

Antitrust Cartel Compliance Roundup

June 19, 2020
Adam Hemlock

Weil, Gotshal & Manges LLP

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Today's Topics

- “No poach” and wage fixing
- Procurement collusion task force
- DOJ Antitrust Division policy on compliance programs
- DOJ focus on individual prosecutions
- DOJ's leniency program

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“No Poach” and Wage Fixing

- Cartel-type agreements between employers are illegal and subject to criminal prosecution by the U.S. Department of Justice (“DOJ”)
- There is increased government vigilance in light of COVID-19
- A robust compliance program is critical to mitigate antitrust liabilities and reduce potential antitrust penalties

A labor market, like any other market, however, is ripe for manipulation due to potential anticompetitive conduct and transactions.

Assistant Attorney General Makan Delrahim

Weil, Gotshal & Manges

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Typical Cartel Conduct

- DOJ criminally prosecutes “naked” competitor agreements – agreements that are not reasonably necessary to a separate, legitimate transaction or collaboration between companies
 - Price fixing
 - Bid rigging
 - Market allocation
 - Output restrictions
- Naked agreements are *per se* unlawful
 - There are no justifications, and the agreement is illegal without any inquiry into its effects on competition

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Cartels and Labor Markets

- Agreements not to recruit certain employees or not to compete on certain compensation terms can violate the antitrust laws
 - No-poach agreement: agreement with another employer to refuse to solicit or to hire the other employer's employees
 - Wage-fixing agreement: agreement with individuals at another company about employee salary or other terms of competition, either at a specific level or within a range
- DOJ will criminally prosecute naked no-poach or naked wage-fixing agreements

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DOJ Enforcement of Cartel-Type Labor Agreements

In re: High Tech- Employee Antitrust Litig.

- Beginning in 2010, DOJ sues large tech companies for "no poach" agreements



2016 Antitrust Guidance for HR Professionals

- DOJ will proceed criminally against naked wage-fixing and no-poaching agreements



Spring 2018 DOJ Update

- DOJ "intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information . . . to identify and end anticompetitive no-poach agreements that harm employees and the economy"

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Recent DOJ Enforcement Developments

COVID-19 Agency Warning (April 2020)

- The DOJ and FTC announced they are “closely monitoring” coordination among employers that would “disadvantage workers”
- “COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including . . . essential service providers on the front lines of addressing the crisis”
- The statement reminds businesses of DOJ’s policy to “criminally prosecute companies and individuals who enter into naked wage-fixing and no-poach agreements”
- Additionally, the statement encouraged anyone with information concerning harm to competition in a labor market to contact the government

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Recent DOJ Enforcement Developments

Procurement Collusion Strike Force (“PCSF”)

- Federal training initiative, announced in November 2019, to focus on investigating and prosecuting procurement collusion and other anticompetitive conduct impacting government contracting
- Interagency partnership consisting of prosecutors from DOJ’s Antitrust Division and U.S. Attorney’s Offices, as well as investigators from the FBI, DOD, USPS, and other federal offices
- The scope of PCSF investigatory efforts encompasses direct federal contracting, as well as state and local contracts that rely on federal grants

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Recent DOJ Enforcement Developments

July 2019 Policy Incentivizing Compliance Programs

- At both the charging and sentencing stages, antitrust prosecutors must assess the adequacy and effectiveness of a compliance program to determine
 - (a) whether and how to bring a corporate criminal case
 - (b) a company's culpability score under the U.S. Sentencing Guidelines and resulting fine range
 - (c) whether an independent monitor is required post-resolution
- Organized around "three fundamental questions" for prosecutors to ask
- Lists antitrust factors for prosecutors to consider (but "not a checklist")

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DOJ's Evaluation of Corporate Compliance Programs

Three Fundamental Questions – Question One

- Is the corporation's compliance program **well designed**?
 - Risk assessment
 - Effective and comprehensive format
 - Training and communication
 - Adequate integration
 - Accessible resources

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DOJ's Evaluation of Corporate Compliance Programs

Three Fundamental Questions – Question Two

- Is the corporation's compliance program **applied earnestly and in good faith?**
 - Commitment and encouragement by top management
 - Seniority, autonomy, and authority in program's operations
 - Adequate resources
 - Incentives and disciplinary measures

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DOJ's Evaluation of Corporate Compliance Programs

Three Fundamental Questions – Question Three

- Does the corporation's compliance program **work in practice?**
 - Periodic review, monitoring, and auditing
 - Detection of misconduct
 - Confidential reporting
 - Remedial efforts

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Key Takeaways from July 2019 Policy

