

A PRIMER ON US CRIMINAL ANTITRUST¹

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? Criminal Liability for antitrust violations

?The U.S. is one of the few countries in the world to have criminal prosecution as well as civil penalties for antitrust violation².

? Legislation - s1 and 2 of the Sherman Act 1890

?This criminal liability is provided for by s1 and 2 of the Sherman Act 1890³ and is enforced exclusively by the Justice Department⁴. S1 deals with restraints of trades or commerce by agreement or conspiracy. S2 deals with unilateral restraints of competition. Single firm violations under s2 are not usually criminally prosecuted⁵.

?Section 1 provides that ‘Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.’

What does this cover:

?This means that agreements amongst competitors, even if not evidenced by writing, that reduce competition in the market place within the U.S. or between the U.S. and other nations, may be illegal. Only certain types of agreements are caught by this provision. These are violations which have obvious and substantial adverse effects on competition. Thus hard-core violations include price-fixing, bid rigging, market and customer allocation. These violations can take a variety of forms.

?For example, price fixing can occur when there is agreement to adhere to price discounts, to hold prices firm, to eliminate or reduce discounts, to maintain certain price differentials between different types, sizes, or quantities of products, to adhere to a minimum fee or price schedule, to fix credit terms or not to advertise prices. Bid rigging can be in the form of: bid suppression (where competitors may agree not to bid), complementary bidding (where bids which are submitted are artificially too high or too low so as to be unacceptable to the buyer), bid rotation (where competitors take turns to submit the lowest bid) or subcontracting (where the winning bidder contracts to competitors whom have agreed not to bid or to submit a losing bid). Customer or market allocation can occur not only by refusing to sell to customers allocated to another competitor but by offering an artificially high price to customers to ensure they do not buy.⁶

² Refer to footnote 17.

³ See *Statutory Provisions and Guidelines of the Antitrust Division, section A*, available at <http://www.usdoj.gov/atr/foia/divisionmanual/ch2.htm>.

⁴ Hereinafter referred to as the DOJ.

⁵ The last time the government attempted to do this was in 1976 in the case of United States v Empire Gas Co. 537 F 2d 296, cert denied, 429 US 1122 (1976). The government failed to win as it did not show that there was a dangerous probability that the defendant would successfully monopolize the relevant markets.

⁶ See “Price Fixing & Bid Rigging – They Happen: What They Are and What to Look For” produced by the Department of Justice at <http://www.usdoj.gov/atr/public/guidelines/pfbrprimer.pdf>.

?These are *per se* offences which means that they are automatically deemed illegal – there is no balancing justification. It is important to note that all section 1 antitrust violations which are felonies are subject to the *per se* rule, but not everything which is subject to the *per se* rule is deemed criminal⁷ - such as tie-ins and vertical restraints.⁸

?Behavior which is not *per se* illegal is treated under a rule of reason analysis. This often requires complex and in-depth analysis of market share factors and in practice, a defendant has a greater likelihood of escaping sanctions when this approach is taken.

Types of markets:

Antitrust laws extend to every type of industry, and can apply at every level of market structure. Collusion has been seen in industries concerning vitamins, chemicals, bread, graphite electrodes, automotive paint suppliers and construction, to name but a few. There are however some characteristics which can be typical of potentially collusive markets. For example, the market is often oligopolistic, the products may be homogenous, there may be high barriers to entry and the buyers may be poorly informed.⁹

Who does this cover:

?The Sherman Act applies to both corporations and individuals.

?Domestically, few states have criminal antitrust laws but there is a comfortable relationship between states and federal agencies such that states have shown themselves content to allow federal criminal antitrust laws to be enforced.

?The Sherman Act extends to corporations and individuals in foreign jurisdictions as well. This is where the actions of the corporations and/or individuals have a “direct, substantial and foreseeable” effect on US trade.¹⁰ Jurisdiction is construed broadly such that it will even encompass the situation where anticompetitive behavior takes place outside of the US.

⁷ Note that in *United States v Cinemette Corp. of America*, 687 F. Supp.976 (W.D.Pa 1988) the District Court held that indictment was authorized despite the fact that the law in that circuit that had been shown to be that the *per se* rule did not apply to the specific conduct which was an agreement to compete for rights to show the same film. However, in *United States v United States Gypsum Co.*, 438 U.S 422 (1998), it was held that when conduct which was subject to the rule of reason had a criminal challenge against it, the government would have to show that the defendant had intended the action and its anticompetitive results.

⁸ See for example, “To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement”, Donald Baker, 63 Cornell Law Review 405 (1978) at 406-409.

⁹ For further introductory information see for example, pp71-75 Antitrust, Herbert Hovenkamp 3rd Edition 1999, Black Letter Series West Group. See also “Glossary of Antitrust Terms” by Charles E. Mueller, published in Antitrust Law & Economics Review vol. 26, no. 4, also available at <http://www.home.mpinet.net/cmuller/ii-03.html>.

¹⁰ *The Foreign Trade Antitrust Improvements 1982 Act 15 USCA section 6a* states that the Sherman Act will not reach conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless -
“1/ such conduct has a direct, substantial, and reasonably foreseeable effect” This effect must essentially be on an American domestic market, a market for importing goods into the US or a market for exporting goods from the US, but only if the injury occurs to the exporting business within the US.

This applies as long as there is intent to impact U.S. commerce and that the actions do in fact substantially affect that commerce.¹¹ There are limitations on this.¹²

Civil or Criminal liability:

?S1 and 2 has dual liability such that they allow for civil penalties and criminal sanctions.

?The Justice Department will decide if a case is to be treated as civil and/or criminal, that is, whether the behavior falls into one of the hard-core categories.¹³ It will only bring a criminal prosecution where behavior falls clearly into a hard-core category. To do otherwise, would provide for legal uncertainty as to whether actions would be considered criminal or not and due process would not be fulfilled.

?Criminal enforcement is about punishment of past behavior and is a deterrence.¹⁴

? Why criminal liability

The effect of anticompetitive behavior on the market place

?The aim of the antitrust laws is to protect competition in the market place. As a result of anticompetitive behavior, new entrants may be discouraged, innovation can be stifled, and the consumer may have to pay higher prices while having less choice¹⁵.

For further details, see pp968-1015 "The Law of Antitrust: An Integrated Handbook", 2000, Lawrence A. Sullivan and Warren S. Grimes, Hornbook Series, West Group.

¹¹ *Hartford Fire Insurance v California*, 509, U.S. 764, 113 S.Ct 2891 (1993). The case, using the old case of *United States v Aluminum Company of America*, 148 F.2d 416 (2nd Cir. 1945), took it as well-established that the Sherman Act applied to foreign conduct that satisfied such an intent and effects test. Note the recent case of *United States v Nippon Paper Industries Co. Ltd.*, 62F. Supp.2d 173 (D. Mass 1999) where substantial effects were not found. For a discussion of this case see for example, "The Nippon Paper Trial – Judicial Rejection of Foreign Price-Fixing: What Does It Mean for the Future?", Lisa Phelan and Ian Simmons, pp13-19 Criminal Practice and Procedure Committee, ABA Section of Antitrust Law, No. 30 February 2001.

