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Editor's Note

Eric Sacks, Chicago, IL

This spring's Newsletter reports on significant antitrust developments concerning section 1 issues throughout the world. Contributing editor Dan Dorfman has prepared summaries of the Supreme Court's recent decisions concerning lawful joint venture pricing in *Dagher* and the lack of presumptive market power arising out of tying patents in *Tool Works*. The Supreme Court also denied certiorari in *Santana Products*, which is reviewed by Robert Freitas. Developments in the United States Courts of Appeals and District Courts have been addressed by several contributing editors. Michael Keeley reports on *Twombly v. Bell Atlantic*, in which the Second Circuit addressed whether pleading "plus factors" is necessary to state claim for conspiracy arising out of parallel conduct. Matt Freimuth and Wesley Powell have written on the *Tamoxifen Citrate Antitrust Litigation* and the Second Circuit's treatment of the settlement of a patent case under section 1. David Lundsgaard has written on a boycott action by the DOJ against the National Association of Realtors in the Northern District of Illinois. Djordje Petkoski has written on an FTC case charging price fixing by the North Texas Specialty Physicians, an association of practicing physicians.

John Eklund has summarized the work of the Antitrust Modernization Commission.

There also has been significant activity on section 1 issues internationally. Chris Margison has done extensive work reporting on enforcement developments in Canada. Likewise, Mark Katz and Elisa Kearney have surveyed anti-cartel enforcement throughout the world.

With so many section 1 developments worldwide, it should be no surprise that the Sherman Act Section 1 Committee has several important presentations at the approaching American Bar Association's 54th Antitrust Law Spring Meeting. Matt Liebson has written a summary.

We hope that the articles here help you in your practice. If you have ideas for future pieces, please contact us.

In This Issue:

Recent Developments

The Sherman Act Section 1 Committee maintains a listserv to keep members informed of breaking developments in Sherman Act Section 1 law. You may join by going to the ABA's website, or go directly to ***www.abanet.org/scripts/listcommands.;sp?parm=subscribe/at-S1*** *and follow the instructions there.*

Chair's Report

Lynda Marshall, Washington, DC

The Sherman Act Section One Committee has had a productive year and we in the Committee leadership hope that all Committee members have benefited from our various offerings. As you likely are aware, our biggest offering this year came in the form of programs. Most notably, the Section One Committee co-sponsored a number of brown bag programs, including *Antitrust in the Supreme Court: The Illinois Tool Works v. Independent Ink Case*, *Antitrust Opt Out Litigation*, *IP Licensing & Antitrust Practical Advice on Real World Problems*, and *The NTSP Decision*. The Committee also co-sponsored a teleseminar entitled, *Private Antitrust Litigation in Major Jurisdictions Outside the U.S.* All of these programs were well-attended and well received.

Also on the program front, the Committee will have a strong showing at the 2006 Antitrust Section Spring Meeting, which will be held in Washington, D.C., March 29th through the 31st. There is a more fulsome description of the Committee's Spring Meeting contribution inside this edition of the newsletter, but to give you a preview, our Committee program, *Rule of Reason v. Per Se – Where are the Boundaries Now?* will tackle one of the most timely and interesting issues relating to section one law – what is the correct standard to apply in evaluating conduct under section one. In addition, the Committee will co-sponsor three General Session programs that deal with subjects equally as interesting and relevant to today's antitrust lawyer: *Gun jumping: Pitfalls, Uncertainties and Solutions, Dagher and Illinois Tool*

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VI. A Survey of Recent International Developments in Anti-Cartel Enforcement

The prosecution of cartels continues to be an enforcement priority for competition authorities internationally. This shared commitment has manifested itself in several ways in the time frame covered by this article (June 2005 to date). These include the imposition of record fines and the adoption of legislative and institutional measures to improve the ability of authorities to detect, investigate and prosecute cartel conduct. A principal feature of these efforts has been the establishment or refinement by several jurisdictions of amnesty/ leniency programs designed to encourage cartel participants to disclose their anti-competitive conduct. There also has been a continued emphasis on inter-agency cooperation and international convergence.

