PROGRAM MATERIALS
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February 27, 2019

Cartel Enforcement: What You Don't Know Could Cost You—So Listen in and Know It

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 180, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

Cartel Enforcement
What You Don't Know Could Cost You

Robert E. Connolly

www.reconnollylaw.com
Connolly's Cartel Capers Blog
215-219-4418

February 27, 2019

Robert E. Connolly

- Started in DOJ in 1980 as a trial lawyer
- Appointed Chief of Antitrust Division Regional Office in 1994
- Extensive Experience
  - International Price Fixing Cartels
  - Perjury/False Statement Prosecutions
  - Numerous Jury Trials
  - Obtained Extradition of British Executive
  - Joint investigations with FBI and numerous federal investigative agencies
- Entered private practice in 2013
  - Has represented individuals in price fixing grand jury investigations.

Purpose/Limitations of Program

- The presentation is not capable of making anyone an expert in 60 minutes
- The presentation should impart enough knowledge to give you reason to pause when heading into a potential danger area.
- When you have that feeling that maybe you should consult with legal counsel; walk away and consult with legal counsel.
- If you have the authority to train staff/employees you have a business and ethical duty to do so.
- “Everybody is doing it” is not a defense. In some industries collusion has become a “way of life.” Don’t be fooled; you can get caught and go to jail.

The Sherman Act

- Section 1 of the Sherman Act (15 U.S.C. § 1) prohibits any agreement among competitors that unreasonably limits competition. Section 1 reads: “Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .”
- Price fixing, bid rigging, and market allocation are violations of Section 1 and are prosecuted criminally.

Sherman Act

- Prohibits unreasonable restraints of trade.
- Mergers that lead to undue concentration—higher prices.
- But cartels (price-fixing/bidding rigging) are always a priority for the Department of Justice, Antitrust Division.
- Cartel grand jury investigations are often conducted with the assistance of the FBI.

AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL

- Price-fixing, bid-rigging, and market allocation agreements are economic crimes with potentially devastating effects on the U.S. economy. They rob purchasers, hurt workers, contribute to inflation, destroy public confidence in the economy, and undermine our system of free market competition. Deterring, detecting, and successfully prosecuting these offenses is therefore a crucial part of the Antitrust Division's mission.
- Robust cartel enforcement has been a priority of every administration; Republican or Democrat.

Criminal Violations (Per Se)

- Cartels
  - Basically secret agreements to restrict/eliminate competition between competitors. Such agreements have been shown to defraud consumers and unquestionably raise prices or restrict output without creating any plausible offsetting benefit to consumers.
  - Referred to as per se violations—there are no excuses or defenses. In a case alleging a price-fixing, bid-rigging, or market allocation agreement, it is not a defense that the challenged conduct was necessary to avoid cutthroat competition, or that it actually stimulated competition, or that it resulted in reasonable prices.
  - Price-Fixing; Bid Rigging Broadly Defined

    It’s fraud—a secret agreement to limit competition among vendors/bidders while deceiving the customer into believing there is competition.

Some Examples: Price Fixing

- Price Fixing
  - Agreeing on a price
    - Can be a range; a percent. Prices do not have to be identical. Sometimes there is a price difference due to quality differences between/among competitors. But, if the price was agreed to—it is fixed and illegal.
  - It is price fixing if there is an agreement to limit discounts.
  - The most effective way to fix prices is to agree to limit supply. This is price fixing.
  - While the form of the agreement can vary; an agreement to eliminate or suppress competition can be price fixing.

Other Variations on Price Fixing (Per Se)

- **Market Allocation**. Agreements among competitors about where to sell, what products to sell, and whom to sell to (dividing customers or geographic regions.

    United States v. Topco Assocs., Inc., 405 U.S. 596 (1972)

- **Group Boycott.** Agreements to not deal with potential customers, or to jointly insist upon certain terms.

Bid Rigging

- Agreements among competitors ahead of bid as to who will win
  - In bid rigging there is an agreement about who will be the low bidder and losing bids are intentionally higher (called complementary bids). Complementary bids are submitted, not to win, but to create the appearance of competition.

- Agreements Not to bid. Usually complementary bids are submitted, but agreeing not to bid is also collusion.

- Agreeing to Withdraw Bid. On occasion the low bidder will withdraw the bid so another bidder will get the work at a higher price.

- The winning bidder generally has to pay off the losing bidder in some form: (allowed to win future contracts; loser(s) receive inflated subcontracts; or just a cash payoff.

Agreement Is Key

- The agreement is the essence of a Section 1 violation. To prove an agreement, we must establish a meeting of the minds or mutual understanding between two or more independent business entities or individuals. The agreement can be established by direct evidence (*e.g.*, co-conspirator testimony that the defendant agreed to fix prices) or circumstantial evidence (*e.g.*, bids that establish a pattern of business being rotated among competitors).

- A decision on how to price, whether to bid or at what price is OK, as long as the decision is made independently.

Evidence of a "Conspiracy" Under Section 1

- Contract
- Direct Evidence
- Circumstantial Evidence
  - Circumstances must reveal "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement" 328 U.S. 781, 810 (1946)
  - When circumstantial evidence is used, there must be some evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. *Monsanto Co. v. Spray-Rite Service Corp*., 465 U.S. 752, 764 (1984)
- Parallel pricing plus "plus factors"
- Price signaling / information exchanges.
- Discussing prices/bids with competitors is dangerous because an agreement may be inferred—even if one was not reached.

Recap on Criminal Price Fixing/Bid Rigging

- Per se Offenses—No excuses; government need only prove that there was an agreement.
- Government (or private plaintiffs) do not need to prove that it worked or prices increased.
- Doesn’t not matter if it was a failing industry.
- ”The agreement is the crime.”
- Circumstantial evidence (course of conduct) may be sufficient proof.
- Criminal cases require government to prove agreement “beyond a reasonable doubt.” Civils cases “more probable than not.”

Some Examples—International Price Fixing Cartel: Liquid Crystal Display Conspiracies

An investigation by the Antitrust Division and the Federal Bureau of Investigation revealed an international conspiracy to fix the prices of liquid crystal display (LCD) panels—a product used in computers, cell phones, and other household electronics. Taiwan and Korean LCD companies held secret "Crystal Meetings," occurring at rotating hotels to avoid detection, at which the conspirators systematically fixed the prices of LCD panels used for many electronics products. The LCD prosecutions led to criminal fines totaling more than $1.39 billion and charges against 22 executives, 13 of whom pleaded guilty or were convicted at trial; seven remain fugitives.

