LAW360

Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Trends In Criminal Cartel Enforcement

Law360, New York (January 15, 2015, 11:13 AM ET) --

Bob Bloch

After racking up record corporate criminal fines in three of the last four years, one might think that the Antitrust Division of the U.S. Department of Justice had made a strategic decision to focus more of its enforcement efforts on corporations and somewhat fewer resources on corporate executives. That would be wrong. Although the DOJ's efforts to prosecute individuals may not always receive the same sort of publicity that its high-dollar corporate prosecutions and settlements do, the fact is that corporate executives never have been more squarely in the DOJ's crosshairs than they are today.

The DOJ's intense focus on individual executives, especially foreign nationals, is a relatively recent phenomenon. Although the United States has treated cartel activity as a crime for more than a century, it is only in the last 20 years that enforcement against individuals has been stepped up in a significant way. Price-fixing and bid-rigging were misdemeanors until 1974.[1] Even after the United States made cartels felonious, business executives could still often secure no-jail-time deals. For business executives — especially foreign business executives, who generally faced little or no risk of extradition — the prospect of serving significant prison time for cartel offenses must have seemed remote.

For several years now, however, the DOJ has been steadily escalating the pressure it places on executives. In the 1990s, as part of its leniency programs, the DOJ adopted a series of carrots and sticks to convince foreign companies and their executives to plead guilty and to agree to serve prison time.[2] In that same era, the DOJ abolished "no jail time" plea agreements for foreign executives.[3] The DOJ also embarked on a remarkably successful global lobbying effort to convince other nations to criminalize cartel conduct.

As a result of these efforts, business executives who participate in cartels face greater prosecution risks today than ever before. Consider the facts:

- In April of 2014, the DOJ secured its first-ever extradition of an individual based solely on antitrust charges, which comes on the heels of its first-ever success in convicting foreign executives at trial for antitrust violations.[4]

- At the end of 2013, the DOJ convinced a federal judge to impose a five-year prison sentence, the longest ever in an antitrust case, against the former president of a shipping company.

- Since Jan. 20, 2009, the DOJ has prosecuted 372 individuals. At least 65 percent of these individuals were U.S. citizens. 102 individuals were prosecuted in the DOJ's real estate foreclosure investigations — all of whom were U.S. citizens. Of the remaining 270 individuals, more than 50 percent were U.S. citizens.[5]

- In the ongoing investigation of the auto parts industry, the DOJ has filed charges against 49 executives—a surprisingly large number when compared to the DOJ's other recent international cartel investigations.

In the cartel enforcement world, 2014 may be best remembered for the more than $1 billion in corporate criminal fines the DOJ secured. That is a lot of money, no doubt. But in the long run, we may look back at 2014 as sort of a tipping point: the year that the DOJ proved not only its intent to pursue individual executives who engaged in cartel conduct, but also its ability to do so effectively on a global basis.

First Extradition Solely for Antitrust Charges

In April 2014, the DOJ announced that Germany had agreed to extradite Romano Pisciotti, an Italian citizen, to face U.S. antitrust charges.[6] Pisciotti is the first person ever to have been extradited to the U.S. based solely on antitrust charges.

Pisciotti was an Italian-based executive at Parker ITR Srl. In 2010, Parker pled guilty to price-fixing in the marine hose industry between 1999 and May 2007.[7] (Four other companies and nine individuals also pled guilty to price-fixing in that industry.)

In Parker's plea agreement, tge DOJ "carved out" Pisciotti (i.e., retained the right to prosecute him), who ran Parker's marine hose business from 1985 to 2006. Six months later, the DOJ secured an indictment against Pisciotti, alleging that he participated in a global price-fixing conspiracy among manufacturers of marine hoses. Notably, the DOJ filed the indictment under seal, presumably because Pisciotti refused to travel to the United States to face the charges.

The DOJ then set out to try to secure Pisciotti's presence in the United States. Because Italy did not criminalize cartel conduct until after the events at issue in the case, extradition appeared to be out of the question. (Most extradition treaties require "dual criminality," meaning that extradition is only available when the conduct at issue is illegal in both the countries making and considering the extradition request.) The DOJ thus elected to file a "Red Notice" with Interpol, which obligated member countries to seek to detain Pisciotti with an eye towards his potential extradition. In June 2013, as he sought to clear customs at Frankfurt Airport while flying from Nigeria to Italy, German authorities arrested Pisciotti. At the U.S. government's request, German prosecutors initiated extradition

proceedings.

Pisciotti challenged the validity of his extradition in various European courts, but without success. On April 3, 2014, the Higher Regional Court of Frankfurt ceded to requests from the DOJ and ordered the extradition of Pisciotti. Just three weeks later, Pisciotti agreed to plead guilty to participating in a conspiracy to rig bids, fix prices and allocate market shares of marine hose sold in the United States. Pisciotti agreed to serve two years in prison — with credit for the nine months and 16 days he was held in custody in Germany — and to pay a $50,000 fine.

