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Change may be the catchphrase of this year's U.S. election cycle, but continuity will be the reality for U.S. cartel enforcement. Regardless of whether Republican Senator John McCain or Democratic Senator Barack Obama wins the election in November, the virtual hydraulic press of high-profile and vigorous cartel investigations and prosecutions will continue.

That is not to say there will be no differences at the margins for cartel matters and high-level policy. Despite the conventional wisdom that Democrats care more about "rigorous" antitrust enforcement than Republicans,[1] the past eight years of Republican enforcement efforts demonstrate that cartel enforcement by the U.S. Department of Justice's Antitrust Division ("DOJ") (which handles all federal criminal antitrust matters) is not just a priority, it has been the DOJ's highest priority. Reportedly, grand jury investigations of cartel activity are at an all-time high. Given Senator McCain's past support for pro-enforcement legislation,[2] a McCain administration likely would continue the push for greater cartel enforcement, larger fines, and longer jail sentences.

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[1] *See, e.g., Roundtable Discussion: Advice for the New Administration,* ANTITRUST, Summer 2008, at 9 ("I believe that the antitrust laws for the last four or five years have been under-enforced.") (statement of Robert Pitofsky, Federal Trade Commission Chairman during President Clinton's Administration).

[2] In the past five years, Congress has enacted laws that have increased criminal penalties for cartel activity and empowered the DOJ to have greater access to wiretaps and other surveillance techniques. In

While there is no doubt that an Obama administration likewise would support rigorous cartel enforcement efforts. His campaign promises a broader and more intense enforcement focus on mergers, single-firm conduct cases, and, ultimately, civil lawsuits brought by the DOJ.[3] Cartel enforcement will matter, but all indications are that the DOJ would undergo some abrupt changes in direction and a shift in resource allocation in an Obama administration. The question is how these changes will play out at the margins for cartel enforcement.

There are at least three major policy questions for U.S. cartel enforcement that may come to a head in the next four years. It is at these levels that potential differences between the two possible administrations could have an impact. First, in recent years the trend with regard to individuals involved in cartel activity has been to push for increased jail time and number of individuals prosecuted per cartel. While the deterrent effects of such policies are obvious, there are associated costs that may be weighed differently by different administrations. Second, more and more non-U.S. governments are following

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2003 (prior to Senator Obama taking office), Senator McCain voted in support of increasing the uppermost level of corporate and individual fines and increasing maximum jail time from three years to ten. Antitrust Criminal Penalty Enforcement & Reform Act of 2004, Pub. L. 108-237, 118 Stat. 665 (amending 15 U.S.C. § 1-3,16). Likewise, McCain (as well as Obama) voted in 2005 in favor of the Antitrust Criminal Investigation Improvements Act of 2005, which gave the DOJ greater wiretapping authority. *See* USA Patriot Improvement & Reauthorization Act of 2005, Pub. L. 109-177, 120 Stat. 192 (amending the Patriot Act, section 113, 18 U.S.C. § 2516). Notably, support for both measures was unanimous across party lines.

[3] Senator Obama's campaign website states that "[a]s president, Obama will reinvigorate antitrust enforcement, which is how we ensure that capitalism works for consumers. Thus, he will step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not. An Obama administration will look carefully at key industries to ensure that the benefits of competition are fully realized by consumers. . . . He will take steps to ensure that antitrust law is not used as a tool to interfere with robust competition or undermine efficiency to the detriment of U.S. consumers and businesses. He will do so by improving the administration of those laws in the U.S. and by working with foreign governments to change unsound competition laws and to avoid needless duplication and conflict in multinational enforcement of those laws."). Obama Campaign Website, http://origin.barackobama.com/issues/technology/ (last visited Sept. 9, 2008).

the United States' example and are making hard-core cartel activity a criminal violation punishable by jail time. This trend will complicate and, perhaps ironically, undercut U.S. criminal enforcement efforts. Handling this problem will be a test for either administration. Finally, the DOJ measures its success in part through the amount of fines it imposes. While this metric provides clear guidance and guideposts, there is serious question whether the approach used to calculate these criminal penalties passes Constitutional muster. If the differences among the Justices on the U.S. Supreme Court in past decisions addressing this issue are an indication of the political perspective, either a more liberal or libertarian administration (or political appointees) may be less inclined to "trophy hunt" by means of large fines.