¹² There is a defense based on compulsion by the foreign government to act in such a way. However, this is extremely limited. Note also the principle of comity which results in a balancing of interests of other nations with those of the U.S. However, a comity defense is considered only when there is a need to avoid a clear and direct conflict between the US antitrust laws and the controlling law of the foreign state. Thus this principle too is narrowly construed so as to have a limited effect as an obstacle to U.S. jurisdiction. (*Hartford Fire Insurance ibid.*)

¹³ For a history of this difference see, "To Indict or Not to Indict" *ibid.* See also "The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid Rigging" by the same author, presented at George Washington Law Review Symposium on Antitrust Remedies, March 22-23, 2001.

¹⁴ Note that the standard of liability for criminal cases is more strict than that for civil cases. This is because the Supreme Court has held that criminal intent is a separate element that must be established in a criminal antitrust case. This was decided in the case of *U.S. v United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct.2864 (1978).

¹⁵ For a view of how politics, consumer choice and antitrust intertwine, see "Public Choice and Public Choices: Consumers and the Politics of Antitrust" by Albert A. Foer, presented to the 47th Annual Conference of the American Council on Consumer Interests, Washington, D.C., April 7, 2001, published in

The effect of anticompetitive behavior on the market place is shown by economic price theory.¹⁶

The effect of criminal liability

?By increasing enforcement, providing incentives to report and having greater detection skills, the DOJ has made it difficult for cartels to operate.¹⁷

Other countries with criminal liability

?There are few countries with criminal liability for anticompetitive behavior. Seven countries have criminal liability for corporations and individuals¹⁸ and even in those countries, incarceration is unusual¹⁹. Another three have criminal liability for corporations only.²⁰ Indeed sometimes this approach of the US is seen with great skepticism by other countries.²¹ Other times it is followed with enthusiasm.²² In effect however, countries without criminal fines may have an equivalence in administrative fines, for example, the European competition laws.

Consumer Interests Annual Volume 47,2001 and available at
<http://www.antitrustinstitute.org/recent/114.cfm>.

¹⁶ For a useful introduction to this see Chapter 1 of “Antitrust”, Herbert Hovenkamp, 3rd Edition 1999 publisher Black Letter Series, West Group. See also the “Glossary of Terms” referred to above. Slightly more comprehensive information can be found in a number of textbooks such as “Antitrust law and Economics in a Nutshell” by Ernest Gellhorn and William E. Kovacic, 1994 publisher West Group ,and “Understanding Antitrust and It’s Economic Implications”, E.Thomas Sullivan and Jeffrey L. Harrison, 3rd Edition 1998_ publisher Mathew Bender.

¹⁷ See “Criminal Penalties Under the Sherman Act: A study of Law and Economics” by Joseph C. Gallo, Kenneth G. Dau-Schmidt, Joseph L. Craycroft and Charles J. This provides an empirical study and analysis of the sanctions imposed on firms convicted of criminal price-fixing. It also discusses whether the penalty outweighs the advantages gained from the crime.

¹⁸ Austria, Canada, Ireland, Israel, Japan, Korea and Norway – source Donald Baker *ibid*, “The Use of Criminal law Remedies to Punish Cartels and Bid-Rigging”, quoting from the OECD report on Hard-Core Cartels 2000 The UK has recently announced proposals for criminal antitrust enforcement for individuals. (See for example, The Times Newspaper Tuesday 19th June 2001).

¹⁹ Donald Baker *ibid*, “The Use of Criminal law Remedies to Punish Cartels and Bid-Rigging”, quoting from the OECD report on Hard-Core Cartels 2000.

²⁰ France, Greece and Switzerland.

²¹ [The American criminal antitrust laws are sometime regarded as] “laws of outer space” , Christof R.A. Swaak, “Antitrust Litigation Without Borders: The Tip of the European Iceberg of Problems” , 26th February 2001, Amsterdam, Netherlands, available in Vol. 2, General Session Materials, A.B.A. Section of Antitrust Law, 49th Annual Spring Meeting, Washington DC 2001.

²² Gordon Brown, Chancellor of the Exchequer in the U.K., said: “In the United States, it has long been recognized that cartels are simply a sophisticated form of theft and that the threat of prison sentences . . . is the most powerful and effective deterrent.” The Times, Tues 19th June 2001.

? The history of criminal liability²³

? The original fine in 1890 was an administrative fine of a maximum of \$5,000 per count for corporations or others. In 1955 this rose to a maximum of \$50,000 per count. The Antitrust Procedures and Penalties Act of 1974 increased this maximum to \$1,000,000 for corporations and \$100,000 for others. Violations were also given criminal status. Incarceration was increased from a maximum 1 year punishment for a misdemeanor, to a maximum of 3 years for committing a felony. In 1984 the Criminal Fine Enforcement Act increased penalties for antitrust violations and other federal crimes to \$250,000 for individuals. The Sentencing Reform Act of 1984 established sentencing guidelines for federal judges and allowed for fines of up to twice the gross pecuniary gain of the defendant or twice the loss of the victim. This provision expired in 1987 and was then re-enacted in the same year. Thus the alternative sentencing provisions of 1987 contained in the Criminal Fines Improvement Act, allowed for fines over the statutory maximum of up to twice the gain by the defendant and/or its co-conspirators or twice the loss of the injured parties. This greatly increased the chances of obtaining fines in excess of the statutory maximum. The Antitrust Amendments Act of 1990 increased penalties to not more than \$10,000,000 per count for corporations and not more than \$350,000 per count for others.

In 1991, the Federal Sentencing Guidelines provided a punishment point system which allowed for an evaluation of aggravating and mitigating factors in determining financial liability. This modified the dynamics of fine levying.

There is some public discussion as to whether the Sherman fine maximum should be increased to \$100 million.²⁴

? Criminal sanctions

Sherman criminal sanctions:

?S1 and 2 currently provide that such antitrust violations will be treated as a felony and can result in:

1. up to \$10,000,000 fines for companies
2. up to \$350,000 for individuals or/and
3. up to 3 years imprisonment

An investigation into one area can result in number of different counts. The sanctions above are applied per count.

?The court has discretion in applying these sanctions.

Alternative fines:

²³ For a general evolutionary background see also, "A Primer on the Evolution of American Antitrust Law", Robert Lande & Albert A. Foer. 1999 available at <http://www.antitrustinstitute.org/recent/64.pdf>.

