International cartel defence – strategic choices for businesses

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Cartel activity is unlawful in over 100 jurisdictions worldwide, and the sanctions for violating the cartel laws are severe, ranging from substantial criminal fines, penalties and imprisonment (in the US), to quasi-criminal and financial penalties levied upon businesses and individuals. Cartel prosecutions can take place simultaneously in any jurisdiction in which the cartel is suspected of having operated, resulting in concurrent investigations around the world. Moreover, there are also civil risks, as direct, and sometimes indirect, purchasers may seek to recover single (or in the US treble) civil damages. And regardless of the outcome, simply having to investigate and defend against such a claim diverts management time and legal costs from the productive work of the business and risks public disclosure of corporate conduct. In all respects, participation in an international cartel can have severe adverse consequences for a business.

Representing businesses facing a cartel investigation is a difficult and delicate task for the business's lawyers and its outside counsel. A business that discovers unlawful cartel activity internally (through an employee, customer complaint or any other means) initially must consider how to investigate and then consider whether, when and where to seek amnesty or leniency from prosecution by law enforcement agencies around the world. On the other hand, a business that discovers from external sources that it has become the subject of an ongoing investigation has a different set of issues to consider. This chapter focuses on the latter, and in particular:

- Outline the risks and issues to address.
- Describes the decision-making process.
- Looks at the available strategies.
- Describes the considerations that ultimately will determine the appropriate strategy.

In Europe, a business's first indication of an investigation usually will be a dawn raid by the European Commission. In the US, it might be a range of events, including receiving a notice from the US Department of Justice that it has opened a criminal investigation, receiving a Grand Jury subpoena, an unannounced visit at the business or an employee's home with a search warrant or the corporate disclosure of an investigation by one of the business's competitors, suppliers or customers in a public securities filing or otherwise.

This chapter focuses on the US and the EU enforcement regimes. However, in practice, it also is critical to consider the laws of any other jurisdictions where cartel activity is alleged to have occurred or had an effect.

**RISKS AND CONSIDERATIONS TO BE ADDRESSED**

The risks and considerations to be considered include, of course, the traditional concerns that arise from competition laws, which may conflict with one another depending on differing jurisdictional requirements. They also include, however, wider issues arising under securities, corporate governance, trade secrets, foreign trade, government contracting and employment laws, and other commercial considerations, such as public, investor, supplier and customer relations and the difficulties of managing a business that is threatened with charges of illegal conduct.

**Primary competition law risks**

The principal risks that face businesses accused of participating in a cartel are well known:

- **Prosecution by the competition authorities.** In some jurisdictions, most notably the US, but also the UK and Canada, governments can prosecute individuals and businesses accused of participating in a cartel as having committed a criminal offence, and often individuals face substantial criminal fines and/or jail time. In other jurisdictions, such as the EU, businesses and individuals can be subject to quasi-criminal sanctions. Debarment from government contracts, usually for a limited period of time, is another possible sanction.

  Cartel sanctions purposefully have become more severe, with the US routinely seeking jail terms for the key management personnel responsible for a business's illegal activities, and fines in the US and EU in the hundreds of millions, calculated as multiples of the gain received or loss suffered as a result of the conduct, or as percentages of a business's entire turnover (whether or not associated with the alleged cartel activity).

  The severity of these sanctions sometimes can be substantially mitigated, if a business admits its role in the cartel and provides full evidence against itself and the other participants. The terms and requirements of such mitigation or leniency arrangements differ according to the jurisdiction, the timing of the business's co-operation and the business's role in directing (or not) the illegal conduct. These differences must be managed carefully, and across jurisdictions, by legal advisers.

  **Private damage suits.** The second primary risk is private competition enforcement, which has, for a long time, been limited almost exclusively to the US. Currently, numerous
other jurisdictions also are in the process of strengthening their private competition enforcement mechanisms.

