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Developments in International Cartel Enforcement and Leniency Agreements: 2008 to 2009

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This year marks the tenth anniversary of the first plea agreement accepted by the Antitrust Division of the US Department of Justice that required jail time for a non-US national's participation in an international cartel.¹ Since that time, a number of other governments have recognised the important deterrent effect of jail time for cartel participants and have adopted or strengthened legislation criminalising participation in a cartel. Still, others are considering criminal sanctions. As a result, executives and employees can no longer be comfortable that antitrust enforcement is a simple 'cost of doing business'. Law enforcement officials have become 'more vigilant in detecting, prosecuting and deterring cartel behaviour'² and are holding individuals who participate in cartels accountable for their actions. The continued and growing importance of individual accountability is reflected in the actions of competition authorities worldwide in the past year.

United States: a new enforcement team promises to build on the Justice Department's history of success

The new (but familiar) enforcers

With the election of Barack Obama to the presidency, new political appointees have assumed the top slots at the US Department of Justice and its Antitrust Division. Eric Holder, a well-respected judge, prosecuting attorney and private practitioner, returned to the Department of Justice as attorney general of the United States. Although Mr Holder is not expected to be deeply involved in any but the most serious antitrust matters, in his confirmation hearings he recognised antitrust enforcement as 'a critical part of what the Justice Department does' and committed that 'antitrust enforcement will be something that [the Administration] will devote a lot of attention to'³ as part of its responsibility to 'ensur[e] fairness in the marketplace.'⁴ Christine Varney, the new assistant attorney general for antitrust, is another familiar face. Varney, who served as a commissioner at the US Federal Trade Commission from 1994 to 1997, is expected to continue her predecessor's aggressive investigation of international cartels. In her first speech as assistant attorney general, Varney expressed significant concerns about her predecessor's merger and monopolisation record, but commended the Bush administration for its 'unprecedented success in cracking large domestic and international cartels'. She vowed that 'criminal [...] enforcement [...] will be an important part of the Antitrust Division's response to the distressed economy' because 'markets are increasingly vulnerable to collusion'.⁵

Varney named Molly Boast, a former director of the FTC's Bureau of Competition, and William Cavanaugh, a highly experienced antitrust litigator – and the only senior enforcement official without prior government experience – as deputy assistant attorneys general for civil antitrust. In accord with tradition, Scott Hammond – a career prosecutor – remains as deputy assistant attorney general for criminal enforcement. Carl Shapiro returns for a second tenure as chief economist, serving as deputy assistant attorney general for

economic analysis. Shapiro was at the Division during the Clinton administration, serving under then Assistant Attorney General Anne K Bingaman, the person whom many regard as most responsible for the invigoration of the Division's criminal enforcement programme. All in all, companies will see a continued emphasis on the criminal cartel programme, and should expect the new administration to look for, and create, opportunities to expand its reach and scope.

Recent international cartel prosecutions

In November 2008, the Division announced that three leading electronics manufacturers – LG Display Company Limited, Sharp Corporation, and Chunghwa Picture Tubes Limited – had agreed to plead guilty and pay a total of US\$585 million in criminal fines for their roles in several worldwide conspiracies to fix the prices of liquid crystal display (LCD) panels.⁶ In March 2009, a fourth company – Hitachi Displays Ltd – also agreed to plead guilty and pay a fine of US\$31 million.⁷ In addition, through July 2009, nine individuals have been charged with participation in the cartel.⁸ Five have pled guilty and have been sentenced to serve (or have served) from six to 12 months in jail and to pay fines ranging from US\$20,000 to US\$50,000.⁹ The Division has coordinated with law enforcement officials from Canada, Europe and Asia.¹⁰

The Division also announced its first indictments in a related investigation. In February 2009, the DoJ announced the filing of charges against the former chairman and chief executive officer of Chunghwa Picture Tubes Ltd (Taiwan) for 'his participation in global conspiracies to fix prices of two type of cathode ray tubes used in computer monitors and televisions.'¹¹ This individual had previously been indicted for participation in the LCD conspiracies. In August 2009, the DoJ announced another indictment against an individual for participating in the conspiracy.¹² The Division alleges that meetings in support of the conspiracy were held across Asia, including in China, Indonesia, Korean, Malaysia, Taiwan and Thailand.¹³

The Division continued to announce guilty pleas in two industry-wide investigations first announced in 2007. In the air transportation investigation, through July 2009 the Division's investigation has netted 15 global air cargo and passenger carriers. Those firms have paid, or have agreed to pay (pending court approval), over US\$1.6 billion for participating in cartels involving cargo and passenger transportation.¹⁴ In addition, four executives have also pled guilty to participating in the scheme, and have served (or will serve) jail terms ranging from six to eight months.¹⁵ The Division also continued to obtain guilty pleas from firms and individuals in the *Marine Hose* investigation, but also suffered a setback in its prosecutions against individual participants when, in November 2008, two individuals under indictment were acquitted after trial.¹⁶ In December 2008, a British marine hose manufacturer agreed to plead guilty and to pay a US\$4.54 million fine for participating in the worldwide conspiracy to fix prices of, and allocate market shares for, marine hose products sold in the United States (and elsewhere).¹⁷ The same month, a

Japanese executive with a Tokyo-based firm agreed to plead guilty for his participation in the scheme, and to serve two years in jail and pay an US\$80,000 criminal fine.¹⁸ The same executive also agreed to plead guilty to bribing foreign government officials, in violation of the Foreign Corrupt Practices Act (FCPA). This was no surprise: early in the leniency programme's history, the Division observed that participants in international cartels often violate the FCPA, and that FCPA investigations would often uncover price fixing violations (or vice versa).¹⁹ In April 2009, a French subsidiary of Trelleborg AB (Sweden) agreed to pay a US\$3.5 million fine for its participation in the conspiracy.²⁰