²⁴ For example, see "Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg?", March 6th 1998, available at <http://www.usdoj.gov/atr/public/speeches/1583.htm> and "The Trend Towards Higher Corporate Fines : It's a Whole New Ball Game", March 7th 1997, available at <http://www.usdoj.gov/atr/public/speeches/4011.pdf>, both by Gary R. Spratling.

?There is also an alternative sentencing provision²⁵ which is based on a calculation of up to twice the gain by the defendant or twice the loss of the injured parties.²⁶ Fines of greater than \$10,000,000 can be obtained this way.

*The Federal Sentencing Guidelines*²⁷

?The Federal Sentencing Guidelines provide the means by which fines can be calculated. This involves a point system representing aggravating and mitigating behavior (such as the level of cooperation, the number of high level executives involved, acceptance of responsibility and the history of misconduct).²⁸ The point system results in a figure which is used as a multiplier to a base level fine. The base level fine depends upon the gravity of the offense.

?The guidelines offer 2 different ways of calculating fines. As well as the base level fine and culpability score calculations discussed above, there could alternatively be an evaluation of the economic gains and losses resulting from the offense. Here, a base level fine is again determined, using an estimate of pecuniary gain to the defendant or the pecuniary loss to the public. This is a tricky calculation and the Sentencing Guidelines offer a presumption that the gain or loss is 20% of the volume of affected commerce. The base fine is then multiplied by a culpability factor.

?As well as providing incentives to cooperate, these calculation systems reflects the idea that the antitrust laws are designed to aid the market place, and heavy fines which could bankrupt the institutions involved, are not desired. Thus the provisions allow for very substantial upward or downward departures in an effort to balance the competing stances of punishment and incentive. See footnote for a working example of the Guidelines.²⁹

²⁵ *Criminal Fines Improvement Act, 18 USC 3571(d) (1984) as amended in 1987.*

²⁶ See below.

²⁷ The Sentencing Guidelines Manual has extensive provisions. For fines, see in particular *18 U.S.C. 3571*. For a discussion of the Guidelines see "After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment and other Penalties in the Age of International Cartels", Donald C. Klawiter, George Washington Law Review Symposium on Antitrust Remedies, March 22-23, 2001 (to be published).

²⁸ See *Offense Level Fine Table, Sentencing Guidelines, section 8C2.4(1) and (d)*.

²⁹ A working example of this can be seen as follows: In the case of F. Hoffman-La Roche, Ltd, in the vitamins cartel, first, the DOJ calculated the volume of affected commerce (the firm's sales in the US) to be \$3.28 billion. Then, the base fine was determined – 20% of the volume of affected commerce i.e. \$656 million. Then the DOJ calculated the culpability score. Every firm starts with a score of 5 points. In the case of HLR, there was a 5 point upward adjustment as the unit of the organization within which the offense was committed had 5000 or more employees and high-level personnel participated in the cartel; a 2 point upward adjustment because the firm had a prior history of misconduct; a 3 point upward adjustment because the firm obstructed the government's investigation; a 0 point downward adjustment for an effective program to prevent and detect violations of law, because HLR did not have an effective program; and a 2 point downward adjustment for affirmatively accepting responsibility and fully cooperating in the investigation. 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 and 4.0. Multiplying the base fine (\$656 million) by the minimum (2.0) and maximum of (4.) multipliers yields a Sentencing Guidelines fine range of \$1.3 billion to \$2.6 billion. As a result of HLR's cooperation and assistance in the investigation, it received a large downward departure from the Sentencing Guidelines minimum to a fine of \$500 million. (This

Fines for individuals

As with punishment of the corporation, a culpability point system is used. The base level can result in up to 6 months imprisonment and a fine based on a minimum of 1-5% of the volume of commerce which must be greater than \$20,000.³⁰ An assessment of ‘relevant factors’ is then made by the court and this can increase the fine and imprisonment. Then culpability factors, in a similar vein to that of corporations (for example the role of the defendant, criminal history etc.) are used to alter the offense fine level up. This has resulted in fines as large as \$10 million for individuals.³¹

Fine levels³²:

The first fine imposed under the Sherman Act occurred only 13 years after its enactment.³³ Until 1955 the fines levied were relatively insignificant and this was acknowledged as failing to have the desired effect.³⁴ Before 1992, the average fine was around \$500,000 for corporations³⁵. The Guidelines³⁶ allowed for much larger fines and the last decade has frequently seen fines over \$10,000,000 for corporations. See Appendix 1 and 2 for details of corporate and individual fines.³⁷

Incarceration³⁸:

The Sentencing Guidelines³⁹ allow for incarceration of individuals of a maximum of up to 3 years per count.

example was taken from “Pyrrhic Victories? Reexamining the Effectiveness of Antitrust Remedies in Restoring Competition and Deterring Misconduct”, Gary R. Spratling, presented at the George Washington University Law School, Washington DC on March 22nd 2001.

³⁰ *U.S.S.G. Section 5A Sentencing Table.*

³¹ For example, Robert J. Koehler (CEO of SGL Carbon AG) was fined \$10 million in May 2001 for his activities relating to the Mitsubishi corporation international price-fixing cartel.

³² See “Status Report: Criminal Fines” produced on the DOJ website at <http://www.usdoj.gov/atr/public/criminal/8270.htm>.

³³ Gallo *ibid.*, (*United States v Federal Salt Company 1980-1951, Federal Antitrust Laws with Summary of Cases, (CCH) Case 22 (N.D. Cal. Feb 28, 1903).*

³⁴ For example, Gallo in his article above, mentions that in 1944, Judge Robert Jackson commented that “The antitrust law sanctions are little better than absurd when applied to huge corporations engaged in great enterprise”. (*United States V South-Eastern Underwriters’ Assoc. 3 Trade Cases (CCH) 372 (U.S. 354 June 5, 1944).*

³⁵ Donald Baker *ibid.*

³⁶ *Ibid.*

³⁷ For a breakdown of corporate and individual fines before the 90s, see the article by Gallo *ibid.*

³⁸ See Appendix 3.

³⁹ See in particular *18 U.S.C. 3581-3586.*

Individual jail times have increased such that individual defendants were sentenced to more jail days in fiscal years 1999/2000 (12,246 days) than in the prior 5 years combined. This included 15 sentences of 12 months or more. Most of these were against US executives but foreign violators are treated the same way as domestic violators and there have been 6 foreign nationals sentenced to imprisonment in 2000/2001. The DOJ insists that, one foreign executive from each foreign firm involved in the cartel must plead guilty in the US⁴⁰. Cultural arguments such as extreme social stigma attaching to jail sentences (such as in the case of Japanese executives) does not alter the attitude of the DOJ in handing out jail time. Those who try to avoid the jurisdiction of the US by remaining out of the country, will be considered international fugitives and will have border watches and arrest warrants put on them. See below for the Memorandum of Understanding between the DOJ and the INS.

Incarceration is within minimum security prisons.