Key developments in this regard are summarized below.

Aggressive Anti-Cartel Enforcement

Competition authorities around the world have continued to crackdown hard on domestic and international cartels. In several jurisdictions, record penalties were levied; in other cases, amnesty programs proved to be an important contributing factor in the initiation (and resolution) of proceedings. An increasingly common element has been the focus by authorities on bringing proceedings against individuals.

Record Penalties

Record penalties have been imposed for cartel activity in several jurisdictions:

Argentina – In August 2005, Argentina's antitrust authority fined six cement companies a total of US$107 million for price-fixing. This is the largest fine ever imposed by Argentina's antitrust authority. The authority found that between 1991 and 1999, the participants in the cement cartel colluded on prices and artificially divided up Argentina's cement market.[3]

France – In December 2005, France's competition council imposed record fines totaling EUR€534 million on three wireless telephone providers. Between 1997 and 2003, these companies exchanged detailed information on sign-up and

[3] See "Argentina punishes cement conspirators", *Global Competition Review* (August 10, 2005), at http://www.globalcompetitionreview.com.

cancellation rates and endeavored to stabilize their market shares.[4]

Taiwan – Also in December 2005, Taiwan's Fair Trade Commission imposed the largest administrative fine in its history, totaling US$6.3 million, against 21 cement companies. According to the Fair Trade Commission, the cement manufacturers in question agreed to prevent international cement companies from establishing domestic marketing channels, negotiated the retreat of some companies from the market, and reached an agreement with importers to facilitate the joint increase of cement prices.[5]

Canada – In January 2006, three paper distribution companies pleaded guilty in the Ontario Superior Court of Justice to two counts of conspiring to lessen competition unduly contrary to section 45 of Canada's *Competition Act* for their part in a conspiracy involving carbonless sheets. The companies were each fined CDN$12.5 million, the highest fines ever for a domestic conspiracy of this nature. Previously, the record fine for a domestic conspiracy was CDN$2.5 million.[6]

Impact of Leniency Programs

Two recent cartel proceedings are notable for the significant role played by leniency programs in facilitating the detection of the anti-competitive conduct at issue:

On December 21, 2005, the European Commission fined four companies (Flexsys, Crompton (now Chemtura), Bear and General Quimica) EUR€75.86 million for operating a cartel in the EEA and worldwide rubber chemicals markets. The investigation into this cartel began following an application for conditional immunity by Flexsys in April 2002. Following inspections by the European Commission on their premises, Crompton, Bear and General Quimica also applied to the Commission for leniency, in that order. In accordance with the Commission's Leniency Notice, Flexsys was granted full immunity from penalty, Crompton's fine was reduced by 50%, Bear's fine was reduced by 20% and General Quimica's fine was reduced by 10%.[7]

On the same date, the Australian Competition and Consumer Commission ("ACCC") instituted proceedings against the Visy Group and some of its senior officers for price-fixing and market sharing.[8] The ACCC alleged that, between 2000 and late 2004, Visy entered into and gave effect to anti-competitive arrangements with its principal competitor in the supply of corrugated fiber board containers, Amcor Limited. The cartel was uncovered when Amcor applied to the ACCC for leniency after it had obtained evidence of anti-competitive conduct in the context of unrelated litigation against five former employees. Amcor and its former senior executives were granted conditional immunity under the terms of the ACCC's leniency policy.

Sanctions Against Individuals

As illustrated by the above-mentioned proceedings against senior executives of the Visy Group, it is no longer unusual for individuals to face sanctions for their involvement in cartel conduct. Indeed, in its "Third Report on Hard Core Cartels" published in December 2005, the OECD recommended that competition authorities consider introducing and imposing sanctions against individuals, including criminal sanctions.[9]

As a possible sign of things to come, on March 2, 2006, an individual in Ireland was charged with price-fixing and fined EUR€3,500. This is the first criminal conviction for a competition offense in

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[4] See http://www.conseil-concurrence.fr/user/standard.php?id_rub=160&id_article=502.