I. FOCUSING ON INDIVIDUALS

A current major focus of the DOJ is to increase both the number of individuals who are prosecuted in any particular cartel and the number of days on average those individuals spend in jail. In part, the later trend is occurring because Congress increased the maximum imposable jail term from three to ten years in 2004, thus reflecting a combination of legislative and enforcement policy decisions. The DOJ claims that average jail sentences have risen dramatically since 2000 and are averaging nineteen months.[4]

Importantly, however, these jail terms are almost never imposed because of verdicts issued by juries. Virtually almost all recent cartel jail terms have been the result

[4] Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program, Speech Before ABA Annual Spring Meeting, at 7 (Mar. 6, 2008) [hereinafter Hammond, Recent Developments, Trends, and Milestones].

of plea bargaining. That is, sentences and their lengths are a result of negotiations between prosecutors and an individual's legal counsel when that individual decides it is more beneficial to strike a deal than risk an adverse jury verdict. While jail terms for pleas are calculated within the structures of the U.S. Sentencing Guidelines, prosecutors have wide discretion in how and what to charge a particular individual.

Given that prosecutors' negotiating leverage has been strengthened by arming the prosecutors with the ability to impose significantly higher sentences, it should not be surprising that jail terms are increasing. Prosecutors hold a larger stick to threaten those who would dare test the prosecutors' case at trial. However, the press for greater time served must reach equilibrium—at least for those who would spend the time in jail—at the point at which the prospect of fighting the charges, coupled with the possibility of winning, outweighs the benefit of the certainty of a fixed sentence. This dynamic apparently occurred with one of the executives in the DRAM cartel case, a U.S. national who had worked for a Korean company that had pled out. This executive refused to agree to plead guilty and was tried before a jury in San Francisco. He was acquitted.

Criminal enforcement, including antitrust criminal enforcement, simply cannot function if plea bargaining is not a dominant part of the process. Trying criminal cases is extremely time and resource consuming. The American criminal law system, with the rights embodied in the U.S. Constitution, is designed to make successful prosecution difficult. Moreover, each case helps create a defense roadmap for other individuals (or companies) accused of price fixing. The success of the DOJ's current cartel policy, which

is dependent upon pleas, would be gravely imperiled if a significant number of individuals refused to plea, especially if the results included some number of acquittals.

This potentially unintended consequence—increasing the potential amount of enforcement but resulting in less actual success—could also be affected by the DOJ's push to prosecute more individuals. The number of individuals exposed to criminal prosecution is also some function of plea bargaining. However, these deals are struck by companies that agree to plea; part of the bargain includes certainty on the number of their executives who continue to be exposed to criminal prosecution—so-called "carve outs." In recent years, the number of such individuals that have been excluded from company deals in major cases has increased from a few per company to six, eight, or more. Of course, the more individuals carved out of a plea, the greater number of individuals likely to fight prosecution.

The current administration has pushed for greater individual accountability. Would a new Obama administration draw a different line about how far to push to expand punitive sentences for individuals? If resources are stretched thin or dedicated to non-criminal work, the answer may be yes. Moreover, at least some Democratic enforcers have expressed misgivings about focusing on the prosecution of individuals—so-called white collar criminals—stressing that appropriate deterrence can be imposed instead through large corporate fines.

II. CARTEL PROSECUTIONS GO GLOBAL

The "criminalization" of cartel matters is becoming an international trend. In

recent years, many countries have adopted, at least in part, the United States' approach to prosecuting individuals criminally. Australia, Japan, and the United Kingdom, among others, have enacted laws that allow for criminal penalties, including jail time.

While these overlapping laws may be complementary in theory—at least with regards to deterrence—in practice they may have an unintended consequence of diminishing cooperation and, hence, prosecutions. It is already widely recognized that companies' potential cooperation is being complicated by the increasing multitude of jurisdictions that can grant some form of leniency or credit for cooperation. In global cartel cases, companies have to carefully coordinate their leniency applications or plea agreements so as not to unwittingly damage their chance of either defending a matter or negotiating a favorable resolution in some other venue because they have effectively conceded guilt in one or more jurisdictions.

As countries increase the stakes for individuals, the same dynamic will occur. Individuals will be rightly concerned that a plea in one jurisdiction will effectively destroy their ability to present a defense in another jurisdiction or negotiate a favorable resolution. Given the increasing enforcement reach that has occurred through international cooperation agreements, extradition, and Interpol watch lists, an individual should have a lessened expectation of being able to keep the effect of criminal exposure limited to his/her home country. As a result, more individuals may be forced to hold out entirely or try to structure pleas as packages. Moreover, the fact that an individual may be subject to a number of possible jail terms in different jurisdictions—with possibly no

credit for time served—will diminish the incentive to plea and cooperate. Indeed, the DOJ had to agree to ask the sentencing court for a reduction in U.S. sentences for executives involved in the marine hose cartel who had previously agreed to serve time in the United Kingdom.