? **Amnesty**⁴¹

?The Antitrust Division has a Corporate Lenience Policy.⁴² A revised version of this was introduced in 1993. The major revisions were that amnesty would be automatic before an investigation had begun, and could be obtained after an investigation had begun. Since then, the Amnesty program has become the major method by which investigations have begun or have been furthered.

?The Amnesty program allows for a reduction in criminal fines and can even allow for immunity from prosecution. This applies to all corporate officers, directors or employees. Immunity is given in exchange for full cooperation regarding the investigation. There are varying types of amnesty from complete Amnesty which is only available to the first corporation to self-report and which fulfills certain criteria, partial amnesty which can be given to those who are not the first to self report and who also must fulfill certain conditions, and “Amnesty Plus” which gives some level of amnesty to informers who provide information of a separate cartel to the one being investigated.

Automatic leniency

?The Division will grant amnesty automatically to any corporation which reports illegal antitrust activity before the Division begins an investigation into that activity if the following 6 conditions are met. The conditions contained in the DOJ Corporate Leniency Policy are:

1. No other corporation has reported the activity to the Division;

⁴⁰ See “Pyrhic Victories” *ibid* at pp13-14.

⁴¹ See the “Status Report: Corporate Leniency Program” produced on the DOJ website at <http://www.usdoj.gov/atr/public/criminal/8278.htm>. See also “Cartels and leniency. Criminal liability in US Antitrust and Amnesty Programs – Making Companies an Offer They Shouldn't Refuse” by Stephen D Brown and Brian T Donadio, Dechert, 2001, available at [GCR: Special Reports: AAR: Cartels and leniency](#)

⁴² See <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>. See also “The Corporate Leniency Policy: Answers to Recurring Questions”, Gary R. Spratling, available at <http://www.usdoj.gov/atr/public/speeches/1626.htm>.

2. Once the corporation discovered the illegal activity, it "took prompt and effective action" to end its participation in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

If a corporation does not qualify for automatic leniency, it may still be eligible for discretionary leniency.

Discretionary Leniency

?If a corporation does report illegal antitrust activity but does not meet all of the conditions above, the Division still has discretion to grant amnesty. This applies even if the company has come forward after an investigation had begun. However, 7 conditions in the Corporate Leniency Policy must still be met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction
- 3/4/5/6. Same as 2,3,4 and 5 above
7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

In deciding whether granting leniency would be fair, the Policy states that the primary considerations are:

(1) how early the corporation reports the illegal activity, and (2) whether the corporation coerced another third party to participate in the illegal activity or clearly was the leader in, or originator of, the activity.

The amount of evidence the Division has gathered against a corporation is an important factor in the fulfillment of condition 7. If a corporation has reported illegal activity before an investigation, then there is less onus on the corporation to fulfill this. The burden of fulfillment increases the closer the Division come to having evidence that is likely to result in a sustainable conviction.

Individual leniency program

?The corporate leniency program sets out conditions for leniency for directors, officers and employees who come forward as part of a corporate confession. In addition, there is a specific

Individual Leniency program⁴³ which allows for leniency for individuals who approach the DOJ on their own behalf and not as part of the corporation. This additional policy for individuals was issued on August 11 1994. Under the Individual Policy, the Division will grant agree not to prosecute individuals if they come forward before an investigation has begun if the following 3 conditions are met:

1. When the individual comes to the Division, the Division has no prior information about the alleged activity.
2. The individual reports the illegally activity completely and honestly, and continues to cooperate with the Division throughout the investigation; and
3. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or the originator of, the activity.

Amnesty Plus⁴⁴

?Where a corporation currently under investigation for participation in illegal antitrust activity discovers – e.g. as the result of an internal investigation – the participation of its executives in an antitrust cartel in a market distinct from that under investigation, and the corporation agrees with the Division to cooperate not only in the ongoing investigation (in where the company did not obtain guaranteed amnesty) but also in the investigation of the antitrust activity of which the Division previously was not aware, the corporation can obtain what the Division refers to as "Amnesty Plus."

?As part of this, the Division will grant full amnesty to the amnesty applicant in the new investigation under the terms of the Amnesty Program. The Division also will give the amnesty applicant an additional discount in the calculation of its fine in any plea agreement in the ongoing investigation. This double whammy of incentives provides a great impetus for companies to report other illegal activities.

Amnesty application procedure⁴⁵

?If the staff in Division field offices receive a request for amnesty and agree that amnesty should be granted, they will forward that recommendation to the Deputy Assistant Attorney General for Criminal Enforcement, through the Director of Criminal Enforcement. The Deputy Assistant Attorney General for Criminal Enforcement will review the request and recommendation and ultimately forward it to the Assistant Attorney General for a final decision.

If the Division staff member does not recommend amnesty, or if counsel for the applicant wishes to bypass the staff review procedure altogether, counsel may request a meeting with the Deputy Assistant Attorney General for Criminal Enforcement or the Director of Criminal Enforcement to argue for a grant of amnesty”

⁴³ See <http://www.usdoj.gov/atr/public/guidelines/lenind.htm>.

⁴⁴ See “[Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy – An Update](http://www.usdoj.gov/atr/public/speeches/2247.htm)”, Gary R. Spratling, February 16 1999, available at <http://www.usdoj.gov/atr/public/speeches/2247.htm>

⁴⁵ See “[Answers to Recurring Questions](#)” *ibid.*

Making the decision to apply for Amnesty

?There are a number of risks associated with applying for Amnesty including the fact that the corporation may not turn out to be the first in the door. Immunity from criminal prosecution does not mean immunity from civil sanctions and civil fines can be huge based upon restitution. In addition, the corporation may also be investigated by other jurisdictions as a result of it becoming known that the corporation was involved, and this again opens up another class of fines. So, in making the decision to reveal oneself, in reality a corporation will go through a kind of cost-benefit analysis.⁴⁶ These include questions such as what is the likelihood of being found out, do we have compliance programs in place which will reduce my liability if we are not first in the door, which jurisdiction to apply to first etc.

Many firms have obviously done this analysis and found in favor of amnesty – from a rate of amnesty application of 1/year under the old policy, the rate is now almost 2/month.⁴⁷

? Collateral penalties for antitrust violations

?Once a judgement of criminal liability has been made, plaintiffs who have been injured by the anticompetitive behavior are in a stronger position to claim civil treble damages under the Clayton Act.⁴⁸ Collateral penalties also can include shareholder derivative suits, disqualification from holding certain licenses and offices, disqualification for bidding on various federal government contracts, corporate governance issues and to some extent, stigma.

?Also, a corporation or individual convicted of a Sherman Act violation may be ordered to make restitution to the victims for increases in price caused.⁴⁹ This however is limited by the Illinois Brick rule⁵⁰ which prevents indirect purchasers from claiming restitution.

