Legal Backgrounder

WLF Washington Legal Foundation

Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 19 No. 35 October 15, 2004

CRIMINAL ANTITRUST ENFORCEMENT: A GLOBAL CHALLENGE

by

Steven M. Kowal

Businesses today must confront an unprecedented international legal challenge. The criminal enforcement of antitrust and competition laws has become a global priority. The complexity, cost, management disruption, and potential jeopardy can exceed nearly any other type of legal proceeding.

The United States has led this effort. U.S. antitrust officials utilize a very successful program to induce voluntary disclosure of potential misconduct and cooperation in return for a promise of complete amnesty from prosecution. This program has led to the detection of numerous international cartels that involved billions of dollars in commerce. Before implementing this program, the U.S. had never previously uncovered and successfully prosecuted an international antitrust conspiracy.

These cases have generated corporate fines and criminal penalties that previously were unimaginable. Within the last decade, more than 40 companies have paid fines in excess of $10 million; six have paid more than $100 million; and one paid $500 million — the highest criminal fine ever imposed in the United States. Incarceration for executives has now become common, and the average term of imprisonment is steadily increasing. Recent legislative amendments will push these penalties even higher. Of course, the criminal proceeding triggers the inevitable series of private plaintiff damage actions.

Foreign governments have cooperated with the United States in conducting some of these investigations, and several have signed formal cooperation and assistance agreements. Many of these governments have implemented similar amnesty programs and adopted criminal penalties. This has internationalized criminal antitrust enforcement. Now, resolution of an investigation will require independent negotiations with numerous governments and the imposition of criminal penalties in multiple jurisdictions.

The implication for business is clear. Even when no illegal activity has occurred, an international criminal investigation will impose enormous costs and require the effective coordination of defense efforts in several countries. Companies must expend every resource to avoid such an inquiry. If an investigation is commenced, knowledgeable and experienced legal counsel must be engaged immediately, and an aggressive response must be formulated and pursued.

The U.S. Amnesty Program. The U.S. Corporate Amnesty Program has been described as the most effective investigative tool antitrust officials possess for detecting and prosecuting international cartels. This, however, was not always the case. The original amnesty program, announced in 1978, provided that an applicant was eligible for complete amnesty, but the government would retain significant discretion to

---

Steven M. Kowal is a partner in the Chicago office of Bell, Boyd & Lloyd LLC. He heads the firm's White Collar Criminal Defense Group and is a member of the Antitrust Department. For the last four years, he has chaired the Criminal Practice and Procedure Committee of the American Bar Association's Section of Antitrust Law, and in 2004 he co-chaired the Section's International Cartel Workshop.

determine what level of leniency would be accorded. Very few prosecutorial targets applied for the program, and not a single international cartel was disclosed.

The Antitrust Division changed the amnesty program significantly in 1993, relinquishing much of the discretion it formerly exercised over conferring protection from prosecution. Complete amnesty would be conferred automatically to the first applicant if there was no pre-existing investigation. Amnesty also became available to the first applicant after the government commenced an investigation, so long as sufficient evidence had not yet been obtained to support a successful prosecution. Amnesty was extended to all of the company's officers, directors and employees who cooperated with the investigation. Antitrust Division, U.S. Department of Justice, Corporate Leniency Policy (1993), *available at* http://www.usdoj.gov/atr/public/guidelines/lencorp.htm.

The government's revised program promised complete and unconditional amnesty from criminal prosecution to the first company which disclosed evidence of an illegal conspiracy, and to all of that company's representatives who joined in that disclosure. This revolutionized criminal antitrust enforcement. It provided a substantial incentive to disclose information, and created pressure to make a timely decision because the benefit was conferred only on the initial applicant. According to the Antitrust Division, it receives an average of two amnesty applications each month.

With experience, the government extended the program. It became apparent that many companies engaged in anticompetitive conduct in markets other than that which officials were investigating. The "Amnesty Plus" program promised that a company under investigation could obtain a substantial penalty reduction if it was the first to disclose evidence of misconduct in another market. A company confronted with this problem could receive complete immunity in the second market while reducing the penalty for the conduct already detected in the first. The Antitrust Division has stated that approximately one-half of all international cartel investigations have been initiated as a result of the Amnesty Plus aspect of the program.