Nevertheless, private enforcement in the US will continue to represent by far the largest private risk, because of exposure to treble damages and other instruments of US procedural law, including class actions, attorneys’ fees and extensive pre-trial discovery (that may be used in other jurisdictions as well). Despite the increase in fines imposed by the public authorities, therefore, private damage suits, especially if brought in the US, continue to have at least equally severe financial consequences for businesses.

It is important to consider that a business admitting to liability in order to reduce its exposure to criminal fines may nonetheless find itself subject to substantial civil penalties based upon those same admissions. The US has recently modified the law to modestly protect businesses who admit unlawful conduct and obtain amnesty from prosecution, so that they face only single damages, not treble damages in the civil proceedings. That modification is a relatively new development however, so the precise terms of its operation are quite uncertain, especially as it relates to businesses who co-operate but are not the first to admit to liability in enforcement proceedings.

It is evident, despite this development, that there is a fundamental tension between the best defence in enforcement proceedings, which today often means full co-operation with the authorities (including admissions and the production of incriminating evidence), and the best defence in civil damage suits, where the business's position can be negatively affected by any admission or additional evidence introduced in the public enforcement proceedings.

Secondary legal and non-legal issues

Legal and non-legal issues arising outside competition law can directly or indirectly influence the strategic choices of the business and should be addressed when implementing a defence strategy. It is critical that the specific rules and requirements of a jurisdiction be understood in any individual case, but the most important categories to consider are:

- Securities regulations and disclosures. Public businesses have duties of disclosure upon the occurrence of certain types of events. Learning of and/or resolving a criminal competition investigation by government authorities, as well as other intermediate developments and determinations, could well trigger disclosure obligations in one or more jurisdictions. Those disclosure requirements may run counter to some jurisdictions’ desire to keep the fact of investigations completely confidential. These kinds of conflicts need to be resolved with the investigating authorities, and the need for, content and timing of those disclosures is an ongoing consideration for any business under investigation.

- Shareholder derivative suits. In the US, shareholder derivative suits, alleging breach of fiduciary duty, frequently follow a cartel investigation by the authorities.

- Corporate governance and accounting rules. Corporate governance rules have proliferated in recent years and increasingly need to be considered. They may overlap with requirements under the securities laws, but have further requirements relating to special accounting treatment and/or disclosure of fines, penalties or civil payments, (even if anticipatory). Large businesses will usually also have their own Code of Ethics, which in the event of a cartel infraction, will have been breached.

- Public and investor relations issues. The business’s relations with the public, with capital markets and investors, as well as relations with customers, suppliers and others, will need to be considered and addressed in the process.

- Employment, trade secrets, trade and government contracting. In any particular jurisdiction, the local regulations on these subjects may affect the business’s options in defending a cartel investigation or proceeding. For example, there may be considerations as to whether it is necessary to reprimand an employee, or whether it is unlawful to do so. The answer to such questions may differ by jurisdiction and businesses will need to reconcile these tensions carefully.

Deciding on the best strategy is a complicated task as it requires balancing a number of conflicting considerations.

THE PROCESS – BEST PRACTICES

Few businesses are accustomed to dealing with the exceptional situation of a cartel investigation. Even though time is of the essence, a business learning it is subject to an investigation must ensure that the process is properly organised, and has appropriate supervision, includes an internal investigation, deals with conflicts of interest, is co-ordinated across all jurisdictions and disciplines and does all of this as quickly as is reasonably possible.

Establish appropriate supervision of the process

Recent cartel prosecutions have involved senior management of businesses, and there are famous examples of the top executives becoming the target of investigations. As a result, a business may not be able to, at the outset, exclude the possibility that senior management had a role in, or knowledge of, the conduct that is under investigation. To ensure independent supervision of the internal investigation and determinations, some businesses have established special committees of outside directors to oversee and manage the business’s responses and strategies, which typically are conducted by outside counsel, but often with the general counsel’s input and day-to-day involvement.