⁴⁶ See “To Rat or Not to Rat? The Conspirator’s Dilemma, As Seen From A US Perspective”, Donald I. Baker, April 27th 2001 (to be published) and “A Guide to the Costs and Consequences of an Antitrust Criminal Investigation for Corporate Executives”, Donald C. Kluwiter, available in Vol. 2, General Session Materials, A.B.A. Section of Antitrust Law, 49th Annual Spring Meeting, Washington DC 2001. See also; “When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put A Price Tag on An Individual’s Freedom?”, Scott D. Hammond, March 8th 2001, available at <http://www.usdoj.gov/atr/public/speeches/7647.htm> and “The Criminalisation of Antitrust. Leniency and Enforcement : the Carrot and the Stick. A View from Europe”, Julian Joshua, 2000, available at <http://www.morganlewis.com/spccarrot.htm>.

⁴⁷ “Status Report: Corporate Leniency Program”, produced by the Department of Justice and available at <http://www.usdoj.gov/atr/public/criminal/8278.htm>.

⁴⁸ *Ibid.*

⁴⁹ Note that an opinion of a District Court has shown that the Federal Trade Commission has the right to collect consumer redress from firms which have violated the Federal Trade Commission Act. See <http://www.ftc.gov/opa/2000/11/mylanfin.htm>. This is a press release by the FTC discussing this case of *FTC v Mylan Laboratories, Inc. Cambrex Corporation, Profarmaco S.r.l., Gyma Laboratories*, Civil 1:98CV03114 (TFH). See also <http://www.ftc.gov/opa/2000/11/mylanfin.htm>. See also <http://www.ftc.gov/opa/2001/05/fyi0127.htm>.

⁵⁰ *Illinois Brick Co. v Illinois*, 431 US 720, 97, S.Ct. 2061 (1977). Note that many States do permit recovery by indirect purchasers under State antitrust law. Also, some lower courts have created a number of exceptions to the Illinois Brick rule though none of these has at this time, been approved by the Supreme

?Collusion amongst competitors may encompass violations of the mail or wire fraud statute, the false statements statute, or other federal felony statutes⁵¹, all of which the Antitrust Division prosecutes.

? **Criminal Procedure**⁵²

?An investigation is typically generated by the DOJ by:

- 1/ private complaint
- 2/ a revelation by the media
- 3/ an informant via the leniency program

DOJ will decide if the issue is plausible by looking into it and the industry generally. If conduct is encompassed within price-fixing then the DOJ will recommend a federal grand jury investigation to investigate and gather evidence.

Grand Jury investigation:

?The grand jury is a group of 16-23 individuals who listen to a hearing of the case from the point of view of the government. There is no presence of counsel for the accused or witnesses. It is entirely secret. Given this background, most juries will choose to indict. There are approximately 35 grand juries sitting in Federal courts around the country as at June 2001.

The grand jury investigation will begin by the DOJ issuing subpoenas for documents in the name of the grand jury. Since the process has been kept in wraps, this will most likely be the first time the defendant will hear about inquiries of the DOJ.

Counsel for the defendant will negotiate with the DOJ on the terms of the subpoenas.

Having received the subpoena documents, the government will start the process of oral testimony and call witnesses, in order of the least important first, before the Grand Jury. They use the documents to examine these witnesses. There is no private counsel present but each individual is likely to have its own counsel separate from that of the corporation due to the potential conflicting interests between the company and the individual. Immunity may be argued for.

Indictment:

?On completion of the Grand Jury hearings, the DOJ will normally prepare a draft indictment and a detailed fact memorandum which will be sent to the Assistant Attorney general for the final decision. There is a review of the evidence which defense counsel can also participate in (though they do not see the draft indictment or the fact memorandum) and there may be additional facts offered which were not present at the hearing.

Court. For further details see Hovenkamp *ibid*. See "[AAI supports Overturn of Illinois Brick before House Judiciary Committee](#)", Testimony of Albert A. Foer, 12th September 2000, available at <http://www.antitrustinstitute.org/recent/84.cfm>.

⁵¹ See [Statutory Provisions and Guidelines of the Antitrust Division, section B](#), available at http://www.usdoj.gov/atr/foia/divisionmanual/ch2.htm#N_1_.

⁵² For further information sources see <http://www.abanet.org/antitrust/pubs.html#CRIMINAL> See also "[Procedure and Enforcement in E.C. And U.S. Competition Law](#)", 1993, chapter 18 by Donald I. Baker, Sweet and Maxwell.

The Assistant Attorney General will decide whether or not to indict certain individuals as selected by the staff. If he does, the grand jury normally vote to return the final indictment presented by the staff.

Antitrust Criminal Trial:

?The government is required to prove beyond a reasonable doubt that the defendants have committed the acts charged in the indictment.

The government will rely mostly on the subpoenaed documents and the trial oral testimony from individuals who have been given immunity. (Note the grand jury testimony is only admissible under certain circumstances.⁵³)

Antitrust Criminal Appeal:

?Most appeals concern evidentiary questions,⁵⁴ and sometimes legal questions.⁵⁵ However, the Court of Appeal does not sit for the purpose of reviewing the evidence in a jury case, as long as there was some evidence at trial that supports the verdict.

Appeals go to a 3-judge panel of the Court of Appeal for the circuit in which the District Court is located. It is possible to go higher to the entire circuit or the Supreme Court but this is unlikely.

? Globalization of Antitrust and the problem of jurisdictions⁵⁶

?The globalization of industry with communication has meant the cartels are increasingly larger in international scope and sophistication. Since 1997 international cartel prosecutions have accounted for more than 90% of the fines imposed in criminal antitrust cases annually. By 1999 international cartels have been accredited with affecting over \$17 billion in US sales.⁵⁷

?There are over 100 countries in the world with antitrust laws developing most of whom have been recent entrants into this field.⁵⁸ The problems of international cartels are well recognized

⁵³ Sometime it can be used by prosecutors on direct examination to show inconsistency or to refresh recollection, or by defense counsel to impeach government witnesses on cross-examination. (“Procedure And Enforcement in E.C. and U.S. Competition Law”, *ibid.*)

⁵⁴ Especially whether the trial judge failed to exclude evidence which the defendants assert he should have, or excluded exculpatory evidence offered by the defendants. . (“Procedure and Enforcement in E.C. And U.S. Competition Law”, *ibid.*)

⁵⁵ Relating to failure of the trial judge to include jury instructions requested by the defendants, or to reject jury instructions sought by the government. . (“Procedure and Enforcement in E.C. And U.S. Competition Law”, *ibid.*)

⁵⁶ For more detail see “Extraterritorial Enforcement of the US antitrust laws” by S. L. Katz, J. E. Fink and Y. Tsuchitani from Mauda Funai Eifert & Mitchell available at <http://www.masudafunai.com/English/articles/sales/sales1.asp>.

⁵⁷ “Global Price Fixing. Our Customers are Our Enemy”, John M. Conner (to be published).

