United States Antitrust Law, Policies & Procedures

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Overview

• U.S. Antitrust Laws
  • Civil vs. Criminal Enforcement
  • Elements of Sherman Act Violation
• U.S. Department of Justice Antitrust Enforcement
  • Corporate & Individual Prosecutions
  • Policies and Procedures
• Corporate Leniency Policy
• Parallel Civil Litigation
• International Antitrust Enforcement
• Areas of Risk for Criminal Antitrust Conduct
U.S. Antitrust Laws

- Legal Framework
U.S. Antitrust Laws

- **Sherman Act Enacted in 1890** (original antitrust law)
  - Dual system of public and private enforcement
  - Aimed at preserving free and open competition
  - Competition produces the best products at the cheapest price
- **Most Antitrust Laws Are Civil Violations**
  - Mergers (Clayton Act)
  - Monopolization (Section 2 of the Sherman Act)
  - Price Discrimination (Robinson Patman Act)
  - Certain Anticompetitive Agreements (Section 1 of Sherman Act)
  - Most State Antitrust Laws (e.g. Cartwright Act in California)
- **One Area of Antitrust Law Has Criminal Penalties**
  - Price Fixing, Bid Rigging, Customer or Territorial Allocation, and Output or Capacity Restrictions – Prosecuted under Section 1 of Sherman Act
Section 1 of Sherman Act (15 U.S.C. § 1)

• “[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.”

• U.S. DOJ prosecutes criminally only those agreements between competitors that the courts have characterized as per se violations

  • *Per se* agreements are conclusively presumed to be illegal without any inquiry into the precise harm or business excuse for their use

  • *Per se* agreements include price fixing, bid rigging, customer or territory allocation, or output restriction.
Elements of Section 1 Sherman Act Violation

- (1) “Contract, combination, or conspiracy”
  - Agreement or mutual understanding

- (2) “Unreasonable restraint of trade.”
  - Only certain agreements are illegal: price fixing, bid rigging, customer or territorial allocation, or output restriction.

- (3) Conduct must affect interstate or foreign commerce
  - Affected commerce must cross state or national borders
Element 1 – contract, combination, or conspiracy

- Some form of agreement or mutual understanding
  - Agreement does not need to be written or spoken, it can be inferred or assumed from the circumstances – “wink of an eye”
  - Ignorance of the law is not a defense
  - Most defenses are based on lack of agreement
- Between two or more competitors
  - Agreement between a manufacturer and distributor or customer generally not criminally prosecuted
- Between separate unrelated entities
  - Agreement between a parent and subsidiary is not a violation
- Unilateral decision to raise prices is legal
- Agreement is the crime
  - Does not matter if agreement carried out or if it succeeds
Element 2 – Unreasonable Restraint of Trade – Per Se Violations

- **Price Fixing**
  - Any agreement to raise, lower, maintain or stabilize prices
  - No need to agree on the same price (price range, floors, levels)
  - Agreements on rebates, discounts, terms of sale that effect price

- **Bid Rigging**
  - Agreement to eliminate, reduce, or interfere with job or contract awarded on the basis of bids.
  - Agreements on prices to bid, who should win the bid, who should bid high, who should bid low, or who should refrain from bidding

- **Customer or Territorial Allocation**
  - Agreements to divide customers, markets, territories, market shares

- **Output Restriction**
  - Agreements to reduce capacity or output (e.g. OPEC)
  - Reduce Supply = Increase in Prices
Element 3 – Interstate Commerce

- Conspiracy must “affect interstate commerce in goods and/or services.”
  - Element is easily met and frequently stipulated

- International Cases (Conduct Outside the U.S.)
  - FTAIA (The Foreign Trade Antitrust Improvements Act)
  - To Bring a Case Based on Events Solely Outside the US
    - Fixed Products must be Import Commerce (imported into U.S. by the Defendants) or
    - Conduct had a (1) “direct, substantial, and reasonably foreseeable effect” on U.S. commerce; and (2) “such effect gives rise to a claim” under the Sherman Act.
Sherman Act – Severe Criminal Penalties

- **Individuals**
  - 10 years imprisonment
  - $1 million in fines

- **Corporations**
  - $100 million in fines or
  - Alternative Fine Statute: “twice the gross pecuniary gain or twice the gross pecuniary loss.” 18 U.S.C. § 3571(d)
    - Under this statute the DOJ has obtained negotiated fines of up to $500 million from a single corporate defendant.
    - But, if you go to trial, “gain” or “loss” must be proven by the government to a jury beyond a reasonable doubt under *Apprendi*

- **Collateral Consequences**
  - Debarment (prohibited from bidding on government contracts)
  - Prima Facie Evidence of a Violation in Parallel Civil Cases
  - Potential Investigation or Prosecution in Other Jurisdictions
Antitrust Enforcement in the U.S.

