Are You Ready For the Global Competition Cops?
Trends, Tips and Techniques in Cartel Enforcement in the
U.S. and Europe

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J. Brady Dugan
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave, NW
Washington, DC 20036
202-887-4152
tbdugan@akingump.com

Christina Hummer
Saxinger Chalupsky & Partner
Rechtsanwälte GmbH
Rue de Pascale 22
Brussels, Belgium B-1040
+32 2 230 78 00
c.hummer@scwp.com

Are You Ready for the Global Competition Cops?

- Who are the Competition Cops?
- Trends in Cartel Enforcement – U.S. and Europe
- Leniency and Other Techniques Used to Uncover Violations
- Responding to a Cartel Investigation
- Compliance Tips
Who are the Competition Cops?

- Department of Justice / Federal Trade Commission
- European Commission
- National Competition Authorities of the EU member states (e.g. Office of Fair Trading, Bundeskartellamt)
- Japan, Canada, Korea, Australia, Brasil, South Africa etc

Trends in Cartel Enforcement – U.S.

Top Law Enforcement Priority for DOJ’s Antitrust Division: Criminal Antitrust Enforcement

“Breaking up international cartels that harm U.S. consumers and businesses continues to be the Antitrust Division’s top law enforcement priority. The Division will continue to work closely with our antitrust colleagues abroad in order to stop individuals from engaging in price fixing and bid rigging.”

—Assistant Attorney General
Antitrust Division
U.S. Department of Justice
### Trends in Cartel Enforcement – U.S.
The Sherman Antitrust Act, 15 U.S.C. § 1

- Sherman Act § 1 prohibits “contracts, combinations and conspiracies” that unreasonably restrain trade

- Agreement is the key
  - *Need not be in writing* – may be inferred from circumstantial evidence
  - Agreements include – gentlemen’s agreement; handshake; or even a “knowing wink”
  - Agreement can be proven through circumstantial evidence

### Trends in Cartel Enforcement – U.S.
Conduct Prosecuted

- DOJ Prosecutes “Hard Core” Cartel Offenses

- Agreements Among Horizontal Competitors to:
  - Fix Prices
  - Rig Bids
  - Allocate Markets (Customers/Territories)
  - Allocate Sales Volumes/Restrict Output
No Agreement required to infringe European antitrust law

Article 101 TFEU prohibits

- all agreements between undertakings,
- decisions by associations of undertakings, but also
- concerted practices
- which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

Any Conduct Among Horizontal Competitors to:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development, or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
Trends in Cartel Enforcement – Europe

Conduct Prosecuted (cont.)

- Prosecution not limited to hard core cartels
- Also any “form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.”
  - info exchange
  - hub & spoke

Trends in Cartel Enforcement – U.S.

Penalties for a Sherman Act Violation

- Individuals
  - up to 10 Years in Jail and $1,000,000 fine

- Corporations
  - up to $100 million fine

- Alternative Fine (18 USC § 3571 (d))
  - Twice the Gain or Twice the Loss
Trends in Cartel Enforcement – U.S.
Criminal Antitrust Fines: 2000 - 2010

Criminal Antitrust Fines

Fiscal Year

$1 Billion

$555 Million

$75 Million

$1 Million

$100 Million

$630 Million

$1 Billion

$8 Million

$1 Billion

$473 Million

$389 Million

$107 Million

$70 Million

$50 Million

$10 Million

$5 Million

$1 Million

1000's

2000

2001

2002

2003

2004

2005

2006

2007

2008

2009

2010

Trends in Cartel Enforcement – U.S.
Criminal Antitrust Violation Jail Time: 2000 - 2010

INCARCERATION TREND - Average Months

Average Jail Time (in months)

Fiscal Year

1990's avg.

