

Client Alert

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Cartel Prosecutions – The Next Wave and the New Message from the U.S. Antitrust Division

By Roxann Henry and Brad Lui

It is widely rumored that the U.S. Antitrust Division of the Department of Justice (“Antitrust Division”) is already working toward its next wave of international cartel investigations. The blockbuster auto parts investigation has netted massive fines, jail time, and fugitives, and spawned ripple investigations globally, from China to South Africa.¹ As prosecutions continue and those caught in the net continue to struggle, critical lessons emerge, and not just for the defense. Significantly, the Antitrust Division has been speaking out on compliance, cooperation, and serial offenders.

Those in the trenches see signs that the tidal wave of Antitrust Division auto parts investigations are starting to recede. And the Antitrust Division has promised that we should expect to see enforcement activity in a new area soon.² Yet, what could be bigger than auto parts? So far in the U.S. alone:

- 31 corporate guilty pleas
- \$2.4 billion in fines
- 20 individuals sentenced to one to two years in jail
- 26 additional individuals charged, most remaining fugitives outside the U.S.
- civil class-action settlements in the millions.

As the Antitrust Division moves forward, it is implementing new policies and practices. The newest message from the Antitrust Division is a refinement of its “carrot and stick” approach to promote greater deterrence and self-reporting, with an emphasis on new “sticks.”

The Division wants:

- To induce effective corporate compliance programs.
 - The new “stick” is that the sentencing of any company without an adequate program will include, at a minimum, probation with a mandated compliance program and, in the most egregious circumstances, imposition of a monitor who would be paid by the company and report to the government.

¹ Outside the United States, the European Commission, Canada, Japan, Australia, Korea, and numerous other jurisdictions have already taken enforcement actions or are investigating. None of these auto parts investigations has yet concluded. The financial services investigations also continue to grow. The Criminal Division of the US DOJ has largely dominated these investigations, although working closely with the Antitrust Division.

² Remarks of Brent Snyder at the American Bar Association, Antitrust Division’s Fall Forum, November 6, 2014.

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- Potentially a new “carrot” is under consideration.
- “Cooperation” to include full disclosure of any collusion problems unknown to the Division.
- The new “stick” is an enhanced fine (Bridgestone paid an extra \$100 million after it “cooperated” on marine hoses without disclosing collusion on auto parts).
- The “carrot” remains “amnesty plus.”
- Companies to pressure individuals not only to cooperate but also to plead guilty and go to jail.
- The new “stick” is that continuing to employ carve-outs (employees not protected from prosecution by the corporate plea agreement) or other corporate individuals who refuse to cooperate with the Division may subject the company to probation or a monitor as part of its sentence.
- The “carrot” remains that the value of a company’s cooperation credit in computing the fine can be increased by information from cooperating individuals.

The Antitrust Division has long espoused that prosecution of individuals is necessary for meaningful deterrence. The Division’s position has always been that individuals are the only true actors, and they need to understand and accept personal responsibility for their conduct. The new message from the Division focuses on pushing companies to enable and induce individuals to comply and find new ways to increase self-reporting of misconduct.³

Traditionally, the Division has taken the view that the avoidance of high fines should be adequate incentive to implement compliance training. Thus, the Division highlighted its push for high fines as tantamount to incentivizing compliance training. Similarly, the Antitrust Division pointed to its leniency program as a means to incentivize corporate spending on compliance, arguing that a company with an effective compliance program would be better able to learn of its problems and fix them through an amnesty application. The Division appears now to be recognizing that for companies to justify the type of extensive compliance training and auditing that is most effective may require more. In calculating a corporate fine, the Antitrust Division still does not give any credit for a compliance program, regardless of how meaningful, but perhaps some recognition of those corporate efforts will come.

The Division will not negotiate a plea agreement with a recommended fine without a company’s commitment to cooperate with the Division’s investigation moving forward. Similarly, company employees seeking to be protected from prosecution by a corporate plea must cooperate or forfeit that protection. It has long been known that the Division wants companies to pressure individuals to cooperate and to plead, but the Division’s aggressive stance on continuing employment of carve-outs may go too far. Some carved-out individuals may never be charged, and all are presumed innocent under the law until proven guilty. Continued employment of an individual carved out of the company plea agreement but never charged with any offense does not necessarily reflect on corporate acceptance of responsibility for past misconduct or suggest future cartel behavior will occur. While the Division claims to limit its condemnation of continuing employment to when the Division believes (1) the

³ The Division has also modified its Model Plea Agreement to push cooperation to force increased disclosures.

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employment could have an undue influence on the cooperation of others, or (2) puts the carved-out individual in a position to affect sales and pricing, the Division's policy has the effect of punishing individuals without trial and involving the Division in employment issues beyond its expertise or authority.

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How Morrison & Foerster Attorneys Can Help

We combine strong cartel experience in the United States, Europe, and Asia with an integrated global network to provide clients with what they need: anticipation and avoidance before problems arise and — when they do — a rapid, globally coordinated response. Our cartel representation is informed by more than 30 years of experience, including the resolution of cartel proceedings before the U.S. Department of Justice, the European Commission, authorities in EU member states, Japan, Brazil, Australia, Canada, Korea, and other jurisdictions. Large multinational, domestic, and closely held firms, as well as domestic and foreign individuals, have entrusted their defense to our lawyers.

Cartel Investigations: A High-Risk Landscape. Companies facing international cartel investigations must anticipate enforcement actions not only by the U.S. Department of Justice and/or the European Commission, but also by other antitrust authorities around the world. Investigated companies face reputational harm, the erosion of shareholder value, and the practical costs of ongoing distraction or loss of senior executives. The inevitable follow-on litigation (U.S. federal and state as well as potential victim litigation claims in Europe and other countries) can prolong a company's agony and have severe economic ramifications. Collateral consequences of a felony indictment can range from financing effects to preclusion from government bidding, from False Claims Act allegations to shareholder derivative suits.

Our Approach. We excel at global coordination and collaboration. We are familiar with the nuances of the current maze of leniency policies and the unwritten practices of the enforcers. Our lawyers know the private claimants' lawyers and how they approach their claims. With this expertise and history clients can understand their strategic options to minimize overall cost and disruption.

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We keep our clients' business objectives at the fore as we develop an action plan. We approach cartel investigations holistically and avoid piecemeal solutions. We see little point in stamping out one brush fire if that causes another to flare, potentially sparking a major conflagration.

Our knowledge, technique and discipline has allowed us to overcome enforcement actions against our clients even when others in the same investigation chose to plead guilty or apply for leniency. Our lawyers:

- won one of the rare corporate antitrust “not guilty” verdicts;
- successfully persuaded authorities to drop investigations against our clients;
- have obtained exclusion of our clients from EU statements of objections against other industry participants; and
- have succeeded in dismissals of civil actions and denials of class certification.

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We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 11 straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

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