Source: **AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL, US Dept of Justice, Antitrust Division**

Small Commerce Price Fixing: Former E-Commerce Executive Pleads Guilty to Price Fixing; Sentenced to Six Months

- Daniel William Aston, a former e-commerce executive, pleaded guilty on Jan. 17, 2019 for conspiring to fix the prices of posters sold online. Aston, a resident and citizen of the United Kingdom, was indicted by a federal grand jury in the Northern District of California on Aug. 27, 2015. Aston was a fugitive until his arrest in Spain in May 2018. After his arrest, he spent over five months in Spanish custody before agreeing to submit to U.S. jurisdiction and answer to price-fixing charges.
- Aston is the former Director and part owner of Trod Limited (doing business as Buy 4 Less, Buy For Less, and Buy-For-Less-Online), a U.K. company headquartered in Birmingham, England, which was also charged in the indictment. Trod Ltd. pleaded guilty to the price-fixing charges on Aug. 11, 2016. Aston admitted to fixing the price of certain posters sold in the United States on Amazon Marketplace from as early as September 2013 to approximately January 2014. Following his guilty plea, Aston was sentenced to serve a custodial sentence of six months, with credit for the time he served in Spanish custody. Aston will serve the remainder of his custodial sentence under supervised release.
- Source: DOJ Press Release Monday, January 28, 2019

Bid Rigging: Local Real Estate Foreclosure and Tax Liens Auctions

- Since 2010, the Antitrust Division and FBI have partnered to combat a pattern of collusive and fraudulent schemes among real estate speculators aimed at eliminating competition at real estate foreclosure auctions all across the country. Instead of competitively bidding at public auctions for foreclosed properties, groups of real estate speculators worked together to keep public auction prices artificially low by paying each other to refrain from bidding against one another, or holding unofficial "knockoff" auctions among themselves and paying each other money that should have gone to those with an interest in foreclosed property—such as homeowners and banks.
- To date, more than 130 individuals and several companies have been prosecuted for participating in bid-rigging and fraud conspiracies targeting foreclosure auctions in California, Georgia, Alabama and North Carolina. The Division and the FBI continue to investigate this anticompetitive conduct at auctions around the country.

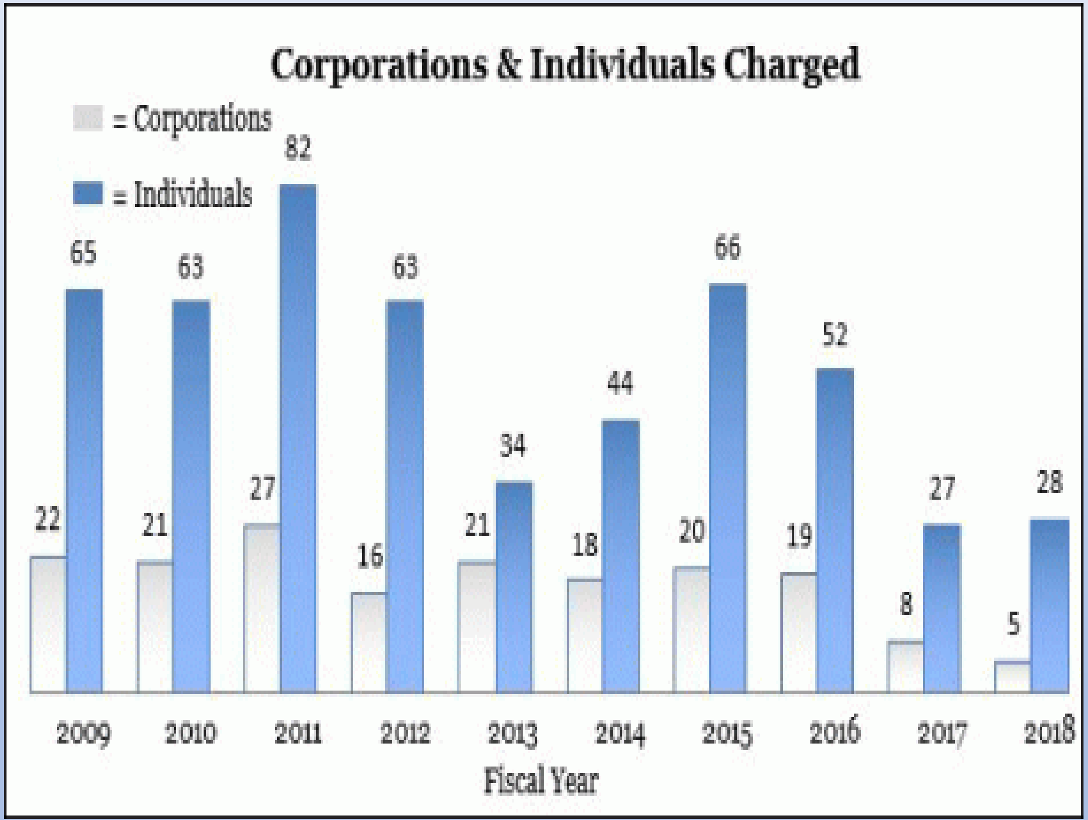
- Source: **AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL, US Dept of Justice, Antitrust Division , September 2018**

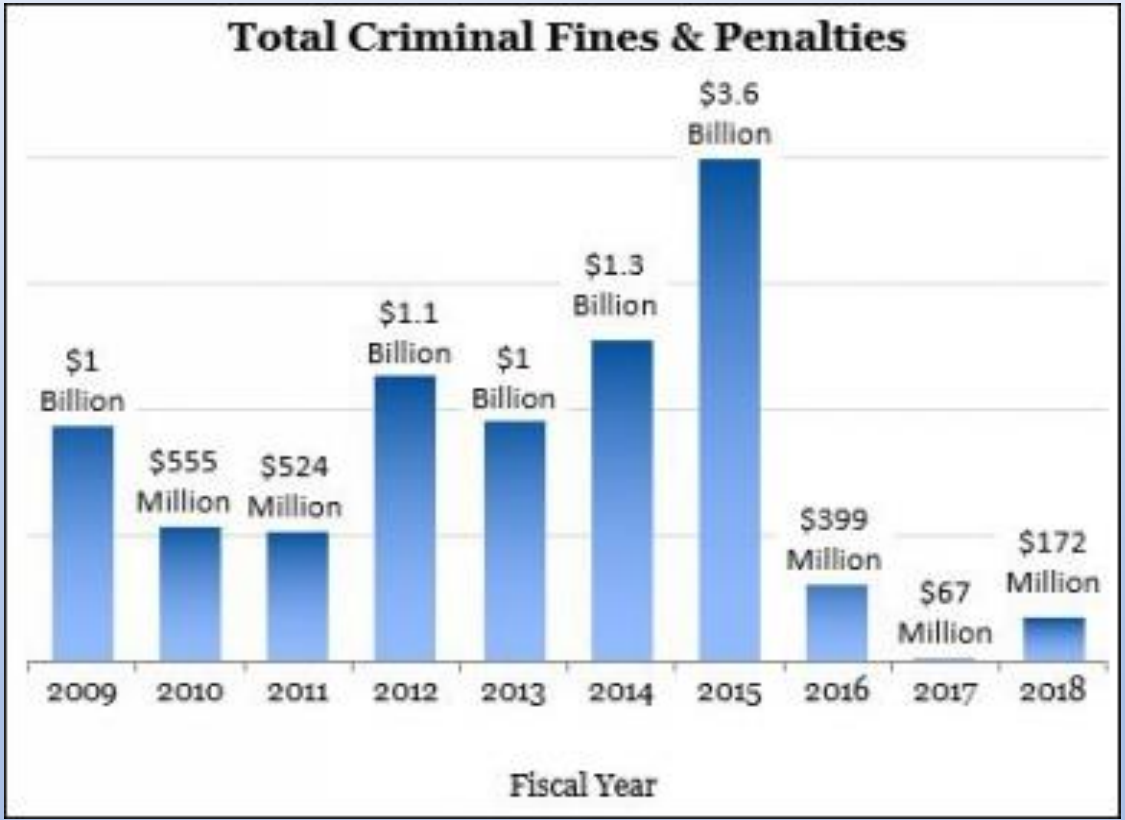
Criminal Penalties for Price Fixing/Bid Rigging