Revenge of Stolt-Nielsen: leniency agreements released

As we noted last year, the Division's attempt to revoke its amnesty grant to Stolt-Nielsen was not supported by the courts, and, after the district court dismissed the Department's indictment for reasons of fairness, the Division abandoned its effort to prosecute Stolt-Nielsen.²¹ However, litigation over Stolt-Nielsen's right to obtain copies of leniency agreements previously entered into by the DoJ continued, and in 2008, the DC Circuit Court of Appeals vacated a district court ruling that amnesty agreements between the Department of Justice and cooperating corporations could be withheld under various exemptions to the Freedom of Information Act (FOIA).²² As part of its attempt to force the Division to honour its amnesty commitment, Stolt-Nielsen had sought all amnesty agreements entered into by the Department of Justice between August 1993 (when the corporate leniency policy was established) and October 2005 (when their FOIA request was initiated). The district court held that the amnesty agreements could be withheld under multiple exemptions to the FOIA, and that no portions of the agreements were 'reasonably segregable' so as to allow redacted versions to be made public.²³ The court of appeals disagreed, holding that only two FOIA exemptions were potentially applicable: release would be exempt if the release of the agreements: 'could reasonably be expected to interfere with enforcement proceedings'; or 'could reasonably be expected to disclose the identity of a confidential source [...] and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation [...] information furnished by a confidential source. [...]'.²⁴ Where information otherwise exempt from disclosure could be redacted, the remaining, non-exempt information should be provided to the requesting party.²⁵ The court of appeals vacated the ruling and remanded for further proceedings.²⁶

In lieu of further proceedings, the Department of Justice entered into a settlement with Stolt-Nielsen, in which it agreed to make copies of the requested letters available to Stolt-Nielsen.²⁷ At the same time, the Division released these letters to the public. The Division subsequently supplemented its release, and, at present, copies of all corporate leniency letters (with appropriate redactions) dated on or before 18 November 2008, are available on the Department's website.²⁸

Leniency policy guidance

In November 2008, the Division released 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Programme and Model Leniency Letters' (FAQs) to provide applicants and interested persons with 'a comprehensive and updated resource [on the leniency programme], and to provide guidance on recurring issues regarding the implementation of the Division's Corporate Leniency Policy and Individual Leniency Policy.'²⁹ While the FAQs largely restate information from earlier Division statements and speeches, they do

expand on previously available information on the 'marker' programme, the difference between obtaining a marker and conditional leniency, the treatment of non-antitrust crimes, and whether restitution is required for price-fixing schemes with purely foreign effects. In addition, they address the controversy over the Department's policy regarding waiver of attorney-client privilege in corporate investigations by reiterating that the Division, in its leniency programme, does not require the production of documents or communications protected by the attorney-client privilege or work-product privilege. The FAQs also provide some purely practical advice, such as who to contact for leniency applications. (The FAQs note that where there is an ongoing investigation, it will be most expeditious for counsel to contact investigation staff, rather than the criminal deputy).³⁰

In conjunction with the release of the FAQs, the Division also released a revised Model Corporate Conditional Leniency Letter, a revised Model Dual Investigations Letter (for use with applicants involved in multiple investigations), a revised Model Individual Leniency Letter, and a new Model Dual Investigations Acknowledgement Letter for Employees (for employees of corporate applicants who are interviewed in connection with one leniency matter but who are also potentially at risk in another matter).³¹ The revisions to the letters do not 'represent changes in the leniency program' but are intended to 'clarify requirements [...] and remove any perceived ambiguities in the letters.'³²

The European Union: legislative and regulatory evolutions

Application of the 2006 Leniency Notice and 2006 Fining Guidelines

The most important contribution of recent years to the global fight against cartel formation and sustainability derives from the adoption of leniency programmes by a growing number of competition authorities. The European Commission (Commission), following the example of the US Department of Justice, implemented its leniency policy in 1996. Since then, several member states have followed suit by implementing national leniency policies. In December 2006, the Commission adopted its third leniency notice (the Leniency Notice).³³

The improvements brought by the 2006 Leniency Notice include the clarification of what information and evidence a leniency applicant needs to provide to the Commission to benefit from immunity from fines. It also clarifies the thresholds for immunity and reduction of fines. Indeed, the mere fact of filing a leniency application to the Commission does not in any way bind the European authority to grant either immunity or a reduction in fines. In the recent *Marine Hose* cartel,³⁴ in which the Commission imposed more than €131 million in fines on five undertakings for participating in a market-sharing and price-fixing cartel for marine hoses, two companies that had filed leniency applications with the Commission were not granted any reductions in their fines. The Commission concluded that the evidence submitted by these two companies was not of 'significant added value' as required by the 2006 Leniency Notice, and therefore did not justify any reduction of their fines.

The 2006 Leniency Notice introduced a marker system for immunity applicants. A marker protects an immunity applicant's place in the queue for a specified period of time in order to allow for the gathering of the necessary information and evidence required to meet the threshold for immunity from fines. The marker system is discretionary (the Commission services may grant a marker, where justified).

