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Cartel Enforcement In The Current Climate

Law360, New York (February 25, 2009) -- The new administration and the recession have many executives wondering what effect the current climate will have on their company's compliance with antitrust laws and the U.S. Department of Justice's ("DOJ") enforcement efforts.

It is no secret that participating in "hard-core" cartel activity (i.e., price fixing, bid rigging or market allocation) is a high-stakes gamble for businesses in the U.S. or abroad that affect U.S. commerce.

Now, however, businesses must be attentive to the risks posed by the current economic climate — which is ripe for cartel activity — and the prospect that under the Obama Administration the DOJ Antitrust Division is poised to trump the impressive cartel enforcement record of prior administrations.

With the global economy stalling in a painful economic recession that many experts expect to get worse before it gets better, with consumers having less money to spend, and with a shrinking tax base, one can expect the Obama Administration to look hard for corporate scapegoats to mollify a discontented and disillusioned public and to provide additional areas of perceived government funding.

In the last 12 months alone, the DOJ Antitrust Division has obtained over \$1 billion in criminal fines from its cartel enforcement prosecutions. The focus of such investigations has increasingly been on foreign — particularly Asian and European — companies involved in global industries.

Do not expect cartel activity to slow down during a global recession — and do not expect DOJ's enforcement efforts to slow down either. Common sense alone suggests that the government will continue to seek to recover large fines from companies who conspire to fix prices that affect U.S. consumers.

Indeed, the president has announced his intention to aggressively pursue international cartels and to “reinvigorate antitrust enforcement.” In addition, the economic recession may give rise to increased enforcement efforts for two other reasons.

First, with business managers facing evermore intense pressure to keep their businesses afloat, cartel activity may increase as individual managers become more susceptible to the temptation of trying to eliminate some of the uncertainty of the market by colluding with their competitors.

Second, as companies downsize or fail, competition authorities may have additional avenues of cartel detection available through disgruntled former employees who may complain to the government about their former employer's anticompetitive activities.

The global business community should expect the DOJ Antitrust Division to continue to be extremely active and aggressive in prosecuting companies around the world that engage in anticompetitive conduct that affects U.S. commerce.

In this climate and with the stakes so high, businesses should ensure that their conduct — and that of their employees — complies with U.S. antitrust laws and determine whether they need to take affirmative steps to eliminate or mitigate any potential problems.

The Stakes are High: Cartel-like Behavior is Subject to Severe Penalties

Hard-core cartel conduct is subject to criminal penalties under U.S. antitrust laws.[1] The three major types of cartel conduct are price fixing, bid rigging, and market allocation, all of which generally involve agreements among competitors on price or output.[2]

These do not include, however, many other categories of regulated conduct such as mergers, resale price maintenance, monopolization, and predatory pricing, which are subject to civil remedies.

Criminal fines for corporations who participate in cartel activities are limited only by the volume of commerce affected by the cartel.[3]

In the last decade, the DOJ Antitrust Division has obtained corporate criminal fines of greater than \$100 million against 14 different companies, including the two largest criminal fines ever issued for price fixing — \$500 million against F. Hoffman-La Roche for its participation in an international vitamin cartel, and \$400 million against LG Display Co. for its participation in an international LCD monitor cartel.[4]

The penalties do not end there. High-level managers are also at risk for prosecution by DOJ for their participation in cartel-like activities.[5] Individuals face maximum statutory penalties under the Sherman Act of up to 10 years imprisonment and \$1 million fines for each violation.[6]

In addition, corporate defendants are often left to face enforcement actions in other countries and the specter of follow-on consumer class action lawsuits that carry the potential for treble damages and joint and several liability.[7]

Economic Recessions Can Spark Cartel Activity and Government Investigations

As the global economy contracts and business managers feel pressure to do whatever is necessary to keep their business afloat, the circumstances are ripe for cartel activity to increase.