⁵⁸ “There has been a sea of change in attitude toward cartel enforcement that is absolutely incredible – a change that even in my position just two years ago I would have said was impossible. other countries are changing their laws. They are changing their discovery tools and investigative procedures. They are

and as such, there is some level of cooperation between enforcement agencies of the different jurisdictions across which violations occur.⁵⁹

Generally a limited degree of enforcement assistance is available under bilateral antitrust agreements between the US and other countries.⁶⁰ This does not make compulsory the exchange of information or access to confidential information. Material may be obtained via specific agreements under the International Antitrust Enforcement Assistance Agreement of 1994.⁶¹ Material specific to criminal antitrust may be obtained via mutual legal assistance treaties of which there are over 30. Assistance can also be obtained through international law avenues such as diplomatic means.

Guidelines:

?The DOJ in conjunction with the FTC produced Guidelines on International Operations in 1995⁶² which relate to the international enforcement policy and also include policy regarding mergers of foreign companies which nevertheless can have a substantial effect on trade in the US. The guidelines contain a number of useful examples.

Memorandum of Understanding:

? To encourage foreign defendants to come forward rather than remaining international fugitives, the DOJ also has a Memorandum of Understanding with the INS which allows the individual to have a final decision on his immigration status made by the INS before entering into any plea agreement with the DOJ. This has decreased the likelihood that foreign executives who have been convicted of antitrust violations in the US, will avoid jurisdiction by simply not traveling to or via the US. This is also beneficial for the executives who in many instances spend much of their time doing business in the US or have relatives there and so do not wish to avoid the country.

changing their enforcement procedures and prosecutorial priorities. And all of these changes are against international cartels.” Gary Spratling “Interview with Gary Spratling”, Antitrust, Summer 2000.

⁵⁹ See “Anticartel Cooperation”, Spencer W. Waller, in “Antitrust Goes Global. What Future for Transatlantic Cooperation?” 2000, Brookings Institute/Royal Institute of International Affairs. This article shows the lack of, and need for further cooperation between the antitrust enforcement agencies on cartel enforcement.

See also “Negotiating the Waters of International Cartel Prosecutions”, Antitrust Division Policies Relating To Plea Agreements In International Cases”, by Gary R. Spratling, March 4th 1999, available at <http://www.usdoj.gov/atr/public/speeches/2275.htm>.

⁶⁰ For example, Brazil, Canada, the European Union, Germany, Israel and Japan.

⁶¹ 15 U.S.C. section 6200-6212.

⁶² See Antitrust Enforcement Guidelines for International Operations, issued by the Department of Justice and the Federal Trade Commission in 1995, available at <http://www.usdoj.gov/atr/public/guidelines/internat.htm>.

? **Recent/Important Cases**⁶³

Below are some of the most recent cases. References are to a selection of press releases on the DOJ website. The information below is believed to be correct at the time it was written. The DOJ website should be consulted for up to date information.

?*Auction Houses*–

On May 2 2001, the DOJ announced that the two largest auction houses in the world, Sotheby's and Christies, were charged with fixing commission rates charged to sellers of works of art, jewelry and furniture at auctions. Sotheby and Christies provide substantially the same services to sellers and, prior to the introduction of the fixed, non-negotiable commission rates, they competed primarily on the basis of price, undercutting each other's offers to sellers. As a result of the conspiracy, sellers lost their principal bargaining tool. The conspiracy lasted over 6 years. The indictment charges the Chairman of the Board of Directors of Sotheby's, and a member of the Board of Directors of Christie's from who was also the Chairman of its Board of Directors for a certain period, with conspiring to fix auction commission rates charged to sellers in the United States and elsewhere from 1993 to 1999 in violation of the Sherman Act.

For more details see the press release of the DOJ at http://www.usdoj.gov/atr/public/press_releases/2001/8128.htm

?*Graphite Electrodes*

On May 10th 2001, the DOJ announced that Mitsubishi Corporation was fined \$134 million after being convicted for its role in an international graphite electrodes price-fixing cartel. At the present time, this fine is the second-highest fine imposed in the graphite electrodes investigation and is the fourth-largest fine ever imposed in an antitrust case.

On February 12, 2001, the Mitsubishi Corporation of Tokyo, Japan, was convicted of aiding and abetting a conspiracy among the world's major manufacturers of graphite electrodes to fix prices in the U.S. and elsewhere, beginning at least as early as March 1992 and continuing until at least June 1997.

Previous prosecutions of the international graphite electrode cartel members have yielded fines, to date, totaling more than \$300 million to date. Six major producers of graphite electrodes in the world have been convicted and fined between \$2.5 million and \$135 million each. A seventh producer cooperated in the investigation and the company and its executives received amnesty. Three individuals have also been convicted in the price-fixing scheme.

For more details see the press releases of the DOJ at http://www.usdoj.gov/atr/public/press_releases/2001/8186.htm
http://www.usdoj.gov/atr/public/press_releases/1999/3880.htm
http://www.usdoj.gov/atr/public/press_releases/1999/3706.htm
http://www.usdoj.gov/atr/public/press_releases/1999/2395.htm

?*NYC Board of Education Contracts:*

⁶³ See also, "[The World Gets Tough on Price Fixers](#)", S. Labaton, N.Y. Times, June 3rd, 2001.

On May 2nd 2001, five executives and three New York City food distribution companies pleaded guilty today to rigging bids on \$126 million dollars of frozen food contracts awarded by the New York City Board of Education (NYCBOE).

For more details see press releases of the DOJ at
http://www.usdoj.gov/atr/public/press_releases/2001/8144.htm
http://www.usdoj.gov/atr/public/press_releases/2001/7898.htm
http://www.usdoj.gov/atr/public/press_releases/2000/4869.htm

?Construction:

On April 12th 2001 the DOJ announced that ABB MIDDLE EAST & AFRICA PARTICIPATIONS AG, a Milan-based, Swiss subsidiary of ABB Asea Brown Boveri Ltd., pleaded guilty and was sentenced to pay a \$53 million fine today for participating in a conspiracy to rig bids on a construction contract funded by the United States Agency for International Development (USAID) in the Arab Republic of Egypt.

For more details see the press release of the DOJ at
http://www.usdoj.gov/atr/public/press_releases/2001/7984.htm

?Graphite:

On February 14th 2001 the DOJ announced that WASHINGTON, D.C. -- A U.S. subsidiary of a Japanese manufacturer of isostatic graphite, and a Japanese executive agreed to plead guilty and pay fines totaling more than \$4.5 million for participating in an international cartel to fix the price of isostatic graphite sold in the United States and elsewhere. This is the first case in which a Japanese business executive has agreed to face a possible jail sentence for a violation of U.S. antitrust law.