The 2006 Leniency Notice has been very successful in persuad-

ing companies to provide evidence of cartels to the Commission. On average, the Commission has received two applications for immunity per month since the introduction of the 2006 Leniency Notice. The popularity of the leniency programme likely can be attributed to the fact that penalties for companies that breach the competition rules can be very severe. For cartel infringements, the largest fine imposed on a single company amounted to €896 million and was imposed on Saint-Gobain in 2008; the largest fine imposed on all members of a single cartel amounted to €1,383 million. In June 2006 the Commission also revised its guidelines for setting fines in competition cases (the 2006 Fining Guidelines). These new guidelines have been adopted to increase the deterrence effect of fines. While the ceiling of 10 per cent of the undertakings worldwide turnover remains unchanged, the 2006 Fining Guidelines provide that fines will be based on an initial amount of up to 30 per cent of the company's annual sales in the market to which the infringement relates. This initial amount is then multiplied by the number of years of participation in the infringement. In addition, designed to act as a specific deterrent to infringing firms and a general deterrent to others who are, or are considering, participating in illegal practices, the new guidelines introduce the concept of an additional 'entry fee' fine of between 15 per cent and 25 per cent of a firm's sale in the relevant market, which may be imposed irrespective of the duration of the infringement. The entry fee applies where a firm is found to have engaged in cartel activities (horizontal price-fixing, market-sharing and output-limitation agreements), but the concept may be applied to other types of infringement in the future.

The guidelines also acknowledge the Commission's case law regarding repeat offenders. When an undertaking is found to have been previously involved in one or more similar infringements, the Commission may increase the recidivist's fine by up to 100 per cent, with each prior infringement justifying an increase of the fine. In this respect, the Commission has also indicated that it will take into account not only its own previous decisions, but also those of National Competition Authorities (NCAs) applying articles 81 or 82 EC.

An example of the impact of the 2006 Fining Guidelines can be seen in the *Car Glass* cartel, which led to the Commission imposing its two highest fines to date against all members of a single cartel, which totalled €1,383 million, and against a single undertaking, Saint-Gobain, which received a record fine of €896 million.³⁵ In this case, in accordance with the provisions of the 2006 Fining Guidelines, Saint-Gobain's fine was increased by 60 per cent because it was a repeat offender, having been fined for cartel activities in previous Commission decisions in 1988 and 1984. This case demonstrates perfectly Competition Commissioner Kroes' mantra that 'Management and shareholders [...] must learn the hard way – if you cheat, you will get a heavy fine'.³⁶

First anniversary of the cartel settlement procedure

It has been a little over one year since the Commission introduced, on 2 July 2008, the possibility for the settlement of cartel cases when the Commission and the parties reach the same conclusions on the scope of the liability and the facts of the infringement (the Settlement Notice). Fines imposed at the end of settlement procedures will be 10 per cent lower than the fines that would have been imposed otherwise. The purpose of this initiative is to streamline the administrative procedure in cartel cases, thereby enabling the Commission efficiently to redeploy resources to other cases.

The settlement procedure only applies to cartels, as an alternative to the ordinary antitrust procedure, and it does not interfere

with the application or the level of reward provided for in the 2006 Leniency Notice. The 10 per cent reduction in fines obtained through the settlement procedure can be added to any reduction granted by the Commission under its leniency programme; the incentive therefore remains for any infringing undertaking to come forward with a leniency application as soon as possible so that it may benefit from full immunity or a reduction in fines.

Settlements are an option for companies that seek to reduce the burden of a long investigation and to benefit from an incremental 10 per cent reduction in their fines. Under this procedure, cartel participants, having seen certain evidence in the Commission file, may choose to acknowledge their involvement in the cartel and their liability for it. The Commission at the end of the case will then issue a formal decision against the cartel participants. The decision will indicate the amount of fines imposed and any reduction awarded under the 2006 Leniency Notice and the Settlement Notice. As illustrated by the *Power Transformers* cartel, however, it is important to stress that engaging in settlements talks does not mean that a settlement will automatically be reached. There, the Commission initiated settlement talks with the parties but later decided not to settle the case, arguing that the settlement negotiations with the cartel participants had failed.

While there have been several candidates for this new procedure, as of July 2009, the Commission has not adopted a decision using the settlement procedure. It is understood that this delay is due both to the fact that the Commission is still feeling its way on this unfamiliar path and that the regulator wishes its first settlement case to feature every member of an alleged cartel. Indeed, under the Settlement Notice not all parties have to accept entry into settlement negotiations for the Commission to effectively use this procedure. Currently, the Commission is holding settlement negotiations with companies in both the *DRAM* cartel case and the *Animal Feed Phosphates* cartel. While the application of the Settlement Notice seems to have taken baby steps since its adoption, it is very likely that the Commission's first decision in this respect will be closely scrutinised and will increase the attractiveness of this alternative procedure for potential applicants similar to what happened in the early days of the Commission's leniency programme.

National enforcement of leniency programmes and divergences in the European Union

Since 2004 and the adoption of Regulation 1/2003, significant developments have taken place in the field of leniency programmes within the European Competition Network (ECN). Regulation 1/2003 is built on a system of parallel competences in which national competition authorities are active enforcers of articles 81 and 82 EC alongside the Commission. A logical consequence of such a system is that a leniency applicant may need to protect its position with all the authorities that may impose sanctions for the cartel activity, that is, it entails a need for filings in multiple jurisdictions. Additional filings are particularly important for those member states that have introduced criminal sanctions for executives when such sanctions can be avoided if the company obtains total immunity.³⁷

The coexistence of several leniency programmes within the European Union has been addressed through the entry into force of Regulation 1/2003. In the Commission's Notice on Cooperation within the Network of Competition Authorities, potential applicants were advised that they might have an interest in protecting their position in several jurisdictions. In view of the discrepancies in the existing national leniency programmes, the ECN's working group on leniency developed a new tool to address real and perceived deficits in

the existing system: the ECN Model Leniency Programme (Leniency Programme). The work within the ECN has been a major catalyst in encouraging member states and NCAs to introduce and develop their own leniency programmes and in promoting convergence among them. As of July 2009, only one member state, Malta, does not have any kind of leniency policy in place.³⁸