2000

2001

2002

2003

2004

2005

2006

2007

2008

2009

2010

8

10

15

18

21

24

24

31

25

25

30

0

5

10

15

20

25

30

35
Trends in Cartel Enforcement – Europe
Penalties for a Violation of Article 101/102 TFEU

- Corporations
  - Up to 10% of the annual turnover

- Individuals
  - No fine on EU-level
  - Fines in certain EU-jurisdictions, such as UK, Ireland, Netherlands
  - Criminal sanctions for bid-rigging in almost all member states
  - Criminal sanctions (other than monetary fines) for other infringements only in certain EU-jurisdictions (e.g. UK, Ireland)

Trends in Cartel Enforcement – Europe
Penalties for a Violation of Article 101/102 TFEU (cont.)

- Parental Liability
  - No need of (in)direct involvement of parent company in collusive conduct
  - “decisive influence” by parent company over the entity involved in the collusive conduct

- Commission targets parent companies
  - Increasing the likelihood of larger fines
    - up to 100% for recidivists – applicable to ALL subsidiaries
    - 10% cap calculated of turnover of ultimate parent company
  - Better enforceability
    - pursuing a potentially more stable and adequately liquid entity
  - Increasing the deterrent effect
    - increase of fine if the parent company is financially strong
Trends in Cartel Enforcement – Europe
Antitrust Fines: 1990-2011

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount in €*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990 - 1994</td>
<td>539,691,550</td>
</tr>
<tr>
<td>1995 - 1999</td>
<td>292,838,000</td>
</tr>
<tr>
<td>2000 - 2004</td>
<td>3,462,664,100</td>
</tr>
<tr>
<td><strong>2005 - 2009</strong></td>
<td>9,663,506,500</td>
</tr>
<tr>
<td>2010 - 2011</td>
<td>3,183,876,432</td>
</tr>
<tr>
<td>total</td>
<td>17,132,576,582</td>
</tr>
</tbody>
</table>

Last update: 14 July 2011
Source: http://ec.europa.eu/competition

Trends in Cartel Enforcement – Europe
Ten highest fines per case

<table>
<thead>
<tr>
<th>Year</th>
<th>Case name</th>
<th>Amount in €*</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>Car glass</td>
<td>1,383,896,000</td>
</tr>
<tr>
<td>2009</td>
<td>Gas</td>
<td>1,106,000,000</td>
</tr>
<tr>
<td><strong>2007</strong></td>
<td>Elevators and escalators</td>
<td>832,422,250</td>
</tr>
<tr>
<td>2010</td>
<td>Airfreight</td>
<td>790,445,000</td>
</tr>
<tr>
<td>2001</td>
<td>Vitamins</td>
<td>790,515,000</td>
</tr>
<tr>
<td>2008</td>
<td>Candle waxes</td>
<td>676,011,400</td>
</tr>
<tr>
<td>2010</td>
<td>LCD</td>
<td>648,925,000</td>
</tr>
<tr>
<td><strong>2007</strong></td>
<td>Bathroom fittings</td>
<td>622,250,782</td>
</tr>
<tr>
<td><strong>2007</strong></td>
<td>Gas insulated switchgear</td>
<td>539,185,000</td>
</tr>
<tr>
<td><strong>2007</strong></td>
<td>Flat glass</td>
<td>486,900,000</td>
</tr>
</tbody>
</table>

* Amounts adjusted for changes following judgments of the Courts (General Court and European Court of Justice).

Last update: 14 July 2011
Source: http://ec.europa.eu/competition
Trends in Cartel Enforcement – Europe
Ten highest fines per undertaking