The United States Amnesty Program changed the dynamics for international cartels. It created an incentive for disclosure that had not previously existed, but at the price of complete exoneration for one of the co-conspirators.

The Development of International Cooperation. The investigation of international cartels highlights the importance of international cooperation. Antitrust enforcers soon learned to work together informally.

DOJ's Antitrust Division also has successfully negotiated a series of formal agreements that promote international cooperation. Antitrust Cooperation Agreements have been established with Australia, Brazil, Canada, the European Union, Germany, Israel, Japan and Mexico. They reflect the working relationship between the antitrust enforcement authorities and establish protocols for continuing cooperation. There is a specific Antitrust Mutual Assistance Agreement with Australia which provides U.S. officials with significant access to evidence in that country.

Mutual Legal Assistance Treaties (MLAT) exist between the U.S. and more than 50 countries. While MLATs do not focus specifically on antitrust enforcement, many contain provisions to foster cooperation in these types of investigations. The most significant assistance is available when the MLAT partner has also enacted criminal penalties for competition offenses.

Cooperation of antitrust authorities has produced tangible results. In Europe, "dawn raids" are executed by the Director General for Competition. In an investigation of alleged bid rigging on U.S. Agency for International Development contracts, more than 100 German police officers conducted a coordinated seizure of documents and interviews of corporate employees at several locations. In an investigation of the plastic additives industry, the EC Director General, the Canadian Competition Bureau and the Japanese Fair Trade Commission coordinated searches and interviews with the U.S. Authorities for at least five countries have executed search warrants on behalf of the U.S. in numerous investigations.

Moreover, cooperation has been extended to include arrests of those charged with antitrust crimes. The U.S. has issued an Interpol "red notice" for several indicted individuals. This is a request for arrest with

  ISBN 1056 3059

the possibility of extradition. To display the seriousness of the offense — or officials' absence of measured judgment — this is the same level of notice that applies to Osama bin Laden.

The significant increase in international cooperation reflects world-wide antitrust officials' emphasis on the investigation of cartels. There are approximately 50 grand jury investigations in the U.S. focused on potential international antitrust offenses. In the last five years, about one-half of all corporate defendants in U.S. antitrust prosecutions have been foreign-based. Clearly, there is a strong focus on international misconduct.

Penalties Continue to Increase. Criminal penalties in the U.S. have reflected the expansion of the enforcement program. Since 1997, the U.S. has collected more than $2 billion in criminal fines. Prison terms for executives also have increased substantially. In 2003, the average jail term was 21 months — and one individual was sentenced to ten years. For fiscal year 2002, at least 30 individuals were sentenced to incarceration for more than one year. Status Report: An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program (2004), *available at* http://www.usdoj.gov/atr/public/guideline/202531.htm.

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, 108 P.L. 237; 118 Stat. 661 (H.R. 1086), intensifies these penalties. The law increased the maximum term of incarceration for an individual from three years to ten years, and the monetary fine from $350,000 to $1 million. The sponsors of the legislation contended that these changes were necessary to rectify perceived disparities with the recent substantial increases for other white collar crimes. Also, the maximum fine for a corporation was raised from $10 million to $100 million. Even this amount, however, does not define the upper limit. Another sentencing provision provides for a fine calculated at twice the pecuniary gain derived from, or loss caused by, the illegal conduct. It was this provision that provided grounds for a fine of $500 million for a company when the statutory maximum was only $10 million. Congress also directed the U.S. Sentencing Commission to revise the Sentencing Guidelines to reflect these statutory changes. Undoubtedly, the result will be another significant escalation in future penalties.

Changes in Civil Damages Will Affect the Amnesty Program. The recent antitrust penalty legislation also includes a significant change in civil damages. A company that is accepted into the Antitrust Division's Amnesty Program and provides the same level of cooperation to private plaintiffs will be liable only for the amount of damages its illegal conduct actually caused. The other companies involved in the violation, however, will continue to be jointly and severally responsible for three times the amount of the damages caused — the recovery that usually is available in civil antitrust damage cases. This reduction in civil liability should provide an additional incentive under the amnesty program.