Conduct an internal investigation

Whenever a business is faced with an investigation into a cartel by the authorities, the first key decision is whether, when and how to launch an internal investigation. Without full knowledge of the facts, the business and its advisers cannot make any rational choices as to the appropriate defence strategy. This ought to seem obvious; however, internal investigations are never popular endeavours. If there is an underlying cartel, getting clear statements from employees (whether managers or not) can be difficult and require multiple interviews, extensive document review and close review of data. The business should plan to deal
with differences between jurisdictions. For example, securing the co-operation or statements of employees in the EU can be challenging as, unlike the US, individuals do not have individual criminal exposure, and their participation in an investigation cannot be compelled. How to approach former employees is another challenge that must be managed early on. The outcomes of such investigation can be painful, unexpected and embarrassing, and they can meet with initial resistance, all of which needs to be understood and managed by external and internal business lawyers.

However, it is usually impractical for a business to decide against conducting an internal investigation (this is especially true for larger and publicly quoted businesses). A failure to investigate will deprive the business of any opportunity to benefit from the proliferating leniency programmes and it may separately be unlawful under governance and securities regulations. For example, for issuers of securities in the US, the Sarbanes-Oxley Act of 2002 contains far-reaching requirements of reporting and investigation where there is "evidence of a material violation of securities law or breach of fiduciary duty or similar violation". A business's own rules of corporate governance and ethics will also have been violated by participation in a cartel, and failure to follow up on the suspicion of a violation risks the appearance that the business's management condones such violations.

In addition, there is always the risk of a domino effect within a particular industry, where the uncovering of one cartel will lead to the uncovering of other cartels in adjacent markets. Businesses should anticipate this possibility in the internal investigation. In the US, the Department of Justice routinely asks witnesses the "omnibus question" (that is, whether they are aware of any other collusive conduct) and defines co-operation as offering a complete answer to that question. Moreover, the leniency rules encourage such disclosures. Under the practice of the US Department of Justice, the first business to report a violation in a second market will not only receive full amnesty for its participation in that cartel, but will also benefit in relation to the original market, where it may be too late to qualify for amnesty (this is called an Amnesty-Plus). There is a similar practice operated by the European Commission.

As a practical matter, the question usually is not whether to investigate at all, but how to do so. If a dawn raid has occurred or a grand jury subpoena has been received, the investigation must begin immediately and start with the materials seized or requested by the authorities. The location and individuals responsible for those documents are critical. However, every business and every investigation is unique and any inquiry should be designed carefully and with the particular business and facts in mind.

**Deal with conflicts of interest**

The fact that violations are criminal offences in the US and in Canada, and increasingly in other jurisdictions such as the UK, can trigger conflicts of interests between the employees and the business. In this situation, it is best to consider (and some authorities will require) whether to have separate representation by counsel for individual employees. (Under most jurisdictions the business can advance and reimburse the employee for the expenses.) This may not be necessary in the EU, however, as individuals do not have individual criminal exposure, and their participation in an investigation cannot be compelled. The relationship between the different outside counsel should be set out in a Joint Defence Agreement. This will protect to the maximum extent possible the legal privilege over information exchanged between counsel to the maximum extent possible.

**Ensure co-ordination across all jurisdictions**

An international cartel will, by definition, be alleged to have operated in a number of jurisdictions. The defence process must be designed to investigate all illegal activities, wherever they may have been committed. The facts may differ dramatically from jurisdiction to jurisdiction, or a single cartel may be alleged to have operated in multiple jurisdictions.

In addition, while leniency rules have proliferated around the world, they are not co-ordinated or necessarily consistent, so that multiple leniency applications likely will be required. Similarly, the interaction between the US discovery process and investigations occurring in the rest of the world is becoming a significant issue. The ability of parties to use materials and information produced in US civil cases with overseas authorities is currently the subject of litigation in the US, but the legal trend (from the US Supreme Court) and the safest assumption for planning purposes, is that evidence discovered in the US may be used in foreign proceedings and that discovery obtained overseas may at some point be discoverable in US courts. As a practical matter, the enforcement agencies have co-operation agreements and will seek waivers from businesses to permit information and evidence sharing. However, it is still vital to consider the jurisdictional limits of the discovery rules, especially in civil proceedings that may follow.