- Compliance programs are not assessed in a vacuum
- Senior management's involvement is "critical"
- DOJ seeks a "culture of compliance"
- Aim for maximum effectiveness in preventing and detecting wrongdoing
- Tailor the program to the company
- Empower employees to "do business confidently"

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Key Takeaways from July 2019 Policy *Continued*

- Autonomy and authority of a program is significant to the DOJ's assessment
- A "paper compliance program" is not an effective one
- Emphasis on the need for continuous improvements to meet evolving risks and developments
- Remedial efforts are relevant *at* the time of a violation and *following* the violation for charging decisions or sentencing recommendations

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Potential Criminal Penalties

- Under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)—set to expire this year, unless renewed by Congress—maximum sentences are
 - Jail term of 10 years
 - Corporate fine: \$100 million, or double the loss/gain
 - Individual fine: the greater of \$1 million, or double the loss/gain
- In 2015, former Deputy Attorney General Sally Yates specified the DOJ's policy to "fully leverage its resources to identify culpable individuals at all levels" in both criminal and civil corporate cases

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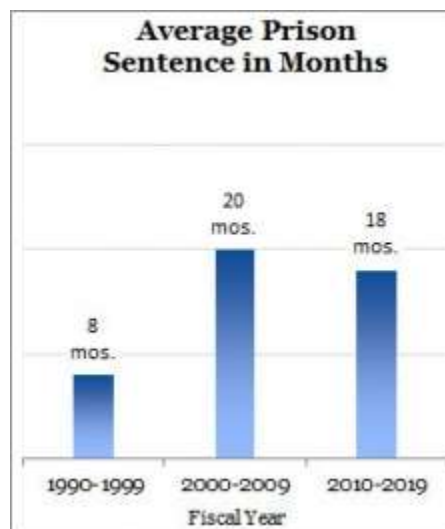
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Potential Criminal Penalties

Recent trends

- In 2019, DOJ issued charges and obtained guilty pleas and convictions in 13 different cartel investigations
 - Guilty pleas from 12 individuals and eight companies
 - Over \$200 million in cartel investigation fines
- Average term of imprisonment for all antitrust defendants is 18 months

Source: <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>

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Individual Liability for Cartel Conduct

Packaged Seafood Investigation

- DOJ charged two companies and four executives with conspiracy to fix the prices of packaged seafood (conduct began as early as 2010)
- Three senior vice presidents of sales pleaded guilty and agreed to pay fines
 - At least \$25,000 fines for two individual defendants
 - Prison sentence TBD
- The former CEO of a defendant company was convicted following a four-week jury trial, in which three senior vice presidents testified
 - Sentencing is pending

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Individual Liability for Cartel Conduct

Online Promotional Products Cartel Investigation

- DOJ charged five companies and six individuals with conspiracy to fix prices of online customized promotional products (alleged conduct began as early as 2012)
- In 2019, DOJ filed two new charges against a company and its CEO, and obtained guilty pleas from four other individuals
 - Owner and president – fined \$20,000 and sentenced to eight months in prison
 - Two executives – each fined \$20,000, one sentenced to six months in prison and the other to three months
 - Former executive sentenced to six months in prison

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DOJ Leniency Program

- Significant investigative tool for detecting cartel activity
- Corporations and individuals involved in antitrust crimes can self-report and avoid criminal convictions
 - The first to confess participation, fully cooperate with DOJ, and satisfy other specific conditions receives leniency for the reported antitrust crime
 - Low initial evidentiary standard for obtaining “marker”

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DOJ Leniency Program

Corporate Leniency Policy

- Two types of corporate leniency
 - Type A leniency: available only before DOJ receives any information about the reported activity from another source
 - All directors, officers, and employees of the corporation who admit their involvement as part of the corporate confession will receive leniency as well
 - Employees who do not fully cooperate can be “carved out” of the conditional leniency letter
 - Type B leniency: available to the corporation even after DOJ receives information, but DOJ has greater discretion for excluding protection for “highly culpable” employees
- “First-in-the-door” requirement applies to both Types A and B

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DOJ Compliance Credit

- Companies that fail to obtain leniency but maintain effective compliance programs may qualify for a deferred prosecution agreement (DPA) and avoid a felony conviction
- “Leniency is and will continue to be the ultimate credit for an effective compliance program that detects antitrust crimes and allows prompt self-reporting.” Deputy Assistant Attorney General Richard A. Powers (Feb. 19, 2020)

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DOJ Leniency Program

Individual Leniency Policy

- Must not have approached DOJ as part of a corporate leniency application for the same conduct
- As with a corporate applicant, an individual applicant is disqualified from obtaining leniency if he or she is the single organizer or single ringleader of a conspiracy
- Absent qualification for leniency or other discretionary immunity, defendants may also seek to reduce their sentence through cooperation

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