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EXPERT ANALYSIS

Critical White Collar Issues in 2016: Antitrust

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Recent U.S. and international antitrust developments will have important white collar implications in 2016.

First, U.S. criminal antitrust prosecutions and treble damage litigation continue at a record pace. More and more industries are facing accelerating risks. Corporate officials are confronting pressure for individual culpability, and effective legal compliance programs are taking on greater importance.

Second, the waters remain unclear on the application of U.S. antitrust laws to international trade restraints. The likely evolution of such extraterritorial application poses ever-increasing compliance challenges.

Third, EU efforts to create a meaningful private antitrust remedy are accelerating. Deadlines for member state legislative action increasing overall antitrust exposure are approaching. Moreover, enhanced EU member-state antitrust enforcement powers are in the works.

PROSECUTION AND TREBLE DAMAGE ACTIONS CONTINUE

In the last decade, the number, complexity and risks of criminal antitrust investigations have grown exponentially. Key industries targeted have included auto parts, financial, air cargo and electronics. Some said the investigation well was drying up, investigations had run their course and enforcement activity would diminish. Recent developments belie such wishful thinking, as the statistics keep piling up.

To put it in perspective, during the decade beginning in 2006, 204 companies and 764 individuals were charged with federal criminal antitrust violations. In these proceedings, significant numbers of defendants pleaded guilty, admitting that they had engaged in per se illegal activity (e.g., price-fixing and market allocation). During that same 10-year period, U.S. criminal fines and penalties equaled almost $12 billion. A total of 572 criminal cases were filed. The average prison term over the last five years was 24 months, up 20 percent from the preceding five-year period.[1]

Fines resulting from investigations into three industries — auto parts, air cargo and LCD panels — netted more than $5 billion.

The auto parts industry has been — and continues to be — particularly hard hit. Through April, 39 companies and 59 individuals have been prosecuted and more than $2.6 billion in fines and penalties have been levied.[2] Many of the guilty individuals are foreign auto parts executives who have "volunteered" to come to the United States to serve jail time in federal prisons. Massive class action treble damage suits are pending, with billions in damages for overcharges at stake.

The U.S. Department of Justice has used its amnesty and amnesty plus programs effectively as leverage to expand the enforcement net. First instituted in 1993 and carefully honed over time based on the Antitrust Division's experience, these programs have produced a deluge of enforcement opportunities for the DOJ. The resulting enforcement avenues are being pursued to the fullest.

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The leniency program offers the possibility that a cooperating company and its cooperating employees can avoid prosecution entirely. Even if such amnesty is not available, the "amnesty plus" program offers a strong incentive for a respondent in one investigation to disclose evidence to the Antitrust Division of cartel activity in another industry. The benefits of amnesty plus cooperation include complete immunity from prosecution for the illegal activity in the second industry and the possibility for a substantial reduction in penalties for participation in the first conspiracy.

It is telling to note that Antitrust Division statistics over the last 10 years indicate around half of the government's investigations have resulted from the amnesty plus program.[3] As Assistant Attorney General Thomas Barnett noted in 2006, "Through amnesty plus, exposure of a single member of a single cartel has the potential to bring a series of cartels tumbling down like a house of cards."[4] Barnett's view has proved particularly prophetic.

As if this continuing track record of criminal prosecution and creating treble damage risk were not enough incentive, the DOJ has continued its high-profile campaign to persuade companies to adopt comprehensive and effective legal compliance programs. Previously, the campaign threatened to use the stick of heightened penalties that companies could face if they did not have an effective program in place. Recently, the DOJ has been increasingly signaling that there is a potentially significant carrot of reduced penalties if an effective program is put in place.

For example, in a recent DOJ sentencing memorandum filed in connection with the prosecution of an automotive shock absorber manufacturer, the Antitrust Division recommended a major fine reduction (as calculated by the U.S. sentencing guidelines), no restitution and no probation. The DOJ explained that its recommendation stemmed from the comprehensive compliance program that the company instituted just after the grand jury investigation began.

Indeed, the DOJ has said that reduced penalties can be appropriate even after conviction but before sentencing. It remains to be seen how this will play out.

In any case, the message is clear: Effective antitrust compliance programs are imperative. Clearly, the best way to avoid problems is to have a comprehensive program in place that will avoid antitrust risk before an industry investigation is launched. An effective compliance program has three principal goals: prevention, detection and mitigation. The program must be "top down," creating a "culture of compliance." It must be company-wide and proactive, and it must emphasize training, accountability and discipline. The antitrust enforcement agencies have repeatedly emphasized the value and importance of such programs.

