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Scott D. Hammond

*Dir. Of Criminal Enforcement, Antitrust Div. U.S. Dept. of Justice*

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# From Hollywood to Hong Kong – Criminal Antitrust Enforcement is Coming to a City Near You

Scott D. Hammond\*

*Come gather 'round people  
Wherever you roam  
And admit that the waters  
Around you have grown  
And accept it that soon  
You'll be drenched to the bone  
If your time to you  
Is worth savin'  
Then you better start swimmin'  
Or you'll sink like a stone  
For the times they are a-changin'\*\*,*

## I. Introduction

What are the risks to a multinational company if it engages in international cartel activity? The answer to that question is changing day by day because laws, policies, and attitudes towards cartel enforcement are constantly changing around the world. Perhaps one of the most telling examples of how the image of antitrust enforcement has changed is its treatment in the media. News coverage of antitrust crimes has become almost sensational. For example, the fine art auction trial that started in the fall of 2001, which centers on a price-fixing conspiracy involving the world's two dominant auction houses, Christie's and Sotheby's, is being covered by nearly every news publication from the *Wall Street Journal* to

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\* Director of Criminal Enforcement, Antitrust Division, United States Department of Justice.

\*\* Bob Dylan, *The Times They Are A-Changin'*, on THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

*People* magazine. The best-selling book *The Informant* – based on the Department’s covert investigation of a worldwide lysine cartel involving the Archer Daniels Midland Company and others – was on the New York Times bestseller list for months on end. Finally, something you may have thought you would never see – even Hollywood has jumped on the antitrust bandwagon with last summer’s release of the movie titled, simply, *AntiTrust*. Now, I grant you that the movie was quite dreadful, it had nothing to do with antitrust crimes, and it bombed at the box office. However, there is still hope for an antitrust blockbuster. The movie rights for *The Informant* were recently sold to Hollywood, and so there still could be an Oscar featuring the antitrust laws in the near future.

Of course, it is not just Hollywood taking notice of the antitrust laws for the first time. Consumer and business groups in the United States and abroad are becoming increasingly vocal about the need for strong antitrust enforcement. And, foreign law enforcement authorities are now investigating and punishing cartel activity that for years was overlooked and unpunished.

How did antitrust crimes suddenly become the rage? What has caused the media, the business community, consumers, and our sister law enforcement authorities to look differently at antitrust crimes? Those are the questions I will focus on today – not just how attitudes around the world have changed with regard to anti-cartel enforcement, but a few thoughts on why they have changed.

First, in order to understand the conversion abroad, we need to begin by recalling how criminal antitrust enforcement has changed in the United States. So, I will start by offering some perspective by comparing what the Antitrust Division’s criminal docket looked like 10 years ago with what it looks like today. Because in order to fully appreciate how much criminal antitrust enforcement has changed, we need to recall what it was like before.

## **II. Criminal Antitrust Enforcement – 10 Years Ago Versus Today**

The Department has a rich and distinguished history of aggressively investigating and prosecuting antitrust crimes. For the most part, however, the prosecutions were aimed at domestic conspiracies – not because we made a conscious policy not to prosecute international cartels, but because we did not have evidence of their existence. In the 1990’s that began to change. Unfortunately, there is not enough time here to discuss all of the factors behind the Division’s successful expansion into international cartel enforcement.

I will simply state, without elaborating, that three of the biggest factors were: (1) a reallocation of Division resources to make international cartel enforcement one of the Division's highest priorities; (2) the 1993 expansion of the Corporate Amnesty Program; and (3) the development of cooperative relationships with foreign antitrust authorities.<sup>1</sup> To give you a flavor of the sea change in the Division's international cartel enforcement efforts, consider these statistics comparing the Division's docket ten years ago with today.

