CARTEL CORNER

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INTRO

In the first half of 2023, antitrust enforcers remained remarkably busy both in the United States (US) and across the European Union (EU). The US Department of Justice's (DOJ's) Antitrust Division (Division) and the Federal Trade Commission (FTC) have continued their aggressive and novel effort to drag antitrust enforcement into the labor markets. The DOJ Procurement Collusion Strike Force (PCSF) has pursued its crackdown on antitrust and fraud involving government procurement with a number of recent cases. And DOJ has pushed the boundaries under Section 2 of the Sherman Act—both by revitalizing the criminal provisions of the law and by pursuing "attempts" to monopolize criminally. The European Union has also kept the pressure on those doing business overseas, imposing significant fines in recent matters and upgrading its online leniency program to make it easier for companies to report wrongdoing.

In this installment of Cartel Corner, we examine this continued aggressiveness toward antitrust enforcement. While these government enforcement efforts have not always been successful, they have nonetheless reframed the landscape for many companies and individuals. What was once thought of as a civil antitrust violation at worst—or no violation at all—is now often pursued criminally. And antitrust enforcers are speaking in more strident tones as they attempt to remake, in certain ways, the way companies do business in the United States and abroad.

Whether antitrust enforcers are ultimately successful remains to be seen. Nonetheless, the trend is real, and it is one that all companies should be prepared to address in the weeks and months to come.

McDermott Will & Emery

LABOR MARKETS

WITH LOSSES MOUNTING, REGULATORS REMAIN AGGRESSIVE IN LABOR MARKET ENFORCEMENT

Under the Biden administration, DOJ has repeatedly made clear that increasing enforcement of alleged anticompetitive conduct within labor markets remains a top priority.

However, DOJ's record to date in its criminal enforcement of labor markets has been less than stellar, with judges and juries rejecting DOJ's approach, as evidenced by recent acquittals of 13 individuals and one company of antitrust charges across four trials. Importantly, one of these recent dismissals delivered a major setback to DOJ's labor market enforcement program and raises questions about the viability of these investigations and prosecutions—particularly as it relates to alleged non-solicitation agreements—and has created a difficult legal precedent for DOJ to overcome.

US V. VDA AND HEE (DISTRICT OF NEVADA)

Although DOJ's labor market prosecutions have been rebuked at jury trials, they secured their first criminal convictions by plea agreement in October 2022. In this matter, a corporate defendant agreed to pay $62,000 as a criminal fine and $72,000 in restitution relating to an alleged wage-fixing conspiracy. Several months later, DOJ resolved its case against a former VDA manager with a six-month deferred prosecution agreement (DPA). Under the terms of the DPA, the defendant agreed to complete 180 hours of community service and a pretrial diversion program.

US V. MANAHE (DISTRICT OF MAINE)

In *Manahe*, DOJ alleged that four defendant home healthcare agency operators entered into a wage-fixing and hiring conspiracy relating to personal support specialists. DOJ survived the defendants' motion to dismiss and also successfully precluded defendants from offering evidence relating to the reasonableness of their alleged conduct. Yet, on March 22, 2023, following a two-week trial, all four defendants were acquitted by the jury, marking DOJ's third consecutive labor market trial loss.

US V. PATEL (DISTRICT OF CONNECTICUT)

In 2021, DOJ indicted six aerospace industry employees, alleging that they engaged in a hub-and-spoke conspiracy between a manager at an aerospace firm and executives at five other engineering service providers to that firm. DOJ charged that the defendants allegedly agreed to refrain from hiring engineers and/or other skilled workers from each other relating to projects for the aerospace firm.

Just prior to trial, the court ruled that defendants could introduce evidence of procompetitive benefits of the alleged agreement to challenge whether the conspiracy existed as DOJ had alleged. The court noted that such evidence was relevant to the defendants' planned ancillarity defense, writing that "the procompetitive evidence at issue here is relevant because it relates to whether defendants joined the charged conspiracy, whether the conspiracy existed as alleged, and whether defendants had the requisite intent to join such a conspiracy." This permitted the defendants to introduce evidence that any alleged restrictions were ancillary, or reasonably necessary, to achieving the legitimate and procompetitive purposes of a business collaboration; this is significant because if the restraint is ancillary, the alleged violation would not be *per se* unlawful but would be subject to the far more lenient rule of reason review.