- Up to 10 years in prison for individuals, possible substantial fines as well.
- Fines up to $100 million but in certain circumstances fines can be, and have been, much higher.
- Sentencing governed by United States Sentencing Guidelines.
- Credit given for “substantial assistance.” The earlier to cooperate, the greater the credit.
- Some credit possibly given to corporations for competition compliance programs. Must be robust.

CRIMINAL ENFORCEMENT TRENDS CHARTS

HTTPS://WWW.JUSTICE.GOV/ATR/CRIMINAL-ENFORCEMENT-FINE-AND-JAIL-CHARTS





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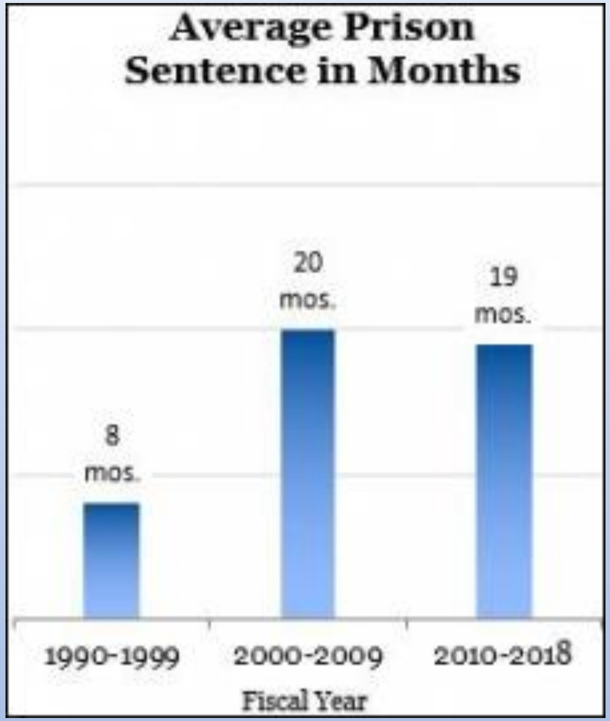


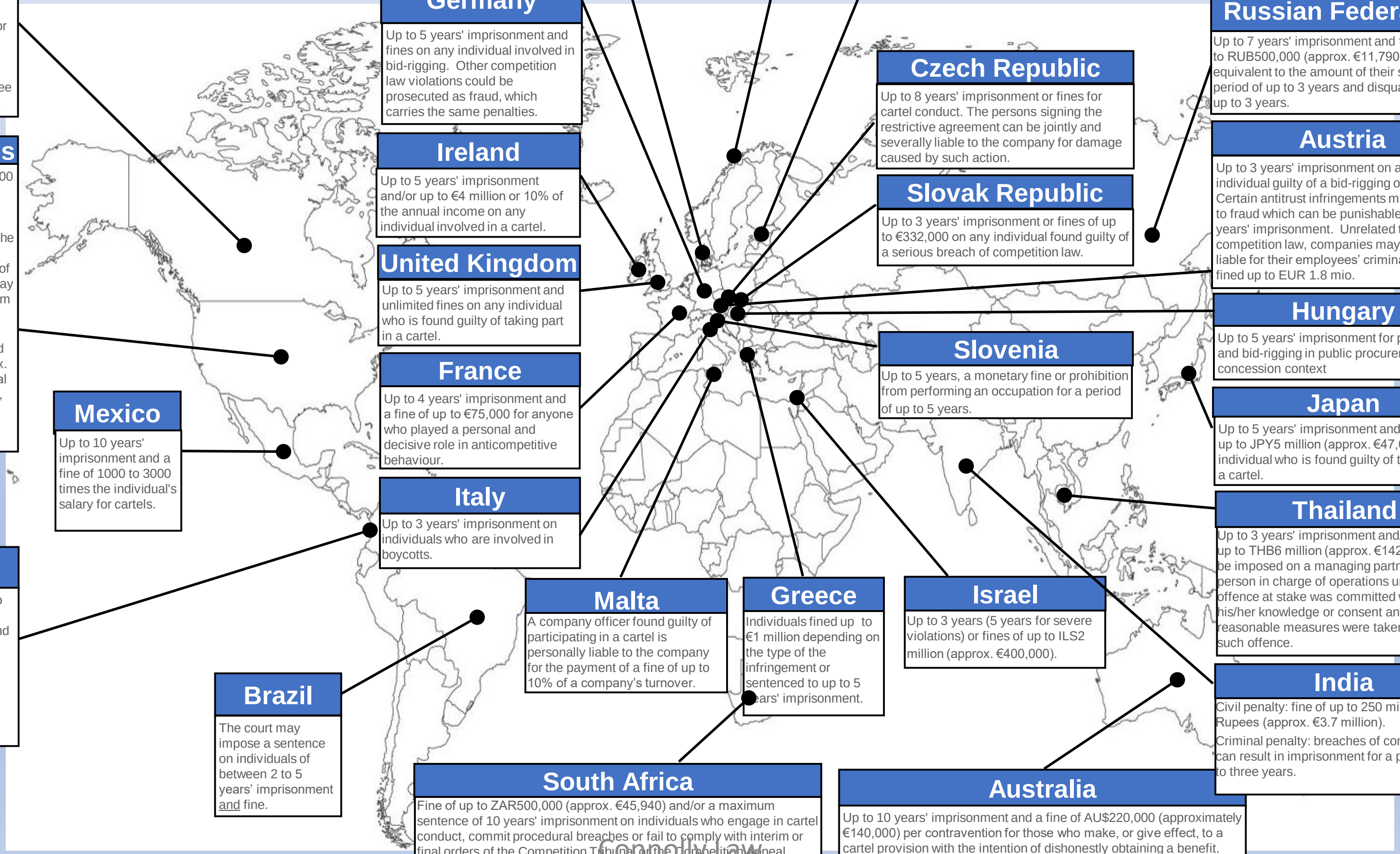
US Cartel Statistics – Ten Highest Fines by Company

