

Some Observations on the Plea-Bargaining Experience in U.S. Criminal Antitrust
Enforcement and Its Relevance in the European Context

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Good afternoon. My name is Robert Fleishman and I am a U.S. antitrust defense litigator based in Washington. I am both honored and pleased to participate in today's discussion of the broad important topics of this conference: the impact of competition law on global business; the spread of enforcement regimes throughout the world; the appropriate interplay among them; and, ultimately the cost-benefit analysis of substantive and procedural convergence of competition law enforcement on a global basis. All will agree that the stakes are high. All will agree careful deliberation is timely.

My point of departure today is a focus on the concept of "plea-bargaining" in the U.S. criminal antitrust context. The question has been put: "Can U.S. style plea-bargaining work in Europe?" or, in terms of my designated topic: "The U.S. plea-bargaining experience: will Europe follow?" I would like to outline my position on these questions in our conversation today from my perspective as a U.S. antitrust defense attorney. That experience includes litigation in both the criminal and civil settings over the past three decades, and as a prosecuting Trial Attorney in the U.S. Federal Trade Commission's Bureau of Competition prior to entering private practice. As practitioner of the art of "plea-bargaining" (as it is put in the criminal context) and "settlement agreements" (as it is put in its civil litigation analogue), I offer the following propositions for consideration: (i) the practice is essential to effective competition law enforcement in any regime with limited resources; (ii) the U.S. experience is deserving of close

scrutiny by policy makers and enforcement officials in Europe, especially now, in light of the constellation of the inter-related competition enforcement policies currently receiving attention and debate in Europe and elsewhere (these include private damages actions; criminalization and incarceration penalties and others); (iii) major pitfalls of the overall U.S. antitrust enforcement experience – and, surely there have been many – flow, not from an aggressive pursuit of “plea-bargaining” techniques or “criminalization” (and incarceration), but from abuses built into the private damages litigation process; and, (iv) effective “plea-bargaining” can play a significant role in non-U.S. regimes minimizing some of the most egregious aspects of the U.S. “litigation culture” as it has developed.

Let me summarize the salient characteristics of U.S. plea-bargaining; make some observations about the failures of the American antitrust enforcement regime writ large from my vantage point; and finally offer some suggestions to consider as the European regimes move into the future. Suggestions – I would hope – which might provide a basis for implementing the better aspects of U.S. enforcement, while helping to avoid some of its major failings.

But first, I begin with a brief normative digression from that task relating to private antitrust damages actions (because that is where I believe the interesting uses of plea bargaining come into play). It is difficult to resist the conclusion that there is a need to move in the direction of effective restitution mechanisms for cartel offenses on a global basis. A growing consensus exists that net costs of global cartels are unacceptable. While industrial economists can argue at length about the quantification of resulting consumer harm, the debate now generally is about “how much,” not “whether.” Substantive competition policy convergence is at

hand, largely, as to the basic cartel offenses.¹ I believe that augers for best efforts at redress. To the extent that will be accomplished through private damages litigations, we would do well to consider avoiding the most obvious U.S. excesses.

Specifically, there are, in my judgment, four inter-related characteristics of the U.S. private damages system that account most directly for its abuses. And, if I'm right, these are the things any developing system of private civil redress that hopes to avoid the worst of the 'litigation culture' should seek to avoid, or at least manage. Here, I believe, are the principle causes of civil litigation abuse in the U.S. system:

- the broad language of the Sherman and Clayton Acts allows pursuit of too many "creative" and dubious theories of antitrust liability;
- the "notice pleading" standard to initiate federal litigation in the U.S. presents an extremely low front end hurdle;
- open-ended pretrial discovery mechanisms (particularly in a digital computerized business environment) create huge costs of defense unrelated to culpability;
- summary judgment procedures are cumbersome and difficult to invoke once a complaint is initiated and survives preliminary motions to dismiss.

Effective plea bargain is the connective tissue that can allow for manageable reduction, if not elimination, of these problematic characteristics.

¹ Obviously, a discussion of competition policy enforcement in the international, inter-cultural context requires some common base of shared substantive law. I would posit that in this setting the shared base is the growing convergence of view that hardcore cartel behavior (horizontal price-fixing; bid-rigging; output restrictions; and customer and market allocations) is a malum per se. As Justice Scalia of the U.S. Supreme Court observed recently in the Trinko case, cartels are "the supreme evil of antitrust." Neelie Kroes has declared "the fight against cartels priority number one." See, Kris DeKeyser, Glasgow Presentation (4/12/07) "The Commissions Fight Against Cartels." See also, Section 188 of the Enterprise Act, criminalizing "dishonestly" engaging in cartel behavior, including horizontal agreements to fix prices, rig bids, allocate markets and restrict output.