Finally, it should be noted that the United States' policy of insisting on jail terms for foreign executives is relatively new—starting in 1999. As other jurisdictions' criminal laws are of even newer vintage, we do not yet have the experience of a foreign country insisting that a U.S. citizen serve jail time. But such a time will come. The political ramifications in the United States will be interesting, especially if prosecutions are brought in countries that have fundamentally different traditions concerning the protection of individual rights.

Handling both the complexity and the diplomacy of world-wide criminal cartel enforcement will be a test for either administration.

III. CALCULATING CORPORATE FINES

In the United States, there is an ongoing debate about the appropriate level of criminal corporate fines for cartel behavior. This issue implicates both statutory law as well as constitutionally protected rights.

In the United States, the explicit statutory maximum corporate fine for a criminal antitrust violation is currently set at a maximum of $100 million by the Sherman Act. However, a fine may exceed this amount pursuant to 18 U.S.C. §3571(d)—a general criminal provision commonly known as the Alternative Fines Statute—and the

calculations set forth by the U.S. Sentencing Guidelines. The fine, however, may not exceed the "greater of twice the gross gain or twice the gross loss."[5] The DOJ has often relied upon this provision to exceed the statutory maximum—eleven times since the statutory amount was increased in 2004 and over fifty times before that.[6]

The issue, however, is that the U.S. Supreme Court—in narrow five to four majorities combining liberal and libertarian leaning Justices—recently has held that the Sixth Amendment right to trial by a jury requires that any fact that increases a sentence beyond the statutory maximum must be found by the jury beyond a reasonable doubt.[7] Calculating gain or loss pursuant to § 3571(d) is the type of fact that becomes a jury question under these standards. However, given the complexity of proving antitrust damages, meeting this high burden may be impossible or at least exceedingly difficult. Indeed, the current Sentencing Guidelines implicitly recognizes this fact as it sets a base fine based upon a "proxy" of 20% of the amount of commerce affected.[8]

While modern corporate antitrust sentencing has never been challenged in court, at least some commentators have argued that the approach set forth in the Sentencing

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[5] The complete text of the statutory provision is:

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

[6] Hammond, Recent Developments, Trends, and Milestones, at 10.

[7] *See United States v. Booker*, 543 U.S. 220, 244 (2005) (Stevens, J., majority opinion on issue of application of 6th Amendment); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (Stevens, J.) (Scalia, J. & Thomas, J., filing separate concurring decisions); *see also Cunningham v. California*, 549 U.S. 270 (2007); *Blakely v. Washington*, 542 U.S. 296 (2004).

[8] *See* United States Sentencing Commission, GUIDELINES MANUAL, § 2R1.1(d)(1) & cmt. 3 (Nov. 2007).

Guidelines is unconstitutional.[9] An approach that uses a proxy to calculate the effect of a cartel, which determines the amount of the fine, is incompatible with the requirement that facts setting fines above the statutory maximum must be determined by a jury. The current DOJ front office has taken these criticisms very seriously, but has attempted to avoid the issue through interpreting § 3571(d) broadly or advocating that the statutory maximum should be further increased.[10]

As the so-called liberal wing of the Court is commonly associated with the Democratic Party, would enforcers appointed by a new Obama administration be more sympathetic to arguments about the constitutionality of the Sentencing Guidelines approach? Would the importance of due process rights, even for corporations, weigh more heavily in policy decisions? Would a more libertarian leaning Assistant Attorney General of a McCain administration hew a new path? If so, such enforcers might advocate fixing the issue, rather than defending the status quo. The Sentencing Guidelines, unlike statutory law, may be amended relatively easily. Moreover, such enforcers may be less willing to take a hard line or even want to test this issue in court, if they believe the U.S. Supreme Court's basic approach is correct.

IV. CONCLUSION

[9] *E.g.*, Antitrust Modernization Comm'n, REPORT & RECOMMENDATIONS, at 299 (Apr. 2007)

> Some observers argue that because proof of gain or loss is typically established through expert witnesses, opinion testimony, and econometric analysis in antitrust cases, it is inherently speculative and can never be sufficient proof beyond a reasonable doubt.

[10] *See, e.g.*, Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, Antitrust Sentencing In The Post-*Booker* Era: Risks Remain High For Non-Cooperating Defendants, Speech Before ABA Annual Spring Meeting, at 7 (Mar. 30, 2005) (arguing that gain or loss should be calculated by amount of commerce affected by entire cartel, rather than amount associated with individual company being sentenced).

Antitrust policy has played little role in the election. Indeed, at least for cartel policy, there may be little to differentiate the candidates. Given that both U.S. political parties as well as the competition legal community view the DOJ's law enforcement efforts against hard-core price fixing to be justified and highly successful, there should be no impetus for a major shift in direction in cartel cases. Nonetheless, only time will tell if a change of administration and personnel will bring change at the margins.