Defendant (FY)	Product	Fine ($ Millions)	Geographic Scope	Country
AU Optronics Corporation of Taiwan (2012)	Liquid Crystal Display (LCD) Panels	$500	International	Taiwan
F. Hoffmann-La Roche, Ltd. (1999)	Vitamins	$500	International	Switzerland
Yazaki Corporation (2012)	Automobile Parts	$470	International	Japan
Bridgestone Corporation (2014)	Anti-vibration rubber products for automobiles	$425	International	Japan
LG Display Co., Ltd LG Display America (2009)	Liquid Crystal Display (LCD) Panels	$400	International	Korea
Société Air France and Koninklijke Luchtvaart Maatschappij, N.V. (2008)	Air Transportation (Cargo)	$350	International	France (Société-Air France) The Netherlands (KLM)
Korean Air Lines Co., Ltd. (2007)	Air Transportation (Cargo & Passenger)	$300	International	Korea
British Airways PLC (2007)	Air Transportation (Cargo & Passenger)	$300	International	UK
Samsung Electronics Company, Ltd. Samsung Semiconductor, Inc. (2006)	DRAM	$300	International	Korea
BASF AG (1999)	Vitamins	$225	International	Germany

Capacitor Investigation: Corporate Fines (recent international cartel investigation)

- Nippon Chemi-Con: $60 million
- Nichicon: $54.6 million (originally agreed to pay $42 million)
- NEC TOKIN: $13.8 million
- Rubycon: $12 million
- Matsuo Electric: $4.17 million
- Hitachi Chemical: $3.8 million
- Elna: $3.8 million
- Holy Stone: $600,000

Growing Number of Countries With Criminal Sanctions



Canada
Companies: Cartel offences attract criminal fines of up to CDN$25 million (approx. €18.3 million).

Individuals: Up to 14 years' imprisonment and/or a fine of up to CDN$25 million (approx. €18.3 million) on an individual director, officer or employee found guilty of conspiracy.

United States
Companies: Up to US$100 million (approx. €72.7 million), or alternatively twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime. Corporations may also be sentenced to a term of probation of up to 5 years.

Individuals: May be fined up to US$1 million (approx. €727,000) or twice the total gain or twice the total loss, and sentenced to a maximum of 10 years in prison on each count.

Mexico
Up to 10 years' imprisonment and a fine of 1000 to 3000 times the individual's salary for cartels.

Colombia
Up to 12 years, fines up to 1000 Minimum Monthly Wage (US$315 million) and inability to contract with state agencies on any individual involved in bid rigging. Bid rigging is the only antitrust violations criminally sanction in Colombia.

Brazil
The court may impose a sentence on individuals of between 2 to 5 years' imprisonment and fine.

Denmark
Unlimited fines on individuals involved in anti-competitive conduct.

Norway
Up to 6 years' imprisonment or fines.

Estonia
Up to 3 years' imprisonment and/or a fine on any member of the management board of a company found guilty of breaching competition law.

Germany
Up to 5 years' imprisonment and fines on any individual involved in bid-rigging. Other competition law violations could be prosecuted as fraud, which carries the same penalties.

Ireland
Up to 5 years' imprisonment and/or up to €4 million or 10% of the annual income on any individual involved in a cartel.

United Kingdom
Up to 5 years' imprisonment and unlimited fines on any individual who is found guilty of taking part in a cartel.

France
Up to 4 years' imprisonment and a fine of up to €75,000 for anyone who played a personal and decisive role in anticompetitive behaviour.

Italy
Up to 3 years' imprisonment on individuals who are involved in boycotts.

Malta
A company officer found guilty of participating in a cartel is personally liable to the company for the payment of a fine of up to 10% of a company's turnover.

Greece
Individuals fined up to €1 million depending on the type of the infringement or sentenced to up to 5 years' imprisonment.

Israel
Up to 3 years (5 years for severe violations) or fines of up to ILS2 million (approx. €400,000).

South Africa
Fine of up to ZAR500,000 (approx. €45,940) and/or a maximum sentence of 10 years' imprisonment on individuals who engage in cartel conduct, commit procedural breaches or fail to comply with interim or final orders of the Competition Tribunal or the Competition Appeal Court.

Czech Republic
Up to 8 years' imprisonment or fines for cartel conduct. The persons signing the restrictive agreement can be jointly and severally liable to the company for damage caused by such action.

Slovak Republic
Up to 3 years' imprisonment or fines of up to €332,000 on any individual found guilty of a serious breach of competition law.

Slovenia
Up to 5 years, a monetary fine or prohibition from performing an occupation for a period of up to 5 years.

Russian Federation
Up to 7 years' imprisonment and fines of up to RUB500,000 (approx. €11,790) or fines equivalent to the amount of their salary for a period of up to 3 years and disqualification of up to 3 years.

Austria
Up to 3 years' imprisonment on any individual guilty of a bid-rigging offence. Certain antitrust infringements may amount to fraud which can be punishable by up to 10 years' imprisonment. Unrelated to competition law, companies may be held liable for their employees' criminal acts and fined up to EUR 1.8 mio.

Hungary
Up to 5 years' imprisonment for price-fixing and bid-rigging in public procurement or concession context

Japan
Up to 5 years' imprisonment and/or a fine of up to JPY5 million (approx. €47,000) on any individual who is found guilty of taking part in a cartel.

Thailand
Up to 3 years' imprisonment and/or a fine of up to THB6 million (approx. €142,000) may be imposed on a managing partner or a person in charge of operations unless the offence at stake was committed without his/her knowledge or consent and/or reasonable measures were taken to prevent such offence.

India
Civil penalty: fine of up to 250 million Indian Rupees (approx. €3.7 million).

Criminal penalty: breaches of competition law can result in imprisonment for a period of up to three years.

Australia
Up to 10 years' imprisonment and a fine of AU$220,000 (approximately €140,000) per contravention for those who make, or give effect, to a cartel provision with the intention of dishonestly obtaining a benefit.

AS OF: 27 January 2014

EU truck makers fined $3.2 billion over price collusion (No Criminal Penalties but Huge Fines)

BRUSSELS/PARIS - EU regulators imposed a record fine of 2.9 billion euros ($3.2 billion) against Europe's biggest truckmakers on Tuesday for colluding over 14 years to fix prices and delay adoption of cleaner engine emissions technology.

