

REAL-WORLD RISKS OF CROSS-BORDER ANTITRUST INVESTIGATIONS

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The US Department of Justice (DOJ) investigation of possible antitrust violations in the auto parts industry has resulted in nearly a dozen Japanese businesspeople going to jail in the US, some for as long as two years. Antitrust violations such as price-fixing and bid-rigging are also crimes in Japan – indeed, Japanese prosecutors are currently trying individuals for such crimes – but it’s more common for such cases to result in suspended sentences, with no jail time.

It’s particularly striking that many of these businesspeople were residing in Japan at the time they were prosecuted, and many pled guilty to violations of US law based, at least partly, on conduct that happened in Japan.

There’s always been a risk for Japanese businesspeople of prosecution under the Sherman Act, and we’ve long advised on protecting companies and their employees against it; but while there have been a few precedents, this is the first time the DOJ has pushed to put so many Japanese behind bars. And more prosecutions can be expected.

This situation creates many practical challenges for companies being investigated, as well as companies doing business in the US that could face similar investigations in the future, and entities that are looking to invest in such companies. There’s the obvious challenge of defending against such investigations, but here are a few examples of other challenges that may be less obvious:

Travel Restrictions: The DOJ sometimes places names of individuals they want to interview on a “border watch” list. Suppose you’re visiting the US for work or vacation, or just transiting. If your name happens to be on the list, you could be detained at the airport or be visited at the hotel and interviewed by the FBI. You could even be held in the US for months

until a trial, which actually happened to executives in one investigation. Thus, it may be prudent to limit travel for individuals who could be on the list, as well as others who may have relevant information. Such restrictions can last for several years.

Document Preservation: One of the most important things to do at the start of any investigation is to impose a “legal hold”, and preserve relevant materials. Not doing so could result in significant added penalties, and could be costly in other ways. For example, old emails may contain damaging information, but they also may contain necessary information for the defense. Document preservation has become standardized in the US over the last 10 years, but it’s much less so in Japan, and many companies and lawyers are still not familiar with the potential dangers of failing to preserve relevant documents, or the latest document preservation technologies.

Transactional Due Diligence: Due diligence for antitrust, as well as other regulatory issues such as anti-bribery and embargoes, is becoming increasingly important in corporate deals. If an M&A target or a possible joint venture partner is under investigation, numerous complications can arise for both parties. If a company is seeking amnesty or leniency, disclosing that fact could result in losing amnesty or leniency. There are also issues concerning protection of attorney-client privilege, and public disclosure for listed companies. A purchaser should consider the risk of successor liability, and risks of potential fines, criminal penalties, civil damages claims and legal costs.

Because of the extremely serious risks created by cross-border antitrust investigations, it’s important to realize that these cases cannot be handled like “normal” lawsuits. It’s crucial to get advice from lawyers who are experienced in this complex area of law, and can help navigate through risks around the world, while understanding the business issues at stake.



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