- Policies, Statistics, and Procedures
US DOJ – Antitrust Enforcement

- **U.S. Department of Justice, Antitrust Division**
  - Exclusive Jurisdiction to Enforce Sherman Act
  - One section in D.C. and Seven Field Offices responsible for Criminal Enforcement (San Francisco, New York, Chicago, Philadelphia, Cleveland, Dallas and Atlanta)

- **Priorities and Policies**
  - (1) corporate prosecutions with large criminal fines;
  - (2) increased jail time for individuals
  - (3) international price fixing cases (larger volume of commerce)
  - (4) efforts to make foreign nationals go to jail in U.S.
    - (e.g. MOU with Department of Homeland Security on relief from deportation)
  - (5) heavy reliance on self reporting through corporate leniency policy which provides immunity for those who report first
DOJ Statistics – Criminal Fines

Criminal Antitrust Fines

Fine Totals


Fiscal Year

- $169 Million
- $152 Million
- $280 Million
- $75 Million
- $107 Million
- $350 Million
- $338 Million
- $473 Million
- $701 Million
- $630 Million
- $555 Million
- $1 Billion
Top Ten Cartel Fines in the U.S.

- $500 Million: Hoffmann-La Roche (Vitamins, 1999)
- $400 Million: LG Display (LCD, 2009)
- $350 Million: Air France/KLM (Air Cargo, 2008)
- $300 Million: Korean Air Lines (Air Cargo, 2008)
- $300 Million: British Airways (Air Cargo, 2008)
- $300 Million: Samsung Electronics (DRAM, 2006)
- $225 Million: BASF AG (Vitamins, 1999)
- $220 Million: Chi Mei Optoelectronics (LCD, 2010)
- $185 Million: Hynix Semiconductor (DRAM, 2005)
- $160 Million: Infineon Technologies AG (DRAM, 2004)
DOJ Statistics – Longer Jail Sentences

INCARCERATION TREND - Average Months

Fiscal Year

Average Jail Time (in months)


8 10 15 18 21 24 31 25 24 30
DOJ Statistics – More Jail Sentences Imposed

Percentage of Defendants Sentenced to Jail

Percentage


Fiscal Year

37 38 46 53 50 71 67 68 87 80 78

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Corporate Leniency or Amnesty Policy

- **Full immunity to the first company** (and its employees) that comes it and reports its involvement in a criminal antitrust conspiracy.
  - Biggest source of cases for the DOJ
  - “Amnesty Plus” – if not the first amnesty applicant, you can get a reduction on your fine if you bring in a new product for amnesty – allows the government to roll one case into the next.
  - Immunity to all current and former employees who agree to cooperate.
  - Creates a race to be first to the prosecutor’s door
  - Adopted by 50 other countries around the world

  - Single (not treble) damages and no joint and several liability.
  - Requires defendant to cooperate with plaintiffs in civil case
DOJ’s Increased Reliance on Leniency Applicants To File Cases

Figure 8: Number of Criminal Cartel Cases Filed Each Fiscal Year, Broken Out by Those Assisted and Not Assisted by a Leniency Applicant

Source: GAO analysis of Antitrust Division data.
Cartel Enforcement - Aggressive Investigative Techniques

- Use of Other Criminal Statutes
  - Obstruction of Justice
  - Mail/Wire Fraud Statutes
- Extradition of Foreign Nationals
  - Ian Norris (2010)
- Covert Surveillance
  - Audio and Video Recording
  - Wiretap authority for antitrust offenses (2006)
- Search Warrants
- Border Watch
  - Track travel into and out of the U.S.
- Interpol Red Letter Notices (international arrest warrant)
Industries Subject to Cartel Investigations

- Air & Water Transportation (cargo/passenger)
- Computer Components/ Consumer Electronics
- Banking & Financial Industry (Private Equity)
- Food Industry
- Oil & Gas
- Automobile Parts
- Chemical
- Home Appliances
- Government Procurement
- Cement/Ice/Paper (commodities)
- Construction
- Software, High-Tech, Labor Agreements
Chronology of a Criminal Antitrust Case

- **Grand Jury Investigation**
  - Government investigates and collects information to determine if a crime occurred: search warrant, subpoenas, leniency applicant

- **Plea Agreement**
  - Admission of guilt by defendant
  - Parties negotiate the terms of the resolution: fines, jail time
  - 90% of cases are resolved by plea agreement

- **Indictment**
  - Formal charges by the government of a violation
  - Government must provide all relevant evidence to the defendant
  - Defendant can file motions to limit evidence or dismiss charges

- **Jury Trial**
  - Government must prove guilt “beyond a reasonable doubt.”