The collusion, initiated by senior executives meeting at hotels and trade shows, was later delegated down the chain of command to be "organized at a lower level by the truck producers' subsidiaries in Germany", the European Commission, the EU's executive body, said after a five-year investigation.

Reuters, July 19, 2016, https://www.reuters.com/article/us-eu-cartel-truckmakers/eu-truckmakers-fined-3-2-billion-over-price-collusion-idUSKCN0ZZ13K.

EU does not have criminal penalties but many member states do.

Not Per Se Violations

- Joint Ventures Distinguished
  - Open; known to customer; procompetitive efficiencies. The Court distinguished a secret agreement from a known joint venture, where “[t]he public may obtain at least the benefit of the joint responsibility. . . . The public agents know then all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid.”
  - McMullen v. Hoffman 174 U.S. 639, 652 (1899)

- Trade Associations Distinguished—Obviously legal to belong to a trade association. There are many pro competitive benefits.
  - But, can be used as cover for cartel; sham agendas; side meetings dangerous.

Some Cautions Around Trade Associations

- Counsel should be present at all meetings.
- Written agenda should be prepared, approved in advance, and followed.
- No agreement (express or implied) that limits each member's right to make independent decisions.
- If there is any inappropriate discussion, announce you are leaving and walk out.
- Be careful what you say at social gatherings.

Distinguishing horizontal (per se) from vertical agreements (rule of reason—not criminal)

- Horizontal agreement – agreement among firms at the same level of production to restrict competition (competitors or potential competitors).

- Vertical agreement – agreement among firms at different levels of production (manufacturer and wholesaler / wholesaler and retailer). Example: Apple sells phones/computers in Best Buy—vertical agreement.

Key Points on Avoiding Criminal Offenses

- Extreme Caution if Talking to a Competitor About Price/Markets
  - Off hand comments (“we have to do something about the market;” “you’re killing the market”) RED FLAGS

- Where Discussion Necessary e.g. Buy/Sell
  - Document the purpose of the contact; run by legal

- Trade Association: If a proper discussion veers off course; leave and document.

Labor Market Allocation ("No-Poach") and Wage Fixing

- Labor market allocation (frequently referred to as "no-poach") and wage-fixing agreements, are per se Sherman Act violations that eliminate/suppress competition for workers. (exception if reasonably necessary for joint venture/collaboration).
- A wage-fixing agreement is an agreement between employers not to compete on employee salary, benefits, or other terms of compensation, either at specific levels or within a range. Wage- fixing is a form of price fixing for employee compensation.
- A no-poach agreement is an agreement between two or more employers—or their third-party agents or intermediaries (*e.g.*, recruiters)—not to cold-call, solicit, recruit, hire, or otherwise compete for each other's employees. These are the equivalent of market allocation agreements. No-poach agreements eliminate/reduce price competition for workers services.

What Are the Antitrust Divisions Priorities at This Time?

- Cartel enforcement is always a priority
- But, for the most part the Antitrust Division is “reactive.” The priority is whatever credible leads come in the door.
- International cartels get big headlines, large staffs and great attention.
- But, the Division will investigate any credible leads unless matter is so local its best handled by a state enforcement agency.

Recent Trends—Employee "No Poach" Agreements

- As noted in the guidance, "[I]n the past few years, the DOJ brought three civil enforcement actions against technology companies (eBay and Intuit, Lucasfilm and Pixar, and Adobe, Apple, Google, Intel, Intuit, and Pixar) that entered into "no poach" agreements with competitors."
- "Buyer cartels are illegal whether an enterprise is buying computers, software or the employees who create/operate them. Labor is an input and wage fixing agreements are illegal. Of course, as in purchasing other inputs, there may be legitimate pro-competitive joint ventures efforts with an ancillary agreement on labor. But, the cases the DOJ was bringing, were by the express terms of the Complaints, *per se* violations."
- See http://cartelcapers.com/blog/doj-ftc-release-guidance-antitrust-law-employee-hiring-compensation/

Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements

- Beginning no later than 2006, Apple and Google executives agreed not to cold call each other's employees. Apple placed Google on its internal "Do Not Call List," which instructed employees not to directly solicit employees from the listed companies. Similarly, Google listed Apple among the companies that had special agreements with Google and were part of the "Do Not Cold Call" list;
- Beginning no later than May 2005, senior Apple and Adobe executives agreed not to cold call each other's employees. Apple placed Adobe on its internal "Do Not Call List" and similarly, Adobe included Apple in its internal list of "Companies that are off limits";
- Beginning no later than April 2007, Apple and Pixar executives agreed not to cold call each other's employees. Apple placed Pixar on its internal "Do Not Call List" and senior executives at Pixar instructed human resources personnel to adhere to the agreement and maintain a paper trail; and
- In June 2007, Google and Intuit executives agreed that Google would not cold call any Intuit employee. In its hiring policies and protocol manual, Google also listed Intuit among the companies that have special agreements with Google and are part of the "Do Not Cold Call" list.
- https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee

“No-Poach” Investigations: A Current Priority

- DOJ continues to investigate potential antitrust violations involving “no-poach” agreements.
- This investigation relates to agreements between companies not to recruit each other’s employees.
- Guidance provided by the DOJ and FTC in 2016 made clear that the agencies intend to treat such agreements as unlawful collusion unless they are ancillary to a legitimate agreement.
- DOJ has said that it will prosecute no-poach cases criminally where appropriate, and has indicated that it has several active no-poach cases, including some potential criminal cases.

DOJ/ FTC Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation

- Today, [October 2016] the Justice Department's Antitrust Division and the Federal Trade Commission issued guidance for human resource (HR) professionals and others who are involved in hiring and compensation decisions. HR professionals are often in the best position to ensure their companies' hiring practices comply with the law and this guidance will help educate and inform them about how the antitrust laws apply to the employment arena.
- Workers are entitled to the benefits of a competitive market for their services. They are harmed if companies that would ordinarily compete against each other to recruit and retain employees agree to fix wages or other terms of employment or enter into so-called "no-poaching" agreements by agreeing not to recruit each other's employees.
- Going forward, the Justice Department intends to criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers. These types of agreements eliminate competition in the same irredeemable way as agreements to fix the prices of goods or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct. Agreements that do not constitute criminal violations may still lead to civil liability under statutes enforced by both agencies.
- Source: https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals

THE ANTITRUST DIVISION CONTINUES TO INVESTIGATE AND PROSECUTE "NO-POACH" AND WAGE-FIXING AGREEMENTS

- When companies agree not to hire or recruit one another's employees, they are agreeing not to compete for those employees' labor. [W]orkers, like consumers, are entitled to the benefits of a competitive market. Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment.
- A no-poach agreement involves an agreement with another company not to compete for each other's employees, such as by not soliciting or hiring them. A wage-fixing agreement involves an agreement with another company regarding employees' salary or other terms of compensation, either at a specific level or within a range.
- No-poach agreements are naked if they are not reasonably necessary to any separate, legitimate business collaboration between the employers. Naked no-poach and wage-fixing agreements are per se unlawful because they eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers.
- Source: https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements

No-Poach Agreements (cont.)

