6]

Second, we have shown resolve in seeking extradition where appropriate. The development of the United Kingdom's anti-cartel policies over the last few years, including its policies toward corporate executives, has exemplified the evolution in international anti-cartel enforcement. Formerly the United Kingdom would not assist U.S. antitrust investigations pursuant to a Mutual Legal Assistant Treaty (MLAT) request. But, over the last six years, the United Kingdom has become one of the strongest advocates in the international fight against cartels. In June 2005 a British magistrates' court found a British national, Ian P. Norris, extraditable to the United States on an antitrust charge.[7] In September 2005 the British Home Secretary ordered the defendant's extradition. Last month the High Court of Justice dismissed appeals filed by Norris. Norris may now seek leave to appeal to the House of Lords. With the increasingly vigorous resolve that foreign governments are taking toward punishing cartel activity and their increased willingness to assist the United States in tracking down and prosecuting cartel offenders, the safe harbors for antitrust offenders are rapidly shrinking. Our efforts in the *Norris* case should send a powerful signal that cartelists will not be allowed to hide behind borders.

Third, we have been granted additional investigatory powers. The United States amended its investigatory statutes to provide wiretap authority in

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[6]This preadjudication process, which is provided for in the Antitrust Division's 1996 Memorandum of Understanding with the Immigration and Naturalization Service, *available at* http://www.usdoj.gov/atr/public/criminal/9951.htm, is now administered by the Department of Homeland Security.

[7]Norris, former Chairman of Morgan Crucible Company, was indicted in 2004 for fixing prices of carbon brushes (used to transfer electrical current in automotive and transit applications) and for orchestrating a conspiracy to obstruct justice, tamper with witnesses and destroy documents; the Antitrust Division is seeking his extradition on all counts of the indictment. *The Government of the United States of America v. Norris* (Bow St. Magis. Ct. 2005).

criminal antitrust investigations.[8] The decision to grant that power is a signal that the United States places antitrust crimes on par with such other significant economic crimes as bribery, bank fraud and mail and wire fraud.

Fourth, statutory maximum penalties have been increased. In June 2004 the United States increased the individual statutory maximum fine from $1 million to $10 million and the statutory maximum corporate fine from $10 million to $100 million.[9] In November 2005, the United States Sentencing Commission increased the penalties provided for by the antitrust Sentencing Guideline to account for the enormous volumes of commerce affected by international cartels.[10]

Fifth, we have eliminated the no-jail deal. When the Antitrust Division began prosecuting international cartels, just convincing a foreign national to submit to U.S. jurisdiction and plead guilty was a major achievement. A no-jail deal was at times necessary for the Antitrust Division to secure access to an important foreign witness or key foreign-located documents. The dramatic increase in international cooperation and our improved use of investigative tools over the last few years has caused a significant shift in the negotiating balance. The Antitrust Division now insists on jail sentences for *all* defendants — domestic and foreign. We will not agree to a no-jail sentence for any defendant and we do not stand silent at sentencing if a defendant argues for no jail. The Antitrust Division's insistence on jail sentences for both U.S. and foreign defendants provides further incentive for corporations to apply for leniency so that their cooperating executives will receive non-prosecution coverage. And if leniency is no longer available in an investigation, the Antitrust Division's insistence on jail sentences is encouraging executives to come in early to cooperate to minimize their jail time and companies to come in early to minimize the number of individuals who could be subject to jail sentences.

Sixth, we carve out individuals from corporate agreements. The Antitrust Division routinely excludes multiple individuals from the non-prosecution coverage of corporate plea agreements. Individuals excluded from the non-prosecution coverage might be culpable employees, employees

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[8] 18 U.S.C. § 2516(1)(r).

[9] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, Title II § 215(a), 118 Stat. 668 (codified as 15 U.S.C. § 1).