The court also proposed jury instructions that DOJ would be required to prove that the alleged hiring restraints were not ancillary to legitimate collaboration: "Even if the government proves the three elements beyond a reasonable doubt, if the charged agreement is ancillary to a legitimate business collaboration you must find the defendants not guilty. The government bears the burden of proving the charged agreement is not ancillary." Finally, the court also denied DOJ's request to exclude evidence from three experts; this provided the defendants the opportunity to present evidence from experts relating to the lack of harm from the alleged conduct.

And then, in a remarkable decision, the trial court dismissed DOJ's criminal non-solicitation case against all defendants—in the middle of trial—under Federal Rule of Criminal Procedure 29. Importantly, the court held that the case, as a matter of law, "does not involve a market allocation under the *per se* rule." In reaching this stinging decision, the trial court built on several of the key court decisions in *US v. DaVita, Inc. and Kent Thiry*, the criminal non-solicitation trial from 2022. In that case, McDermott represented DaVita's former CEO, who was acquitted on all counts along with DaVita.

In its ruling dismissing the case against the six defendants, the court cited as precedent several of the key arguments and rulings from the *DaVita and Thiry* criminal trial. For example, the *Patel* court highlighted that—citing *DaVita and Thiry*—workers were still able to switch between different engineering staffing companies and that hiring "among the relevant companies was commonplace throughout the alleged agreement." In addition, the court found that the "alleged agreement itself had so many exceptions that it could not be said to meaningfully allocate the labor market of engineers." Given this—and again relying on *DaVita and Thiry*—the court ruled that "no reasonable juror could conclude that there was a 'cessation of "meaningful competition" in the allocated market.'"

A WHOLE-OF-GOVERNMENT APPROACH TO TARGETING LABOR MARKETS

1. THE FTC'S PROPOSED NONCOMPETE BAN

DOJ is not the only federal agency that has been active recently in the labor markets. On January 5, 2023, the Federal Trade Commission (FTC) issued a proposed rule that broadly seeks to ban employers from entering into and maintaining noncompete clauses with their workers, with only limited exceptions. The FTC claims that noncompete agreements constitute "unfair methods of competition" in violation of Section 5 of the FTC Act. The proposed rule would:

- Prohibit employers from entering into and implementing noncompete agreements with workers. It would extend to all workers, whether paid or unpaid, and includes employees classified as independent contractors, externs, interns, volunteers, apprentices and sole proprietors who provide a service to a client or customer.

- Require employers to rescind existing noncompete agreements and actively inform workers that any such agreements are no longer in effect.
- Define noncompete agreements expansively. This includes a functional test for what may constitute a *de facto* noncompete agreement that has the same effect as an explicit noncompete agreement and may include broad nondisclosure or non-solicitation agreements as well.

The proposed rule provides a narrow exception for noncompete clauses entered into in a sale-of-business context. Here, noncompete agreements may still be used to prevent owners who are selling their businesses from competing with the purchasers of their businesses, provided that the individual subject to the noncompete is an owner or partner holding at least 25% ownership interest in the business entity prior to the sale.

The FTC sought public comment on the proposed noncompete ban and received more than 26,000 comments in response. The FTC will now consider the comments and may publish a final version of the rule later this year.

2. THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board (NLRB) recently declared that employers may violate federal law when they require their workers to sign noncompete agreements that are overbroad and prevent such workers from working for competitors. In a May 30, 2023, memorandum, the NLRB general counsel stated that such overbroad agreements "tend[] to chill employees" rights "unless [they are] narrowly tailored to address special circumstances justifying the infringement on employee rights." The NLRB argued that overbroad noncompete agreements are "unlawful because they chill employees from exercising their rights under Section 7 of the National Labor Relations Act, which protects employees' rights to take collective action to improve their working conditions." The "chilling" of employee Section 7 rights occurs "when the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work." Finally, the NLRB reiterated its commitment to a whole-of-government approach to restrictions on the exercise of employee rights, citing the memorandum of understanding it entered into with the DOJ and FTC in 2022, whereby the agencies agreed to share information and coordinate enforcement actions on potential labor market antitrust investigations and violations.