- AAG Makan Delrahim has testified before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights. Delrahim discussed the ongoing scrutiny of no-poach agreements, assuring the American public that "the Antitrust Division is looking out for their salaries, as well."
- The Division has "put employers on notice" [with joint FTC guidelines] that no-poach agreements "are per se violations of the Sherman Act when they are not ancillary to legitimate collaborations."
- Delrahim advised that "[d]efendants should anticipate potential criminal enforcement actions for any such naked no-poach agreements we uncover that post-date our October 2016 guidance."

“No-Poach” Investigations (Non-Criminal)

- State Attorney’s General have brought many “franchise” no poach cases.
- Basically, as part of a franchisor/franchisee agreement the franchise agree not to hire employees of other franchisees of the same franchisors. (i.e. Agreements between Jimmy Johns and its franchisees.)
- To avoid such a lawsuit, many chains have recently agreed to eliminate use of non-poach agreements nationwide.
- Private Class Actions have been brought.

“No-Poach” Investigations

- Attorneys General in 11 states and DC have opened investigations into the use of no-poach agreements by national fast-food chains.
  - The states include Washington, California, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, and Rhode Island, as well as the District of Columbia.
- In July, seven chains (with more than 25,000 locations across the country) agreed to stop using no-poach clauses in their franchise agreements.
- On August 20, 2018 it was announced that eight more chains had agreed to stop the practice.

Are Antitrust Compliance Programs a Good Investment?

ABSOLUTELY!!!!

- To comply with the law
- Builds stakeholder confidence
- Build company reputation for compliance
- Prevent disastrous violation from occurring
  - Potential enormous criminal/civil fines in multiple jurisdictions
  - Employee jail time
  - Customer class action lawsuits
  - Shareholder class action lawsuits
  - Potential debarment from government contracts
  - Enormous brand/company reputational damage
- Increase chance of detection and qualifying for leniency
- Cost of failure heavily outweighs the cost of compliance

Why Compliance Training?

- Sales and marketing personnel, from the C-Suite to the sales force should have an awareness that things they write and say, (e-mails, social media, instant messages, and even digital voice mails) might end up in the hands of a litigious competitor/customer or the government. A single casual remark or careless statement can lead to costly explaining/backpedaling in an investigation or lawsuit.
- No compliance program can guarantee to eliminate all possible violations, but if one occurs, having a compliance program can mitigate damages.

Antitrust compliance

“A corporate compliance program generally will not protect a company from prosecution and certainly will not protect it from potentially devastating treble damage liability. Therefore, every company’s first objective in its compliance program should be to prevent wrongdoing.”

William J. Kolasky
Former Deputy Assistant Attorney General
DOJ Antitrust Division

Senior Executives Need Training: Steve Jobs Clip Admitted at Trial

- The video shows Steve Jobs after the original iPad's 2010 keynote, which introduced the iBookstore. A reporter asks Jobs:

- Why anyone would pay $14.99 for the same eBook they can buy for $9.99 from Amazon.
- Steve Jobs' response? "Well, that won't be the case."
- Reporter tries to clarify: "Meaning you won't be $14.99, or they won't be $9.99?
- Jobs: "The prices will be the same."
- Read more: http://www.businessinsider.com/apple-price-fixing-trial-jobs-video-2013-7#ixzz3gYPiJh00

Staff Needs Training: Text Messaging Case

"at the end of the day we know there is no higher cost associated with messaging. The move [the latest price increase by T-Mobile] was colusive [sic] and opportunistic."

"Gotta tell you but my gut says raising messaging pricing again nothing more than a price gouge on consumers. It's not like we've had an increase in the cost to carry message to justify this or a drop in our subscription SOC rates? I know the other guys are doing it but that doesn't mean we have to follow."

Critical Initial Steps for a Compliance Program

1. Secure management buy-in and support
   - Message that company abides by the antitrust laws must come from the top
   - Critical to secure necessary resources
2. Assess risk
3. Consider guidance from enforcers
4. Think globally
   - Some jurisdictions interpret antitrust laws to reach conduct occurring anywhere in the world
   - Most laws based on same principles but important differences in specific prohibitions and enforcement tools and priorities
   - Trend toward issuing single policy, potentially with separate guidelines for different jurisdictions

A Compliance Program Needs An Effective Monitoring Structure

- Designated employee responsible for antitrust compliance who reports to the board
  - Familiarity with industry in which company operates
  - Regular engagement with business leaders and senior management
- Specific guidelines on what should be reported
- Reporting procedures
  - In-person and confidential form/hotline
  - Prompt and thorough follow up is critical
  - Consider in-house leniency system?

Highlights of an Effective Overall Compliance Program

- // High Level Commitment or Tone at the Top
- // Code of Conduct
- // Oversight & Autonomy by Compliance Staff
- // Adequate Global Compliance Resources
- // Specific Policies and Procedures
- // Comprehensive Internal Audits – Rotational and Proactive
- // Robust Internal Controls
- // Risk Assessment Processes
- // Regular Training and Guidance
- // Internal Hotline
- // Internal Investigation Processes
- // Incentives and Discipline
- // Third Party Due Diligence
- // Well Defined M&A Due Diligence Procedures
- // Timely Integration of Newly Acquired Entities

Effective compliance programs must be tailored to the company's specific business and risks and be dynamic to evolve with the business and its risks.

Assessing Cartel Risks--Business and Industry Risk Assessment

Proper <u>regulatory</u> risk assessment - Know your company, industry, and jurisdiction(s)

- How much cartel risk do you have?
  - Commodity product?
  - Number of players in your industry?
  - Opportunity? (Conferences, Trade Associations, etc.)
    - Very Important to get a handle on your trade associations!
    - Due Diligence
    - Risk Analysis
  - Bids/Tenders?
- Non- cartel risk?
  - Monopolization risks? Market power very much a jurisdictional risk
  - Vertical price/nonprice restraints risk?