Plea-bargaining is not a recent innovation in the annals of criminal law enforcement – neither in the American experience nor in other jurisdictions. Indeed, as Scripture would have it, the trial of Jesus was significantly advanced – if not, in the first instance, made possible – by the testimony of a “snitch.” Collaboration and testimony by someone “on the inside,” presumably in exchange for something of perceived value to the collaborating witness – whether pieces of silver; a reduced penalty; or a non-prosecution agreement – these elements comprise in broadest terms the essence of a plea agreement. Nor is this technique a new development in the criminal antitrust enforcement arsenal – particularly, in the United States. As Scott Hammond, the Deputy Assistant Attorney General for Criminal enforcement, U.S. Department of Justice, Antitrust Division, recently observed: “[O]ver the last twenty years, over 90 percent of the corporate defendants charged with an antitrust defense have entered into plea agreements with the Division where they admitted guilt and cooperated with the Division’s criminal investigations.”²

Consider the U.S. “plea-bargaining experience” in terms of the incentives driving the bargaining participants; the basic functional characteristics of the process; and, finally, what measurable results this process has had for antitrust enforcement in the U.S. context.

Where ever there is prosecutorial discretion there is plea-bargaining. This is not an American concept; nor is it antitrust specific. The use of “snitches” (or “informants” to use a less pejorative term) is an essential tool in U.S. criminal law enforcement – and I suspect this is globally true. In its simplest terms, it is a technique whereby law enforcement officials make various uses of criminals in detecting and prosecuting other criminals. It is an agreed upon

² Scott D. Hammond, “The U.S. model of negotiated plea agreements: a good deal with benefits for all,” OECD Competition Committee Working Party No. 3, Paris, France (October 17, 2006) at 2.

trade-off (formal or informal) that involves some reduction, elimination or delay of possible punishments in exchange for cooperation with the fact finding and adjudication process.

Depending on the upon the degree of discretion in the process – and the facts attendant to a given bargaining situation – the result may be on the one hand complete abatement of punishment, specified and limited cooperation without contrition, admission of guilt, forfeiture, or restitution. This paradigm would be ideal from the perpetrator’s point of view. On the other hand, of course, the paradigm for the prosecutor would be full and unlimited cooperation with ongoing investigations and prosecutions (provision of industry expertise, documents, data and testimony, as requested), an admission of wrong-doing, forfeiture, restitution, and possible incarceration (although with some reduction in exchange for the cooperation.)

In the U.S. antitrust context a wide range of related collateral matters incentivize perpetrators. These include: treble damage class actions based on the underlying criminal conduct; a statutory basis for using facts found (or agreed to) in the criminal setting as evidentiary materials in civil damages cases; an attorney’s fees statute that richly rewards plaintiff’s lawyers; parallel state cases (in a number of jurisdictions involving indirect purchasers); debarment proceedings for government contracting; immigration proceedings for non-U.S. citizens; and, of course, potential parallel international investigations and enforcement actions. For a company ensnared in a U.S. antitrust investigation, a speedy omnibus resolution to as much of this corporate nightmare as possible is a huge goal. And this of course applies to European based entities with operations in – or into – the U.S. as well.

As to the prosecutors, the incentives for engaging in plea-bargaining are simple: detection, deterrence and cost effective disposition of specific cases. The risk of trying a case to

a jury and losing it is not small. Acquittals are costly. Proof “beyond a reasonable doubt” is a demanding standard and single witness cases are difficult to win.

Now, there are problems using “snitches.” They lie. They are criminals. They usually are deserving of punishment. They are disloyal by definition. Not attractive people; indeed, not attractive witnesses in many ways and subject at trial to attack on credibility grounds. In an antitrust context the cooperating witness almost invariably winds up offering testimony against head-to-head competitors in the marketplace, in exchange for reduced or avoided punishment.

At the level of a corporate defendant, the defense can try to dress up a plea agreement as internal house-keeping “and coming clean” as a good corporate citizen; but still, in the antitrust context, there can be something “odorous” about it; they’re attacking their competitors and getting away with what others are being convicted and jailed for doing. Everyone has a written corporate compliance program these days; but, the ethical culture of a company can still be to cheat – and then attack the competition – ultimately benefiting from its conduct. Of course the biggest risk for the prosecutor is that you make the wrong deal with the wrong people – or entity. You let the biggest fish get away. Full truth is not told and this fact does not come to light in a timely way. All this said, on balance you use “informants” because you need to use them. You can’t make cases without them. That has long been and continues to be the U.S. experience.