Ten years ago, the Antitrust Division only opened a few investigations of suspected international cartel activity. Today, there are over thirty sitting grand juries looking into such offenses. The subjects and targets of these investigations over the past few years have been located on five continents and in over twenty different countries. Similarly, ten years ago, the Division filed only two cases against foreign-based companies, both involving domestic conspiracies, and not a single charge was brought against a foreign individual defendant. So that it is clear that I have not picked a year with a statistical anomaly, I should add that in the four previous years, from 1987 through 1990, the Division did not bring a single case against a foreign firm or a foreign national. By comparison, last year nearly seventy percent of the companies charged by the Division were foreign-based firms, and roughly thirty-three percent of the individual defendants were foreign nationals. In fact, the Division has now convicted foreign executives from Germany, Belgium, The Netherlands, England, France, Switzerland, Italy, Sweden, Canada, Mexico, Japan, and Korea for engaging in cartel activity. Moreover, executives from Canada, Germany, Switzerland, and Sweden have served prison sentences for violating U.S. antitrust laws.

The international cartels that have been prosecuted over the last five years have, for the most part, dwarfed the domestic and regional conspiracies that the Division had traditionally prosecuted. Since fines for antitrust offenses under the U.S. Sentencing Guidelines are based in large part on the amount of commerce affected by the cartel, the fine levels for antitrust offenses have grown to levels that were unimaginable ten years ago. For example, ten years ago, roughly \$20 million in total fines were imposed in Division cases for the entire year. In fact, in the five years before and after 1991, the Division obtained, on average, about \$27 million in

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<sup>1</sup> For a more detailed discussion of the factors which have contributed to the Antitrust Division's success in fighting international cartels, see Gary R. Spratling, *Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg?*, Speech Before the ABA National Institute on White Collar Crime (Mar. 6, 1998).

criminal fines annually. In 2001, defendants were fined over \$280 million, more than ten times that prior average. Moreover, in the last five years, the Division has obtained over *\$2 billion* in criminal fines – many multiples higher than the sum total of all previous criminal fines imposed for violations of the Sherman Antitrust Act dating back to its inception in 1890. Well over ninety percent of these fines were in connection with the prosecution of multinational firms engaged in international cartel activity.

Similarly, ten years ago, the largest corporate fine ever imposed in an antitrust prosecution was \$2 million. By comparison, six antitrust defendants have now been fined \$100 million or more, including a \$500 million fine imposed on F. Hoffmann-La Roche for its leadership role in the international vitamin cartel. The \$500 million fine has the distinction not only of being the highest fine ever imposed in an antitrust case, it is also the largest single fine imposed in a Department of Justice case for any crime, under any statute.

### **III. Inside The Lysine Cartel – The First Milestone**

With that perspective, let's turn next to the issue of how and why attitudes towards international cartel enforcement have changed around the world. The first milestone, in my opinion, was the Division's high-profile prosecution of Archer Daniels Midland Company ("ADM"), its top executives, and their co-conspirators in the worldwide lysine cartel. This case was investigated by the Chicago Field Office and concluded with guilty pleas by all of the world's major lysine producers and the conviction by a Chicago jury of three former high-level ADM executives. This was a monumental case for the Division's criminal enforcement efforts because it grabbed the attention of so many groups that we were urgently trying to reach – including the media, U.S. consumers, the business community, and foreign governments. The investigation also revitalized our relationship with the FBI. I will touch briefly on how this investigation impacted each one of these groups.

First, the investigation and trial received unprecedented exposure in the media for a number of reasons, including the identity of the defendants, the use of a government informant inside ADM, and the existence of video and audio tapes secretly recorded by the FBI showing the conspirators in the act of fixing prices and carving up the world market for lysine. Developments in the investigation and trial were tracked closely by newspapers and weekly magazines. Excerpts of the FBI tapes were played on television news shows. And, as I mentioned earlier, the investigation spawned a best-selling

book. This type of media exposure for an antitrust crime had never happened before. So, for many Americans, this was their first exposure to antitrust crimes. I know that I had friends and, I am reluctant to admit, even family members call me about the case and say, "Oh, now I finally get what you do for a living – go and nail the crooks!" When the public viewed the tapes, they saw with their own eyes an unmitigated, undeniable crime of fraud and deceit. One could not have asked for a better introductory lesson for the U.S. public as to why price fixing is a crime and why those that commit it are criminals.

Secondly, the investigation completely revitalized our partnership with the FBI. After the investigation, the FBI leadership declared that antitrust crimes were one of the top priorities of its white-collar crime program and then backed it up by dedicating unprecedented resources to investigating antitrust crimes. Agents followed their lead and became excited about working antitrust investigations. Today, FBI agents are assigned to all of the Division's ongoing international cartel investigations.