According to the charge, Toyo Tanso USA Inc., of Troutdale, Oregon, a subsidiary of Toyo Tanso Co. Ltd, of Japan, and Takeshi Takagi, and Japanese citizen and resident, conspired with unnamed co-conspirators to suppress and eliminate competition in the non-machined and semi-machined isostatic graphite industry from as early as July 1993 until at least February 1998.

For more details see the press release of the DOJ at
http://www.usdoj.gov/atr/public/press_releases/2001/7476.htm

?Food preservatives:

On January 23rd 2001 the DOJ announced that three top executives of Ueno Fine Chemicals Industry Ltd. and an executive from the Japanese chemical giant Daicel Chemical Industries Ltd. were indicted today by a federal grand jury for participating in a 17-year international price-fixing conspiracy in the food preservatives industry, the Department of Justice announced. In addition, Ueno, a Japanese chemical producer, has agreed to plead guilty and to pay an \$11 million criminal fine for its role in the same conspiracy.

The conspiracy affected nearly \$1 billion in U.S. commerce. Roughly \$200 million worth of sorbates -- which include potassium sorbate and sorbic acid -- are sold annually worldwide.

Ueno is the fifth company to be charged with participating in the sorbates conspiracy, following Eastman Chemical Company, Hoechst AG, Nippon Gohsei, and Daicel. The \$11 million fine against Ueno would bring the total fines imposed in this investigation to more than \$130 million to date.

For more details see the press releases of the DOJ at
http://www.usdoj.gov/atr/public/press_releases/2001/7310.htm
http://www.usdoj.gov/atr/public/press_releases/1999/2560.htm

?Lysine and Citric acid

On September 22nd, 2000, 2 executives from Archer Daniels Midland, were re-sentenced for their roles in a conspiracy to fix prices and allocate sales in the lysine market worldwide. A third ADM executive had also previously been convicted as well as a Japanese defendant who remains an international fugitive.

The lysine cartel involved 5 firms and 6 individuals from the US, Japan, a Korean-based firm with US operations and a separate Korean firm. Due to the cartel, prices of Lysine went up by 70% in a market of \$60,000,000 of annual sales worldwide.

Citric Acid:

The Citric Acid cartel was related to the lysine cartel and 5 firms from the US (ADM), a German-based firm, 2 Swiss firms and a French-based Dutch firm, and several foreign nationals pleaded guilty to fixing prices and allocating sales volumes in the US and elsewhere for citric acid. This took place between July 1991 and June 1995. Due to the cartel, prices of citric acid went up by more than 30%.

This case, considered to be one of the most important in criminal antitrust enforcement, was the first time a corporation had been fined over the statutory \$10,000,000. The case was also important due to the size and reputation of ADM and due to the sophistication of the cartel⁶⁴.

For more details see the press releases of the DOJ at
http://www.usdoj.gov/atr/public/press_releases/2000/6544.htm
http://www.usdoj.gov/atr/public/press_releases/1996/573at.htm

?Marine Construction:

On May 16th 2000, the DOJ announced that the former president of a leading Houston-based marine construction contractor, J. Ray McDermott, S.A., was indicted today by a federal grand jury for conspiring to rig bids for heavy-lift marine installation services provided to customers in the Gulf of Mexico.

This is the fourth case to date, brought by the Department in its ongoing antitrust investigation of the marine construction industry.

For more details see press release of the DOJ at
http://www.usdoj.gov/atr/public/press_releases/2000/4757.htm

⁶⁴ For an interesting narrative of what happened in this case, "The Informant", Kurt Eichenwald, 2000, Broadway Books, and "Rats in the Grain: The Dirty Tricks and Trials of Archer Daniels Midland" by James B. Lieber, Four Walls Eight Windows, and also "Global Price-Fixing. 'Our Customers are the Enemy'" by John M. Conner, *ibid* (to be published).

?Vitamins:

On April 5, 2000, the DOJ announced that three former executives of BASF AG and one former executive of F. Hoffmann-La Roche Ltd. agreed to plead guilty, serve time in U.S. prisons, and pay criminal fines for their roles in an international conspiracy to suppress and eliminate competition in the vitamin industry, the Department of Justice announced today.

In four separate criminal cases filed in U.S. District Court in Dallas, the Department of Justice charged two Swiss nationals and two German nationals with conspiring with unnamed co-conspirators to fix, raise, and maintain prices, and allocate the sales volumes of vitamins sold in the U.S. and elsewhere. The cases also charge that the conspirators allocated contracts for vitamin premixes for customers throughout the U.S. and rigged the bids for those contracts. The conspiracy lasted from January 1990 until February 1999 and affected the vitamins most commonly used as nutritional supplements or to enrich human food and animal feed--vitamins A, B2, B5, C, E, and beta carotene. Vitamin premixes, which are used to enrich breakfast cereals and numerous other processed foods, also were affected by the conspiracy.

Two former BASF Fine Chemicals Division Presidents, and the former BASF Group Vice President and a former Hoffmann-La Marketing Director, each agreed to submit to the jurisdiction of a US federal court. One of the Swiss national has agreed to serve a four-month prison term and pay a \$350,000 fine. One of the German nationals agreed to serve a prison term of three and one-half months and pay a fine of \$125,000. The other Swiss national and the other German national each agreed to serve three months in prison and pay a fine of \$75,000.

On May 20, 1999, Hoffmann-La Roche pleaded guilty to the same conspiracy and was sentenced to pay a record \$500 million criminal fine. On that same day, a former Director of Hoffmann-La Roche's Vitamin and Fine Chemical Division, also was charged with participating in the vitamin cartel and lying to Department investigators in 1997 in an attempt to cover up the conspiracy. This director, a Swiss national, pled guilty to the charges and was sentenced on July 23, 1999, to a four-month prison term and a \$100,000 fine. On October 29, 1999, a former President of Hoffman-La Roche who is also a Swiss plead guilty to participating in the vitamin conspiracy. He was sentenced to a five-month prison term and fined \$150,000.

The BASF individuals were the first individuals charged with participating in the illegal vitamin cartel on behalf of their former employer, BASF. On September 17, 1999, BASF pleaded guilty to participating in the vitamin conspiracy and was sentenced to pay a criminal fine of \$225 million.

To date, the Antitrust Division has prosecuted 18 cases resulting from the ongoing investigation of the worldwide vitamin industry, seven of which charged foreign nationals.

For more details see the press releases of the DOJ at
http://www.usdoj.gov/atr/public/press_releases/2000/4494.htm
http://www.usdoj.gov/atr/public/press_releases/1999/2626.htm
http://www.usdoj.gov/atr/public/press_releases/1999/2450.htm

?Chemicals:

On May 5th 1999, the DOJ announced that A German chemical and pharmaceutical giant today agreed to plead guilty and pay a \$36 million criminal fine for participating in a 17-year international conspiracy to fix prices and allocate market shares on the sale of sorbates in the United States and elsewhere.