The functional characteristics of U.S. plea-bargaining are fairly straight forward and well known but let me observe in passing that in the antitrust arena, there are two basic and distinct pieces. First there is the more formalized approach defined by the modern era leniency program developed in the early 1990’s by the Justice Department, Antitrust Division.³ This program

³ DOJ Antitrust Division’s Leniency program has been in place since as early as 1987; however, its lack of transparency led few to make use of it. In 1993, the program was stimulated

offers complete criminal “amnesty” at the federal level to the first cartel member who comes in and tells the Justice Department about the violation it does not otherwise know about. “Second in” applicants to this process can achieve benefits from cooperation as well. The program is open both to individuals and corporations directly; and, in the corporate context provides for the potential for non-prosecution agreements for cooperating individuals employed by the company.

A classic example of this process at work is the recently disclosed on-going investigation of the alleged global marine hose cartel. This investigation -- which involves a coordinated, multi-national enforcement effort including the U.S. Departments of Justice and Defense, the UK Office of Fair Trading and the European Commission -- came to light last month with simultaneous arrests of eight executives from the United Kingdom, France, Italy and Japan who had traveled to Houston, Texas, for the purpose -- according to U.S. prosecutors -- of meeting to further the goals of an on-going cartel they have now been charged with participating in, involving price fixing, bid rigging and market allocation for “United States sales of marine hose used to transport oil.”⁴

It is very early in the overall investigation. Each of these individual defendants has an opportunity to attempt to negotiate a plea. No corporate entities have yet been charged. The eight defendants are alleged to represent variously two Italian, two UK, one French and one Japanese firm. One can fairly expect more activity in due course. Meanwhile, sifting through documents obtained in response to U.S. search warrants and dawn raids is on-going. Grand Jury testimony can be anticipated.

by increased transparency, as well as substantially increased maximum penalties for Sherman Act criminal violations.

⁴ “Eight Executives Arrested on Charges of Conspiring to Rig Bids, Fix Prices and Allocate Markets for Sales of Marine Hose,” Department of Justice Press Release (May 2, 2007).

What is most notable about this process is the fact that not one single individual employed by a 6th producer also referred to by the DOJ as a cartel participant has been either arrested or charged. In the affidavit submitted to a federal judge in Miami in late April to obtain the arrest and search warrants for the 8 executives who were arrested and charged, the 6th producer is identified only as a “cooperating company.”⁵

⁵ “Affidavit in Support of Criminal Complaint and Arrest Warrants,” May 1, 2007, filed in U.S. v. Whittle, et. al., Case No. 07-2553 PRP (S.D. Fla). The affidavit sets forth elsewhere in relevant part:

B. Evidence of the Conspiracy

1. The Cooperating Co-Conspirator

8. A foreign-based manufacturer of marine hose has admitted to the Untied States its involvement in the bid-rigging, price-fixing and allocation conspiracy. This company (hereinafter “cooperating company”) has agreed to cooperate with the investigation and is negotiating a cooperation agreement with the Antitrust Division. If the cooperating company receives a cooperation agreement and abides by the terms of its cooperation agreement, the Antitrust Division will not prosecute it or its cooperating employees for any involvement they may have had in the marine hose cartel. However, the cooperating agreement will not absolve the cooperating company of restriction obligations it may have to its victims.

9. The cooperating company has produced numerous documents to the Antitrust Division detailing the conspiracy. According to its records, from at least 1999 through at least 2006, the cartel rigged bids, fixed prices and allocated market shares for marine hose sales around the world, including jobs in the Untied States and at U.S. military bases in Turkey and Japan.

10. The DCIS has interviewed executives with the cooperating company, including two confidential sources who were members of the conspiracy (hereinafter “CS1” and “CS2”). For many years, CS1 was the cooperating company’s primary point of contact with the cartel. During interviews, CS1, CS2 and other employees confirmed the cooperating company’s involvement in the cartel from at least 1999 through 2006. CS1 and CS2 sold marine hose for the company overseas, including in the Untied States. They had responsibility for marine hose pricing and reviewed and submitted prices in bids to customers. I have corroborated much of the information they have provided with documents obtained during the investigation. In my opinion, they are credible witnesses.