NEW CRIMINAL LAW MARKET PROHIBITIONS IN CANADA

New amendments to the Canadian Competition Act bring Canadian law in line with the United States. Effective June 23, 2023, these amendments make it a criminal offense to engage in certain labor market practices. Specifically, the new prohibitions make it illegal for employers to agree "to fix, maintain, decrease or control wages or other terms of employment; or to refrain from hiring or trying to hire one another's employees." Shortly before the law went into effect, the Competition Bureau published enforcement guidelines on wage-fixing and no-poaching agreements.

TAKEAWAYS

- In its prior trial losses, DOJ has seized on those court rulings agreeing that DOJ had successfully pled that alleged labor market antitrust violations constitute *per se* violations and denied motions to dismiss on that basis. In *Patel*, the court also denied a motion to dismiss on the same basis but then reached a very different conclusion once the factual record was before it. The court's decision—that the alleged market-allocation conduct in the *Patel* matter *did not* fall under the *per se* rule—offers a rebuke of DOJ's arguments in the labor market space and raises questions about the viability of its criminal labor market investigations and prosecutions, particularly as they relate to alleged non-solicitation agreements.
- In response to DOJ's aggressive—and so far, unsuccessful—pursuit of labor cases, courts are displaying skepticism, if not outright unwillingness, to apply a strict *per se* rule at trial. This is evident in the court decisions and jury instructions permitting, by way of example, evidence relating to procompetitive benefits, harm and impact, in addition to requiring prosecutors to prove far more than whether an agreement existed to restrain trade.
- There is uncertainty surrounding the FTC's broad noncompete ban proposal, but the FTC is signaling increased scrutiny of noncompete agreement practices for which companies should prepare. Employers with existing or potential noncompete agreements should review such agreements and consider with legal counsel the effect that any final rule may have on those agreements. In addition, entities should take care in documenting the rationale for noncompete agreements, and the procompetitive benefits that they serve for the entity.
- Although the losses mount, DOJ has provided no signal that it intends to back away from its current, aggressive posture in labor market investigations. To the contrary, DOJ continues to investigate and prosecute alleged labor market violations, actions that Assistant Attorney General Jonathan Kanter recently referred to as "righteous." And in a recent filing, DOJ characterized the *Patel* decision as wrong as a matter of law and contrary to well-established US Supreme Court and Fifth Circuit precedent. In response to this approach, companies should remain vigilant and stay current with their antitrust compliance. Moreover, groups and individuals involved in hiring and compensation decisions may benefit from antitrust training relating to these issues and should ensure that direct and third-party employment agreements and arrangements are made with antitrust laws in mind.

EUROPE

THE EC ENHANCES ITS ONLINE "eLENIENCY" TOOL

In September 2022, the European Commission (EC) upgraded its online platform "eLeniency" to ensure that companies that are parties to cartel and antitrust proceedings can easily and securely access documents online. The upgraded platform allows for an efficient interaction with the parties and adapts the tool to today's new working methods. In October 2022, the EC published a Frequently Asked Questions (FAQs) document on leniency to clarify certain concepts and current practices when the EC applies the Leniency Notice.

In October 2021, EC Executive Vice-President and Commissioner for Competition Margrethe Vestager announced a new era of cartel enforcement while acknowledging that the number of leniency applications was falling, thus expressing the need to reform the leniency program. [1] According to estimates of the Organization for Economic Co-operation and Development (OECD), leniency applications in 2020 were 70.5% lower in Europe compared to 2015. [2] In the European Union specifically, only four leniency applications were filed with the EC in 2021, down from 15 in 2019.

Before Vestager's announcement, and also in response to declining leniency applications, the EC launched the eLeniency platform in 2019. eLeniency is a one-way tool that allows companies and their legal representatives to submit statements and documents online as part of leniency, settlement and non-cartel cooperation proceedings. However, until now access to documents that are subject to particular protection, such as corporate statements, was taking place exclusively at the EC's physical premises.

The upgraded platform released in September 2022 allows parties involved in cartel and antitrust proceedings to securely make corporate statements and submit other leniency material. The eLeniency tool aims to replace the traditional procedure of dictating oral corporate statements or receiving access/notification of case documents at the EC's physical premises, given that it has been designed to accommodate disclosure and discovery concerns. Specifically, the data submitted or displayed in eLeniency is not cached on the leniency applicant's computer nor anywhere else. To this end, all data displayed through the eLeniency tool is secure and all copy, print and download functionalities are disabled. The only place where the data is physically stored is on the EC's securely hosted server. Moreover, the upgraded version grants the possibility to provide online notification of letters, decisions and other documents issued by the EC.