- **Appeal**
Taiwan Companies Affected by U.S. Antitrust Laws

- **TFT-LCD Investigation**
  - Chunghwa Picture Tubes (2009)
    - $65 million fine; 6 executives charged and 3 pled guilty
  - Chi Mei Optoelectronics (2010)
    - $220 million fine; 5 executives charged and 4 pled guilty
  - HannStar Display Corp. (2010)
    - $30 million fine; 2 executives charged and 1 pled guilty
  - AU Optronics (2010)
    - indicted along with it’s U.S. subsidiary and six executives

- **Air Cargo Investigation**
  - China Airlines (2010) ($40 million)
  - Eva Airways Corp. (2011) ($13.2 million)

- **Auto Lights Investigation**
  - Sabry Lee (2011) -- $200,000
  - Three Taiwanese executives charged and two pled guilty (other was arrested on an airplane in the Los Angeles airport).
Civil Damage Lawsuits

- Follow-on civil damage claims
Private Civil Damage Lawsuits – Compensation to Customers for Harm Caused by the Cartel

- **Who can sue?**
  - Customers, both direct (federal law) and indirect purchasers (state law)
  - Individuals, small and large businesses, government agencies
- **How can they sue?**
  - Individual law suits by each customer
  - Numerous customers can join together and file a class action
- **How much money can they recover?**
  - Triple damages (price overcharge x 3)
  - Joint and several liability – Each defendant is liable for harm caused by all the defendants combined
- **Where do they sue?**
  - Initially, state and federal court all over the country
  - Cases are consolidated into a single lawsuit in federal court
Chronology of a Civil Damage Lawsuit

- **Complaint**
  - “A short and plain statement of the claim” filed by the customer
- **Motion to Dismiss** (or Answer)
  - complaint must contain sufficient facts to demonstrate “plausible” claim for relief to survive a motion to dismiss
- **Discovery**
  - Request for documents, admissions, interrogatories, depositions
  - Extremely costly and time consuming
- **Motion for Class Certification**
  - Numerous, Common, Typical, Adequate, Ascertainable
  - Crucial stage of proceedings that can ultimately resolve the case
- **Motion for Summary Judgment**
- **Trial**
- **Appeal**
Civil Damage Lawsuits -- Challenges

- Mere Announcement of Grand Jury Investigation Triggers Scores of Class Action Lawsuits
  - Lower burden of proof (“preponderance of the evidence”)
  - Civil Liability can frequently exceed criminal fines
  - Foreign civil damage claims increasing (Canada, Europe)

- Challenges and Opportunities In Civil Cases
  - Motions to Dismiss and Class Certification (case law moving in defendants’ favor)
  - DOJ access to civil discovery (grand jury subpoenas for law firms)
    - See In re: Grand Jury Subpoenas Served on White & Case, et. al., 677 F.3d 1143 (9th Cir. 2010)
  - Adverse Inference from Employees’ Exercise of 5th Amendment Right to Remain Silence and Not Testify in a Civil Deposition
International Antitrust Enforcement

- Competition laws have been adopted around the world
Globalization of Cartel Enforcement

- Stringent competition laws in the US, EU, and throughout Asia – now enforced in over 100 countries!
Globalization of Antitrust Enforcement

- Global nature of economy means that any cartel conduct will generate investigations in numerous countries
  - Over 50 countries have immunity programs
  - Movement towards criminalization of cartel conduct (e.g. U.S., UK, Canada, Brazil, Japan, South Korea, Ireland, Australia, Israel)
  - E.g. (1) not uncommon for cartel case to result in immunity applications in six or more countries, (2) investigation of minor violations can result in investigations in multiple countries

- Challenges
  - Managing discovery around the world (e.g. preserving privilege)
  - Problems with inconsistent approaches (substantively and procedurally)
  - Threat of information leaking from one jurisdiction to the next
Areas of Greatest Risk for Cartel Conduct

• Common red flags to be aware of when investigating or trying to prevent cartel conduct
Areas of Risk for Cartel Conduct

- **Mergers** (inadequate due diligence)
- **Foreign Subsidiaries** (in countries without strong antitrust compliance cultures)
- **Revolving Door Among Competitors** (employees switch from one competitor to the next)
- **Inadequate Training**
  - E.g. Engineers moved to sales position without training
- **Cost Cutting Measures Reduce Compliance Training**
  - Economic downturn is period of highest risk for cartel conduct
- **Other Improper Conduct**
  - E.g. Foreign Corrupt Practices Act (FCPA) – Bridgestone (marine hose) and Panalpina (freight forwarding)
- **Any Competitor Contacts Should Raise Red Flags**
Questions & Answers
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