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The second piece of the Antitrust Division's plea agreement process is a longer standing and more informal one. Rule 11 of the Federal Rules of Criminal Procedure in very broad terms authorizes prosecutors to negotiate pleas in pursuit of resolution of criminal investigations and

II. Additional Information for Execution of Arrest Warrants

26. The United States is seeking warrants in the Southern District of Texas to search the defendants and their hotel rooms, and to seize items, including records, documents and materials relating to the marine hose bids and prices, during the defendants' anticipated upcoming stay in Houston, Texas, for the Offshore Technology Conference ("OTC"). The OTC is an annual worldwide conference of engineers, scientists and managers associated with the ocean resources industry. This year, the OTC is scheduled for April 30 to May 3, 2007. Corporate members of the conspiracy are regularly represented at the OTC and documents I have reviewed suggest that the defendants WHITTLE, BRAMMAR, ALLISON and COGNARD each have attended the OTC at least once from at least 2001 through 2006. I have reviewed emails between WHITTLE and other cartel members in which WHITTLE has tried to organize in-person meetings during or immediately after the OTC to discuss the marine hose conspiracy, including with co-conspirators from Dunlop, Trelleberg and marine hose manufacturer with operations in Broward County. At these meetings, according to documents I have reviewed, WHITTLE planned to discuss with these co-conspirators, among other things, upcoming prices to quote for marine hose.

27. DCIS has learned through its investigation that the defendants will be staying in hotels in Houston during the time of this year's OTC. A private meeting including WHITTLE, BRAMMAR, ALLISON, COGNARD and other co-conspirators is planned during the OTC. Documents I have reviewed show that WHITTLE intends to discuss future understandings about the marine hose conspiracy during this meeting.

28. The United States plans to arrest the defendants on the requested warrants soon after this meeting in the Southern District of Texas. The United States anticipates executing these arrest warrants simultaneously with the execution of the search warrants. The United States is coordinating the execution of its planned searches with the execution of warrants and/or other searches in locations across the United States and in several foreign countries. The foreign jurisdictions have determined that they must begin their searches as early as 5:00 a.m. Central Daylight Time in the United States. Once the searches begin abroad, there is a risk that individuals in foreign locations will contact the defendants in the United States. This would give the defendants an opportunity to flee and/or destroy or remove evidence sought before daylight or otherwise obstruct the investigation before warrants can be executed in the United States. Due to these potential exigent circumstances, and given the difficulty of coordinating execution with foreign law enforcement, the United States may need to execute these arrest warrants as early as 5:00 a.m. Central Daylight time."

charges. These agreements can be entered into before or after indictment. It is the grand jury process which is the central mechanism against which the bargaining process in this informal context plays out. In an ongoing investigation a potential witness can be subpoenaed to the grand jury signaling the beginning of a negotiation for immunity or a limited guilty plea. The process often involves a proffer (by a defense attorney then as a next step, the potential witness directly). Issues of self-incrimination are finessed with limited use agreements (so called “Queen for a Day” letters); and, ultimately resolution can involve provision of use immunity or insistence on a guilty plea to stipulated factual allegations.

The significance the Antitrust Division places on the plea agreement process in its criminal arsenal is emphasized by the fact that the Antitrust Division Grand Jury Practice Manual devotes an entire chapter to formal and less formal rules of the “plea agreement” game.⁶ Although Antitrust Division prosecutors must take careful steps to avoid bargaining away “readily provable charges” or arriving at a resolution inconsistent with the broad goals of the U.S. Sentencing Guidelines;⁷ nevertheless, wide discretion is a key characteristic of this process. And, of course, the flexibility key is “provability.” As the Grand Jury Manual observes: “Absent unusual circumstances, criminal cases may be disposed of pursuant to plea agreements.”⁸ And elsewhere “...the methods of negotiating are extremely subjective...”⁹

What’s negotiable? The simple answer is most things in the right case: jail time; fine level; restitution amount; forum selection. And, perhaps for a corporation most important of all

⁶ Antitrust Division Grand Jury Practice Manual, (Chpt. IX), <http://www.usdoj.gov/atr/public/guidelines/4371.htm> (“Antitrust Division Grand Jury Manual”).

⁷ See, Hammond, *supra* at 3.

⁸ Antitrust Division Practice Manual at 2.

⁹ *Id* at 5.

in the antitrust context, the scope of the substantive offense charged. The big issues here at play are what's the definition of the product market involved; what's the definition of the geographic market involved; and what was the time of the conspiracy. These can have huge impacts on subsequent civil cases both in terms of duration and scope.