One of the main aims of the leniency programme is to facilitate multiple filings within the EU in line with the Commission's 'one-stop shop' policy. On this basis, a system of summary applications was adopted for cases in which the Commission is particularly well-placed to deal with the case (ie, cases involving more than three member states). Where a full application for immunity has been made with the Commission, NCAs can accept to protect temporarily the applicant's position on the basis of very limited information foreseen in the leniency programme. This information is broadly equivalent to information needed for a marker and it can be given orally – this is important in limiting any risk of disclosure of leniency information and documents, especially in view of potential US litigation proceedings. To date 20 NCAs accept such summary applications, which demonstrate their increasing willingness and efforts to speak as one voice.³⁹

However, while the ECN has promoted a certain level of convergence of the member states' procedure, there is still some degree of divergence in the tools used by the NCAs to crack down cartels. This can be illustrated by the United Kingdom's Office of Fair Trading's (OFT) latest innovation to detect cartel activity. On 29 February 2008, and in addition to its existing leniency programme, the OFT introduced a new policy under which it will offer financial rewards of up to £100,000 to those who provide it with insider information about cartels. The OFT is one of the very rare NCAs, together with the South Korea authority, to have introduced a reward payment in the course of competition law related proceedings, although rewards have been available to informants providing evidence in relation to criminal infringements for many years. The OFT's reasoning in introducing this scheme is based on the fact that it would be unwise to rely exclusively on leniency given that leniency programmes generally uncover end-of-life cartels, whereas more general screening and investigative work may be better placed to uncover cartels at an early stage, and in innovative and evolving sectors.

The OFT announced that this policy would apply for 18 months and that a decision will be taken in August 2009 whether or not it should be made permanent. It is understood that the Commission has been considering the possibility of introducing a similar scheme in the European Union. There is no doubt that the Commission will be extremely interested in the OFT's report and conclusions after this 18 month try-out period.

China: introducing the amnesty programme

Chinese competition policy entered a new epoch on 1 August 2008 with the entry into force of the new Antimonopoly Law (AML), China's first comprehensive competition law.⁴⁰ The AML addresses restraints of trade as 'monopoly agreements', encompassing hard-core cartels as well as other horizontal and vertical practices. Article 13 of the AML broadly defines 'monopoly agreements' to include all 'agreements, decisions or other concerted conduct that eliminate or restrict competition'.

The AML applies the same basic analytical framework to all anti-competitive practices involving multiple firms (other than abuses of 'collective dominance'). Article 13 of the AML prohibits horizontal 'monopoly agreements' among competitors, including both hard-core cartels and other competitor collaborations, while article 14

prohibits vertical monopoly agreements. Each article lists specific prohibited restrictive practices, followed by separate 'catch-all' clauses capturing all other monopoly agreements as defined by the enforcement authorities. Article 15, in turn, creates a general framework for exempting 'monopoly agreements' that would otherwise be prohibited under articles 13 and 14. To qualify for exemption under article 15, the restrictive practice must be shown to serve one of the beneficial purposes designated under article 15, to benefit consumers, and not to eliminate competition in the relevant market.

The National Development and Reform Commission (NDRC) has authority to address pricing-related violations of the rules against monopoly agreements, while other violations are to be addressed by the State Administration of Industry and Commerce (SAIC). Article 46 of the AML lays the foundation for a programme of granting amnesty or leniency to participants in any prohibited monopoly agreements that voluntarily disclose the monopoly agreement to the authorities. It provides that 'where business operators, on their own initiative, report information concerning the conclusion of monopoly agreements and provide important evidence to the Anti-monopoly Enforcement Authority, the Anti-monopoly Enforcement Authority may reduce the penalty imposed or grant exemption from penalty after weighing the relevant circumstances'. Article 46 is not limited to hard-core cartels among competitors. As drafted, it authorises amnesty or leniency for self-reporting participants in any type of monopoly agreement, including vertical restraints or competitor collaborations.

Article 46 itself does not compel the enforcement authorities to grant amnesty or leniency under any circumstances. Although this provision might be interpreted as an exception to the mandatory penalties otherwise applicable to monopoly agreements under article 46, the discretion to waive or reduce penalties rests with the enforcement authorities themselves. Article 46 does not provide concrete assurances of mitigated penalties available through the amnesty and leniency programmes of other jurisdictions.

The SAIC released a draft of the Regulations on Prohibition Monopoly Agreements (SAIC Draft Monopoly Agreement Rules) for public comment on 27 April 2009. These draft rules explore the mechanics of the amnesty and leniency process in greater detail. Article 12 provides separate procedures for granting amnesty and leniency to successive applicants. First, SAIC 'may exempt a violating business operator from the fine provided that it is the first one that voluntarily reports to the administrative authorities for industry and commerce relevant information on the monopoly agreement and provides significant evidence'. Article 12 further limits 'significant evidence' to evidence that could be used to 'initiate an investigation' or to 'play a key role in finding a monopoly agreement, including the business operators involved, product scope, the method of entering such agreement, specific implementation status of the agreement, etc'. In addition to providing an exemption from penalties for the first business operator to step forward, article 12 also allows the enforcement authorities to 'mitigate the penalty on any other violating business operator that voluntarily reports to the administrative authorities for industry and commerce relevant information on the monopoly agreement and provides significant evidence according to the situation in its discretion'. Article 13 confirms that the 'exemption or mitigation of the penalty shall be based on the sequence of the voluntary reporting by business operators, the importance of the evidence provided, specific circumstances concerning the conclusion and implementation of the monopoly agreement, and cooperation with the investigation'. Specifically, the first business operator to voluntarily report will be exempted from the entire penalty, the

second will receive a mitigation of '50% of the penalty,' and the third will receive a mitigation of '30% of the penalty'. Although articles 12 and 13 do not prescribe specific penalty reductions for other business operators that voluntarily disclose their participation in monopoly agreements, the enforcement authorities retain the discretion to mitigate penalties for more than three parties to single monopoly agreement. An important limitation is contained in article 13 which provides that a business operator that 'organises', 'initiates', or 'coerces' others to engage in a monopoly agreement is not eligible for amnesty or leniency. As of early August 2009, these measures have not been finalised.