<table>
<thead>
<tr>
<th>Year</th>
<th>Undertaking**</th>
<th>Case</th>
<th>Amount in €*</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>Saint Gobain</td>
<td>Car glass</td>
<td>896,000,000</td>
</tr>
<tr>
<td>2009</td>
<td>E.ON</td>
<td>Gas</td>
<td>553,000,000</td>
</tr>
<tr>
<td>2009</td>
<td>GDF Suez</td>
<td>Gas</td>
<td>553,000,000</td>
</tr>
<tr>
<td>2001</td>
<td>F. Hoffmann-La Roche AG</td>
<td>Vitamins</td>
<td>462,000,000</td>
</tr>
<tr>
<td>2007</td>
<td>Siemens AG</td>
<td>Gas insulated switchgear</td>
<td>396,582,500</td>
</tr>
<tr>
<td>2008</td>
<td>Pilkington</td>
<td>Car glass</td>
<td>370,000,000</td>
</tr>
<tr>
<td>2010</td>
<td>Idea Standard</td>
<td>Bathroom fittings</td>
<td>326,091,196</td>
</tr>
<tr>
<td>++2007**</td>
<td>ThyssenKrupp</td>
<td>Elevators and escalators</td>
<td>319,770,900</td>
</tr>
<tr>
<td>2008</td>
<td>Sasol Ltd</td>
<td>Candle waxes</td>
<td>318,200,000</td>
</tr>
<tr>
<td>2010</td>
<td>Air France / KLM</td>
<td>Airfreight</td>
<td>310,080,000</td>
</tr>
</tbody>
</table>

* Amounts adjusted for changes following judgments of the Courts (General Court and European Court of Justice).

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Source: http://ec.europa.eu/competition

Trends in Cartel Enforcement – Europe
Image Loss
Criminal Antitrust Enforcement Trends in the U.S.

- Create a Global Enforcement Net – International Cooperation
  - Evidence gathering – formal and informal cooperation
  - Coordinated raids
  - Extradition
  - Coordinated prosecutions

- Pursue Aggressive Enforcement Techniques
  - Consensual monitoring
  - Search and arrest warrants
  - “Court-authorized surveillance”
  - “Drop in” interviews

- Use of Other Criminal Statutes
  - Mail / wire / honest services fraud
  - Other bribery / solicitation statutes
  - FCPA

Cartel Enforcement Today – Samples for rest of the World

- **Australia**
  - Criminal Penalties Enacted in 2009 and New In Effect
  - Maximum Individual Sentence is 10 Years Imprisonment

- **Brazil**
  - Criminal Penalties Enacted in 1990
  - Maximum Individual Sentence 2 to 5 Years Imprisonment
  - Very Aggressive Prosecution Today

- **Canada**
  - New Legislation in 2009, Included Lower Burden of Proof for Conviction and High Penalties in Criminal Cases
  - Maximum Individual Sentence is 14 Years Imprisonment

- **China**
  - Anti-Monopoly Law Prohibits Agreements to Fix Prices or Allocate Markets or Customers
  - Sanctions between 1 and 10 Percent of Turnover
  - No Criminal Provisions in AML, but Price Law May Be Used to Target Individuals Criminally

- **Japan**
  - Stronger Criminal Penalties Enacted in 2010
  - Maximum Individual Sentence is 5 Years Imprisonment
Leniency And Other Techniques – U.S. Tools Available to the Government

- Broad power to gather documents
  - Grand jury subpoena
  - Search warrants
- Use of cooperators
  - Including, perhaps, current employees
- Coordination with foreign governments
  - Both formal (e.g. Mutual Legal Assistance Treaties) and informal

Leniency And Other Techniques – U.S. Tools Available to the Government

- Grand Juries
- Leniency / Cooperation agreements
- Search Warrants
- Consensual Recordings
- Wiretaps
- Informants
- Immunity
- Field Interviews
Leniency And Other Techniques – U.S.
DOJ’s Amnesty Program

Corporate Leniency (“Amnesty”)

- **First** company to satisfy amnesty criteria gets: *Immunity From Prosecution*
- Must agree to cooperate
  - Usually extends to all current and former employees who agree to cooperate
  - Can get amnesty where there is no current DOJ investigation (Part A amnesty) and where there is a DOJ investigation already open (Part B amnesty)

Leniency And Other Techniques – U.S.
DOJ’s Amnesty Program (cont.)