In summary, the simultaneous analysis of all opportunities and risks across the various jurisdictions is necessary for a business to make optimal decisions about the timing and strategy of its defence.

**Proceed swiftly**

Since all leniency programmes place a premium on being in early (if not first), the process for assessing the business's exposure and/or desire to provide materials to the authorities must take place very quickly. Some jurisdictions will permit a business to "lay down a marker" by admitting participation in a cartel and committing to provide the available evidence as soon as the internal investigation has been completed.

**DECIDING ON THE APPROPRIATE STRATEGY**

Very soon after completion of the internal investigation, the business needs to decide which basic strategy it wants to adopt in relation to the one, or more, public enforcement proceedings that it knows are pending or that are likely to be opened. This chapter assumes the most difficult case: that the investigation has revealed some, but inconclusive evidence of international cartel-like behaviour, and that there is reason to believe that at least one participant already has sought amnesty from the authorities.
In making strategic decisions, usually on the basis of incomplete information, the business needs to make predictions as to the likely future developments, not only in the various public enforcement proceedings, but in relation to the likely forum of private suits and the overall relations of the business with the public, investors and employees.

The three basic options are full denial, full co-operation and measured co-operation.

Full denial

The strategy of full denial and complete defence is the oldest defensive strategy. For a long time, this was the preferred defence in European proceedings. To some, it was the only acceptable behaviour for a European business. In the US, the balance of considerations has always included the level and quality of evidence presented, the likelihood of prevailing on the merits, the risks of civil litigation and damages and the costs of defending on the merits. In fully denying the allegations in any jurisdiction, a business would:

- Deny any infringement or agreement in restraint of trade.
- Respond to information requests in a minimalist way. Under EU and US rules of procedure, the authorities can (and most often do) issue compulsory information requests, requiring a response even if they are the subject of an investigation that can result in fines being imposed on the defendant.
- Challenge the scope and/or sufficiency of the discovery or investigative process.
- In general, not admit any role in any cartel.

The same strategy will be employed in private suits, forcing the claimants to prove every single element of their case.

Today, with effective leniency programmes proliferating, this strategy is less likely to succeed if there is strong evidence of a cartel. There is a high likelihood that other industry participants have been or will be co-operating with the authorities and providing proof of the cartel. In the EU, a denial by one or two businesses will therefore not be effective in fending off the authorities and the business will relinquish any chance of receiving a reduction of the sanctions. This strategy in the EU is probably worth considering only if the business was a fringe recipient of amnesty will no longer be jointly and severally liable for treble damages and under some circumstances in a US court the guilty plea can constitute prima facie evidence of participation in a cartel.

In the US, however, it can be a harder calculation. Criminal enforcement is a judicial function, not an administrative proceeding, so that charges must be proven by a prosecutor in a court of law and beyond a reasonable doubt, as determined by a jury. Defendants have obtained acquittals even where other purported members of the cartel have entered guilty pleas in accordance with leniency petitions. A decision to deny involvement has to be based on the particular facts of the case and the full range of commercial considerations. A decision to fight a criminal charge can be difficult and costly (financially and personally) even where the defendant prevails.

For publicly held businesses especially, outright denial of all unlawful conduct everywhere can be difficult where:

- As a result of the internal investigation there is evidence of some infringement, even if the evidence is not as robust as the authorities suspect or allege.
- Employees who violated internal policies and/or laws must be reprimanded.

