CARTELIZATION

The World Has Changed: Global Cartel Enforcement Brings New Risks

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Multinational companies confront a wide range of risk. But an area of risk that may not be fully appreciated by multinationals is cartel behavior.

Cartel conduct—that is, reaching an agreement with a competitor to fix prices or allocate customers or markets—can be extraordinarily costly for a company. The risk presented by cartel conduct is somewhat akin to the risk from a natural disaster—they are both hard to predict and can potentially be devastating. Yet unlike natural disasters, the risk is internal to the company.

The experience of the airline industry illustrates the dangers.

Between 2007 and 2011, authorities in nine jurisdictions investigated over 20 airlines, from 19 different countries, for fixing prices on fees charged to customers.1


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in the U.S., and 21 airline executives were charged with crimes—six served prison sentences. Outside the US, criminal proceedings were brought in the UK, and the airlines paid nearly another billion dollars in regulatory fines in Europe, Asia, Australia and Canada. Beyond the criminal and regulatory consequences, more than 100 class action lawsuits, seeking several hundred million dollars in damages, have been filed by private plaintiffs in the U.S.—that litigation continues.

Developments in both the U.S. and Europe have increased the risk to multinational companies. The Department of Justice is increasingly aggressive in its investigation and prosecution of international cartels. Foreign competition authorities are becoming more aggressive as well, for instance, the UK Enterprise and Regulatory Reform Act 2013 will (as of April 1, 2014) remove the “dishonesty” element from the UK criminal cartel offence, expressly to facilitate an increased level of criminal convictions for cartel activity in the UK. And the threat of follow-on class action litigation, once largely a U.S. phenomenon, is becoming more common in Europe and elsewhere. This article discusses those developments and provides practical advice for companies faced with responding to a cartel investigation, as well as those seeking to avoid such problems.

**Lienancy and the Global Cartel Regulatory Framework**

Most cartel investigations in the U.S. and elsewhere begin with a company applying for leniency. The US Department of Justice pioneered the use of leniency as a tool to generate cartel prosecutions. The DOJ discovered that if you offer immunity to the first member of the cartel to cooperate with the government, and if you combine that with severe penalties for every other member of the cartel, then you can create a race to become a DOJ cooperator. Given the success of the US program, other countries followed suit with their own cartel leniency programs. Today, some form of cartel leniency program is available in many countries, including all of the U.S.’s most significant trading partners.

The widespread spread of cartel leniency programs means cartels are globally regulated. Leniency programs and greater coordination among international competition agencies have made parallel investigations in multiple jurisdictions routine. The international investigations into the air cargo industry are again illustrative. On the morning of St. Valentine’s Day in 2006, the U.S. DOJ and the European Commission launched dawn raids on the offices of a number of air

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10 For example, that of the top 10 U.S. trading partners in 2013, Canada, China, Mexico, Japan, Germany, South Korea, the United Kingdom, France, Brazil and Saudi Arabia, all but Saudi Arabia have cartel leniency programs. See Census Bureau, U.S. International Trade Data (available at http://www.census.gov/foreign-trade/statistics/highlights/tpothpartners.html); and see also International Competition Network, Detailed Guidelines, Notes and Other Materials Providing Guidance About Leniency Programs. Available at http://www.internationalcompetitionnetwork.org/index.php/en/about-icn (last visited August 2013).

cargo carriers. Korea and Japan then launched dawn raids on several airlines, and the investigation quickly spread to competition regulators in Australia and Canada.

The global regulation of international cartels both increases expenses and adds risks for multinational companies. A company that comes within the cross hairs of the global competition cops often must defend itself simultaneously before regulators in multiple jurisdictions—hence the added expense. But defending a company generally includes providing evidence (such as company documents) to the competition regulators. Providing evidence to regulators in multiple jurisdictions increases the risks to the company in a number of respects.

A significant element of the risk to companies that must deal with multiple leniency regimes comes from the disparate treatment of confidential information by those different regimes. A company that applies for leniency can expect to provide statements and ordinary evidence to regulators in multiple jurisdictions in- increases the risks to the company in a number of respects.

The risk that material submitted in an overseas leniency application may be discovered in follow-on litigation is in part a consequence of the different laws in different jurisdictions. For example, information that may be withheld from a US leniency application on the basis of attorney-client privilege may have to be included in a leniency application to a jurisdiction that takes a different view of the privilege. Similarly, in the U.S., the DOJ would likely take the position that information submitted in a leniency application is protected from disclosure in a civil case under an informant privilege or a law enforcement privilege—foreign jurisdictions may have a different view. In the


15 See Case C-380/09, Pfeiffer AG v. Bundeskartellamt (finding disclosure of confidential leniency documents subject to national laws); see also Hammond, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, (Feb. 25, 2010) (noting that if the DOJ obtains a waiver from the applicant, then the Antitrust Division will seek to “co-ordinate investigative steps, share . . . information provided by a mutual leniency applicant, and co-ordinate searches”). Note also that the EU and UK leniency programs permit applicants to apply via a verbal leniency application to avoid the creation of new documents describing the cartel which would potentially be disclosable in follow-on damages actions—the onus is on the applicant to take advantage of this. See European Commission, MEMO/06/469 (December 7, 2006), available at http://europa.eu/rapid/press-release_MEMO-06-469_en.htm.