[5] See Taiwan Fair Trade Commission Press Release, "The Taiwan FTC Imposes Heavy Fine on Cement Cartel" (December 15, 2005), http://www.ftc.gov.tw/EnglishWeb/ShowNewsEnglish.asp?ID=1.

[6] See Competition Bureau Press Release, "Competition Bureau Investigation Leads to Record Fine in Domestic Conspiracy" (January 9, 2006), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2018&lg=e.

[7] See European Commission Press Release, "Commission fines four firms €75.86 million for rubber chemical cartel" (December 21, 2005), http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1656&format=HTML&aged=0&language=EN&guiLanguage=en.

[8] See Australian Competition and Consumer Commission Press Release, "Proceedings instituted against Visy group, senior executives for alleged cartel in the corrugated fiberboard container market" (December 21, 2005), http://www.accc.gov.au/content/index.phtml/itemId/719891.

[9] OECD Competition Committee, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation* (December 15, 2005), www.oecd.org/competition.

Europe.[10] Another first that occurred in the past year was the decision in June 2005 by a magistrates' court in the United Kingdom that the former chief executive of Morgan Crucible Co. should be extradited to stand trial in the United States for allegedly fixing prices of components used to power trains. The U.K. Home Secretary approved the decision and ordered Mr. Norris' extradition in September 2005. Mr. Norris has challenged this order and the matter continues to be litigated.

While Mr. Norris' case is the first one in which the United States has sought extradition for an antitrust offense, it is not the first time that foreign nationals have faced the prospect of jail time in the United States for participating in cartel offenses. According to an official of the United States Department of Justice, twenty foreign nationals have pleaded guilty and been imprisoned in the United States on these grounds since 1999.[11] Most recently, on March 1, 2006, four Korean executives of Hynix Semiconductor Inc. agreed to plead guilty and serve jail time in the United States for their involvement in a global conspiracy to fix the prices of DRAM sold to certain computer and server manufacturers.[12]

Leniency Programs Adopted/Revised

As noted in the preceding section, leniency programs (also called immunity/ amnesty programs) are one of the most effective tools available to competition authorities in detecting and prosecuting cartels. For that reason, several competition authorities have adopted their own such programs in recent months, most notably in Japan. Other authorities (in Australia, Canada, the European Commission and United Kingdom) have sought to improve their existing programs by introducing revisions or initiating reviews. Although there are differences between these various programs, there is a clear trend towards convergence in policies and procedures, in recognition of the value of having largely consistent programs in place across jurisdictional boundaries.

Leniency Programs Adopted

Japan – As part of major revisions to Japan's *Antimonopoly Act*, the Japan Fair Trade Commission (the "JFTC") has introduced a leniency program which became effective in January 2006.[13] As in most jurisdictions, the Japanese leniency program offers cartel participants an incentive to come forward by holding out the prospect of reductions in potential penalties. Thus, parties who are the "first in" to report their anti-competitive conduct will be entitled to complete immunity from the administrative surcharges which the JFTC is empowered to impose. Similarly, the second and third companies to report will be entitled to receive reductions of 50% and 30%, respectively, but only if they provide information to the JFTC before the start of its investigation. If the information is provided after the start of the JFTC investigation, only a 30% reduction will be available (for up to three applicants). Applicants will be disqualified from receiving leniency where: (i) a report containing false information was submitted; (ii) the applicant did not submit additional information as requested; or (iii) where the applicant forced others to engage in the cartel or tried to block others from ceasing participation in the cartel.

Although the Japanese leniency program does not incorporate a formal "marker" concept, anonymous calls can be placed to the JFTC before an application is made to determine if leniency is available. The initial immunity application must be made to the JFTC in writing by fax; however, the JFTC may be prepared to receive more detailed information orally in subsequent stages if it is satisfied that there is a risk of discovery in civil proceedings in other jurisdictions.