Pisciotti's extradition highlights the increasing risks foreign executives face when they decide not to return to the United States to face antitrust charges. That risk profile has changed significantly in recent years. Historically, most countries did not criminalize antitrust offenses, which meant that extradition was a nonstarter. But more than 30 countries now impose criminal liability for cartel activities, including major economic powers like Australia, Brazil, Canada, Germany, Israel, Japan, Mexico, South Korea, the United Kingdom and Russia. In addition, most countries have bilateral extradition treaties with the United States (Russia, China, Namibia, the United Arab Emirates and North Korea being notable exceptions). Foreign executives who live in these countries — or who pass through them while on international travel — now face significant new extradition risks.[8]

Longest Prison Sentence in Criminal Antitrust Case

Frank Peake, the former president of Sea Star Line LLC, a shipping company, recently was sentenced to serve five years in prison and fined $25,000 as a result of his conviction at trial of fixing shipping rates between the United States mainland and Puerto Rico.[9] Although the 60-month sentence was shorter than the 86-month sentence requested by the government, it is still the longest sentence ever imposed for a Sherman Act violation.[10]

The sentencing was disputed. Peake argued that the 86-month sentence requested by the government was unreasonable, in part because it would have been significantly longer than the sentences imposed on the AU Optronics Corp. executives who were convicted at trial, and because it would have been dramatically longer than the 12- to 24-month sentences that had been imposed on pleading defendants in the auto parts cases.[11] Peake argued that an appropriate sentence would be probation, a period of house arrest, community service and a $20,000 fine.[12]

The court emphatically disagreed with Peake's proposal. The court acknowledged that Peake may have felt compelled to conspire with competitors because of the economic difficulties in the shipping industry.[13] But it noted that Peake's sentence should reflect that his conduct involved noncompetitive bids,[14] a significant amount of commerce (over $500 million)[15] and the fact that he played a leadership role in the conspiracy.[16] The court went on to say that Peake "receive[d] training in antitrust relations and could have put a stop to the conspiracy at any time. Instead, he allowed it to continue and took the lead in several aspects because he was benefiting indirectly by the bonus compensation which he was receiving."[17]

This historically long sentence may be indicative of what is to come. After all, Peake's situation was not that different from many senior executives who find themselves facing antitrust charges. Like many such executives, he received antitrust training, had the ability to stop communications with competitors and may well have had the best interests of his business at heart. The DOJ will doubtless point to this five-year sentence in future cases as an important precedent. Peake's lengthy sentence will affect both how executives weigh plea offers and how courts think about sentencing in contested antitrust cases. Indeed,

Peake's five-year sentence is three years longer than the longest sentence (24 months) imposed to date in the auto parts cases, which, thus far, involve only pleading defendants. To avoid this sort of "trial penalty," future defendants may be more inclined to resolve cases with plea agreements.

Continued Focus on Foreign Executives

Pisciotti's extradition and prosecution is emblematic of the DOJ's continued focus on foreign executives. Cartel investigations of the automotive parts, optical disk drive, DRAM, marine hose, LCD, air cargo, air passenger fees, freight forwarding and refrigerant compressor industries have focused on how the alleged anti-competitive conduct of foreign executives affected the U.S. market. In these investigations, the DOJ has carved out 250 executives from corporate plea agreements. Of these executives, the majority were not U.S. citizens, but had U.S. pricing authority or responsibility for sales into the United States.

The DOJ has several tools at its disposal when prosecuting foreign executives. The DOJ has increasingly leveraged the 1996 memorandum of understanding between the DOJ, the Antitrust Division and the Immigration and Naturalization Service to offer immigration assurances to foreign executives who agree to plead guilty. In addition, where appropriate, the DOJ is increasingly bringing fraud and obstruction of justice charges related to executives' cartel conduct.[18] Even when the DOJ decides not to bring charges for obstruction of justice, it can use obstruction of justice to gain leverage in plea bargaining negotiations.[19]

The DOJ may place pressure on corporations that plead guilty to encourage their foreign executives to plead guilty as well. As the assistant attorney general for the Antitrust Division recently explained, "[i]t is hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals in positions with senior management and pricing responsibilities who have refused to accept responsibility for their crimes and who the companies know to be culpable."[20]

Increasing Prosecution of "Carveouts"

