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## Global Forum on Competition

### CRISIS CARTELS

#### Contribution from the United States

-- Session III --

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## CRISIS CARTELS

### -- United States --

1. This submission responds to the “Questions and points for consideration” relating to Crisis Cartels distributed by the Global Forum by the OECD Secretariat. Put simply, United States antitrust law does not provide for any special treatment of cartels during economic downturns. This is rooted in the United States’ long history of enforcing the antitrust laws and from lessons learned during the Great Depression. This submission explains the general philosophy of the United States towards the prosecution of cartels, provides insight into our recent enforcement record, and concludes with a short discussion of our related competition advocacy efforts.

#### **1. Governmental policies towards cartels during crises: assessment and evolution**

2. Cartels are illegal at any time and are subject to criminal prosecution, regardless of the economic climate. Indeed, there is some literature that suggests cartels are more likely in times of economic trouble when incentives for colluders to defect from price-fixing agreements are weaker. If gains from cheating a cartel are smaller during times of economic crisis (because demand is lower), while the costs of cheating are higher, we are likely to see more collusion during periods of economic decline.

3. Thus, there are no special provisions related to economic downturns for changes in the legal standard, for exemptions or other derogations from the law, for the creation of cartels, for legal defenses to cartel conduct, for special sector-specific treatment, or for special considerations that the antitrust agencies must take into account in enforcing the antitrust laws. Nor are there special provisions for sanctions and penalties related to economic downturns.

4. This was not always the case. Eighty years ago, at the time of the Great Depression, U.S. antitrust enforcement policy took a different approach to cartels. As described in 2009 by Assistant Attorney General Christine Varney,<sup>1</sup>

*Significantly, the onset of the Great Depression did not cause the nation to reconsider the damaging effects of cartelization on economic performance. Instead of reinvigorating antitrust enforcement, the Government took the opposite tack. Legislation was passed in the 1930s that effectively foreclosed competition. The National Industrial Recovery Act (“NIRA”), which created the National Recovery Administration (“NRA”), allowed industries to create a set of industrial codes. These “codes of fair competition” set industries’ prices and wages, established production quotas, and imposed restrictions on entry.*

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<sup>1</sup> “Vigorous Antitrust Enforcement in this Challenging Era,” Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks as Prepared for the Center for American Progress, May 11, 2009, available at <http://www.justice.gov/atr/public/speeches/245711.htm>.

*At the core of the NIRA was the idea that low profits in the industrial sectors contributed to the economic instability of those times. The purpose of the industrial codes was to create “stability” – i.e., higher profits – by fostering coordinated action in the markets. The codes developed following the passage of the NIRA governed many of America’s major industrial sectors: lumber, steel, oil, mining, and automobiles. Under this legislation, the Government assisted in the enforcement of the codes if firms contributed to a coordinated effort by permitting unionization and engaging in collective bargaining.*

*What was the result of these industrial codes? Competition was relegated to the sidelines, as the welfare of firms took priority over the welfare of consumers. It is not surprising that the industrial codes resulted in restricted output, higher prices, and reduced consumer purchasing power.*

*It was not until 1937, during the second Roosevelt Administration, that the country saw a revival of antitrust enforcement. ... The lessons learned from this historical example are twofold. First, there is no adequate substitute for a competitive market, particularly during times of economic distress. Second, vigorous antitrust enforcement must play a significant role in the Government’s response to economic crises to ensure that markets remain competitive.*

5. As AAG Varney concluded, “passive monitoring of market participants is not an option. Antitrust must be among the frontline issues in the Government’s broader response to the distressed economy.”<sup>2</sup>

6. Importantly, the U.S. Sentencing Guidelines, which apply to criminal sanctions in federal cases, do take into account financial limitations on a defendant’s ability to pay a fine, but these provisions are based on the financial condition of the particular individual or firm, and are not tied in any way to general economic conditions.<sup>3</sup>

7. Beyond the criminal area, the Antitrust Division of the United States Department of Justice (“Antitrust Division”) and the Federal Trade Commission (“FTC”) have received requests for special treatment in antitrust investigations from parties alleging hardships resulting from the economic downturn. These requests have ranged from completing a merger review more quickly than normal to requests to fashioning merger remedies (e.g., divestitures) in ways that take into account the difficulty of finding buyers for divested assets in difficult economic times. As to the former, if assets would be more quickly deteriorating while waiting for a Division decision, consistent with good analytical decision-making, then the Division may speed the pace of its review. As to the latter, this depends on the facts of each unique investigation. For example, in *United States v. Signature Flight Corp.*,<sup>4</sup> the Division had challenged a merger alleging it would create a monopoly in the market for flight support services at Indianapolis International Airport. The defendant agreed in 2008 to a federal court consent decree requiring divestiture of certain flight operations at the airport. In 2009, after the court had approved the decree, the defendant petitioned the court for an extension of the divestiture deadline, arguing that the “global financial crisis” had caused the market for sale of these operations to collapse. The Division opposed the motion and the

<sup>2</sup> *Id.* Attached to this submission is a more detailed exposition of the economic damage caused by lax antitrust enforcement during the Great Depression: “Competition Policy in Distressed Industries,” Carl Shapiro, Deputy Assistant Attorney General for Economics, Antitrust Division, U.S. Department of Justice, Remarks as Prepared for the ABA Symposium: Competition as Public Policy, May 13, 2009, available at <http://www.justice.gov/atr/public/speeches/245857.htm>.

<sup>3</sup> U.S. Sentencing Guidelines, *Guidelines Manual* (2010), § 8C3.3.