Antitrust Division’s Evolving Views

- The Antitrust Division previously argued that if a company had an effective, preexisting compliance program, then the compliance program would have prevented the wrongdoing or detected the violation, which would allow the company to self-report the conduct and receive leniency under the Antitrust Division’s Corporate Leniency Policy (under which a corporation receives non-prosecution protection).
- Four years ago, the Antitrust Division began to take compliance programs into consideration when determining corporate fines. At that time, the Antitrust Division announced that it would, under certain circumstances, credit companies that proactively adopted or strengthened compliance programs after coming under investigation.
- On Sept 16, 2015, The Antitrust Division announced that Kayaba Industry Co. Ltd., dba KYB Corporation (KYB) had agreed to plead guilty and to pay a $62 million criminal fine for its role in a conspiracy to fix the price of shock absorbers installed in cars and motorcycles sold to U.S. consumers. The plea agreement indicated that KYB would receive credit for instituting an effective compliance program going forward.

Antitrust Division's Evolving Views (cont.)

- The first thing to note is that the government praised KYB's cooperation, noting that it cooperated early, the CEO ordered a complete and timely internal investigation, and the company has made employees and documents available that were outside the US. I would say that early and complete cooperation is probably the most important factor in convincing the government that there has been a change in culture. But, in the past, that alone would not earn a company any credit for a compliance program. In its sentencing memorandum, the Division said this about KYB's compliance efforts:
- "KYB's compliance policy has the hallmarks of an effective compliance policy including direction from top management at the company, training, anonymous reporting, proactive monitoring and auditing, and provided for discipline of employees who violated the policy." Case: 1:15-cr-00098-MRB Doc #: 21 Filed: 10/05/15.
- See http://cartelcapers.com/blog/antitrust-division-provides-guidance-for-an-effective-compliance-program/

Antitrust Division's Recent Comments on Compliance Programs

- "More recently, Judge Ginsburg has also given our criminal program at the Antitrust Division something to think about by writing with Josh Wright on the topic of "Antitrust Sanctions." Judge Ginsburg and Josh point out the wisdom of considering a company's compliance programs in designing sanctions that optimally deter price-fixing and other criminal conduct by employees. They have also questioned whether the Sentencing Guidelines give enough credit to companies with effective compliance programs. We are taking this suggestion seriously as it applies to our criminal program and are considering how best to recognize corporate compliance efforts. That includes carefully examining whether and how pre-existing compliance programs might merit our consideration, whether at the charging stage or at sentencing."
- ATR Speech, Nov. 6, 2018; https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-c-finch-delivers-remarks-judge-douglas
- http://cartelcapers.com/blog/antitrust-division-recent-comments-on-compliance-programs/

United States Sentencing Guidelines: §8B2.1 - EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

- (a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (b)(1) of §8D1.4 (Recommended Conditions of Probation — Organizations), an organization shall—
- (1) exercise due diligence to prevent and detect criminal conduct; and
- (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
- Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.
- (b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:
- (1) The organization shall establish standards and procedures to prevent and detect criminal conduct.
- (2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

United States Sentencing Guidelines: §8B2.1 - EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

- (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.
- (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.
- (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.
- (4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.
- (B) The individuals referred to in subparagraph (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.
- https://guidelines.ussc.gov/gl/§8B2.1

USSG Sentencing Guidelines (cont.)

- (5) The organization shall take reasonable steps—
- (A) to ensure that the organization’s compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
- (B) to evaluate periodically the effectiveness of the organization’s compliance and ethics program; and
- (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.
- (6) The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.
- (7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization’s compliance and ethics program.
- (c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

West/Thomson Reuters--Antitrust Compliance Toolkit

- The Antitrust Compliance Toolkit provides several continuously maintained resources to guide counsel in creating, implementing, and auditing a company's antitrust compliance program. In addition to resources specifically on compliance, this Toolkit also includes resources on the substantive federal antitrust laws that are relevant to company compliance efforts and on recent government antitrust investigations.
- **See: https://content.next.westlaw.com/Document/I0f9fe7a8ef0811e28578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1**

How Do Cartel Investigations Get Started

<u>CORPORATE LENIENCY POLICY</u>

- The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. “Leniency” means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

- When a company secures corporate leniency it is not charged criminally saving potentially millions in criminal fines
- Company executives are generally covered by the leniency policy as long as they cooperate and are truthful.
- Competition agencies worldwide have adopted similar leniency/amnesty policies
- Leniency company is not protected from private treble damages suits but without a criminal conviction, they are in a better position.

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- Type A: Before An Investigation Begins
- Type B: After an Investigation Has Begun But Before Indicatable Evidence
- https://www.justice.gov/atr/corporate-leniency-policy
- Frequently Asked Questions About the Antitrust Division Corporate Leniency Policy, https://www.justice.gov/atr/page/file/926521/download.

How Do Investigations Get Started?

- ***Federal Agents Investigating Other Conduct***
- Government agents investigating other conduct—like fraud, money laundering, tax violations, or public or foreign corruption—sometimes discover evidence of price-fixing, bid-rigging, or market allocation conduct.
- Merger Review Process
  - The Antitrust Division or Federal Trade Commission may request documents during a merger review. Evidence of collusion has sometimes been found during this review.

How Do Investigations Get Started?

- Complaints From Consumers
- Information from the public is vital to the work of the Antitrust Division. Your e-mails, letters, and phone calls could be our first alert to a possible violation of antitrust laws and may provide the initial evidence needed to begin an investigation.
- To report antitrust concerns to the Antitrust Division:
- Visit the Report Violations on the Antitrust Division website:
- https://www.justice.gov/atr/report-violations

US Antitrust Criminal Investigation Process

- Antitrust Division Attorneys Investigate
  - With assistance from FBI or other investigative agencies

- Subpoenas versus Search Warrants
  - When a company is the subject of a search warrant it means there is already probable cause to believe that price fixing has occurred. The government will use subpoenas if it does not have enough evidence to obtain a search warrant.
- International Cooperation Among Competition Agencies
  - Whenever possible the US government coordinates searches worldwide with other countries to obtain evidence. These are referred to as ‘dawn raids’ in the EU. The goal is to catch the entire industry by surprise before any document destruction occurs and to try to interview witnesses before people get “lawyered up.”

Dealing With a FBI “Drop In” Interview

- **Your Option: Do Not Speak to Investigators** Without Counsel present (Be polite; ask for business card; offer to get back to agent)
- It is not a crime to decline to be interviewed.
- It is not an indication of guilt! Agents are prepared. You are not.
- There will almost always be 2 agents—and one of you.
- You may be asked details about events that happened years ago.
- An innocent mis-recollection to you may be a crime to the government.
- You can offer to be interviewed after you’ve had some time for reflection.

US Criminal Investigation Process (cont.)

- Obstruction of Justice is a Serious Offense. (Used as leverage to get cooperation)

    1) Destroying Records both inside and outside the United States. United States *v.* Norris, 719 F. Supp. 2d 557 (E.D. Pa. 2010);
    2) Making False Statements;
    3) Influencing Others to Make False Statements

- Virtually any electronic record is recoverable
    - Social Media; texts; what's app;
    - Incriminating Records may be valuable to “trade” at a later date for a favorable deal.