Although businesses are always trying to maximize revenue, profits and shareholder wealth, during difficult economic times, individual managers face increased pressures to achieve results as they struggle to ensure the survival of their businesses and — more importantly — their own jobs.

Indeed, the lure of the protection and potential benefits of collusion during previous recessions was so strong that the government of at least one other country has attempted to stabilize at-risk industries by permitting the formation of “recession cartels.”[8]

It is reasonable to expect that, as economic pressures mount, individual business managers are likely to face increased temptation to coordinate with their competitors in an effort to maintain the viability of their individual business units.

Besides increasing the temptation to collude among individual business managers, economic recessions may also facilitate cartel detection and thereby increase DOJ’s cartel investigations and prosecutions.

Detection is one of the most difficult aspects of cartel enforcement for competition authorities due to the highly secretive nature of cartel-like behavior.

Because detection can be so difficult, the DOJ Antitrust Division created its “leniency program,” in which the initial government informant can gain complete amnesty for being the first cartel member to self-disclose the existence of the cartel and its anticompetitive activities.[9]

Based on the success of DOJ’s leniency program, numerous other competition authorities around the world have adopted similar programs.[10]

In addition to the increased cartel detection provided through the self-disclosures of amnesty applicants in the DOJ’s leniency program, in this economy, cartel detection may increase as an indirect result of corporate downsizing and employee layoffs — an environment in which disgruntled former employees may be motivated to expose cartel activities of their former employers and/or competitors.

Expect Expanded Antitrust Enforcement Under the Obama Administration

Although antitrust enforcement issues rarely take center stage during a presidential campaign, President Obama openly criticized the Bush Administration's level of antitrust enforcement:

"Regrettably, the current administration has what may be the weakest record of antitrust enforcement of any administration in the last half century." [11]

In addition, he announced his policy in no uncertain terms on the campaign trail:

"As president, I will direct my administration to reinvigorate antitrust enforcement ... My administration will take aggressive action to curb the growth of international cartels, working alone and with other jurisdictions to ensure that firms, wherever located, that collude to harm American consumers are brought to justice." [12]

President Obama's remarks are a warning shot to businesses that operate or sell goods in U.S. marketplaces.

An increased focus on cartel enforcement is significant because, notwithstanding President Obama's criticism of the Bush Administration, the DOJ Antitrust Division's recent cartel enforcement has hardly been lax. [13]

Not only should businesses expect the Obama Administration to target cartel activity, they should expect prosecutors to work harder to coordinate enforcement with other competition authorities around the world.

Coordinated efforts gained significant traction as an effective prosecution and enforcement tool during the Clinton and Bush administrations. They also attract lots of attention and serve as powerful reminders that competition authorities work together to thwart cartel-like activities.

For example, DOJ has coordinated so-called "dawn raids" with other international competition authorities to enhance the element of surprise on unsuspecting businesses. [14]

In recent years, the DOJ Antitrust Division appears to have been particularly focused on cartel activity among multinational companies based in Asia and Europe. [15]

DOJ recently reported that it has over 50 pending grand jury investigations of suspected international cartel activity, and foreign based corporate defendants comprised over 80 percent of the instances where DOJ obtained a corporate fine of \$10 million or greater. [16]

Consistent with his campaign statements, President Obama's recent appointments of Eric Holder as Attorney General and former FTC Commissioner Christine Varney as

Assistant Attorney General in charge of the Antitrust Division are widely regarded as strong evidence that he intends to make good on his promise to “reinvigorate antitrust enforcement.”[17]

Attorney General Holder recently told Congress that antitrust enforcement is “a critical part of what the Justice Department does,” particularly when consumers are saddled by a tough economy, and he expects that going forward DOJ will be more active in its antitrust enforcement efforts than it was under the previous administration.[18]

Moreover, Assistant Attorney General-designate Varney has publicly stated that she will continue the enforcement approach she used while she was commissioner,[19] and experts reportedly agree that this means she will maintain a tough stance on cartels.[20]

In this climate and under the current circumstances, forward-thinking companies have significant reasons to ensure that their business practices and compliance programs are helping to protect against and detect cartel-like behavior.