Access to eLeniency is restricted to users pre-authorized by the EC on a case-by-case basis.

The use of the eLeniency system is currently voluntary. Companies and their legal representatives can continue to use the oral procedure to make statements or receive access to information on site at the EC's premises, if they wish to do so.

To make its leniency program more attractive, the EC published new guidance on its leniency policy and practice through an FAQs document, in October 2022, providing further transparency, predictability and accessibility to potential leniency applicants.

[1] EC, Speech by EVP M. Vestager at the Italian Antitrust Association Annual Conference, "A new era of cartel enforcement", 22 October 2021, press release.

[2] See "OECD Competition Trends 2022," p. 46.

The FAQs set forth the conditions to qualify for leniency: the applicant must (i) cooperate genuinely and fully, (ii) have ended its involvement in the cartel immediately following its application (except for involvement that would, in the EC's view, be reasonably necessary to preserve the integrity of the inspections) and (iii) not have destroyed, falsified or concealed evidence of the cartel, nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities. In addition, if immunity applicants have taken steps to coerce other firms to join or remain in the cartel, they are not eligible.

Indeed, the EC decides reductions in fines based on when evidence is submitted and on the value it represents for its investigation.

The threshold of significant added value has been clarified in this document. The EC assesses the evidence provided by an applicant against what is already in its possession at the time of the submission. More specifically, the EC considers (i) the stage of the procedure at which applicants provide their evidence, (ii) the contemporaneous, direct or compelling character of the evidence provided and (iii) the contribution to the overview of the cartel operation, organization, background and context in which the cartel operated, which the EC could not obtain on the basis of the evidence it already possesses. The document indicates that under the 2006 Leniency Notice, only three applicants have failed to reach the threshold.

Furthermore, the FAQs state that informal exchanges about potential immunity applications are possible on a no-names basis and without the need to disclose the prospective applicant's identity, other cartel participants, the sector or any details identifying the sector. This would provide some certainty to businesses on whether the requirements for immunity are satisfied, prior to the disclosure of the evidence. The firms will therefore be able to make an informed choice as to whether to apply for immunity/leniency.

The guidance also describes the process for making a hypothetical application, which is distinct from an informal exchange. The applicant may remain anonymous and need not disclose the identities of co-conspirators, but the hypothetical application must describe the sector, geographic scope and estimated duration of the cartel. Moreover, if the EC informs the applicant that the hypothetical application satisfies the requirements for immunity, the applicant is obligated to disclose the evidence in full to the EC.

The EC's guidance also introduces a leniency officer who will be the first point of contact for any potential leniency applicant: "[T]he Leniency Officer can offer informal advice, provide information on the leniency process and engage with prospective applicants or their legal representatives to discuss potential applications on a 'no-names' basis." The leniency officer can also inform potential immunity applicants if immunity is available for the cartel in which potential applicants are involved. The leniency officer will function as a helpful point of contact for potential and actual leniency applicants going forward and is tasked with providing leniency applicants with additional reassurances as they consider self-reporting their conduct.

The guidance clarifies that the EC may support the applicant against a request for disclosure of leniency submissions produced to the EC. Indeed, the guidance states that "the EC is prepared to explain to non-EU courts that not protecting leniency submissions may undermine a key element in the policy of the European Union and that such protection should accordingly be recognised in light of the principle of international comity," which could be helpful for defendants in US lawsuits and against discovery requests. The FAQs highlight that the Damages Directive (i) prohibits the disclosure of leniency statements submitted to the EC or a national competition authority

(NCA) in damages proceedings before national courts of Member States or in non-EU jurisdictions, (ii) prevents an immunity recipient from being held liable to cartel victims, unless full compensation cannot be obtained from the other cartelists, and (iii) protects immunity recipients from contribution claims by their co-cartelists.