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[10] See "First criminal conviction in Europe", *Global Competition Review* (March 8, 2006), http://www.globalcompetitionreview.com.

[11] See Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, "Charting New Waters in International Cartel Prosecutions", The Twentieth Annual National Institute on White Collar Crime (March 2, 2006).

[12] See U.S. Department of Justice Press Release, "Four Korean Executives Agree to Plead Guilty, Serve Jail Time in the U.S., for Participating in DRAM Price-Fixing Conspiracy" (March 1, 2006), http://www.usdoj.gov.

[13] See Japan Fair Trade Commission Press Release dated April 20, 2005, http://www.jftc.go.jp/e-page/pressreleases/index05.html.

In its original draft form, the JFTC leniency program was based entirely on a system of written reports. The JFTC backed away from this position as a result of criticism raised during the public consultation process. Although the initial application form now required is abbreviated, it still obliges immunity applicants to disclose the product(s) at issue, the act(s) for which leniency is sought and the duration of the conduct at issue.

It also should be noted that the Japanese program only covers the administrative sanctions which the JFTC can impose. The leniency program does not formally extend to criminal prosecutions, which remain under the exclusive authority of Japan's public prosecutors. That said, the Japanese Ministry of Justice has stated that it will pay full regard to the JFTC's decision to provide immunity to the first leniency applicant and, under ordinary circumstances, will not prosecute such parties. Second and third applicants, however, will not necessarily obtain the benefit of this treatment and may be subject to criminal prosecution.

Other Jurisdictions

Leniency programs also have been introduced in several other jurisdictions in recent months:[14]

Austria – Austria's Federal Cartel Authority introduced its leniency program effective January 1, 2006.[15] Complete immunity is available to the first party to report cartel conduct of which the Authority is not aware. Where the Authority is already aware of the cartel, the first party may nonetheless obtain a 30% to 50% reduction in penalty. Subsequent parties to report may obtain reductions of 20% to 30%.

Mexico – Mexico's Federal Competition Commission announced the introduction of a leniency program in January 2006. Complete immunity will be granted to the first company or individual that comes forward with relevant and convincing evidence before the initiation of an investigation. Complete immunity will not be available if an investigation has already been initiated. However, a substantial reduction in the applicable fine will be available as long as no charges have yet been laid. The second corporation or individual to request leniency may be given a 30% reduction in the applicable fine and a 20% reduction in the applicable fine may be available to any subsequent leniency applicant. There is also the possibility of a further penalty reduction if information is provided on other anti-competitive practices. Of note, a leniency applicant will not be disqualified if it was the ringleader of the cartel.[16]

Leniency Programs Revised/Under Review

Australia –The ACCC has issued a revised Immunity Policy for Cartel Conduct, effective September 2005.[17] Key aspects of this revised policy include the following:

automatic full immunity from prosecution and penalty will be provided to the first eligible participant to report its involvement in a cartel up until the point where the ACCC has sufficient evidence (under the former policy, full immunity was only available if the ACCC was unaware of the cartel when the participant self-reported);

immunity will not be available to cartel ringleaders or cartel members that have coerced others into taking part in the cartel;

a marker system will be established to allow potential applicants to secure their place in the immunity queue while they complete internal investigations;

immunity applications will no longer be required to be made in writing;

[14] Although not yet adopted, the Danish Prime Minister announced in October 2005 that Denmark intends to institute an anti-cartel leniency program in 2006 as part of that country's intensified efforts against cartels. See "Denmark aims at leniency in 2006", *Global Competition Review* (October 12, 2005), http://www.globalcompetitionreview.com.

[15] The Austrian Federal Cartel Authority also has published a handbook outlining the aspects of its program. See "Austria publishes leniency handbook", *Global Competition Review* (December 22, 2005), http://www.globalcompetitionreview.com.

[16] See "Mexico gets Leniency", *Global Competition Review* (March 8, 2006), http://www.globalcompetitionreview.com.