Indeed, the government drumbeat to prosecute individuals has only grown louder and more strident. Less than six months ago, U.S. Deputy Attorney General Sally Yates issued a memo titled "Individual Accountability for Corporate Wrongdoing." The memo said, "One of the most effective ways to combat corporate misconduct is by seeking accountability from individuals who perpetuated the wrongdoing."[5]

The Yates memo made it clear there will be no cooperation credit for mitigating penalties without corporate disclosure of "all relevant facts relating to the individuals responsible for the conduct."[6] Echoing a key element of corporate compliance, Assistant Attorney General for Antitrust Bill Baer said in late 2014, "It is hard to imagine how companies can foster a corporate climate of compliance if they still employ individuals in positions with senior management and pricing responsibility who have refused to accept responsibility for their crimes and who the companies know to be culpable."[7]

Thus, there are enhanced risks of investigation, increased exposure of individual corporate executives and greater incentives for effective compliance tools. The foregoing should serve as a wakeup call for business executives who need to take decisive action to avoid the serious consequences that have affected countless companies and business executives.

UNCERTAINTY HEIGHTENS RISKS

As noted above, an increasing number of industries — for example, auto parts, air cargo, banking and electronics — have been rocked by antitrust issues. Many of these U.S. government and

private civil antitrust actions brought against corporate and individual defendants have involved conduct occurring outside the United States. Billions of dollars in fines and substantial jail time have been imposed based on the legal determination that the corporate and individual actions were subject to the "extraterritorial" application of the U.S. antitrust laws.

The underlying legal basis for many of these criminal prosecutions and damage actions has been the Foreign Trade Antitrust Improvements Act, 15 U.S.C.A. § 6A. The FTAIA was enacted in 1982 to help clarify the application of U.S antitrust laws to international trade, particularly in private treble damage actions. The FTAIA is poorly worded, purporting to limit international antitrust claims to trade restraints (not involving import commerce)[8] that have a "direct, substantial and reasonably foreseeable effect" on protected domestic interests and "give rise to the claim asserted."

In construing the FTAIA, the U.S. Supreme Court said the legislation "initially lays down the general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct (i.e., non-import activity involving foreign commerce) within the Sherman Act's reach provided that the conduct (1) sufficiently affects American commerce ... and (2) has an effect of the kind that the antitrust laws consider harmful."[9]

Recently, several federal appeals court decisions compounded the confusion and exacerbated the conflict about how the FTAIA should be interpreted.[10] Such confusion threatened the legal basis on which many international cartel investigations, prosecutions, incarcerations and damage actions were based.

On June 15, 2015, the U.S. Supreme Court denied petitions for writs of certiorari from the 7th U.S. Circuit Court of Appeals and the 9th U.S. Circuit Court of Appeals that involved the same price-fixing conspiracy. One can speculate as to why the court declined the invitations to resolve the conflicts surrounding the FTAIA. Ironically, the losing party in the 9th Circuit decision (an individual whose criminal price-fixing conviction was affirmed) was an officer of the foreign company that was the winning party in the 7th Circuit decision.

In the 9th Circuit case, the court upheld the conviction of an individual criminal defendant on the ground that the U.S. antitrust laws applied to foreign conduct. In the 7th Circuit case, the court found that the U.S. antitrust laws did not apply to the same price-fixing conspiracy alleged in a private treble damage action.

The Supreme Court's refusal to resolve these questions leaves important uncertainties in place. Is the application of the FTAIA a question of substance or jurisdiction? The answer is probably substance. What constitutes "import commerce?" How are "direct domestic effects" to be measured? What is "direct" and what is "indirect"?

On the one hand, it now seems clear that foreign conduct affecting only foreign commerce is beyond the scope of the FTAIA. On the other hand, how many links in the chain from foreign activity to domestic commerce are too many? When does challenged conduct in international trade "give rise to a claim" under the FTAIA? Does it matter who asserts the claim — a private plaintiff or the U.S. government? Specifically, when the DOJ prosecutes conduct under the FTAIA, how does it meet the "give rise to the claim" asserted criterion?

These uncertainties pose future problems (or opportunities). The Justice Department seemingly is in an unusual position, having to bring criminal cases under the FTAIA where it is undisputed that the challenged conduct did not give rise to a claim for damages — one of the key elements of the FTAIA.

Is the U.S. government entitled to more deference than the antitrust regime of a foreign government where the conduct took place? How does the FTAIA accord the government such deference? Finally, there is the open question of how, if at all, the FTAIA would apply to state antitrust laws (including many that track the original language of the Sherman Act (before the FTAIA was enacted in 1982)), including those permitting indirect purchaser relief?