16 The risk that material submitted in an overseas leniency application may be discovered in follow-on litigation is in part a consequence of the different laws in different jurisdictions. For example, information that may be withheld from a US leniency application on the basis of attorney-client privilege may have to be included in a leniency application to a jurisdiction that takes a different view of the privilege. Similarly, in the U.S., the DOJ would likely take the position that information submitted in a leniency application is protected from disclosure in a civil case under an informant privilege or a law enforcement privilege—foreign jurisdictions may have a different view. In the


tions were introduced in Canada by the 1990s, and presently follow-on private actions against investigated companies are common place in Canada.

**Recent Developments in Foreign “Class Action” Litigation**

Although the EU has long provided a right of compensation to victims of cartel conduct, there had been no way to bring something akin to a U.S. class action lawsuit. Class action mechanisms—known in Europe as “collective redress”—had been left to the EU member states. Recently, though, the European Commission (EC) proposed a new Directive and other regulatory changes that would introduce a minimum level of collective redress procedures across the EU. Individual member states can still fashion their own collective redress procedures, for example, recent proposals to change collective redress procedures in the U.K. may bring them closer to U.S.-style class actions.

The European Directive proposes that companies recover compensation for the harm incurred, as well as compensation for lost profits. Currently, follow-on actions in Europe are typically brought by larger companies that can recover sufficiently to offset the costs of such complex and multi-jurisdictional litigation. For example, Michelin is currently bringing 16 private antitrust actions for damages against its suppliers stemming from cartel investigations in such industries as chemicals, synthetic rubber, sea freight, air freight, steel, energy and temporary workers.

Follow-on litigation in multiple jurisdictions creates additional risks that confidential, proprietary, or perhaps even incriminating information may be revealed publicly. Pfleiderer and other decisions by European courts suggest that materials sought in leniency applications could be discoverable in follow-on litigation. To limit this risk, the EC has delineated different levels of protection for documents submitted by a leniency applicant: (1) documents that will not be disclosed, such as the leniency corporate statements and settlement submissions; (2) documents that are only disclosable once the investigation of the competition authority is closed, such as the confidential version of the Commission’s decision; and (3) documents that are always disclosable are “pre-existing information,” such as company documents and files.

While there is much focus currently on the development of collection actions in cartel matters in Europe, there are indications that many other countries are also seeking to allow some form of private litigation in cartel matters. For example, Korea, Russia, and Japan have all recently taken steps to develop a private action system. Japan has been working with consumer groups to develop a more EU-styled collective redress system. Russia and Korea, on the other hand, seem to be moving more to a U.S.-styled private enforcement system. The head of the Russian Federal Antimonopoly Service noted publicly in July that his agency was looking to introduce a group action mechanism in November 2013 as further means to deter and punish monopolistic behavior, referring specifically to the class action system in the U.S. Similarly, the head of the Korean Fair Trade Commission recently noted that the future of competition law enforcement in Korea was through private damages claims that would include such U.S.-style features as treble damages and injunctions.

Given the size of these markets, the development and encouragement of private antitrust claims will have a major impact on businesses that become entangled in cartel investigations in these jurisdictions. The steps a company takes during the investigation and enforcement stage—such as how it conducts the global internal investigation and how it approaches leniency in various jurisdictions—can directly impact how the company will fare in follow-on private actions in any number of other jurisdictions.

**How to Weather the Storm: Think Locally, Act Globally**

The globalization of cartel regulation—which includes regulation by government enforcers as well as litigation by private parties—is a relatively new and still evolving phenomenon. Any business that operates

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27 See Class Actions Coming to Korea, Global Competition Review (Mar. 15, 2013).
across borders runs the risk of becoming ensnared in a multi-jurisdictional cartel investigation and follow-on civil investigation. The cost to a company can be enormous and those costs include not only money spent defending the company and paying any fines or damages awards that are levied, but also the cost of distracting the company from other, more core business pursuits. In the investigations of the airlines’ cartels, nine jurisdictions have levied fines totaling almost $2 billion. Follow-on lawsuits have been filed in multiple jurisdictions, costing companies millions to settle. But more than seven years after the dawn raids, both the regulatory investigations and the private lawsuits continue. 28


The solution for multinationals is to think locally but act globally. Think locally: the rules for responding to a cartel investigation vary from one jurisdiction to the next, and the company must know the anti-cartel rules in each jurisdiction in which it does business. Local experts can be critically important both in understanding the jurisdiction’s regulations and its regulators. Act globally: actions taken in one jurisdiction can have consequences in another jurisdiction. There must be a global strategy that takes account of the different jurisdictions in which the company operates. Thinking locally and acting globally is important both in fashioning an effective compliance program for the company and in mounting an effective defense should a problem arise.