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Antitrust & Trade Regulation Report™

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Far Beyond Double Jeopardy: Global Antitrust Enforcement, Duplicative Punishments, and the Need for Effective Compliance

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The proof is in the numbers—antitrust enforcement in the United States has exploded in recent years. The Antitrust Division of the Department of Justice reported criminal fines of $1.3 billion for fiscal year 2014 and an average yield of almost $1 billion in fines from 2009 to 2014.[1] Fines resulting from the auto parts and LIBOR antitrust investigations caused fiscal year 2015 fines to more than double any of those totals, reaching an all-time high of $3.6 billion.[2] These fines rival and in some cases best fines imposed in two other key U.S. compliance areas, Foreign Corrupt Practices Act[3] and international trade sanctions.[4] Given the en-

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[1] *Criminal Enforcement: Trends Charts Through Fiscal Year 2015*, Antitrust Div., Dep't of Justice, http://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts (last updated Dec. 10, 2015).

[2] *Id.*

[3] *See* Richard L. Cassin, *The 2015 FCPA Enforcement Index*, The FCPA Blog (Jan. 4, 2016), http://www.fcpablog.com/blog/2016/1/4/the-2015-fcpa-enforcement-index.html (recounting $133 million in FCPA fines during 2015, $1.56 billion in FCPA fines during 2014, and an average yearly total of fines equaling $805 million from 2009 to 2015).

[4] *See* Justice News, Office of Public Affairs, Dep't of Justice (last visited Dec. 28, 2015), http://www.justice.gov/justice-news (showing press releases containing the search term "IEEPA"—demonstrating fines and forfeitures to the Department of Justice arising out of trade sanctions violations in excess of $9.7

 ISSN 0003-6021

forcement climate and unprecedented criminal fines, antitrust compliance should be rocketing to the top of the list of compliance priorities for businesses potentially impacted by the increased enforcement.

This point is made all the more pressing by the fact that antitrust enforcement has become a major emphasis around the world. Antitrust violations often touch multiple jurisdictions, causing multiple enforcement authorities to become involved. As Deputy Assistant Attorney General Brent Snyder recently stated in remarks at the Sixth Annual Chicago Forum on International Antitrust:

> The United States is now almost always joined in investigating and punishing international cartels by the European Commission, Japan, Brazil, Canada, Australia, and others. These jurisdictions investigate with vigor and impose tough sanctions. As a result, companies are now exposed to enormous monetary penalties around the world.[5]

Recent figures bear out DAAG Snyder's point. For example, the European Commission issued nearly €1.7 billion in fines in 2014 and nearly €1.9 billion the year prior.[6] Competition authorities from Brazil to China have stepped up enforcement as well, imposing large sanctions on cartel participants.[7]

The recent overseas enforcement trend indicates that competition law is now, more than ever, a global compliance risk. Companies operating in multiple jurisdictions face investigation and potential punishment by multiple competition authorities.

Given the surge in antitrust enforcement and the large penalties associated with violations, an essential component of any risk management program for an international business is a robust antitrust compliance program. Such programs assist companies in preventing antitrust violations altogether, thus avoiding the morass of duplicative enforcement actions from national competition authorities across the globe and follow-on private litigation in certain jurisdictions. Even if it fails to prevent a violation, an effective compliance program also has the potential to assist companies in obtaining leniency from authorities and reducing fines ultimately levied.

Multi-jurisdictional offenses and enforcement

There have been multiple, wide-ranging competition enforcement actions in recent years that have demonstrated the potential for duplicative punishments for international antitrust violations.