Japan: amendments to strengthen the leniency programme

Japan has a statutory based leniency programme with requirements similar to those of the United States; however, it extends only to financial penalties. The regulation⁴¹ providing for a leniency programme was amended on 3 June 2009 and will come into force within a year (the date has yet to be determined).

At present, only a total of three applications (received either before or after the initiation of an investigation) may be eligible for a reduction in the surcharge that may be levied upon a participant in a cartel. Under the amended regulation, up to five applications may be so eligible (with a maximum of three after an investigation commences). In either case, the benefits to those who come in prior to the commencement of an investigation by the Japanese Fair Trade Commission (JFTC) are: 100 per cent reduction for the first qualifying applicant, 50 per cent for the second, and 30 per cent for the third and after. Once the investigation commences, the maximum reduction granted will be 30 per cent, even to the first qualifying applicant. Currently, each entity must file a separate application for a reduction in the penalty. Under the new regulation, if certain companies belong to the same group of companies (as defined and specified in the new regulation), they may file a joint application and be granted the same proportion of reduction (ie, a group of companies if jointly filing may all be granted a 100 per cent reduction).

While the statutory foundation for the leniency programme does not address leniency from criminal prosecution, 'The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations' published by the JFTC on 7 October 2005, states that the JFTC will not file criminal charges against the first (qualified) applicant applied prior to the investigation.⁴² The Ministry of Justice has indicated that it will respect such a decision made by the JFTC, although it can in its sole discretion prosecute a defendant.⁴³

From the introduction of the leniency programme in January 2006 through the end of 2008, 264 applications have been made, of which 74 have been granted leniency.⁴⁴

Notes

- 1 Plea Agreement, *United States v Sommer*, Crim No.3:99-CR-201-R (ND Tex, May 20, 1999), available at www.usdoj.gov/atr/cases/f2400/sommer.pdf.
- 2 Belinda A Barnett, Antitrust Division, Department of Justice, 'Criminalization of Cartel Conduct - The Changing Landscape', (3 Apr 2009), available at www.usdoj.gov/atr/public/speeches/247824.htm.
- 3 See transcript of 'Hearing on the Nomination of Eric Holder to be Attorney General', Day One (15 Jan 2009) at 127.
- 4 See Remarks by Attorney General Eric H Holder to Department of Justice Employees (3 Feb 2009) available at www.usdoj.gov/ag/speeches/2009/ag-speech-090203.html.
- 5 See Christine Varney, assistant attorney general, Antitrust Division, US Dept

- of Justice, 'Vigorous Antitrust Enforcement in this Challenging Era', 11 May 2009, available at www.usdoj.gov/atr/public/speeches/245711.htm.
- 6 See Press Release, Dept of Justice, LG, Sharp, 'Chunghwa Agree to Plead Guilty, Pay Total of US\$585 million in Fines for Participating in LCD Price-Fixing Conspiracies', 12 Nov 2008, available at www.usdoj.gov/atr/public/press_releases/2008/239349.htm.
- 7 See Press Release, Dept of Justice, 'Hitachi Displays Agrees to Plead Guilty and Pay US\$31 Million Fine for Participating in LCD Price-Fixing Conspiracy', 10 Mar 2009, available at www.usdoj.gov/atr/public/press_releases/2009/243414.htm.
- 8 See Press Release, Dept of Justice, 'Korean Executive Agrees to Plead Guilty and Serve One Year in Prison for Participation in LCD Price-Fixing Conspiracy', 27 Apr 2009, available at www.usdoj.gov/atr/public/press_releases/2009/245215.htm.
- 9 See id and Press Release, Dept of Justice, 'Four Executives Agree to Plead Guilty in Global LCD Price-Fixing Conspiracy', 15 Jan 2009, available at www.usdoj.gov/atr/public/press_releases/2009/245215.htm.
- 10 See 'Remarks Prepared for Delivery' by assistant attorney general Thomas O Barnett at a Press Conference Regarding LG, Sharp and Chunghwah's Agreement to Plead Guilty in LCD Price-Fixing Conspiracies (12 Nov 2008), available at www.usdoj.gov/atr/public/press_releases/2008/239396.htm.
- 11 See Press Release, Dept of Justice, 'Former Executive Indicted for His Role in Two Cathode Ray Tube Price-Fixing Conspiracies', 10 Feb 2009, available at www.usdoj.gov/atr/public/press_releases/2009/242473.htm.
- 12 See Press Release, Dept of Justice, 'Former Taiwanese Executive Indicted in Color Display Tube Price-Fixing Conspiracy', 19 Aug 2009, available at www.usdoj.gov/atr/public/press_releases/2009/249156.htm.
- 13 Id.
- 14 See Press Release, Dept of Justice, 'Three International Airline Companies Agree to Plead Guilty to Price Fixing on Air Cargo Shipments', 9 Apr 2009, available at www.usdoj.gov/atr/public/press_releases/2009/244630.htm; Press Release, Dept of Justice, 'Lan Cargo SA, Aerolinhas Brasileiras SA and El Al Israel Airlines Ltd Agree to Plead Guilty for Fixing Prices on Air Cargo Shipments', 22 Jan 2009, available at www.usdoj.gov/atr/public/press_releases/2009/241710.htm; Michael Antalics, et al, 'Developments in International Leniency Agreements: 2007 to 2008', *The Antitrust Review of the Americas 2009*, at 8, 11, note 6.
- 15 See Press Release, Dept of Justice, 'Dutch Airline Executive Agrees to Plead Guilty for Fixing Prices on Air Cargo Shipments', 29 Apr 2009, available at www.usdoj.gov/atr/public/press_releases/2009/245298.htm; Press Release, Dept of Justice, 'Former British Airways Executive Agrees to Plead Guilty to Participating in Price-Fixing Conspiracy on Air Cargo Shipments', 30 Sept 2008, available at www.usdoj.gov/atr/public/press_releases/2008/237809.htm; and sources cited at Antalics, 'Developments in International Leniency Agreements: 2007 to 2008', supra note 14.
- 16 Dept of Justice, Antitrust Division Update, Spring 2009, available at www.usdoj.gov/atr/public/244014.pdf.
- 17 See Press Release, Dept of Justice, 'British Marine Hose Manufacturer Agrees to Plead Guilty and Pay US\$4.5 million for Participating in Worldwide Bid-Rigging Conspiracy', 1 Dec 2008, available at www.usdoj.gov/atr/public/press_releases/2008/239884.htm. For a discussion of the earlier indictments and guilty pleas in this investigation, see Antalics, 'Developments in International Leniency Agreements: 2007 to 2008', supra note 14.
- 18 See Press Release, Dept of Justice, 'Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine Hose and Related Products', 10 Dec 2008, available at www.usdoj.gov/atr/public/press_releases/2008/240307.htm.
- 19 See Remarks of the Deputy Assistant Attorney General, Antitrust Division, Department of Justice, 'International Cartels: The Intersection Between