Moreover, the Damages Directive provides protection to leniency applicants against exposures to civil damages since it prohibits disclosure of leniency statements submitted to the EC or NCAs. However, this does not provide immunity from private damages claims for leniency applicants. In this context, Germany's Federal Cartel Office announced last year that the authority is currently looking at the possibility of protecting leniency applicants from follow-on damages claims, seeing a possibility to reverse the decline in leniency applications.[3] Finally, the EC has recognized that a company seeking to avoid the risk of exposure to follow-on damages actions may hesitate to submit a leniency application because the limitations period has closed, or has nearly closed, based on a false assumption that the EC may not pursue the infringement. The guidance emphasizes that the EC is empowered to adopt a decision finding an infringement even in situations where a fine is time-barred because the limitations period has run its course.

Lastly, the FAQs also underscore that companies that have been found guilty of serious professional misconduct by, *inter alia*, having entered into an agreement with other companies with the aim of distorting competition, may be excluded from EU and/or national public tender procedures or be made subject to a financial penalty. Such exclusion is foreseen by the EU Financial Regulation and the Public Procurement Directive, as transposed into the Member States' law. However, a new benefit for leniency applicants is that they may still be able to participate in these procurement procedures at both the EU and national levels, since active cooperation with the competition authority, with the EC or the NCAs, constitutes an element to be considered when the tendering authority assesses the grounds for exclusion.

THE EC SANCTIONS ANOTHER PURCHASING CARTEL

In November 2022, the EC fined five styrene purchasers (Sunpor, Synbra, Synthomer, Synthos and Trinseo) €157 million for participating in a cartel concerning purchases on the styrene monomer merchant market, while INEOS was granted a full reduction of the fine to be imposed. Styrene monomer is an intermediate chemical product that serves as a key input for many other chemicals, such as plastics, resins, rubbers and latexes.

This lengthy investigation started in June 2008 in several EU Members States,[4] and the EC determined that INEOS, Sunpor, Synbra, Synthomer, Synthos and Trinseo exchanged sensitive commercial information and coordinated their negotiation strategy on an industry reference price of styrene monomer (the Styrene Monthly Contract Price (SMCP)), published by Independent Commodity Intelligence Services, between May 1, 2012, and June 30, 2018. The SMCP was widely used as a reference price in the industry, due to the volatility of styrene prices, and often formed part of the pricing formula in styrene supply agreements.

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[3] *Global Competition Review*, "Mundt touts immunity from damages for leniency applicants," 10 September 2021, https://globalcompetitionreview.com/article/aArticlemundt-touts-immunity-damages-leniency-applicants

[4] EC, "Commission confirms unannounced inspections in the styrene monomer purchasing sector," press release, 8 June 2018, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_4101.

In assessing the fine for each company, the EC granted cooperation credit (leniency) resulting in a fine reduction of 30% to the benefit of Sunpor, 20% for Synthomer, 40% for Synthos and 20% for Trinseo pursuant to the 2006 Leniency Notice, and a full immunity to INEOS (namely, a reduction of 100% of the fine to be imposed). The last company involved, Synbra, did not apply for leniency. All companies also received an additional 10% reduction of their fine pursuant to the EC's 2008 Settlement Notice in light of their admission to participating in the cartel and their acknowledgment of liability thereof as part of the EC's settlement process, the 40th settlement since the introduction of the Notice in 2008. The fines imposed ranged from €17 million (Synbra) to €43 million (Synthomer).

The breakdown of the fines imposed on each company is as follows:

COMPANY	REDUCTION UNDER THE LENIENCY NOTICE	REDUCTION UNDER THE SETTLEMENT NOTICE	TOTAL FINE
INEOS	100%	10%	€0
Synthos	40%	10%	€32,505,000
Sunpor	30%	10%	€31,720,000
Trinseo	20%	10%	€32,621,000
Synthomer	10%	10%	€43,011,000
Synbra	0%	10%	€17,215,000

This is the fourth case concerning purchasing cartels, after the *Car Battery Recycling* case,[5] *Ethylene Purchasing* case[6] and *Raw Tobacco* case.[7] Indeed, unlike in most cartels where companies conspire to increase artificially their sales prices, the six companies colluded to lower an element of the price of styrene, an input material. Gerald Miersch, head of the cartel unit, clearly underscored during a cartel workshop that the EC is looking for non-traditional cartel behavior (*e.g.*, purchase cartels).[8]

In 2019, the EU's General Court (GCEU) confirmed the EC's fines to a battery recycling cartel and, in doing so, considered that purchasing cartels are considered by-object infringements under EU competition rules.[9]