Full admissions and co-operation

At the other end of the spectrum is the strategy of full admissions and co-operation. In order to receive amnesty or at least a reduction of the otherwise applicable sanction, businesses can admit liability to the authorities at an early stage, produce all available evidence, and continue to co-operate with the authorities as required. This type of co-operation increasingly includes an expectation on the part of the authority that key managers, who instigated the cartel or at least played a key role, will be fired or at least demoted.

This strategy is now a more popular route than in the past, and can be more straightforward to implement than a mixed strategy (see below, Strategies in-between). It is appropriate for a business that has determined the evidence strongly suggests unlawful behaviour that it wishes to put behind it, and move forward with a clean slate. If the business has made this determination, the considerations that relate to the securities and governance laws, employment and other laws are usually accommodated easily.

This strategy can involve a degree of interpretation of even ambiguous facts in the most incriminating light, to supplement more definitive evidence. This can be a difficult and uncomfortable exercise, and it is likely to run against the natural interests of some individuals.

The obvious drawback of this strategy is the fact that full admissions can work against the business in a private suit. In order to reduce this risk, the US has recently amended its laws to provide that in addition to obtaining immunity from prosecution, a recipient of amnesty will no longer be jointly and severally liable for treble damages but will be liable only for actual damages (Antitrust Criminal Penalty Enhancement and Reform Act of 2004). However, a business that does not qualify for amnesty, but still pleads guilty in return for reduced sanctions, will continue to be liable for treble damages and under some circumstances in a US court the guilty plea can constitute prima facie evidence of participation in a cartel.

The legal situation is somewhat different in Europe, where it is likely that a final European Commission decision imposing a fine will make the business’s participation in the cartel binding on national courts in relation to its participation (Article 16, Regulation 1/2003). This effect will not be fundamentally different whether the business co-operated or not.
Strategies in-between

There are, of course, a large number of strategies available that lie in-between the two above extremes. In the face of some evidence of an infringement, or evidence that is inconclusive, there are other possibilities, including fully co-operating with the investigation but not admitting wrongdoing, confining admissions to the strictest interpretation of the evidence (no incriminating inferences), or admitting to limited aspects of the suspected conduct such as:

- The specific products affected by the cartel.
- The geographic extent of the cartel.
- The duration of the cartel.
- The effectiveness (or lack of effectiveness) of the cartel on the market.
- The level of a business’s involvement (for example, denying participation at group level, in order to contain the enforcement proceedings at a lower level of the corporate chain).
- The nature of the conduct alleged to be unlawful.
- The existence of internal corporate rules and training of employees on compliance with the competition laws.

This sort of strategy is appealing for businesses that are not eligible to receive amnesty, because they are not first in the door. However, in the EU and the US, this approach is the least predictable or routinely tested through repeated and reported experiences, and it is the approach requiring the most judgment calls. It will involve regular strategic and tactical decisions to handle the particular issues and different procedural phases across different jurisdictions. Importantly, the uncertainty of outcomes associated with this approach can be challenging to boards of directors, managers and employees, though it perhaps most readily reflects the complexity of these situations.

Conclusion – the challenges

The range of strategic choices available to publicly quoted businesses can seem more limited than initially thought:

- Where there is some reason to suspect that a business may have participated in a cartel, the business very likely will need to conduct an internal investigation to uncover as much as possible of the business’s involvement.
- Where an internal investigation reveals substantial evidence of cartel behaviour, it will be very difficult for the business to deny completely any wrongdoing vis-à-vis the authorities and the public.
- Where the internal investigation reveals mixed or inconclusive evidence of cartel behaviour, the business has a tougher choice to make as between full admissions and co-operation, and a more circumspect approach.
- These alternatives must be considered in light of the rules and practices of multiple jurisdictions simultaneously.

In spite of these limitations, however, a large number of important and complex tactical decisions have to be made throughout the duration of the various procedures and usually on the basis of incomplete information. The number of jurisdictions involved and the developing nature of the laws, both regarding public enforcement proceedings and civil damage claims, make this a challenging (and evolving) task.