[17] The ACCC has issued guidelines with respect to its revised Immunity Policy, which are available at http://www.accc.gov.au/content/index.phtml/itemId/708758. In February 2006, the ACCC also issued a publication entitled *Cartels – What Small Businesses Need to Know*, which is a guide to assist small businesses in identifying and avoiding involvement in, or being a victim of, cartel behavior.

corporate immunity will also encompass all current and former employees;

if the first immunity applicant is unable or unwilling to meet all of the ACCC's requirements, subsequent applicants may still qualify for immunity; and

the ACCC may, in appropriate cases, approach individual cartel participants about the availability of immunity as part of its efforts to destabilize cartels.

Canada –The Canadian Competition Bureau issued two documents recently in connection with the review of, and possible changes to, its Immunity Program.

In October 2005, the Bureau released a revised set of "Frequently Asked Questions" to describe in greater detail certain aspects of its Immunity Program (the "Immunity FAQs. The Immunity FAQs set out the Bureau's policies with respect to various steps in the immunity application process.

The Bureau followed the Immunity FAQs with the release in February 2006 of a consultation paper on its Immunity Program, soliciting responses from stakeholders on a series of issues that have arisen since the Immunity Program was introduced in its current form in 2000. These two documents are discussed in greater detail in the preceding article on Canadian developments.

European Commission

In April 2005, Commissioner Kroes stated that a revised Leniency Notice would be published in late 2005.[18] Some of the deficiencies Commissioner Kroes identified in the European Commission's existing Leniency Notice included the need for a one-stop shop for European leniency applications, a process for the simplified handling of European cartel cases and greater clarity on issues of concern to parties such as oral applications and disclosure of corporate statements. In February 2006, somewhat later than anticipated, the European Commission published draft amendments to its 2002 Leniency Notice. However, these amendments only deal with the issue of disclosure of corporate statements and do not cover the range of issues identified by Commissioner Kroes in her speech. The draft amendments propose to add an annex to the Leniency Notice containing a special procedure for the protection of corporate statements made to the European Commission in the context of its leniency program. The draft amendments are intended to respond to concerns that corporate statements made to the Commission will be discoverable in civil damage proceedings in foreign jurisdictions. Key features of the proposed amendments include: a clear policy statement that requiring corporate statements to be disclosed in civil proceedings could undermine the Commission's anti-cartel enforcement and that the Commission is prepared to intervene in civil proceedings to prevent this from occurring; a procedure for making oral statements; a prohibition against access to the Commission's file for any purpose other than for proceedings under Article 81 of the EC Treaty; and sanctions against any party which abuses its right of access to the file.[19]

United Kingdom –In June 2005, the UK Office of Fair Trading ("OFT") introduced an interim policy document to supplement and elaborate on the procedures set out in its existing leniency policies.[20] The OFT's goal in adopting this interim policy document is to make it even "more attractive" for parties to apply for immunity or leniency in the United Kingdom. Among the changes introduced by the interim policy are: allowing hypothetical inquiries about the availability of leniency; a marker system; and an oral application process.

The interim policy document also sets a high "bar" on when an undertaking or individual will be found to be a "coercer" and therefore ineligible for immunity. The OFT states that there must be evidence that the "coercer" took "clear and positive" steps to compel an unwilling participant to take part in the cartel, for example where such strong economic

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[18] See Neelie Kroes, "The First Hundred Days", (Brussels) 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005, International Forum on European Competition Law, http://www.europa.eu.int/comm/competition/speeches/index_2005.html.

[19] See European Commission Press Release, "Public consultation of intended amendment to the Commission's 2002 Leniency Notice" (February 22, 2006), http://www.europa.eu.int/comm/competition/index_en.html.

[20] See "Leniency and no-action: OFT's interim note on the handling of applications" (July 2005), http://www.oft.gov.uk/Business/Cartels/default.htm. The OFT continues to welcome any comments on its interim policy but intends to test the proposals for about a year before publishing final guidance.

pressure was exerted on other cartel participants as to make market exit a real risk if they did not join. The OFT notes that it has never refused corporate immunity on "coercer" grounds and does not believe that this factor will lead to a significant number of refusals in the future.