When setting the fine in a case of a purchasing cartel, the EC in the *Car Battery Recycling* case considered that the usual value of sales baseline, used as a starting point for the fine calculation, did not reflect the gravity and nature of the infringement, because the cartel concerned purchases, not sales. The EC explained in that case that "the more successful a sales cartel is, the higher the value of sales and thus the amount of the fine. The inverse is true for purchase cartels: The more successful a purchase cartel is, the lower the amount of the value of purchases and thus the amount of the fine."[10] The EC also decided, on the basis of point 37 of the Fining Guidelines,[11] to

[5] EC decision, "Commission fines three companies €68 million for car battery recycling cartel," AT. 40018, 8 February 2017.

[6] EC decision, "Commission fines ethylene purchasers € 260 million in cartel settlement," AT. 40410, 14 July 2020.

[7] EC decision, *Raw Tobacco Spain*, AT. 38238, 20 October 2004.

[8] Concurrences, cartel workshop, "An advanced seminar on substantive and procedural EU developments," January 2023.

[9] GCEU, Case T-240/17, *Campine and Recycling*, ECLI:EU:T:2019:778, para. 306.

[10] *Car battery recycling* (Case COMP/AT.40018), para. 364.

[11] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, p. 2–5.

increase, in a discretionary manner, by 10% the amount of the fine to be imposed on each of the addressees of the contested decision in order to take into account the particularities of the case and to achieve deterrence. The GCEU justified that increase "on the basis that, in the present case, what was at issue was a purchase cartel and the value of purchases in itself was unlikely to be an appropriate proxy for reflecting the economic importance of the infringement. It explained, in that regard, that in the case of a cartel whose objective it is to reduce purchase prices or to prevent their increase, the more successful it is, the lower the amount of the value of purchases and thus the amount of the fine."[12] Therefore, it was legitimate for the EC to apply a 10% increase to ensure an adequate deterrent.

The complete settlement decision is not yet available to the public, pending the companies' completion of a version that does not expose business secrets or confidential information.

CMA RAISES POTENTIAL REWARD FOR UK CARTEL INFORMANTS

The Competition and Markets Authority (CMA) is stepping up its enforcement efforts against cartels and has more than doubled its prize from £100,000 to £250,000 for tips concerning suspected cartel behavior.

Cartels typically operate covertly and are difficult to detect and prove for the antitrust agencies. Leniency programs used to play a central role in cartel detection and prosecution. However, the increase in private damage actions has diminished the allure of leniency programs for cartel participants when their cooperation with the competition authorities improves the likelihood that cartel victims will file a successful lawsuit for damages.

In light of this, via its "Cheating or Competing" campaign, the CMA incentivizes witnesses of unlawful activity to come forward by offering a reward and preserving their anonymity. The CMA believes it should offer monetary rewards for information that aids in the detection and investigation of cartels and, in appropriate cases, leads to the fining of the companies or criminal prosecution of the individuals involved. The reward is distinct from the CMA's leniency program.

Such a whistleblower rewards program is not common among antitrust agencies, as it could interfere with leniency applications. Besides the CMA, the Korea Fair Trade Commission, the Competition and Consumer Commission of Singapore, and the Competition Commission of Pakistan offer such rewards.

PROCUREMENT

PCSF, DOJ CONTINUE CRACKDOWN ON ANTITRUST CRIMES AND RELATED FRAUD

DOJ's PCSF has continued its crackdown on antitrust crimes and related fraud involving government procurement and funding. In its first three years, it opened more than 65 investigations—domestically and abroad—across 50 different industries and has prosecuted more than 30 individuals and companies.

[12]GCEU, Case T-240/17, *Campine and Recycling*, ECLI:EU:T:2019:778, para. 65.

Enforcement continues to pick up steam each year. The PCSF and its procurement cases are now a mainstay of the Antitrust Division's criminal enforcement program efforts and remain a top priority for DOJ.

Recent important developments with the PCSF include the following:

ADDITIONAL PARTNERS

On November 15, 2022, the PCSF announced that it had further expanded its ranks to include the offices of inspector general for the US Department of Energy, Department of the Interior, Department of Transportation and Environmental Protection Agency. Together, these offices are responsible for overseeing hundreds of billions of dollars made available through the Infrastructure Investment and Jobs Act, the Inflation Reduction Act of 2022, and the Creating Helpful Incentives to Produce Semiconductors (CHIPS) and Science Act of 2022. With this announcement, the PCSF now has a total of 34 formal partner agencies and offices.

