

Why the Recent Upswing in US Cartel Enforcement?

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The US Department of Justice's Antitrust Division is prosecuting criminal antitrust violations with unprecedented vigor and success. Nine months into its current fiscal year, it has imposed over \$1 billion in criminal fines and has already surpassed all historic full-year totals except FY 2012. In light of this, many companies have moved to reevaluate and fortify their antitrust compliance programs.

The Antitrust Division's high level of activity is largely due to its wide-ranging investigation into the international auto parts industry. It is the largest criminal investigation that the Antitrust Division has ever pursued. Since the first auto parts plea agreements were announced in 2011, 27 companies have agreed to plead guilty and pay over \$2.3 billion in criminal fines. Thirty-six executives have been charged with criminal violations, 25 of whom have pled guilty; 22 have been sentenced to serve time in US prisons.

These remarkable results are a testament to the effectiveness of the Antitrust Division's amnesty program, which offers first-in-the-door whistleblowers immunity from criminal prosecution and de-trebling of civil damages. The auto parts investigation apparently began with an amnesty application for wire harnesses. Some of the companies under investigation quickly discovered that they had also participated in cartels in other automotive parts, and sought amnesty. Plea agreements indicate that the auto parts investigation has expanded to include, among other things, starter motors, alternators, air flow meters, valve timing control devices, fuel injection systems, ignition coils, windshield washer and wiper systems, power window motors, radiators, air conditioning systems, seat belts, air bags, bearings, electric powered steering assemblies, and anti-vibration rubber products—nearly 40 products in all.

The Antitrust Division has made a point of pursuing charges for obstruction of justice when cartelists destroy documents and tell others to do so. In the auto parts investigation, it has charged two individuals and two companies with obstruction. In February, Kazuaki Fujitani, a

former director of Denso Corporation, pled guilty to an obstruction count for destroying documents. In May, prosecutors indicted Hitoshi Hirano, a former Tokai Rika Co. Ltd. executive, for obstruction and price fixing. The indictment alleges that he destroyed paper and electronic documents after learning that the FBI had executed a search warrant, and persuaded other employees to do the same. Tokai Rika and Mitsuba Corporation each pled guilty to single obstruction counts in 2012 and 2013, respectively. Two other auto parts manufacturers, Hitachi Automotive Systems Ltd. and Mitsubishi Electric Corporation, have entered into plea agreements that describe how they destroyed evidence, although neither was charged with obstruction. In publically announcing obstruction charges, the Antitrust Division has stated that it will “vigorously prosecute individuals who destroy evidence in an attempt to conceal their participation in illegal conspiracies.” Such statements indicate that the Antitrust Division will continue to charge obstruction of justice where warranted as a matter of policy.

“The Antitrust Division’s expanding criminal enforcement program set a precedent this year... successfully extraditing foreign nationals on antitrust charges for the first time.”

The Antitrust Division’s expanding criminal enforcement program also set a precedent this year with regard to extradition of foreign nationals. Until recently, the Antitrust Division had never successfully extradited a foreign national on antitrust charges, despite having prosecuted numerous large international cartels over the last two decades. However, in April, Romano Piscioti, an Italian citizen, was extradited from Germany to face criminal antitrust charges. He pled guilty to fixing prices, rigging bids and allocating sales of marine hose, and was sentenced to two years in prison. Based on this precedent, the Antitrust Division may seek to extradite more foreign nationals who it has indicted for cartel conduct.

The Antitrust Division is prosecuting domestic conspiracies with the same tenacity with which it has pursued international cartels. Last month the Antitrust Division obtained guilty pleas from three related US companies, Riverside Seat Company, Woodbridge Foam Fabricating, Inc., and SW Foam LLC, for fixing prices of polyurethane foam. It has also obtained convictions of two individuals and guilty pleas from 58 individuals and two companies in its ongoing investigations of bid rigging in local real estate foreclosure auctions in California, Georgia and Alabama. Its investigation of bid rigging in tax lien auctions has yielded 15 guilty pleas and six indictments. The latest major investigation publically acknowledged by the Antitrust Division is an investigation of possible anticompetitive conduct by capacitor manufacturers. Capacitors are found in virtually every kind of electronic device, and manufacturers in the US and abroad produce huge numbers of them every year. Although in an early stage, this investigation already appears to have the potential to involve a large number of companies in multiple countries. It could also lead to investigations of other electronic components or products.

Because the Antitrust Division is aggressively enforcing the antitrust laws, firms should re-evaluate their interactions with competitors and strengthen their antitrust training and

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compliance programs. Care must be taken that legitimate competitor collaborations, such as joint ventures or trade association activities, do not give rise to pricing or bidding discussions. It is hard to overstate the benefits of such precautions. One of the largest cartels ever prosecuted—the air cargo cartel—was discovered as a result of an effective compliance and training program. Lufthansa discovered the cartel, reported it to antitrust authorities around the world, and received complete amnesty from criminal prosecution. Given the choice, it is far better to be the amnesty applicant than the unfortunate recipient of a subpoena or search warrant.

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