With the global economy contracting, with increased economic pressures adding to the temptation of business managers to collude with their competitors, with the increased risk of displaced former employees blowing the whistle on anti-competitive conduct, and with the Obama administration’s announced intent to “reinvigorate antitrust enforcement,” it is clear that DOJ’s criminal cartel enforcement activity is not going to slow down anytime soon. Indeed, we think it will speed up.

What Should Companies Do? Prepare and Prevent

In this complicated and risky environment, although budgets are understandably and perhaps unavoidably tight, companies that conduct business that affects the U.S. economy must, at a minimum, have a comprehensive and robust antitrust compliance program to help prevent criminal antitrust violations and to help limit any potential criminal penalties against the corporation and its officials if a violation occurs.[21]

To create and maintain an effective program, a company must do more than require employees to attend a lecture or webcast once a year. An effective antitrust compliance program provides for training on at least two levels, based on seniority of personnel.

Lower-level employees who have no authority to affect price or strategy may receive an overview on the relevant law. Executives with authority for deciding pricing, choosing customers and strategic planning should receive intensive and interactive training that exposes them to a range of potentially problematic conduct, from explicit agreements to subtle cooperation with competitors.

Interactive discussions and role-playing exercises on how individuals should respond to particular situations involving contacts with competitors are among the tools that companies can use to effectively communicate the dangers of engaging in

communications with competitors and how best to avoid implicit and explicit invitations to collude.

Compliance training, including an overview of an individual's rights and obligations in dealing with government agents and Antitrust Division attorneys, also affords the opportunity to prepare executives for the possibility of a criminal antitrust investigation.

For example, since the Antitrust Division routinely uses "drop-in" visits at the start of an investigation, executives should understand that they may request to have counsel present before they speak with law enforcement agents.

Although no amount of planning or training will completely erase the possibility of a violation or an enforcement investigation, a robust compliance program will go a long way to minimize risks by increasing the likelihood that employees will maintain best practices, demonstrating that the company is serious about antitrust compliance issues, and preparing executives and other employees for responding to legal crises.

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[1] International antitrust enforcement continues to grow and many other jurisdictions have recently used their authority to levy substantial fines against companies that have participated in cartels.

For example, in 2008 the E.C., Germany, Japan, U.K., Korea, France, and Greece each fined companies over €100 million (the EC alone levied fines totaling €3.3 billion). See David Vascott et al., Rating Enforcement, *Global Competition Review*, June 2008, at 14.

[2] See www.usdoj.gov/atr/public/guidelines/211578.htm.

[3] Although the statutory maximum corporate fine is \$100 million under the Sherman Act, 15 U.S.C. § 1, the DOJ relies on the alternative fine statute, 18 U.S.C. § 3571(d), when seeking to impose fines higher than the statutory maximum.

This provision authorizes criminal fines of up to twice the gross gain (for cartelists) or twice the gross loss (of consumers) resulting from the violation.

Rather than require an actual calculation of the effects on commerce attributable to a defendant, the U.S. Sentencing Guidelines apply a proxy of 20 percent of the volume of commerce as a base fine. Comments to the Sentencing Guidelines explain:

It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain, because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices.

Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3).

The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the Court to determine the actual gain or loss.

U.S. Sentencing Guidelines Manual § 2R1.1, comment, n.3 (2008).

[4] See www.usdoj.gov/atr/public/criminal/sherman10.htm;
www.usdoj.gov/atr/public/press_releases/1999/2450.htm;
www.usdoj.gov/atr/public/press_releases/2008/239349.htm.

[5] See, e.g., www.usdoj.gov/atr/public/press_releases/2009/242162.htm;
www.usdoj.gov/atr/public/press_releases/2009/242030.htm.