DEFENDANTS ACQUITTED IN ALLEGED CONSTRUCTION BID-RIGGING SCHEME

On May 11, 2023, a Minnesota federal jury acquitted a Minnesota construction company and its CEO of alleged bid-rigging charges. DOJ had alleged that the defendants conspired to rig bids for public concrete repair and construction contracts in Minnesota. Another concrete contractor had previously entered a plea of guilty in 2021 for his involvement in the alleged conspiracy.

CALIFORNIA ROAD IMPROVEMENTS AND REPAIR

In November 2022, a construction company owner became the third person to plead guilty for his role in a bid-rigging and bribery scheme involving California Department of Transportation (Caltrans) improvement and repair contracts. The company owner was alleged to have recruited others to submit sham bids on Caltrans contracts and to have bribed a former Caltrans contract manager with cash payments, wine, furniture and remodeling services on his home in excess of $800,000. The company owner was sentenced in April 2023 to 78 months in prison and ordered to pay $984,699.53 in restitution for his role in the scheme.

In April 2022, the former Caltrans manager also pleaded guilty to his role in the scheme. He was sentenced in April 2023 to 49 months in prison and ordered to pay $984,699.53 in restitution. A former contractor had pleaded guilty in October 2022 and was sentenced to 45 months in prison and ordered to pay $797,940.23 in restitution.

All told, this PCSF investigation and prosecution has resulted in prison sentences of 172 months and more than $2.7 million in restitution.

COMMERCIAL FLOORING

On September 22, 2022, the owner of a commercial flooring company in Fairbanks, Alaska, pleaded guilty for his role in a conspiracy to provide kickbacks related to commercial flooring services at a US Army facility. DOJ had alleged that the company owner paid kickbacks of more than $100,000 to an employee of the prime contractor and conspired to inflate the costs of four flooring construction subcontracts over a period of five years.

INSULATION CONTRACTING

On September 28, 2022, the owner of a Connecticut insulation contracting firm was sentenced to one year and a day in prison for his participation in bid-rigging and fraud schemes targeting insulation projects at universities, hospitals, and other public and private entities in Connecticut. His company was ordered to pay a $150,000 criminal fine.

On November 4, 2022, another insulation contracting firm in the same alleged conspiracy was sentenced to pay a $1,001,989 criminal fine and $313,121 in restitution. And another co-conspirator was sentenced to 15 months' imprisonment and restitution of $1,062,155 in February 2023 for his participation in the scheme. This was the seventh sentencing arising out of DOJ's investigation into the insulation contracting industry.

TEXAS MILITARY CONTRACTING

In January 2023, a Texas military contractor pleaded guilty to rigging bids on public military contracts in Texas. DOJ alleged that the contractor conspired to rig bids on certain government contracts, including work on heavy military equipment, such as refurbishing armor kits for military trucks and turrets for Humvees, from May 2013 to January 2018, securing government payments in excess of $17.2 million.

SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESSES

On January 18, 2023, the owner of several construction companies was sentenced to 27 months in prison and ordered to pay a $1.75 million fine for his role in a long-running scheme to defraud the United States. In June 2022, the company owner was convicted at trial relating to his role in obtaining valuable government contracts under programs administered by the Small Business Administration. At trial, the evidence showed that the company owner conspired to install a service-disabled veteran as the ostensible owner of a general construction company held out as a Service-Disabled Veteran-Owned Small Business (SDVOSB), and he and his co-conspirators secured more than $240 million in government contracts that were set aside for SDVOSBs and other small businesses in order to benefit their larger, nonqualifying businesses.

NEW YORK TRANSPORTATION AUTHORITY

To date, three Metropolitan Transportation Authority (MTA) employees have pleaded guilty to conspiring to rig bids at MTA surplus vehicle auctions. On January 30, 2023, the first MTA employee pleaded guilty to conspiring with other individuals to use inside information to cheat the auction bidding process to ensure that a company controlled by him and a co-conspirator submitted the winning bid and would be awarded the contract. Then, on February 9, 2023, two married MTA employees each pleaded guilty as part of the same scheme.