<sup>4</sup> *United States v. Signature Flight Support Corp.*, available at <http://www.justice.gov/atr/cases/f243900/243975.htm>.

court denied it, noting that the “final judgment was negotiated in the midst of troubling economic news, and the parties specifically countenanced the possibility that Signature would have difficulty selling the [operations],” and that at least two bidders had in fact made offers to purchase the assets. The FTC has seen an increase in the number of firms seeking special consideration in merger review, especially in the health care sector, due to alleged hardships in these times of economic downturn. The standard of review for mergers remains unchanged, however. *See*, for example, the matter of *Laboratory Corporation of America*, where the FTC rejected arguments based on such allegations.<sup>5</sup>

## **2. Enforcement record on cartels during the recent economic downturn**

8. The Division continues to vigorously prosecute violations of the antitrust laws. Notably, the Antitrust Division has not observed changes in the types of cartels formed or incentives of cartel participants to seek leniency as a result of the economic downturn. During our most recent Fiscal Year, ending September 30, 2010, the Division filed 60 criminal cases and obtained fines in excess of roughly \$550 million. In these cases, 84 corporate and individual defendants were charged. Of the individual defendants sentenced, 76% were sentenced to imprisonment. The average sentence was 30 months and total jail time for all defendants was about 26,000 days. In Fiscal Year 2009, arguably a period of greater economic turmoil, the Division’s statistics were similar. Seventy-two total cases were filed, 87 defendants were charged and served over 25,000 days in prison, and over \$1 billion in fines was collected. Indeed, Fiscal Years 2008 and 2009 saw substantial fines imposed against firms and individuals, and the incarceration of individuals reached over 14,000 and 25,000 days, respectively.<sup>6</sup>

9. The need to monitor closely the use of federal government funds distributed as part of the Administration’s economic stimulus program, the \$787 billion American Recovery and Reinvestment Act of 2009 is also critically important. In May 2009, the Department of Justice launched a Recovery Act initiative designed to help procurement officials prevent collusion and fraud in the award of stimulus projects and to detect and prosecute collusion and fraud if it occurs. As part of the initiative, the Department is training thousands of procurement and grant officials, government contractors, and government auditors and investigators on the signs of collusion and fraud and actively assists other agencies in investigating and prosecuting fraud.

## **3. International cooperation on cartels**

10. The Antitrust Division continues to work closely with our counterparts around the world and to see the fruits of this close collaboration result in the successful prosecution of global cartels, to the benefit of consumers in all participating jurisdictions. The Division has noted no apparent change in the amount or type of international cooperation related to cartel enforcement as a result of the recent economic downturn.

## **4. Competition advocacy on cartel-related matters**

11. In contrast to the efforts noted above that occurred during the Great Depression, there has been no support for widespread abandonment of antitrust, even though the U.S. experienced the sharpest downturn in its economy since the 1930s. However, there have been some limited suggestions for specific antitrust exemptions. In Congressional hearings on the newspaper industry in 2009, for example, some

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<sup>5</sup> See the FTC’s November 30<sup>th</sup> 2010 complaint, available at <http://www.ftc.gov/os/adjpro/d9345/101201lapcorpempt.pdf> §§ 38-41. The case is currently under litigation

<sup>6</sup> See United States Department of Justice, Antitrust Division, Criminal Enforcement Fine and Jail Charts 2000-2010, available at: <http://www.justice.gov/atr/public/criminal/264101.html>.

industry witnesses, noting the difficult economic conditions facing many newspapers, called for the enactment of an antitrust immunity with regard to all newspaper mergers and joint ventures. The Division opposed these suggestions, explaining in Congressional testimony that U.S. antitrust law is sufficiently flexible to permit a wide range of business practices and creative business models that newspapers might employ as they seek to develop new sources of revenues and to cut costs to survive.<sup>7</sup> The Division also noted that the failing firm defense in merger cases may be applicable in some situations where two competing newspapers seek to merge and have assets that would otherwise exit the industry.<sup>8</sup>

12. Although related to a public health crisis, rather than an economic one, the Pandemic and All-Hazards Preparedness Act of 2006<sup>9</sup> created a limited antitrust immunity for private participants in meetings and consultations of private persons engaged in the development of certain pandemic or epidemic products. These meetings, to be chaired by the Department of Health and Human Services, must be notified to and open to the Attorney General and Chairman of the Federal Trade Commission. The Act has a sunset provision and expires in 2012 unless additional legislation is enacted. To date, the antitrust immunity provisions have been potentially applicable in only one study group, and the Division and Federal Trade Commission are carefully monitoring this group for possible antitrust problems.

## 5. Conclusion

13. The United States remains committed to vigorous enforcement of the antitrust laws as a means of ensuring a vibrant and well-functioning economy regardless of the broader economic climate. Indeed, the lessons from the Great Depression remind us that the prosecution of illegal cartels and other antitrust violations is just as necessary during times of economic difficulty as during times of economic prosperity.

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<sup>7</sup> It is worth noting that in 1970, Congress passed the Newspaper Preservation Act, which enables joint *operating* agreements between and among newspapers within close geographic proximity. This exemption extended to areas such as printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution. Importantly, there was to be no merger, combination, or amalgamation of editorial or reportorial staffs, and editorial policies were required to remain independent. 15 U.S.C. §1803.

<sup>8</sup> Statement of Carl Shapiro before the Subcommittee on Courts and Competition Policy, Committee on the Judiciary, U.S. House of Representatives, "A New Age for Newspapers: Diversity of Voices, Competition, and the Internet," April 21, 2009, available at <http://www.usdoj.gov/atr/public/testimony/245063.htm>. See also OECD Roundtable on Failing Firm Defense, Contribution by the United States, DAF/COMP/WD(2009)99 (October 6, 2009); ICN Recommended Practices for Merger Analysis, VIII. Failing Firm/Exiting Assets, 30-34 (2010), available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf>.

<sup>9</sup> Public Law 109-417, 120 Stat. 2831-81 (2006).