Thirdly, ADM's record-breaking \$100 million fine and the incarceration of its top executives reverberated through the board rooms of multinational companies around the world – a prime group of interest to the Division. The fine was more than six times greater than the then-highest fine. Moreover, the executives, including the Vice Chairman of the Board of Directors, were given at or near the maximum three-year jail sentence allowable under the Sherman Act. Of course, what also grabbed the business world's attention was the way we collected the evidence against the lysine cartel – the co-opting of one of the company's top executives as a cooperating witness, the covert audio taping of telephone conversations and video taping of meetings in bugged conference rooms, and the simultaneous execution of search warrants by dozens of FBI agents at the offices of the corporate subjects around the United States. By using informers, tape recordings, and search warrants, the message to the business community was clearly communicated – we will not pull any punches. These are the bare knuckle tools that the Division will use to detect and crack antitrust crimes.

Lastly, this case, and more specifically the tapes themselves, had a monumental impact on a number of foreign governments. After the case was tried, we sat down with foreign government officials and played the tapes for them. In most cases, we were addressing more than antitrust authorities, because, in many countries, the antitrust officials did not need to be persuaded. They were already well aware of the harm caused by cartel activity, and they were already pushing

for reform in their laws or in their investigative powers. Thus, they would arrange for us to meet with key government policy makers, treasury officials who held the purse strings for additional funding, or representatives of influential trade or business groups, so that we could help win them over. And so we would play the tapes for them, and they would see with their own eyes how their businesses and their consumers were being victimized. We would talk about the lysine and other international cartels prosecuted by the Division, and they would see how these cartels had acted with impunity within their borders. Simply put, the lysine tapes made foreign governments question, if not rethink, how they investigated and treated cartel offenses. And then came the knockout punch – the exposure of “Vitamins, Inc.,” the worldwide vitamin cartel.

#### **IV. Exposing Vitamins, Inc. – The Next Milestone**

The detection and prosecution of the worldwide vitamin cartel is the next major milestone, in terms of influencing the way many people looked at cartel offenses, that I want to discuss. Once again, it had a major impact on key audiences like the media, consumers, the business community, and foreign governments – this time for many of the same reasons, but also for a few new ones.

Like the lysine cartel, the vitamin cartel involved a sophisticated secret global cartel, huge multinational defendants, and massive fines. However, unlike lysine, this cartel involved a high-visibility consumer product with tremendous media and consumer appeal. Here was a cartel that impacted products that appeared in nearly every household, and in every cupboard, of every consumer in America. Here was a cartel that was so sophisticated that its members were able to carve up the world’s billion dollar vitamin market among a few multi-national companies and fix prices on a country-by-country basis around the world. Here was a cartel that operated for nearly ten years with such precision and profit that it was tabbed “Vitamins, Inc.” by one of its members. It was the single largest antitrust conspiracy the Division had ever uncovered, and the fines and sentences imposed on the cartel members reflected just that.

And so, if there were any companies or executives who were asleep when the lysine sentences were imposed, they would have to be in a coma not to be awakened by this. Nearly a billion dollars in fines were imposed against the cartel members, including a \$500 million fine imposed against F. Hoffmann-La Roche and a \$225 million fine imposed on BASF AG. In addition, eleven executives, including six European executives, were sentenced to serve time in

U.S. prisons for their role in this conspiracy.

Of course, the high-profile nature of this conduct and the massive fines that were imposed also grabbed the attention of the foreign press, as well as foreign businesses and consumers. Many of these groups demanded to know whether their governments would be acting to protect their interests against cartel behavior. So, the vitamin cases fueled the movement towards rethinking the adequacy of competition laws and law enforcement powers that was already beginning to take place in many governments abroad. These governments began to ask themselves whether they had sufficient penalties in place to deter cartel activity. Did their competition authorities have the necessary investigative tools to detect cartel activity when it occurs? Should cartel activity be treated as an administrative or a criminal offense? Should individuals as well as corporations be sanctioned for cartel offenses?