[6] See 15 U.S.C. § 1.

[7] See 15 U.S.C. § 15.

[8] For instance, during the mid-20th century, Japanese authorities approved “recession cartels” as a means of combating severe economic recessions. See generally Michael Beeman, Public Policy and Economic Competition in Japan, Change and Continuity in Antimonopoly Policy, 1973-1995 19 (2002).

[9] The DOJ’s head of cartel enforcement has called the leniency program the “single greatest investigative tool” for the agency’s enforcement effort, and the program has directly led to nearly \$4 billion in criminal fines. See www.usdoj.gov/atr/public/speeches/212269.pdf;
www.usdoj.gov/atr/public/speeches/232716.htm.

For each cartel that DOJ prosecutes, there can be only one amnesty applicant that receives immunity under the leniency program and avoids immense corporate fines and individual prison terms.

Moreover, since 2004, amnesty recipients facing civil liability have limited their exposure to single damages under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“ACPERA”).

As civil lawsuits inevitably follow criminal charges, companies face significant additional incentives to self report under ACPERA. Without ACPERA protection, private plaintiffs

may recover treble damages, but under ACPERA they are limited to single damages, thus increasing the incentives that companies have to self-report cartel activity to DOJ.

[10] Competition authorities in the following countries have adopted leniency programs: Australia, Austria, Belgium, Brazil, Canada, Czech Republic, Denmark, E.C., France, Germany, Greece, Hungary, Italy, Japan, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Slovakia, South Africa, South Korea, Spain, Switzerland and U.K.

See generally David Vascott et al., Rating Enforcement, *Global Competition Review*, June 2008, at 13. Because competition agencies around the globe continue to follow the DOJ's lead in adopting their own leniency programs, companies have further incentives to self-report.

[11] Statement of Senator Barack Obama for the American Antitrust Institute, www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

[12] *Id.*

[13] Since 2001, DOJ antitrust prosecutions have netted nearly \$3.5 billion in criminal fines and the length of jail sentences imposed on individuals have increased greatly. See www.usdoj.gov/atr/public/speeches/232716.htm.

[14] See www.usdoj.gov/atr/public/speeches/222159.htm. The marine hose and air cargo pleas provide recent examples of major DOJ Antitrust Division prosecutions that stemmed from coordinated dawn raids. See, e.g., www.usdoj.gov/atr/public/press_releases/2008/235515.pdf (marine hose); www.usdoj.gov/atr/public/press_releases/2009/241710.htm (air cargo).

[15] Samsung, Korean Air, Hynix, Mitsubishi, LG, and Sharp are recent examples of multinational Asian companies that the Antitrust Division has prosecuted. European companies that the Antitrust Division has prosecuted recently include British Airways, F. Hoffman-La Roche, BASF, Infineon, Air France and KLM.

[16] See www.usdoj.gov/atr/public/speeches/232716.htm. DOJ's most recent major antitrust plea agreements each involved foreign companies paying fines greater than \$100 million. See www.usdoj.gov/atr/public/press_releases/2008/239349.htm (LG Display Co. et al.); www.usdoj.gov/atr/public/press_releases/2009/241710.htm (LAN Cargo S.A. et al.).

[17] See www.bloomberg.com/apps/news?pid=20601087&sid=apUgfJrJlin8&refer=home.

[18] See The Nomination of Eric Holder to be Attorney General in the Obama Administration, Hearing Before the Senate Judiciary Committee (2009) (statement of Eric Holder).

[19] See www.law360.com/articles/40222.

[20] See, e.g., www.bloomberg.com/apps/news?pid=20601087&sid=apUgfJrJlin8&refer=home.

[21] The existence of “an effective compliance and ethics program within the meaning of §8B2.1” is a factor to be considered in determining appropriate criminal fines for corporate violations. U.S. Sentencing Guidelines Manual §8C2.8 (2008).