Corporate Leniency (“Amnesty”)

- **Civil implications:** private plaintiffs limited to **single damages**; no joint and several liability
- **International implications:** some form of leniency is available in many foreign jurisdictions; for international cartels, generally need multiple leniency applications
Leniency And Other Techniques – Europe

- Immunity from fines
  - European Commission vs 27 national competition authorities
    - Often no certainty which competition authority proceeds with an investigation
    - Need to file leniency applications both on EU and national level
  - No protection of potential criminal prosecution in a Member State in case of immunity on EU level or partly even on the national level

Responding to A Cartel Investigation – U.S.

- What does the government know?
- What does the company know?
- Complying with process
- Dealing with the government
Responding to A Cartel Investigation – U.S.
The Internal Investigation

- When interviewing key employees
  - 5th Amendment Concerns
    - Upjohn warning
    - Separate counsel?
  - Attorney client privilege concerns
  - Is there an employee a whistleblower?

- When gathering documents
  - Litigation hold
  - Electronic documents
  - Sarbanes – Oxley concerns – when does the obligation to preserve documents begin?

Responding to A Cartel Investigation – U.S.
When Amnesty is Not Available

- Alternative to amnesty is prosecution
  - No “deferred prosecution agreements”
  - No “no-jail deals” for individuals

- Prosecution has meant
  - High fines, and
  - Long jail sentences

- But cooperation credit may be available

- Remember that prosecution brings collateral consequences
  - Possible debarment
  - Private damages litigation
Responding to A Cartel Investigation – Europe
When Amnesty is Not Available

- Go in second (or third, etc) to benefit from a reduction of fines
  - Need to provide evidence with significant added value (in particular written evidence)
  - Second undertaking – reduction of 50% - 30%
  - Third undertaking – reduction of 30% - 20%
  - Subsequent undertakings – reduction up to 20%

- Develop defense strategies

- Consideration
  - Bilateral/multilateral infringement?
  - Evidence?
  - Hub & spoke?
  - Info exchange?
  - Potential damage claims ("Pfleiderer")

Responding to A Cartel Investigation – U.S.
Private Plaintiffs Also Enforce the Antitrust Laws Aggressively

- Civil antitrust lawsuits can be filed by governments, individual plaintiffs, or as class actions of thousands (or even millions) of consumers
- Private antitrust class action brings
  - Possibility of treble damages and attorney’s fees
  - Joint and several liability
- Class action lawsuits routinely follow government antitrust investigations or criminal charges
- Class actions can also be filed without a previous government investigation
- Antitrust litigation is very expensive...even if you win
Legal Professional Privilege

- US
  - In-house and external counsel
  - Overall applicability to all areas of law

- EU
  - Only for external counsel ("Akzo")
  - Only for "European counsel"
  - Only applicable to antitrust infringements
  - Only in a few Member States on national level as well

Compliance Tips

The Risks are High

- The anti-cartel laws present a significant business risk
  - Steep corporate fines and lengthy jail sentences

- The competition enforcers are acting globally
  - The number of jurisdictions with tough anti-cartel provisions grows every year
  - The level of cooperation among enforcers deepens every year

- The techniques employed to catch violators is increasingly aggressive and sophisticated
  - EU: Sector inquires
  - E.g. UK: Tip – monetary reward for independent informant

So . . .
Compliance Tips
Effective Antitrust Compliance

- Compliance efforts cannot be a one-time event
  - Requires regular training as well as updating
  - Introduction of screens
  - Internal audits
    ■ In the course of transactions
    ■ Domino effect in industry
- Catching problems early is critical to securing leniency
  - The DOJ creates a race for leniency
  - The difference between securing leniency vs. having to plead guilty is sometimes measured in hours
- A robust, effective compliance program can impact charging decisions as well as sentencing decisions

QUESTIONS?