[10] Prior to the amendment, the largest volume of commerce enhancement for an individual under the antitrust guideline was $100 million; there are now additional enhancements for affected volumes of commerce more than $250 million, $500 million, $1 billion and $1.5 billion. While the Sentencing Guidelines are not mandatory, courts are required to consider them when rendering judgment against criminal antitrust defendants. *United States v. Booker*, 543 U.S. 220, 245-46 (2005).

who refuse to cooperate with the Antitrust Division's investigation or employees against whom we are still developing evidence.[11] The Antitrust Division will insist at the beginning of corporate plea negotiations — if we have not done so earlier in the investigation — that those individuals obtain separate counsel, and will then deal with their separate counsel regarding resolutions for the individuals.

III. THE ANTITRUST DIVISION'S LENIENCY PROGRAM

The greatest single driver of our success, though, is our Corporate Leniency Program. Under that program, the first corporate cartel member that comes promptly to the Antitrust Division, cooperates with our investigation and otherwise meets the requirements of our program will get a promise of full immunity – not only for the corporation, but also for cooperating individuals. The Antitrust Division's Corporate Leniency Program is our greatest source of cartel evidence, and has served as a model for similar programs that have been adopted by antitrust authorities around the world.[12] Our experience with cartel enforcement has taught us that cartels are usually extremely profitable for those who engage in them, and it is very difficult to detect cartel behavior or, once discovered, to compile sufficient evidence to successfully prosecute cartel members in court.[13] The Antitrust Division has had great success combining vigorous criminal prosecution with our leniency program in order to increase the likelihood of cartel detection.

To be successful, a leniency program must provide significant benefits as compared with the alternative strategies of staying in a cartel or withdrawing but remaining silent. This requires both severe penalties and a genuine fear of detection. If firms perceive that the risk of being caught by antitrust authorities is very small, stiff maximum penalties will not be sufficient to deter

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[11]On April 12, 2013, the Division revised its carve-out practice by limiting employees carved out to those the Division has reason to believe were involved in criminal wrongdoing and who are potential targets of a Division investigation and by listing the names of uncharged carve outs in a plea agreement appendix filed under seal. *See* Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division's Carve-Out Practice Regarding Corporate Plea Agreements, http://www.justice.gov/atr/public/press_releases/2013/295747.pdf.

[12]For a detailed discussion of the requirements and application of the Antitrust Division's Leniency Program, *see* Gary R. Spratling, The Corporate Leniency Policy: Answers To Recurring Questions, Presented at the ABA Antitrust Section's Annual Spring Meeting (April 1, 1998), *available at* http://www.usdoj.gov/atr/public/speeches/1626.htm; *see also* "Leniency Policy for Individuals" *available at* http://www.usdoj.gov/atr/public/guidelines/0092.htm and "Corporate Leniency Policy" *available at* http://www.usdoj.gov/atr/public/guidelines/0091.htm.

[13]Cartels often use extreme measures to conceal their activities. *See generally* Scott D. Hammond, **Caught in the Act: Inside an International Cartel, Presented at the** OECD **Competition Committee Public Prosecutors Program (October 18, 2005**), *available at* http://www.usdoj.gov/atr/public/speeches/212266.htm.

cartel activity or to cause firms to report their wrongdoing to authorities in exchange for amnesty. Once the credible threat of detection exists, the threat of being turned in by one's fellow corporate cartelists will increase. It is also very helpful to have an individual leniency policy, which creates the potential for an amnesty race as between a corporation and its own culpable employees.[14] Finally, there must be predictability and transparency to the program. This affords potential applicants a high degree of assurance that, if they take the risk of coming forward, they will get the reward. Transparency in a leniency program makes it more likely that applicants will come in and that the cartel will be broken up.

The Antitrust Division's leniency program uses a classic carrot and stick approach to anti-cartel enforcement: it provides major incentives for companies that choose to self-report antitrust offenses (*e.g.*, relief from criminal prosecution for the reporting corporation and its officials), but this amnesty is available only to the first in the door and on certain conditions (*e.g.*, it is not available to ring leaders and requires full, complete and truthful cooperation). The key is that only one company can qualify for amnesty. A company that does not win the race to the prosecutor — even if by only a matter of days or hours, as has been the case on a number of occasions — will not be eligible for amnesty. A second-in company can offer to cooperate and may enter into a plea agreement and have its fine reduced, but this process falls outside of our leniency program. This situation leads to tension and mistrust among the cartel members. In this way, the program can serve to prevent cartels from forming, or to destabilize them by causing members to turn against one another in a race to the government.