For example, the Air Cargo investigation—involving an alleged conspiracy among major international airlines to fix prices for air cargo rates[8]—was the subject of enforcement actions in 10 different jurisdictions: the United States, European Union, Australia, Brazil, Canada, Mexico, New Zealand, South Africa, South Korea, and Switzerland.[9] The international auto parts investigations have been pursued by no fewer than seven jurisdictions—the United States, European Union, Australia, Japan, Canada, China, and South Korea.[10]

These multi-jurisdictional investigations have serious multi-jurisdictional consequences. For example, fines arising out of the Air Cargo investigations now total roughly $2.8 billion between the United States and European Commission.[11] Other competition authorities have levied substantial fines as well, totaling over $250 million.[12] Multi-jurisdictional consequences can even extend to multiple authorities within one country. The Department of Justice recently announced that fines arising out of the LIBOR antitrust investigation have reached $9 billion, with fines coming from entities that include the Federal Reserve, the New York State Department of Financial Services, the Commodity Futures Trading Commission, the Office of the Comptroller of the Currency, and foreign authorities.[13]

These facts are illustrative of two key issues. First, a globalized economy combined with global concerns over competition issues means antitrust violations by large multinationals may occur in multiple countries,

billion during 2015, $1.7 billion in 2012, and $649 million in 2010); *Resource Center: Civil Penalties & Enforcement Information*, Office of Foreign Assets Control, Dep't of Treasury (last updated Nov. 24, 2015), https://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx (showing an average of almost $593 million in civil penalties arising out of Office of Foreign Assets Control enforcement actions from 2009 to 2015).

[5] Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Remarks at the Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), http://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

[6] *Cartel Statistics*, European Comm'n, http://ec.europa.eu/competition/cartels/statistics/statistics.pdf (last updated Oct. 21, 2015).

[7] *See* Carlos R. Rainer & Aubrey J. Stock, *Spotting issues before it's too late*, Norton Rose Fulbright (Mar. 2015), http://www.nortonrosefulbright.com/us/knowledge/publications/127163/spotting-issues-before-its-too-late (recounting that China's competition authority recently ''levied fines totaling $200 million against auto parts manufacturers'').

[8] Press Release, Dep't of Justice, Major International Airlines Agree to Plead Guilty and Pay Criminal Fines Totaling More Than $500 Million for Fixing Prices on Air Cargo Rates (June 26, 2008), http://www.justice.gov/archive/atr/public/press_releases/2008/234435.pdf.

[9] John Terzaken & Pieter Huizing, *How Much is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels*, 27-SPG Antitrust 53, 53 (Spring 2013).

[10] ABA Section of Antitrust Law, 2013 Annual Review of Antitrust Law Developments 257-60 (2014); Howard W. Fogt, *Global Auto Parts Antitrust Probe: Compliance Programs Must Be a Top Priority*, 22 No. 3 Westlaw Journal Antitrust 10, at *2 (June 13, 2014).

[11] Press Release, European Comm'n, Antitrust: Commission fines 11 air cargo carriers €799 million in price fixing cartel (Nov. 9, 2010), http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en; Antitrust Div., Dep't of Justice, *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More*, Antitrust Div., Dep't of Justice, http://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more (last updated Nov. 18, 2015).

[12] *See* Nick Taylor, et al., *Antitrust Alert: Australia Court Rejects Antitrust Challenge to Air Cargo Cartel, Finding ''No Market in Australia''*, Jones Day (Nov. 2014), http://www.jonesday.com/antitrust-alert--australia-court-rejects-antitrust-challenge-to-air-cargo-cartel-finding-no-market-in-australia-11-05-2014/.

[13] Press Release, Office of Pub. Affairs, Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.

   ISSN 0003-6021

thus arousing the interest and speculation of multiple governmental authorities.

Second, competition authorities have had limited success in coordinating punishment for competition violations, even when they have attempted to do so. For example, during prosecution of the recent Air Cargo matter, competition authorities in Europe, Australia, and the United States attempted to set fine amounts according to methods that would avoid redundant punishment of airlines for transactions that had anticompetitive effects in two jurisdictions.[14] The methods adopted were inconsistent and, in the recent words of two commentators, ''incapable of solving the underlying over-punishment issue.''[15] Even when it is reasonable for multiple countries to have a hand in punishing antitrust violations, there is still a substantial likelihood that the violations could be over-punished as a result of redundant enforcement.[16]

Effective compliance program as key protection

Adoption of an effective antitrust compliance program is a key protection against suffering the full consequences of antitrust violations. A strong compliance culture with effective compliance training and protocols can have both preventive benefits and post-violation value.