- FCPA Violations and Antitrust Violations', 9 Dec 2009, available at www.usdoj.gov/atr/public/speeches/3981.htm.
- 20 See Press Release, Dept of Justice, 'Subsidiaries of Swedish Company, Trelleborg AB, Agree to Plead Guilty and Pay US\$11 million in Criminal Fines, 20 Apr 2009, available at www.usdoj.gov/atr/public/press_releases/2009/245025.htm. At the same time, a US subsidiary agreed to pay a US\$7.5 million fine for its participation in a US-based conspiracy to allocate customers and rig bids in the sale of marine fenders and buoys, and plastic marine pilings.
- 21 See Antalics, 'Developments in International Leniency Agreements: 2007 to 2008', supra note 14, at 8.
- 22 *Stolt-Nielsen Transp Group v United States*, 534 F3d 728 (DC Cir 2008).
- 23 *Stolt-Nielsen Transp Group v United States*, 480 F Supp 2d 166, 182 (DDC 2007).
- 24 *Stolt-Nielsen Transp Group*, 534 F3d at 733.
- 25 *Id* at 734.
- 26 *Id*.
- 27 See Settlement Agreement, *Stolt-Nielsen Transp Group v United States*, Civ No. 05-2217 (DDC 26 Jan 2009), available at www.usdoj.gov/atr/foia/rl/stolt_agreement.pdf.
- 28 The letters are available at www.usdoj.gov/atr/foia/leniency_letters.htm.
- 29 Department of Justice, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters', 19 Nov 2008, available at www.usdoj.gov/atr/public/criminal/239583.htm.
- 30 *Id* at 2.
- 31 The Model Letters are available at www.usdoj.gov/atr/public/criminal/leniency.htm.
- 32 Scott D Hammond, deputy assistant attorney general for criminal enforcement, Antitrust Division, Department of Justice, 'Recent Developments Relating to the Antitrust Division's Corporate Leniency Program', 5 Mar 2009, available at www.usdoj.gov/atr/public/speeches/244840.htm.
- 33 OJ C 298/17 of 8 Dec 2006.
- 34 Case COMP/39406 *Marine Hose* of 28 Jan 2009.
- 35 Case COMP/39125 *Car Glass* of 12 Nov 2008.
- 36 Commission press release IP/08/1685.
- 37 A number of NCAs have addressed this issue either directly in their legislation or through public statements. Hence, under UK law, if an undertaking applying for leniency receives total immunity, then the employees of the undertaking will receive protection against criminal prosecution. Similarly in France, the Autorité de la Concurrence has publicly stated that it will refrain from passing on to the criminal prosecutor cases in which an undertaking has either received or applied for full immunity.
- 38 Slovenia is the latest country to have adopted a leniency programme based on the ECN leniency programme. It came into force in April 2008.
- 39 This is the case for the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Sweden, and the United Kingdom.
- 40 See Zhonghua Renmin Gongheguo Fanlongduan Fa [Antimonopoly Law of the People's Republic of China], (promulgated by the Standing Committee of the National People's Congress on 30 Aug 2007 and effective on 1 Aug 2008), available at www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXLK&id=371229&pdmc=11006 (visited 7 Oct 2007). An unofficial English translation is available as an appendix to Nathan Bush, 'The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead', Antitrust Source, Oct 2007, available at www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf. References and quotations herein are based on this English translation.

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O'Melveny & Myers LLP offers seamless antitrust and competition representation in Europe, Asia, and the United States. Few firms can match our consistent strength across these three major economic areas.

At any given moment, we are shepherding mergers through global clearance processes, designing antitrust-compliant licensing or distribution agreements, and vindicating clients' interests in the courtroom. Our lawyers include former high-ranking regulatory officials who maintain close contact with enforcement agencies, providing clients with invaluable insights into governmental decision-making processes.