NEW YORK CITY DEPARTMENT OF EDUCATION PUBLIC SCHOOLS

In February 2023, a former salesman pleaded guilty for his role in a bid-rigging scheme involving the sales of certain brands of digital interactive whiteboards to the New York City Department of Education Public Schools (NYCDOE). This alleged conspiracy lasted for almost two years, during which time the salesman sold boards to his bid-winning co-conspirator, who then made the sale to NYCDOE, and the losing co-conspirator was paid to install the boards in the classrooms. The salesman also created and submitted sham bids to ensure his co-conspirator won the bid.

TAKEAWAYS

- The PCSF has become a core and programmatic component of the Antitrust Division's criminal enforcement program. Moreover, the PCSF's collaborative effort—comprising a number of government agencies—is consistent with the whole-of-government approach that has been a hallmark of the Biden administration.
- Although the PCSF boasts investigations and charged cases in a variety of industries, nearly half of all PCSF cases related to Department of Defense contracts.
- The PCSF has had a string of successes—both in plea agreements and at trial—at a time when then there is significant government procurement spending in a variety of industries. We would expect investigations and charged cases to continue to rise as we progress into the second half of 2023.

SECTION 2

BRINGING BACK SECTION 2: DOJ'S NEW ENFORCEMENT TOOL

Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations..." (15 U.S.C. § 2). The Division has worked to "reinvigorate" Section 2 to prosecute monopolization criminally, bringing charges for such violations for the first time in almost five decades. (See DOJ press release, "Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks at Howard Law School" (January 12, 2023)).

In *US v. Zito*, DOJ obtained a guilty plea in its first criminal Section 2 case brought since 1977. There, Zito, the president of a paving and asphalt company, pleaded guilty to one count of attempted monopolization of the highway crack-sealing services markets in Montana and Wyoming for proposing a "strategic partnership" with his company's competitor to allocate regional markets. Had the scheme been agreed to by the competitor, it would have created a monopoly for Zito's company in his allocated territory. Zito agreed to pay a $27,000 fine in his plea agreement.

DOJ's latest pursuit of Section 2 violations relates to an alleged conspiracy to monopolize the transmigrante forwarding market in a Texas border region. The indictment alleges 12 transmigrante agency owners and industry participants utilized violence to monopolize the industry, threatening those who would not participate in their illegal activities. (See *US v. Martinez, et al.*, 4:22-cr-00560 (S.D. Tex. Nov. 9, 2022).) The 11-count indictment includes charges for conspiracies to fix prices and allocate markets under Section 1 of the Sherman Act, as well as the conspiracy to monopolize the same market in violation of Section 2 of the Sherman Act. Unlike most traditional antitrust cartel cases, this case also alleges extortion, money laundering and threats of physical violence.

TAKEAWAYS

Unlike Section 1, Section 2 encompasses conduct that *attempts* to monopolize, regardless of whether the attempt results in an agreement. Given that attempts are not actionable under Section 1 of the Sherman Act, DOJ has created a new tool in its toolbox, the result of which is to broaden significantly the range of potential criminal conduct for individuals and companies. Companies must now expand their focus to include not only areas where there is a traditional meeting of the minds, but where someone may have invited a competitor to collude (or tried to do so unsuccessfully). This is a broader and more complex set of competitor communications to be mindful of, underscoring the importance of antitrust-related compliance.

Although only two Section 2 charges have been brought thus far and the limits of this new tool are uncertain, DOJ vows to use all means to prosecute anticompetitive activity. We expect the trend will continue and that the Division will likewise continue to proceed with criminal investigations and prosecutions in concert with its aggressive new position under Section 2.

CONCLUSION

As we move into the second half of 2023, we should expect the number of antitrust investigations and enforcement actions to grow. Defeat at the hands of judges has not deterred antitrust enforcers from seeking to expand the law. Nor have losses in front of juries stopped the Division's push to remake certain areas of antitrust law. The trend line is clear, and DOJ officials have articulated it through their words and actions. In the months to come, we expect more of the same: aggressive, often boundary-breaking, antitrust enforcement.

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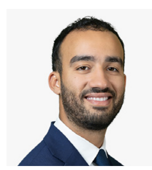

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