## **V. Cracking Down On Hardcore Cartels In The United Kingdom**

The United Kingdom is a prime example of a nation that has grappled with these issues over the last few years and has instituted dramatic changes in their cartel enforcement program. In March 2000, the British government implemented a new competition law that prohibited cartels and other anti-competitive behavior and gave its Office of Fair Trading new investigative powers and expanded resources for detecting cartel activity. The new civil powers included the creation of a leniency program that was modeled after the Division's Corporate Leniency Policy. The Competition Act also imposed a fining scheme that will lead to stiff penalties of up to thirty percent of a company's U.K. annual turnover for violators. Little more than a year later, the U.K. and U.S. governments agreed to remove a "side letter" to the U.K.-U.S. Mutual Legal Assistance Treaty ("MLAT"), which had excluded antitrust matters from the scope of the cooperation provisions of the MLAT. The types of assistance in antitrust matters that the U.K. can now provide to the Division include the use of the U.K. courts to take testimony from witnesses, obtain documents, and assist in the collection of criminal fines. Finally, in November 2001, the U.K. government proposed legislation that would create a new criminal offense for individuals that engage in hardcore cartel activity. The proposed law would provide for maximum jail sentences of up to five years for antitrust offenders. The criminalization of cartel offenses in the U.K. may also make it possible in the near future to extradite individuals involved in

cartels from the U.K. to face antitrust charges in the United States.

Here is an excerpt about the proposed legislation from a letter that appeared in a recent edition of the *Financial Times*. The letter speaks volumes as to how dramatically the debate has changed in the U.K., not just because of its content, but because of the identity of its author. The letter begins:

If there is a guiding principle that dictates the way we do business in the United Kingdom it is that it should be conducted fairly. Anti-competitive practices create weak markets, protect the inefficient, deprive us of choice, stifle innovation and support bad practice. They defraud consumers and break the will of those business people who work hard to pursue their ambitions. . . .

The letter goes on to say:

The [current] Competition Act imposes sanctions and fines on businesses, not on the managers who decide to operate a cartel. It is right that managers should also face sanctions, because they can gain significantly if the companies they work for make excess profits – it feeds through into executive bonuses and share options. Those operating a cartel are engaging in theft and should face a similar sanction. . . .

The letter then goes on to take issue with the various arguments that have been advanced against the proposed legislation, which I will not recount here, and concludes by stating:

I want to see a business environment that is fair for all businesses. I will not defend the indefensible and will be supporting the government and its bill.

Who is the author of this letter? You might expect by its tone that it was written by a government official at the United Kingdom's Office of Fair Trading or the Department of Trade and Industry. No. The letter was written by David Lennan, who serves as the Director General of the British Chamber of Commerce.

## **VI. Global Criminalization Of Cartel Activity – The Next Milestone?**

What is in store for the future of international anti-cartel enforcement? Could the United Kingdom's proposed legislation to

criminalize cartel offenses for individuals be the next major milestone? A number of countries already have laws in place that provide for criminal sanctions, including Canada, Japan, Ireland, France, Norway, Austria, Germany, Korea, and the Slovak Republic. Other countries, such as Australia, are already considering similar laws. Is the day coming when hardcore cartels are prosecuted criminally around the world? Sound farfetched? Could any of us have predicted the changes that occurred in the last ten years or even in the last few years? A few years ago, when the United Kingdom did not even fine companies for cartel activity, would you have guessed that today they would be moving towards jail terms for culpable individuals? Back in the early 1990's, when antitrust fines topped out at \$2 million in the United States, did you advise clients that the time was coming when they would risk fines of \$100 million or more if they engaged in cartel activity? Who among us expected to see the day when European business executives would begin voluntarily submitting themselves to U.S. jurisdiction and serving time in U.S. prisons because they feared looking over their shoulders the rest of their lives as international fugitives? The times they are a-changin'.

In November 2001, antitrust enforcers from more than twenty-five countries around the world attended a workshop in Canada to exchange best practices for fighting cartels. The Division organized the first event of this kind in 1999 in Washington. In 2000, it was hosted by the United Kingdom. Each year the debate shifts. The interest in stronger and more aggressive anti-cartel enforcement measures grows, while the safe havens for cartel activity shrink. So stay tuned, because the one sure thing that you can predict is that more changes are in store for the future.

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