- **You are Not Obligated to Speak to Investigators** Without Counsel present (Be polite; ask for business card; offer to get back to agent)

The Various Forms of Obstruction of Justice

- Count II of the Indictment alleges Norris "knowingly and wilfully conspired and agreed with unnamed co-conspirators, both known and unknown to the Grand Jury, to knowingly and wilfully commit offenses against the United States, that is: (a) to corruptly persuade and attempt to corruptly persuade other persons known to the Grand Jury with intent to influence their testimony in an official proceeding; and (b) to corruptly persuade and attempt to corruptly persuade other persons known to the Grand Jury with intent to cause or induce those other persons to alter, destroy, mutilate or conceal records and documents with the intent to impair their availability for use in an official proceeding; that is, a federal grand jury sitting in the Eastern District of Pennsylvania, conducting a price-fixing investigation of the carbon products industry, contrary to Title 18, United States Code, Section 1512(b)(1) and Section 1512(b)(2)(B), respectively."
- Count III charges Defendant with witness tampering, in violation of 18 U.S.C. § 1512(b)(1). The elements of the offense are: (1) the defendant knowingly corruptly persuaded or attempted to corruptly persuade some person; (2) the defendant acted with intent to influence the testimony of that person in an official proceeding; (3) the defendant knew or should have known that the official proceeding was pending or likely to be instituted; and (4) the official proceeding was a federal proceeding.
- Count Four alleges Defendant "knowingly corruptly persuaded other persons . . . with intent to cause or induce those persons to alter, destroy, mutilate or conceal records and documents, with intent to impair their availability for use in an official proceeding, that is the federal grand jury sitting in the Eastern District of Pennsylvania investigating . . . possible federal criminal antitrust violations occurring in the carbon products industry and committed by the defendant and others.

- *US. v. Norris*, 719 F. Supp. 2d 557 (E.D. Pa. 2010) fn 1.

Organization as Client
Rule 3-600 Rules of Professional Conduct

- In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. *The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.*
- ***ABA and other state rules are similar***
- Employees should be made aware that company counsel does not represent them and the company may disclose information to the government provided by the employee.
- Failure to give employees "Upjohn" warning may lead to counsel being disqualified from representing the company. Upjohn Co. v. United States, 449 U.S. 383 (1981).

Getting Business Done During an Investigation

- By this point you MUST HAVE EXPERIENCED COUNSEL--USE THEM

- A document hold should be place immediately on all possible relevant documents
- Employees may speak with the government if they choose. Could be obstruction if they are told not to.
- Besides the government investigation, there will almost certainly be private class action suits for damages.
- Both the grand jury and the private class action cases will go on for years.

Have A Plan in Place For the “Knock at the Door”

- You learn you have a possible cartel problem. What do you do?
- You should already have your “break the glass” plan ready.
  - Speed will be of the essence in a race for amnesty
  - Don’t want to be caught flat footed
- Be on high alert if you are not the subject of a cartel investigation but the is one in a related industry.
- Amnesty “Plus” is when the Division will give a company a discount on the fine for a cartel they are caught in and “amnesty” for another cartel if they spread the investigation to another industry
- See https://www.justice.gov/atr/status-report-corporate-leniency-program for more detail.

Settle or Fight?

- Early Cooperation Rewarded
  - For both individuals and companies

- Focus is Holding Individuals Accountable with jail terms
  - This includes foreigners, including those who may never have set foot in the United States.
  - A foreigners (or fugitives' peril) :Indictment under seal; border watches; Interpol Red Notice; extradition

Settle or Fight?

- Government rewards early cooperation
  - Leniency Policy already discussed
  - Favorable Plea Agreements for Company and Individuals

"The rewards for admission into the Division's Corporate Leniency Program to the first qualifying company to come forward and report a cartel offense have been much touted. While the top prize is reserved for the amnesty applicant, a company that moves quickly to secure its place as "second in the door" and provides valuable cooperation can also reap substantial benefits. This paper discusses the rewards and incentives available for "second-in" companies that approach the Division after the opportunity for amnesty has passed."

Scott Hammond, Antitrust Division, https://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations

Settle or Fight?

- Trial Penalty
  - Companies that choose to fight will suffer severe consequences if they lose.
  - High fines without any benefit for cooperation
  - Possible Imposition of Compliance Monitor as Condition of Probation
  - A High Number of Executives Could Also be Indicted.
    - United States v. AU Optronics., Company, its subsidiary and six executives indicted, https://www.justice.gov/atr/case-document/superseding-indictment-1

The Fight Can Be Won

- But, Price Fixing Cases are Not Easy to Win So Fighting May be an Option
  - Government has to prove case beyond a reasonable doubt.
  - Government witnesses tend to have gotten good deals—impacts credibility.
  - The cases that go to trial tend to be the weakest the government has.

Forex – "The Cartel" On Trial

- Three former London-based currency traders were found not guilty on Friday of U.S. charges that they schemed to rig benchmark exchange rates, the latest verdict to emerge from a U.S. probe into the multitrillion-dollar foreign exchange market. The traders used a chatroom they dubbed "the cartel" to exchange information.
- Lawyers for the three defendants argued at the trial that there was nothing illegal about competing traders exchanging information about their positions.
- The case followed worldwide investigations that resulted in about $10 billion in fines for large banks.
- Several others have been charged in the U.S. probe, including Mark Johnson, a former head of foreign exchange cash trading at HSBC Holdings Plc, who was sentenced to two years in prison in April after being found guilty by a jury, and former Barclays trader Jason Katz, who pleaded guilty and faces sentencing next year.
- Barclays, Citigroup, JPMorgan, BNP Paribas SA, Royal Bank of Scotland Group Plc and UBS Group AG all entered related guilty pleas, and were collectively fined more than $2.8 billion.
- Source: Reuters, https://www.reuters.com/article/us-forex-trial/london-forex-traders-found-not-guilty-in-us-rigging-case-idUSKCN1N02HH October 26, 2018

Your Corporate Client as a Consumer

- Purchasing Department should also be aware of antitrust/competition laws.
- Your corporate client is entitled to an open/free market.
- Companies have remedies if they are the victim of price fixing.
- Corporations can complain to DOJ/ file treble damages suits.

Additional Resources

- USDOJ: Antitrust Division Home Page: http://www.justice.gov/atr/

- Frequently Asked Questions Regarding the Antitrust Division's Leniency Program: http://www.justice.gov/atr/public/criminal/239583.htm

- American Bar Association--Antitrust Section http://www.americanbar.org/groups/antitrust_law.html

- Cartel Capers www.cartelcapers.com