Competition Authorities Seek Enhanced Powers and Resources

As part of the international campaign against cartel conduct, competition authorities in a variety of jurisdictions have taken steps recently to enhance their enforcement capabilities.

For example, a number of jurisdictions have allocated more budgetary and manpower resources to this effort. In November 2005, Ireland increased the annual budget of its competition authority by 15% in order to provide more staff for its cartel division and pay for increased investigative field work.[21] This followed a decision by the European Commission in June 2005 to create a directorate with 60 staff dedicated exclusively to cartels.[22]

Other jurisdictions have implemented, or are proposing to implement, legislative changes in this regard. In Japan, for instance, the recent revisions to the *Antimonopoly Act* included an increase in administrative fines for cartel conduct to 10% of a company's annual turnover. These amendments also authorize the JFTC to obtain search warrants to assist in its investigations.[23]

Turkey is another jurisdiction looking to improve its enforcement capabilities in this area. The Turkish Competition Board has said that it does not have sufficient investigative powers to properly pursue cartel conduct. Accordingly, it has asked for the authority to engage in e-mail supervision, secret camera use, house and body searches and wiretaps. These proposals have the support of Turkey's industry and trade minister, although amendments to Turkey's *Law on the Protection of Competition* have not yet been proposed.[24]

The Canadian Competition Bureau also continues to consider possible amendments to the *Competition Act*'s cartel (conspiracy) provisions. In the fall of 2005, an external working group of expert lawyers and economists was struck to help the Bureau evaluate various models that could be used when applying the conspiracy provisions, including whether the adoption of a per se offense is appropriate (currently, Canadian conspiracy law requires that a negative ("undue") impact on competition be demonstrated). Committee members have agreed on criteria for evaluating the potential models and have commenced their analysis of a number of case scenarios, all with a view to determining, among other things, what behavior the conspiracy provisions should cover and whether they should ultimately be criminal in nature (as is currently the case) or provide for civil proceedings. Public technical roundtables are expected in the late summer or fall of 2006.[25]

Separately, the Bureau also proposed in the fall of 2005 to increase the maximum fines under the *Competition Act*'s conspiracy provisions from the current CDN$10 million per count to CDN$25 million per count. As part of the same legislative package, the Bureau proposed to introduce a new "market studies" power, which would have allowed it to launch investigations into the state of competition in any sector of the economy without the need to demonstrate a belief that anti-competitive conduct had occurred. These proposals "died on the Order Paper" when the Canadian parliament was prorogued in November 2005 in advance of general elections. It is not clear if the new minority government will seek to re-introduce these proposed amendments at some stage during its term.

Finally, the Australian Government announced in September 2005 proposed changes to the *Trade Practices Act* that would create a criminal offense for

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[21] See Competition Authority Press Release (November 17, 2005), http://www.tca.ie/.

[22] See European Commission Press Release, "Commission Acting Against Cartels – Questions and Answers" (December 5, 2005), http://www/europe.eu.int/comm/competition/index_e.html.

[23] See Japan Fair Trade Commission Press Release (April 20, 2005), *supra*.

[24] See "Turkey asks for more power", *Global Competition Review* (January 18, 2006), http://www.globalcompetitionreview.com.

[25] See Commissioner of Competition, "Competition Bureau Progress and Priorities", speech to the Canadian Bar Association Annual Conference on Competition Law (November 3, 2005), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1994&lg=e.

cartels, in addition to the existing civil cartel provisions.[26] Potential criminal penalties would involve fines (corporate and criminal) and imprisonment for individuals up to a five year maximum. The ACCC would also be authorized to seek warrants to conduct search and seizures. In addition, individuals could be disqualified from managing corporations and corporations would not be able to indemnify officers against civil liability to pay a pecuniary penalty and for legal costs incurred in resisting enforcement proceedings.