Most of the corporate defendants in international cartel cases are multinational companies selling many products. It will come as no surprise then to learn that a company fixing prices in one product market may be doing so in other markets. The Antitrust Division has had great success pursuing a strategy of cartel profiling, in which one investigation eventually gives root to prosecutions in additional different markets. In fact, roughly half of the more than one hundred sitting grand juries currently investigating suspected cartel activity were initiated as a result of evidence obtained as a result of an investigation of a completely separate market.

[14]The real value and measure of the Antitrust Division's Individual Leniency Program is not in the number of individual applications we receive, but in the number of corporate applications it generates — when corporate management learns that an individual employee has committed cartel conduct, management takes an uncomfortable risk if it does not apply for amnesty immediately.

For example, a new investigation results when a company approaches the Antitrust Division to negotiate a plea agreement in a current investigation and then seeks to obtain more lenient treatment by offering to disclose the existence of a second, unrelated conspiracy. Under these circumstances, companies that choose to self-report and cooperate in a second matter can obtain what is known as "Amnesty Plus." In such a case, the company will receive amnesty — that is, total immunity for the company and its cooperating employees — in connection with that second conspiracy. Additionally, the company will receive a substantial additional discount by the Antitrust Division in calculating an appropriate fine for its participation in the first conspiracy.[15]

Amnesty Plus induces companies that are already under investigation to clean house and report violations in other markets in which they may be involved. Companies that elect not to take advantage of the Amnesty Plus opportunity risk potentially harsh consequences: the Antitrust Division's "Penalty Plus" policy. If a company participated in a second antitrust offense and does not report it, and the conduct is later discovered and successfully prosecuted, where appropriate, the Antitrust Division will urge the sentencing court to consider the company's and any culpable executives' failure to report the conduct voluntarily as an aggravating sentencing factor. We will pursue a fine or jail sentence at or above the upper end of the Sentencing Guidelines range. Moreover, where multiple convictions occur, a company's or individual's sentencing calculations may be increased based on the prior criminal history. In one recent Penalty Plus case, the Antitrust Division asked the court to impose a sentence that was substantially more than the Sentencing Guidelines fine range because of the company's recidivism as an antitrust offender. In that case, the volume of affected commerce was $17 million; the company paid a fine of $12 million and three of its executives were carved out of the plea agreement. If the company had reported the conduct when it had the chance in connection with the earlier prosecution, it would have paid no fine and its executives, who now are subject to prosecution, would have (if they cooperated) been given full nonprosecution protection.

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[15]The size of this additional discount depends on a number of factors, including: (1) the strength of the evidence provided by the cooperating company in the amnesty product; (2) the potential significance of the uncovered case, measured in such terms as the volume of commerce involved, the geographic scope and the number of co-conspirator companies and individuals; and (3) the likelihood that the Antitrust Division would have uncovered the cartel absent the self reporting (*e.g.*, for example, if there is little overlap in the corporate participants involved in the original cartel and the Amnesty Plus matter, then the credit for the disclosure likely will be greater). *See generally* Scott D. Hammond, Measuring the Value of Second-In Cooperation **in Corporate Plea Negotiations**, Presented at the ABA Antitrust Section's Annual Spring Meeting (March 29, 2006), *available at* *http://www.usdoj.gov/atr/public/speeches/215514.htm.*

For a company, the failure to self-report under the Amnesty Plus program could mean the difference between a potential fine as high as eighty percent or more of the volume of affected commerce versus no fine at all on the Amnesty Plus product. For the individual, it could mean the difference between a lengthy jail sentence and avoiding jail altogether. As a result of the Antitrust Division's Amnesty Plus and Penalty Plus policies, companies understand that they cannot afford to remain willfully ignorant by limiting the scope of their internal investigations. The risks to the companies and their executives are too great.