Our experience includes representing Advanced Micro Devices (AMD) in its global fight against Intel Corporation for monopolising the x86-micro-processor industry through scare tactics and coercion. With litigation and investigations spanning the US, EU and Asia, O'Melveny has helped AMD secure important victories worldwide, most recently in Europe when the EC fined Intel a record €1.06 billion (US\$1.44 billion) for its anti-competitive practices.

Our work regularly garners international awards and recognition. For example, O'Melveny is recommended as a leading antitrust and competition law practice in *Global Competition Review's* 'GCR 100' and *Chambers Global* (2009) states that O'Melveny 'is the global quarterback – it is prominent around the world, from Beijing to Brussels.'

After nearly 125 years as a law firm, we know the importance of giving back. Through O'Melveny's scholarship programmes, pro bono services, and individual service, we honour our roots and build for the future. We are proud to count among our colleagues a former US secretary of state and scores of other lawyers with significant public service experience.

- 41 An English translation of the amended regulation has not yet been published; a summary published by the JFTC outlining the changes is available at www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf.
- 42 See 'The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations', available at www.jftc.go.jp/e-page/legislation/ama/policy_on_criminalaccusation.pdf.
- 43 See the account by Hiroshi Obayashi, the director general of the criminal affairs bureau of Ministry of Justice at www.shugiin.go.jp/itdb_kaigiroku.nsf/html/kaigiroku/009816220050311004.htm (in Japanese only); <http://kokkai.ndl.go.jp/SENTAKU/sangiin/162/0063/16204190063012a.html> (in Japanese only).
- 44 See Report on Enforcement Status of the Antimonopoly Act in 2008 at www.jftc.go.jp/pressrelease/09.june/09060302.pdf (in Japanese); www.jftc.go.jp/e-page/pressreleases/2009/June/090603.pdf (English summary).



Michael Antalics

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Mike Antalics is a partner in O'Melveny's Washington, DC office. Mike joined O'Melveny after serving for 23 years at the Federal Trade Commission, most recently as deputy director in the FTC's Bureau of Competition from 2000 to 2001, where he oversaw the Bureau's antitrust enforcement mission. Prior to that, Mike was an assistant director for mergers from 1997 to 1999 and assistant director for non-merger litigation from 1991 to 1997.

While at the FTC, Mike successfully litigated numerous significant cases, including the drug wholesaler merger litigation, involving the four largest drug wholesalers in the United States; the *Ticor Title Insurance Company* price-fixing case, involving the six largest title insurance companies; and the *Intel* case, involving alleged anti-competitive practices of the largest semiconductor manufacturer. Mike twice received the Brandeis Award given to the FTC's outstanding litigator, and three times was awarded the Team Award for litigation team efforts.

Since joining O'Melveny, he has successfully litigated the *Arch Coal* merger case against the FTC in federal court, and has successfully obtained the approval of numerous mergers before the FTC and DOJ. Mike also has successfully represented companies in class action litigation, and provided advice in civil and criminal antitrust investigations. Among the clients he has represented are Quest Diagnostics Incorporated, Evonik Degussa GmbH, Verizon Communications Inc, Exxon Mobil Corporation, Wal-Mart, Northwest Airlines and Warner Bros Entertainment Inc.

Mike is listed as a leading antitrust lawyer by *Chambers USA*, *Chambers Global*, *The Global Counsel Handbook on Competition Law* and *PLC Which Lawyer? USA*.



Nathan Bush

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Nate Bush is a partner O'Melveny's Beijing office. Prior to relocating to Beijing in 2004, Nate worked in O'Melveny's Washington, DC office. He focuses on regulatory matters and litigation concerning antitrust and competition, anticorruption and international trade.

Nate counsels clients regarding merger notifications, compliance strategies and enforcement risks under the competition regimes of China and other jurisdictions in the region, and is experienced with matters involving US antitrust laws, including merger filings, litigation of civil antitrust claims and price-fixing investigations. He advises international companies on compliance with the US Foreign Corrupt Practices Act and other anticorruption rules and has conducted internal investigations for firms in sectors ranging from financial services to consumer electronics in Japan, China, Hong Kong, Singapore and Vietnam. In the area of international trade and market access, Nate represents multinational companies before the US and Chinese governments on matters involving China's WTO accession commitments and the WTO dispute settlement process.

He has represented clients from Australia, Belgium, China, South Africa and Spain in US antidumping proceedings and advised US and Japanese clients regarding Chinese trade remedy measures.

Representative work includes representing Northwest Airlines in its merger with Delta Air Lines and AMD in its global fight against Intel.

Nate is a frequent author and speaker and is active in the American Chamber of Commerce in China, serving as legal committee chairman for 2008 and general counsel for 2009. *Chambers Asia*, *Legal 500 Asia-Pacific* and *PLC Which Lawyer? Asia* list Nate as a leading antitrust lawyer.



Riccardo Celli

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Riccardo Celli is the managing partner of O'Melveny's Brussels office and head of the European antitrust and competition practice. He has a double qualification as an Italian avvocato and a solicitor of the Supreme Court of England and Wales. Riccardo has practised in Brussels since 1992 and has extensive experience advising on EU, Italian and UK competition law, as well as regulatory law.

Riccardo has been successful in high-profile cases covering all main areas of EU competition law (article 82, mergers, and cartel cases). Most recently, he advised AMD in its article 82 complaint against Intel that culminated on 13 May 2009 when the European Commission fined Intel a record €1.06 billion for its anti-competitive practices.