i. Prevention

The most obvious way that adoption of a strong compliance program can have value is through prevention of antitrust violations in the first place. A compliance program might forestall problems by educating employees and managers about the risks of certain activities, like contact with competitors. A strong compliance program can also be a driving force in ensuring that the culture at a business does not drift towards passivity, accommodation, or acceptance of illegal activities.

ii. Leniency

Even if a compliance program does not succeed in preventing unlawful conduct, it still may allow for early detection of that conduct. As discussed below, one hallmark of a highly effective compliance program is the provision of ways to detect unlawful conduct, such as creating a hotline for persons to report potentially illegal activities or conducting antitrust audits. Early detection gives businesses the option of reporting violations to authorities before a government investigation has been launched or before law enforcement is even aware of any potential problem.

Leniency programs substantially reward this type of early reporting. The Antitrust Division's Leniency Program, for example, grants immunity from criminal prosecution to the first—and only the first—member of a cartel that notifies the government of the cartel's existence, meets the Division's leniency requirements, and fully cooperates with authorities thereafter.[17] In some instances, cartel members who self-report even after an initial amnesty applicant (''second-in'' members) may be eligible for other benefits, which include possibly reducing the scope of affected commerce used to calculate fines, securing a cooperation discount, and obtaining more favorable treatment for culpable executives.[18] Further, ''amnesty plus'' benefits may be available, such as where a company is not the first in the door for amnesty in a cartel conspiracy, but may have information about a separate cartel involving a different market, industry, or geographic area. If the company is first-in for the separate conspiracy, it may become eligible for amnesty in the separate matter and could be eligible for additional credits for cooperating in the first conspiracy investigation.

In addition, the Antitrust Criminal Penalty Enhancement and Reform Act, which is complementary of the Division's Leniency program, provides for other potential benefits to encourage cartel defections, incentivizing cartel members to race to the Division to put down their ''marker'' so they can, among other things, avoid treble damages in follow-on private civil antitrust suits. Over fifty other jurisdictions have variations of leniency programs, including Australia, Brazil, Canada, the European Union, Japan, South Korea, and the United Kingdom.[19] Through leniency, early reporting and cooperation can help avoid millions or even billions of dollars in fines.

iii. Sentencing relief

A strong compliance program may also allow a company to obtain a measure of relief at sentencing or in settlement with competition authorities.

In 2015, the ability to obtain sentencing relief was surprisingly illustrated twice in the United States. The Department of Justice historically has refused to provide any sentencing mitigation credit on the basis of compliance programs in criminal antitrust prosecutions. It has reasoned that the Antitrust Division's leniency program provides ample incentive to adopt a strong compliance program that might ''uncover'' violations. A compliance program that failed to ''prevent'' an antitrust violation, so the argument goes, was evidently not a program worthy of reward.[20]

Perhaps as some evidence of potential thawing of its position, the Antitrust Division has, however, recommended reduced fines against two entities in the past year on the basis of their compliance efforts. In the prosecutions arising out of the LIBOR investigation, the government recommended that Barclays receive a ''modest'' reduction in its fine because of the strength of

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[14] Terzaken & Huizing, *supra* note 9, at 55.

[15] *Id.*

[16] *Id.*

[17] *See generally* Scott D. Hammond & Belinda A. Barnett, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters* at 1, 4-5, ANTITRUST DIV., DEP'T OF JUSTICE (Nov. 19, 2008), http://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/239583.pdf.

[18] Scott D. Hammond, Deputy Assistant Att'y General, Antitrust Div., Dep't of Justice, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations at 3-11, 14 (Mar. 29, 2006), http://www.justice.gov/atr/file/518436/download.

[19] Scott D. Hammond, Deputy Assistant Att'y General, Antitrust Div., Dep't of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades at 1, 3 (Feb. 25, 2010), http://www.justice.gov/atr/file/518241/download.