This is the second case filed to date, as a result of the Department's ongoing investigation into illegal, collusive practices in the sorbates industry. In October 1998, Eastman Chemical Company, a U.S. producer of sorbates, pleaded guilty and was fined \$11 million for its participation in the conspiracy.

The conspiracy affected nearly \$1 billion in United States commerce.

For more details see the press release of the DOJ at

http://www.usdoj.gov/atr/public/press_releases/1999/2418.htm.

Appendix 1 (p6):

Fine level for corporations etc:

The following statistics show the largest fines levied to date.⁶⁵

Note that most of the largest fines are regarding foreign corporations. In 1991 only 1% of corporate defendants in cases brought by the division were foreign. In 1997 this figure had increased to 32% and in 1998 this was 50%.⁶⁶

<i>ANTITRUST DIVISION</i>				
<i>Sherman Act Violations Yielding a Fine of \$10 Million or More</i>				
Defendant (FY)	Product	Fine (\$ Millions)	Geographic Scope	Country
F. Hoffmann-La Roche, Ltd. (1999)	Vitamins	\$500	International	Switzerland
BASF AG (1999)	Vitamins	\$225	International	Germany
SGL Carbon AG (1999)	Graphite Electrodes	\$135	International	Germany
UCAR International, Inc. (1998)	Graphite Electrodes	\$110	International	U.S.
Archer Daniels Midland Co. (1997)	Lysine & Citric Acid	\$100	International	U.S.
Takeda Chemical Industries, Ltd. (1999)	Vitamins	\$72	International	Japan
Daicel Chemical Industries, Ltd. (2000)	Sorbates	\$53	International	Japan
ABB Middle East & Africa	Construction	\$53	International	Switzerland/Hdq. Italy

⁶⁵ For up to date information, see the website of the Antitrust Division of the Department of Justice at <http://www.usdoj.gov/atr/>. For example, the fourth largest antitrust fine of \$134,000,000 was recently imposed on Mitsubishi (for more information see the Department of Justice press release at http://www.usdoj.gov/atr/public/press_releases/2001/8186.htm). Also, Akzo Chemicals has recently been fined \$12,000,000 for its part in an international price fixing and market allocation conspiracy (for more information see http://www.usdoj.gov/atr/public/press_releases/2001/8468.htm).

⁶⁶ “Status Report: International Cartel Enforcement” by Gary R. Spratling, Washington DC, February 1999. Part of the “The Expanding International Dimensions of Antitrust”, A Workshop On International Antitrust Policy and Enforcement. See also “Status Report: International Cartel Enforcement” produced by the DOJ and available at <http://www.usdoj.gov/atr/public/criminal/8279.htm>.

ANTITRUST DIVISION				
<i>Sherman Act Violations Yielding a Fine of \$10 Million or More</i>				
Defendant (FY)	Product	Fine (\$ Millions)	Geographic Scope	Country
Participations AG (2001)				
Haarmann & Reimer Corp. (1997)	Citric Acid	\$50	International	German Parent
HeereMac v.o.f. (1998)	Marine Construction	\$49	International	Netherlands
Sotheby's Holdings Inc. (2001)	Fine Arts Auctions	\$45	International	U.S.
Eisai Co., Ltd. (1999)	Vitamins	\$40	International	Japan
Hoechst AG (1999)	Sorbates	\$36	International	Germany
Showa Denko Carbon, Inc. (1998)	Graphite Electrodes	\$32.5	International	Japan
Philipp Holzmann AG (2000)	Construction	\$30	International	Germany
Daiichi Pharmaceutical Co., Ltd. (1999)	Vitamins	\$25	International	Japan
Nippon Gohsei (1999)	Sorbates	\$21	International	Japan
Pfizer Inc. (1999)	Maltol/Sodium Erythorbate	\$20	International	U.S.
Fujisawa Pharmaceuticals Co. (1998)	Sodium Gluconate	\$20	International	Japan
Dockwise N.V. (1998)	Marine Transportation	\$15	International	Belgium
Dyno Nobel (1996)	Explosives	\$15	Domestic	Norwegian Parent
F. Hoffmann-La Roche, Ltd. (1997)	Citric Acid	\$14	International	Switzerland
Merck KgaA (2000)	Vitamins	\$14	International	Germany
Degussa-Huls AG (2000)	Vitamins	\$13	International	Germany

ANTITRUST DIVISION				
<i>Sherman Act Violations Yielding a Fine of \$10 Million or More</i>				
Defendant (FY)	Product	Fine (\$ Millions)	Geographic Scope	Country
Ueno Fine Chemicals Industry, Ltd. (2001)	Sorbates	\$11	International	Japan
Eastman Chemical Co. (1998)	Sorbates	\$11	International	U.S.
Jungbunzlauer International AG (1997)	Citric Acid	\$11	International	Switzerland
Lonza AG (1998)	Vitamins	\$10.5	International	Switzerland
Akzo Nobel Chemicals, BV & Glucona, BV (1997)	Sodium Gluconate	\$10	International	Netherlands
ICI Explosives (1995)	Explosives	\$10	Domestic	British Parent
Mrs. Baird's Bakeries (1996)	Bread	\$10	Domestic	U.S.
Ajinomoto Co., Inc. (1996)	Lysine	\$10	International	Japan
Kyowa Hakko Kogyo, Co., Ltd. (1996)	Lysine	\$10	International	Japan

Appendix 2 (p6)

Fine levels for individuals:

The following statistics show the numbers and the totality of individual fines over the last 10 years.⁶⁷

1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
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Total Individual Fines (\$000)	2,806	1,275	1,868	1,240	1,211	1,572	1,247	2,499	12,273	5,180
- Number of Individuals Fined	37	27	45	33	25	16	17	20	50	43

⁶⁷ Antitrust Division Workload Statistics FY 1991-2000, <http://www.usdoj.gov/atr/public/7344.htm>.

Appendix 3 (p7)

Incarceration

The following statistics show the numbers of antitrust violators confined over the last 10 years.⁶⁸

1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
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Incarceration										
Number of Individuals Sentenced	50	29	56	40	27	19	17	16	54	47
Number of Individuals Sentenced to Incarceration Time	22	11	14	9	16	5	3	5	28	18
Total Number of Actual Days of Incarceration Imposed by the Court	6,594	2,488	4,726	1,497	3,902	2,431	789	1,301	6,662	5,584
Other Confinement										
(i.e. 18. Includes house arrest or confinement to a halfway house or community treatment center)										
Individuals Sentenced to Other Confinement	16	15	26	22	16	8	9	10	25	20
Number of Other Confinement Days	1,519	1,734	3,552	2,475	2,933	1,148	1,270	1,530	2,850	2,567

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⁶⁸ Antitrust Division Workload Statistics FY 1991-2000, <http://www.usdoj.gov/atr/public/7344.htm>.