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All of these uncertainties compound the risks that companies and individuals face when doing business internationally.

ACTIVITY IN THE EUROPEAN UNION

More robust, more harmonized antitrust enforcement — public and private — is gaining momentum in the EU. First, EU legislation (known as a "directive") requires that all EU member states implement national laws by Dec. 27 to facilitate damage actions for injuries caused by violations of EU antitrust laws (e.g., cartels and abuses of dominant positions).

This directive requires steps to harmonize and liberalize current national rules on damage actions, particularly with regard to the following:

- Discovery of evidence (possible court orders requiring production of relevant evidence to prove a claim or establish a defense).
- Statutes of limitations (at least five years from discovery of injury due to the violation).
- Measure of damages (full compensation, possible passing-on defense, rebuttable presumption of injury in cartel cases but no punitive (i.e., U.S.-style treble damages)).
- Joint and several liability (possible contribution).
- Use of prior EU Commission or member state final infringement decision as conclusive proof of violation (final infringement decision in one member state has presumptive effect in another member state).

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In addition, on Aug. 3, 2015, the EU Commission adopted changes to its procedures to align these commission rules with the EU damage directive. These changes relate to access to evidence in the commission's case file as well as the efficacy of the commission's leniency program and settlement procedures.

Parallel efforts to establish an EU-wide system of "collective redress" continue. The EU Court of Justice has expanded the scope of recoverable damages. Progress continues to be made. These continuing developments reflect the increasing priority to redress the perceived ongoing failure of the EU member states to protect those injured by antitrust violations.

However, while there will likely be additional exposure to damages actions for violations of European competition laws, there remain, among other things, major national differences on procedural rules. Even in jurisdictions, like the United Kingdom, that are relatively favorably disposed toward private damage actions (including collective redress) for persons injured by antitrust violations, there remain a number of formidable obstacles or disincentives (e.g., single damage cap, access to evidence and loser pays) to broad-scale use of the private redress systems.

Moreover, there is a current ongoing consultation to further modernize and improve EU and member state antitrust enforcement that began more than 10 years ago with the adoption of EU Regulation 1/2003.[11] The commission and EU member states are now studying areas where antitrust enforcement could be improved to reduce differences in national procedures and sanctions, to promote more effective enforcement tools (fines and leniency), and to assure adequate resources.

The foregoing developments make it clear that antitrust will be a critical white collar issue in 2016 — and likely for many years to come.

NOTES

[1] *See* Criminal Enforcement Trends Charts Through Fiscal Year 2015, https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

[2] *See* Press Release, SEC, Former President of Auto Parts Company Pleads Guilty to Participating in Body Sealing Products Bid-Rigging Conspiracy (Apr. 20, 2016), https://www.justice.gov/opa/pr/former-president-auto-parts-company-pleads-guilty-participating-body-sealing-products-bid.

[3] *See* Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S Dep't of Justice, Speech at the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy, Criminal Enforcement of the Antitrust Laws: The U.S. Model (Sept. 14, 2006), www.justice.gov/atr/speeech/criminal-enforcement-antitrust-laws-us-model; *Status Report: Corporate Leniency Program,* U.S. DEP'T OF JUST. (June 25, 2015), www.justice.gov/atr/status-report-corporate-leniency-program.

[4] *Id.*

[5] *See* Brent Snyder, Deputy Assistant Attorney Gen., U.S Dep't of Justice, Remarks at the Yale Global Antitrust Enforcement Conference
(Feb. 19, 2016), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust.

[6] The directives in the Yates memo have been incorporated into a revised U.S. Attorneys' Manual. The manual has a new section titled "Focus on individual wrongdoers" and takes a very aggressive approach to attorney-client privilege issues.

[7] *See* William J. Baer, Assistant Attorney Gen., Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium (Sept. 10, 2014), https://www.justice.gov/atr/file/517741/download.

[8] Import commerce has been and would presumably always be subject to U.S. antitrust laws because of the requisite effects on domestic competition.

[9] *F. Hoffman-LaRoche Ltd. v. Empagran SA,* 542 U.S. 155, 162 (2004).

[10] *Lotes v. Hon Hai Indus.,* 753 F.3d 395 (2d Cir. 2014); *United States v. Hsiung,* 758 F.3d 1074 (9th Cir. 2014), *amended and superseded by United States v. Hsiung,* 778 F.3d 738 (9th Cir. 2015); *Motorola Mobility v. AU Optronics,* 775 F.3d 816 (7th Cir. 2015); *Animal Sci. Prods v. China Minmetals Corp.,* 654 F.3d 462 (3d Cir. 2013).

[11] OJ L 1, 04.01.2003, at 1-25.

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