Despite the significant penalty reduction for amnesty applicants, civil damage concerns still affect the decision to disclose information to the government. Specifically, a question remains whether damages from entirely foreign transactions can be pursued in U.S. courts. If so, then the amount of potential civil damages could exceed a company's ability to remain financially viable.

The U.S. Supreme Court recently addressed this issue in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004). The Court held that if a price fixing conspiracy causes a domestic antitrust injury and a separate foreign injury, then the foreign purchasers cannot pursue a claim in U.S. courts. However, the decision did not address the situation which arises if the domestic and foreign effects of the conspiracy are linked. Until this issue is fully resolved, some concern exists that foreign purchasers will have access to U.S. courts — and representation by the U.S. class action bar.

Foreign Governments Have Become Aggressive. Governments around the world have joined the U.S. in its effort to detect and prosecute international cartels. Several have adopted amnesty programs, and most of these programs incorporate the principal features developed by the U.S. The program in the European Union now virtually eliminates the discretion of the enforcement authority to impose a penalty on

  ISBN 1056 3059

the applicant, and it authorizes full immunity for the first applicant, even after the investigation has begun.[1]

The encouragement of disclosure through amnesty implies some form of prosecution for the others involved in the conspiracy. Although the U.S. still leads the world by a wide margin in criminalizing antitrust violations, other countries are pursuing criminal sanctions. Canada, for example, has had a very active criminal enforcement program for more than a decade. In the Enterprise Act of 2002, the United Kingdom imposed criminal penalties for "hard core" competition offenses, with a maximum sentence of five years in prison.

The European Union does not possess the authority to impose criminal penalties, although several of the member states do. The EU, however, has levied substantial monetary fines for cartel conduct. In the international vitamin price fixing conspiracy, for example, Hoffmann-La Roche paid €462 million and BASF paid €296 million.

The proliferation of countries focused on cartel conduct increases the complexity of these matters at an exponential rate. A potential amnesty applicant, for example, must consider individual applications in each of the relevant countries and must determine the best order in which to approach them. Unfortunately, the application is not standardized and the requirements for acceptance are not uniform. Also, there are significant procedural differences that must be understood and followed. In much of Europe, for example, the attorney-client privilege applies only to certain categories of lawyers, and often not to in-house counsel. *AM&S v. Commission*, Case 155/79, 1982 E.C.R. 1575, 1611.

The complexity and challenge of international cartel investigations will continue to intensify. Certainly, additional countries will become active, and each will require a separate, and in some instances unique, approach.

Effective Defense Response Is Crucial. The internationalization of criminal antitrust enforcement has transformed the defense approach. The era of defense inactivity while awaiting government action is over. Companies must move aggressively at the first internal hint of a potential antitrust problem — and certainly if there is any indication of government interest. The facts must be gathered, legal vulnerability assessed, and crucial decisions made. If a company is eligible for amnesty, the appropriate considerations must be reviewed and government authorities must be contacted. Since amnesty is awarded only to the first applicant, a proactive approach is necessary. Simply because the company may be foreclosed from total immunity in the U.S., for example, does not mean that significant advantages cannot be obtained in another country. Even if amnesty is not available, substantial benefits can be obtained by rapid cooperation with the enforcement authorities if the case does not support a reasonable defense. When the investigation must be defended, the foundation must be laid to represent the defendants through litigation.

The cost, complexity and potential jeopardy of a criminal antitrust enforcement proceeding dictates that avoidance of questionable conduct is paramount. Companies must dedicate substantial resources to antitrust compliance programs, and to periodic and thorough antitrust audits, which should be performed by lawyers knowledgeable in both antitrust law and current enforcement policy. The cost of these programs is insignificant in relation to the cost encountered in even a minor investigation that does not result in a criminal prosecution.

If a problem is detected, knowledgeable and experienced counsel must be engaged immediately. Experience in addressing and defending international cartel matters can be invaluable. In an era when companies are forced to confront a global threat, they must be prepared to meet the challenge.

[1]At least the following governments have adopted some form of amnesty or leniency program to encourage self-disclosure: Australia, Brazil, Canada, the Czech Republic, the European Union, France, Germany, Ireland, Korea, New Zealand, Sweden and the United Kingdom. Other countries, including Japan, are considering such adoption.

  ISBN 1056 3059