IV. Global Cooperation in Anti-Cartel Enforcement

Finally, a word about international cooperation. Although I have focused on how we do things in the United States, it is important for all of us here to take note of the efforts and successes of cartel prosecutions in other jurisdictions because the benefits of vigorous, principled cartel enforcement across borders. Over the past several years there has been a growing worldwide consensus that international cartel activity is pervasive and is victimizing both businesses and individuals everywhere. A shared commitment to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world. I would note that Hungary has been part of this movement toward global cartel enforcement; indeed, Dr. József Sárai of our host agency has been actively involved as a co-chair of the International Competition Network's Cartel Working Group.

The extraordinary success of the Antitrust Division's leniency program has generated widespread interest around the world. In particular, many nations are following the Antitrust Division's successful carrot-and-stick approach and developing voluntary disclosure programs similar to our leniency program that reward self-reporting, while simultaneously imposing stiffer sanctions for companies and executives who lose the race for amnesty.[16] We have advised a number of foreign governments in drafting and implementing effective leniency programs in their own jurisdictions. As a result, countries such as Japan, Australia, Brazil, Canada, Germany, Ireland, Korea and the United Kingdom have announced new or revised leniency programs, with still other countries in the process of following. The convergence in leniency programs has made it much easier and far more attractive for companies to simultaneously seek and obtain amnesty in the United States, Europe, Canada and other jurisdictions where the applicants have exposure.

[16] *See generally* Scott D. Hammond, Cornerstones of an Effective Leniency Program, Presented at the ICN Workshop on Leniency Programs (November 22-23, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206611.htm.

One benefit of increased international cartel enforcement is simply that cartels run a greater risk of detection with more prosecutors on the beat. Having colleagues in other jurisdictions focused on criminal enforcement also leads to greater success in the Antitrust Division's own prosecutions, with easier access to evidence and witnesses. Adding more jurisdictions to the list of countries with criminal enforcement also increases deterrence since it raises the cost of entering or continuing in cartels. We know that executives actively engaged in cartels in other countries have specifically decided not to fix prices in the United States in order to reduce the risk of going to jail there. Increasing the number of jurisdictions that need to be avoided makes cartels harder to manage and less profitable. Moreover, increasing cartel enforcement globally reduces the number of safe havens for executives who have engaged in cartel offenses and provides stronger incentives for those executives to accept responsibility and cooperate with anti-cartel investigations.

Of course, these benefits will flow only if cartels know they will face vigorous prosecution. Such prosecutions are increasing and I am pleased to observe the criminal enforcement accomplishments of other jurisdictions. Antitrust authorities around the world have become increasingly aggressive in investigating and sanctioning cartels that victimize their consumers.[17] The Antitrust Division's recent success in prosecuting foreign nationals who violate the U.S. antitrust laws has been aided by the changing attitudes around the world regarding the harm caused by cartels and the resulting increased cooperation provided by foreign authorities.

The improved cooperation with foreign law enforcement authorities already has provided us with increased access to foreign-located evidence and witnesses that have proven to be instrumental in the cracking of a number of international cartels. For example, in February 2003 the Antitrust Division, the European Commission 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. More than 250 investigators and agents were involved in the simultaneous launching of these investigations on three continents. This represented the

[17]Foreign authorities are increasingly turning their focus toward criminal prosecution of corporate executives involved in cartels. The Organization for Economic Cooperation and Development **(OECD) has** recommended that governments consider imposing criminal sanctions against individuals to enhance deterrence and incentives to cooperate through leniency programs. OECD Competition Committee, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation* (December 15, 2005), *available at* http://www.oecd.org/dataoecd/58/1/35863307.pdf. Recent developments in Australia, Japan, Israel and Ireland are prime examples of the global trend toward greater individual accountability.

first time that an international cartel investigation had gone overt simultaneously in four jurisdictions, but it is no longer uncommon for international antitrust authorities to discuss investigative strategies and to coordinate searches, service of subpoenas, drop-in interviews and the timing of charges in order to avoid the premature disclosure of an investigation and the possible destruction of evidence. Such coordination among multiple jurisdictions will continue to be an important part of cartel investigations, and such cooperation will lead to more effective anti-cartel enforcement in the future.

V. Conclusion

Thank you for your attention. I look forward to the remarks of my fellow panelists and the discussion to follow.