[20] Brent Snyder, Deputy Assistant Att'y General, Antitrust Div., Dep't of Justice, Compliance is a Culture, Not Just a Policy at 8 (Sept. 9, 2014), http://www.justice.gov/atr/file/517796/download.

its compliance efforts after learning of the violation.[21] Similarly, in *United States v. Kayaba Industry Co.*, the Division recommended a below-guidelines fine at sentencing for defendant auto-parts manufacturer KYB, which was being prosecuted for a conspiracy to restrain trade in the market for shock absorbers. The Division commended KYB's cooperation with investigators as well as its major post-violation efforts to build a strong compliance program.[22]

Other competition authorities have expressed similar interest in rewarding strong compliance efforts. In 2015, the Canadian Competition Authority published a new version of its ''Corporate Compliance Programs'' publication. The guide states that the Competition Bureau will treat a ''credible and effective'' corporate compliance program in place at the time of the violation as a ''mitigating factor'' when making recommendations regarding sentencing leniency to prosecutors.[23] The French competition authority has also issued a ''framework document'' on antitrust compliance programs, stating that a party may receive up to a 10% reduction in its fine for instituting a sufficient compliance program as part of a settlement with the authority.[24]

What type of compliance program will allow a company to obtain these benefits? The Antitrust Division's sentencing memorandum in the KYB case is instructive. The earmarks of an effective compliance program include:

1. A strong educational component, including classroom and one-on-one training, for senior management and personnel with jobs that have a high potential for antitrust violations;
2. Efforts to ensure the efficacy of this education through the administration of pre- and post-training tests about antitrust laws and risks;
3. Prophylactic measures intended to prevent opportunities to commit violations or make people think twice before completing them, such as (1) requiring prior approval for and reporting of contacts with competitors and (2) mandating certification by sales personnel that prices were set independently and that price information was not exchanged with competitors;
4. Measures to ensure the prompt reporting of antitrust violations, such as by setting up an anonymous hotline allowing employees to report possible violations of law;[25]
5. A strong corporate culture, supported at the top by senior management, that makes antitrust compliance a corporate priority;
6. Willingness to punish those responsible for violations through, at the least, demotion.[26]

This list demonstrates that the expectations for an antitrust compliance program are rigorous. Along this line, DAAG Snyder has stated publicly that the Antitrust Division will be conservative in handing out sentencing credits on this basis. He remarked that a compliance program will only warrant a sentencing reduction if ''a company makes extraordinary efforts not just to put a compliance program in place but to change the corporate culture that allowed a cartel offense [to] occur.''[27] A nominal improvement on a preexisting program that failed to prevent the violation will not cut it.

Conclusion

Global antitrust enforcement has never been more fierce. The incentives to design and implement an effective antitrust compliance program have never been greater. In light of the increased enforcement and converging enforcement trends marked by heightened, international involvement, businesses that fail to augment antitrust compliance as a priority compliance area may needlessly open themselves up to significant consequences.

In the current escalating enforcement environment, antitrust compliance programs require real commitments, both intellectual and financial. The enforcement surge and spectacular fines levied over the past several years for antitrust violations demonstrate that the return on investment for well-developed programs can be huge.

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[21] Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Remarks at the Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), http://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

[22] United States Sentencing Mem. & Mot. for Downward Departure at 7-8, *United States v. Kayaba Indus. Co.*, Criminal No. 1:15-CR-98 (S.D. Ohio Oct. 5, 2015), ECF No. 21.

[23] Competition Bureau, Government of Canada, *Corporate Compliance Programs* § 3.2.1 (June 3, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html#s3_0.

[24] Autorité de la concurrence, French Republic, *Framework-Document of 10 February 2012 on Antitrust Compliance Programmes* (Feb. 10, 2012), http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf.

[25] The US Sentencing Guidelines provide guidance on the minimum requirements for an effective antitrust compliance program, including mandatory monitoring and auditing components. *See* USSC Sentencing Guidelines Manual § 8B2.1 (2014), *available at* http://www.ussc.gov/guidelines-manual/2014/2014-chapter-8 (''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 . . . .'').

[26] United States Sentencing Mem. & Mot. for Downward Departure at 7-8, *United States v. Kayaba Indus. Co.*, Criminal No. 1:15-CR-98 (S.D. Ohio Oct. 5, 2015), ECF No. 21.

[27] Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Remarks at the Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), http://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

  ATRR ISSN 0003-6021