Although as the grand jury manual observes negotiating methods are widely subjective, general tactics on both sides during the process are basic and familiar. The prosecutors tend to urge the potential defendant to move quickly – usually through some reference to a transportation metaphor. “The train is leaving the station.” “The boat is leaving the pier.” And the like. The message is always: “Other people are in talking to us; and, once they cut a deal, we will have far less need for you.” Defense tactics almost always involve joint defense communications with other counsel representing other individuals “of interest” to the prosecutors, or corporations with subpoenas for document production to the grand jury. Grand Jury proceedings are conducted in secret. It is our very own Star Chamber. Consequently, information is at a premium. Witnesses can discuss their GJ testimony if they chose. Debriefing witnesses, therefore, is key, and joint defense doctrines in the case law largely permit this. This is of course a high stakes game and requires trust and extreme care.

The other major tactical step a defense lawyer must take in this process once a decision to cooperate has been made also relates to the concept of trust and credibility. To get the best deal for your client -- whether a corporation or an individual -- a defense lawyer needs to convince the prosecutor that the individual client not only has important facts but will be fully cooperative and “a credible” witness. As discussed, the witness is always subject to cross-examination at a subsequent trial against a co-conspirator for taking a self-serving deal and inflicting pain on a

competitor. Showing the government that an individual who will be testifying presents well, is articulate, and otherwise credible becomes an important part of the negotiation process.

So what have been the results of this program in the United States? Here is a brute fact: 90% of antitrust convictions over the last twenty years involve plea agreements. That figure alone leads to the conclusion that plea-bargaining is the U.S. antitrust criminal enforcement process --not just an important adjunct of it. Consider, for example, the on-going DRAM grand jury investigation. To date that investigation of hard-core cartel activity involving DRAM sales prices has yielded some \$732 million dollars in fines; and courts have imposed an aggregate of over 7½ years of days in jail time for individual defendants. As Assistant Attorney General Barnett recently testified before Congress, “Over the full course of the investigation this matter has yielded charges against four companies and 18 individuals of which 11 are foreign nationals who have served or agreed to serve time in U.S. prisons.”¹⁰ What’s truly notable about this investigation is that to my best knowledge there have been no trials in this case. All of this has been the result of the use of plea agreements, either the formal amnesty program or more informal negotiations under Rule 11, or both.

So, where does that leave us on the threshold questions? Can U.S. plea agreement techniques and policies work in Europe? And, are they to be forthcoming? In light of a growing number of investigations like “Marine Hose” – and, in light of articulated and implemented formal programs such as the EU and UK leniency procedures -- it is perhaps not too glib to

¹⁰ “Statement of Thomas V. Barnett Before the subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee of the Judiciary, United States Senate, Concerning Oversight of the United States Department of Justice, Antitrust Division (March 7, 2007) at 3. See, also, U.S. Department of State, Antitrust Division Update (Spring 2006), at 5. (<http://www.usdoj.gov/atr/public/216254.htm>)

suggest these questions – at least in the first instance – are dull ones. “We have seen the future and it is now.” Any European corporation which values continuing participation in U.S. markets – and any related European corporate official desiring to travel to and from the United States in pursuit of that market participation – has the potential for plea bargaining plainly “thrust upon” it by the current aggressive reach of the U.S. enforcement authorities. Of course, with European leniency programs already in place, and the coordination of “dawn raids” and parallel leniency applications, the reach of many European enforcers, too, has already become quite “aggressive” in the current calculus of corporate decision making.

In closing, let me return to the “normative.” I have said “plea bargaining” is necessary (hence, desirable) for successful criminal enforcement. But it also plays an important role in containing the scope and cost of private civil actions, as well. As bad as the U.S. “litigation culture” is, it could be worse. Guilty pleas, stipulated facts and testimony in criminal pleas plainly provide some constraint on the need for potentially limitless pretrial discovery and the costly replowing of ground already covered.

Moreover, in any relatively new regime developing procedures to stimulate private damages actions, the efficiencies and savings from muscular but careful use of “plea bargaining” techniques can be even more profound. This is especially so if other steps are taken as the process is defined to further circumscribe the potential for U.S.-style litigation.

The abuses in the U.S. antitrust enforcement system at base lay in a private damages case component that simply spawns too many cases, that cost too much and take too long to resolve. This is often blamed on the existence of private damages actions, in themselves, and class action procedures, together with treble damages and attorneys’ fees provisions. I believe those to be the “wrong suspects.” Obviously, one could eliminate the abuses of private damages actions by

eliminating private damages actions altogether. Apart from completely declining any private redress mechanism, carefully limiting the process in ways the U.S. experience fails to do can offer measurable benefits.