Additional highlights include representing Norsk Hydro in obtaining EU merger control clearance for the merger of its oil and gas activities with Statoil – a US\$30 billion deal – and obtaining the acquittal of Firma Léon van Parys, the European importer of 'Bonita' bananas, of all charges in the EC banana cartel investigation following dawn raids in 2005 and extensive follow-up inquiries prior to the issuance of formal charges in mid 2007.

Riccardo is a frequent speaker and author on competition law and regulatory matters, and recently served as a non-governmental adviser to the International Competition Network's 8th Annual Conference. He is recognised globally as a leading antitrust and competition lawyer in many specialised publications, and was recognised as runner-up 'Litigator of the Week' by *American Lawyer Litigation Daily* for his work on the *AMD/Intel* case.



Hiroshi Naito

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Hiroshi Naito is a counsel in O'Melveny's Tokyo office. He focuses on competition law such as merger filings and compliance matters and complex civil litigation with emphasis on intellectual property.

Hiroshi is a frequent author, with recent publications including: 'Major Reform of Japan's Antimonopoly Law: New Merger Control Thresholds,' *O'Melveny Antitrust and Competition Alert* (June

2009); ‘Practical eDiscovery Issues in US Litigation,’ *Business Law Journal* (May 2009); and ‘The Implementation and Pending Issues of China’s Anti-Monopoly Law,’ *International Business Law and Practice*, a publication of the Japanese Institute of International Business Law (September 2008).

Prior to joining O’Melveny, Hiroshi worked at an Osaka law firm where he handled litigation matters, particularly in the area of trademarks and unfair competition. Upon completion of his LLM studies in the United States, Hiroshi worked at the New York firm Anderson Kill & Olick PC counselling Japanese clients on US patent and trademark filing matters, and patent litigation.



Philippe Noguès

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Philippe Noguès is an associate in O’Melveny’s Brussels office. Philippe is a member of the Paris and Brussels Bars. He focuses on EU and French competition law, and on the coordination of multi-jurisdictional matters. Philippe advises in the fields of mergers and acquisitions, anti-competitive agreements, concerted practices and abuse of dominant position in relation to various industry sectors such as energy, aviation, mineral resources, automotive and pharmaceutical.

Recent work includes representing Northwest Airlines in obtaining Phase I EC clearance without remedies or conditions in its merger with Delta Air Lines. In this precedent-setting outcome the Brussels team was successful in persuading the EC that the fact that there was no prospect of the merger significantly impeding effective competition on transatlantic routes between the US and the EU because of the two airlines’ existing relationship with Air France/KLM and their common membership of SkyTeam. More recently, Philippe represented AMD in its article 82 complaint against Intel that culminated on 13 May 2009 when the European Commission fined Intel a record €1.06 billion for its anti-competitive practices.

Philippe has authored a number of articles on competition law, especially in the field of leniency and in the energy sector.



Bilal Sayyed

O’Melveny & Myers LLP

Bilal Sayyed is a counsel in O’Melveny’s Washington, DC office. Bilal represents clients before the Antitrust Division and FTC in merger and non-merger investigations. He also has an active Hart-Scott-Rodino counselling practice.

Since joining O’Melveny in 2005, Bilal has advised clients in a number of significant merger and non-merger investigations, including Dynegy Corporation in the sale of its midstream NGL business to Targa Resources; Rea Magnet Wire in its acquisition of Phelps Dodge’s North American magnet wire business; a major integrated petroleum company in the FTC’s 2005 to 2006 gasoline price investigation; a third party in a challenge to a significant horizontal merger; and a major retail drug store chain in the sale of its US business to

a significant competitor.

Before joining O’Melveny, Bilal served as attorney adviser on competition matters to then FTC chairman and current O’Melveny antitrust and competition practice co-chair, Timothy Muris. Bilal advised the chairman on significant merger matters including investigations involving the casino, chemical, cruise-line, defence, health-care, natural gas, petroleum, pharmaceutical, mining, retail, supermarket and transportation industries. Bilal also advised on major non-merger matters – physician price-fixing investigations, professional association cases and inquiries into improper use of the standard-setting process, and seminal complaints and opinions – *In the Matter of Polygram Holding Inc* (Three Tenors), *In the Matter of Union Oil Company of California* and *FTC v Rambus*. Bilal also coordinated all petroleum and electricity matters while in the chairman’s office.

While at the FTC, Bilal was also an attorney adviser in the Office of Policy Planning.



Christine Wilson

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Christine Wilson is a partner in O’Melveny’s Washington, DC office. Her practice focuses on antitrust and trade regulation and international competition law and policy. Prior to joining O’Melveny, Christine served as chief of staff to Chairman Timothy J Muris at the Federal Trade Commission from 2001 to 2002.

Christine’s experience as an antitrust enforcer enables her to provide informed counsel to clients on maximising business opportunities while complying with the antitrust laws. Clients rely on Christine to obtain antitrust approval for complex global mergers, to shape business initiatives that comply with the antitrust laws and to represent their interests in high-stakes government antitrust investigations.

Representative experience includes representing Northwest Airlines in its merger with Delta Air Lines as well as before the Department of Transportation and the DoJ in its successful bid for antitrust immunity with SkyTeam partners; ExxonMobil before the FTC in the agency’s investigation of price-gouging following Hurricanes Katrina and Rita; and Verizon Communications in its acquisition of MCI Inc.

Christine is a recognised authority on global antitrust and competition issues. She serves as an adviser to the US government in connection with the Unilateral Conduct Working Group of the International Competition Network (ICN). She is a member of the Competition Committees of both the US Council for International Business (USCIB) and the Business and Industry Advisory Committee (BIAC) to the Organization for Economic Cooperation and Development (OECD). In addition, she serves on the International Task Force of the Antitrust Section of the American Bar Association.