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## Globalizing The Criminality Of Cartel Offenses

Law360, New York (February 20, 2009) -- Two more jurisdictions, Australia and South Africa, may now join the growing number of countries that impose criminal penalties for antitrust violations.

The legislatures in both countries recently introduced legislation that amends their competition law statutes to criminalize cartel offenses.

This is part of an international trend, as nations on five continents now follow the United States' approach of criminally prosecuting individuals (and corporations) for the most serious antitrust violations.

High fines have become commonplace, and courts in a number of countries have imposed jail sentences. Combating cartels is a high priority for many antitrust enforcers worldwide, and criminal prosecution of individuals is seen as an effective deterrent to cartel behavior.

Following a slow but steady international trend, the legislatures in Australia and South Africa recently introduced legislation that amends their competition law statutes to criminalize cartel offenses.

The Australian Parliament is considering an amendment that would criminalize cartel conduct under the Trade Practices Act 1974.

A key feature of the bill is that individuals found guilty of cartel conduct face imprisonment for up to 10 years and/or fines of up to AUD\$220,000 (US\$141,170).

The bill covers price fixing; allocation of customer, suppliers, and territories; and bid rigging. The Parliament has referred the bill to the Senate Economics Committee, which will report back in late February.

South Africa's National Assembly has gone further and passed an amendment to its

Competition Act 1998. The bill authorizes the criminal punishment of a firm's director or a manager, who caused the firm to engage in a "prohibited practice" or knowingly acquiesced in the firm doing so.

The Competition Act 1998 covers price fixing, market allocation, and bid rigging. The law would impose fines of up to R500,000 (US\$50,000) and/or 10 years imprisonment. Although the National Assembly has passed the bill, South Africa's president returned the bill to parliament due to constitutional concerns.

In response, parliamentary committees refused to alter it. The president is now expected to refer the bill to the Constitutional Court for final adjudication.

The laws in many countries around the globe now mirror the U.S. approach to sanctions for cartel offences.

In the European Union, nine of the 27 member states criminally prosecute behavior associated with cartels (the Czech Republic, Estonia, France, Hungary, Ireland, Romania, Slovakia, Slovenia and U.K.), and three more have criminal sanctions for bid rigging (Austria, Germany, and Italy).

Elsewhere, countries with criminal sanctions for cartel offenses include Canada, Cyprus, Israel and Japan.

Only the United States and United Kingdom actually have imprisoned individuals for cartel offenses. A notable recent example is the 2-3 years' imprisonment in the U.K. for three British businessmen involved in the marine hose industry cartel, imposed by both the U.K. and U.S.

Other jurisdictions, such as Ireland and France, have sentenced individuals to jail for cartel crimes, but so far none of those individuals have actually served any jail time.

Although jail is the most severe penalty for cartel offenses, almost all of the world's 100+ antitrust enforcement regimes prohibit cartels and impose sometimes-extraordinary fines for cartel offences.

In January 2009, an LG executive agreed to plead guilty and pay a \$25,000 fine — on top of a 7-month prison sentence — for his role in a global conspiracy to fix prices of liquid crystal displays. A month before, LG pleaded guilty and was sentenced to pay \$400 million.

The EU too regularly imposes high fines for price fixing. Its largest cartel fine was imposed in November 2008 on automobile manufacturer Saint-Gobain, for €896 million (US\$1.14 billion).

Convergence has led to increasing cooperation among competition authorities in detecting, investigating and prosecuting cartels.

In response, companies subject to antitrust investigations must be careful to coordinate any leniency applications, investigation responses and plea agreements, so as to avoid having the response to enforcement in one jurisdiction compromise the defense in another.

As more jurisdictions adopt and enforce legislation authorizing imprisonment for criminal antitrust offenses, individual defendants will find themselves negotiating how to serve jail sentences imposed by multiple jurisdictions.

As the international trend towards criminalizing cartel offenses continues, it is important for companies operating in multiple countries to better understand these jurisdictions' antitrust and criminal laws and procedures.

The Australian Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008 can be found:

[parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/billhome/r4027%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/billhome/r4027%22)

The South African Competition Amendment Bill is available at:

[www.parliament.gov.za/live/content.php?Item\\_ID=216&DocumentNumber=75756](http://www.parliament.gov.za/live/content.php?Item_ID=216&DocumentNumber=75756)

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