International Co-operation

An important and developing element of anti-cartel enforcement is the growing cooperation between competition authorities in different jurisdictions. This reflects a recognition that cartels often have a cross-border impact and that inter-agency cooperation is increasingly necessary to effectively counter such behavior. This trend has been recognized by the OECD, which states in its December 2005 report on hard core cartels that "cooperation among competition authorities in investigation of cartels has reached unprecedented levels and exchanges of cartel enforcement know-how have intensified".[27]

A very recent and well-publicized example of inter-agency cooperation took place in February 2006 when the European Commission and the Antitrust Division of the U.S. Department of Justice coordinated searches of the cargo operations of certain airlines in Europe and the United States. Canada's Competition Bureau and Korea's Fair Trade Commission are also reported to be participating in this investigation, which is apparently examining surcharges on fuel, security and war-risk insurance.

Inter-agency cooperation can be based on both formal and informal arrangements. A recent example of a formal cooperation agreement is the one entered into by the governments of Japan and Canada, which came into effect on October 6, 2005. This agreement is designed to improve cooperation and coordination between the two countries in their competition enforcement efforts, including with respect to international cartels.[28]

One of the issues that has often bedeviled inter-agency cooperation is to what extent may competition authorities exchange information in the pursuit of cartel enforcement. In an attempt to provide some helpful guidance on this issue, the OECD released in October 2005 its *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard-Core Cartel Investigations* ("Best Practices").[29] While recognizing the importance of information exchanges in dealing with international cartels, the OECD acknowledges that the prospect of information exchanges should not undermine cartel investigations, including the effectiveness of leniency programs, by acting as a disincentive to cooperation by cartel participants who have come forward.

Some of the "best practices" recommended by the OECD in this regard include:

(a) the requesting jurisdiction should explain in detail how the request for information concerns the investigation of a hard-core cartel;

(b) the requesting jurisdiction should identify its domestic confidentiality laws and related practices and confirm that it will maintain the confidentiality of the exchanged information and oppose the disclosure of information to third parties for the use of such information in private civil litigation;

(c) the requested jurisdiction should have discretion not to provide the requested information where: (i) the requesting jurisdiction's investigation relates to conduct that would not be deemed hard-core

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[26] See Joint Media Statement of the Treasurer and the Minister for Small Business and Tourism, "Government Progressing Trade Practices Act Reforms to Benefit Consumers and Business" (September 2, 2005), http://www.treasurer.gov.au/tsr/content/pressreleases/2005/013.asp.

[27] OECD Competition Committee, *Hard Core Cartels*, *supra*. See also Neelie Kroes, "The First Hundred Days", *supra* and Scott Hammond, "Charting New Waters in International Cartel Prosecutions", *supra*.

[28] See Competition Bureau Press Release, "Canada and Japan Sign Competition Agreement on Competition Law Enforcement" (September 7, 2005), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1943&lg=e.

[29] See OECD, *Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations* (October 2005), http://www.oecd.org/document/59/0,2340,en_2649_37463_45997391_1_1_1_37463,00.html.

cartel conduct by the requested jurisdiction; (ii) honoring the request would be unduly burdensome or might undermine an ongoing investigation; (iii) confidential information may not be sufficiently safeguarded in the requesting jurisdiction; (iv) the execution of the request would not be authorized by its domestic law; or (v) honoring the request would be contrary to the public interest;

(d) the exchanged information should be used or disclosed by the requesting jurisdiction solely for purposes of the investigation of a hard-core cartel unless the laws of the requested jurisdiction provide the power to approve the use or disclosure of the exchanged information in other matters related to public law enforcement, and the requested jurisdiction has granted such approval in accordance with its domestic law requirements; and

(e) the requested jurisdiction should not give prior notice of the exchange to the source of the information, unless such notice is required under its domestic laws or an international agreement.

It may be noted, however, that given the importance of leniency programs, certain authorities have decided that they will not provide information to other agencies without the applicant's consent (e.g., the Canadian Competition Bureau).

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