Pisciotti's extradition, Peake's lengthy sentence and the DOJ's increased leverage in plea negotiations are strong signals of the DOJ's "get tough" approach toward executives accused of fixing prices. Another is the DOJ's prosecution decisions in the auto-parts investigation: The record to date shows the DOJ's strong drive to prosecute executives. Thus far, the DOJ has brought public charges against 59.7 percent of all executives carved out of corporate plea agreements in the automotive parts investigation (i.e., plea agreements that date back at least one year), as reflected in the chart below. By contrast, it brought public charges against only 37.6 percent of carveouts in international cartel investigations in the last five years (Air Cargo, Air Passenger, Freight Forwarders, Marine Hose, Optical Disk Drive, Refrigerant Compressors and TFT-LC).[21]

Automotive Products Investigation		
Company	Prosecutions/Carve-Outs	Percentage of Individuals Prosecuted
Furukawa Electric Co., Ltd.	3/4	75%
Yazaki Corporation	6/7	85.7%
DENSO Corp.	6/7	85.7%
G.S. Electech	1/1	100%
Fujikura Ltd.	2/2	100%
TRW Deutschland Holding GMBH	0/1	0%
Nippon Seiki Co., Ltd.	0/1	0%
Autoliv, Inc.	0/3	0%
Tokai Rika Co., Ltd.	1/5	20%
Diamond Electric Mfg. Co., Ltd.	2/2	100%
Yamashita Rubber Co., Ltd.	1/2	50%
Panasonic Corp.	1/4	25%
Hitachi Automotive Systems Ltd.	4/6	66.7%
Jtekt Corporation	1/3	33.3%
Mitsuba Corporation	1/5	20%
Mitsubishi Electric Corp.	3/5	60%
Mitsubishi Heavy Industries Ltd.	0/1	0%
NSK Ltd.	1/2	50%
T. Rad. Co. Ltd.	1/2	50%
Valeo Japan Co., Ltd.	0/2	0%
Toyo Tire & Rubber Co. Ltd.	3/4	75%
Takata Ltd.	5/9	55.6%
Stanley Electric Co. Ltd.	0/1	0%
Total[22]	**43/72**	**59.7%**

Other International Cartel Investigation[23]	Prosecutions/Carve Outs	Percentage of Individuals Prosecuted
Optical Disk Drive	4/4	100%
Marine Hose	12/14	85.7%
DRAM	17/22	77.3%
TFT-LCD	16/27	59.3%
Refrigerant Compressors	2/6	33.3%
Air Passenger and Air Cargo	16/86	18.6%
Freight Forwarders	0/19	0%
Total	**67/178**	**37.6%**

Conclusion

The trends are clear. Executives who are involved in price-fixing have never faced more serious personal risks. Executives are who are implicated in price-fixing are more likely to be both “carved out” of corporate plea agreement and prosecuted for their conduct. Foreign executives facing price-fixing charges are facing risking risks of extradition. And executives that go to trial run the risk of increasingly lengthy prison sentences if found guilty. In short, business executives involved in cartels or collusion face an unprecedented level of personal risk.

The DOJ’s increasing focus on prosecuting foreign executives places a premium on corporate compliance efforts. As the DOJ has noted, “the easiest way for companies and their executives to avoid prosecution is not to commit crimes.”[24] Effective antitrust compliance programs greatly reduce the chances that companies and their executives will conspire to fix prices. And it maximizes the chance that any anti-competitive conduct will be discovered early enough to qualify for corporate leniency or otherwise receive significant benefits through cooperating with a DOJ investigation.[25]

—By Bob Bloch, Kelly Kramer and Stephen Medlock, Mayer Brown LLP

Bob Bloch is a partner in Mayer Brown's Washington, D.C., office and former chief of the U.S. Department of Justice Antitrust Division's Professions and Intellectual Property Section. Kelly Kramer is a partner in the firm's Washington office. Stephen Medlock is an associate in the firm's Washington office.

Correction: An earlier version of this article misreported statistics. The error has been corrected.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Antitrust Penalties and Procedures Act, Public Law 93-528, §3, 88 Stat. 1708.

[2] See, e.g., Memorandum of Understanding Between The Antitrust Division United States Department of Justice and The Immigration and Naturalization Service United States Department of Justice (March 15, 1996), available at http://www.justice.gov/atr/public/criminal/9951.htm.

[3] Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades 7 (Feb. 25, 2010) ("At that time, a no-jail deal was necessary for the Division to secure access to important foreign witnesses or key foreign-located documents. . . . However, by 1999, the Antitrust Division's ability to successfully investigate and prosecute foreign nationals who violate U.S. antitrust laws had significantly advanced with enhanced investigative tools and increased international cooperation. Thus 'no-jail' deals became a relic of the past.").

[4] See, e.g., Bill Baer, Assistant Attorney General, Antitrust Div., U.S. Dep't of Justice, Remarks Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium (Sept. 10, 2014) (discussing implications of AU Optronics verdict).

[5] On April 12, 2013, the Antitrust Division changed its policy regarding executives who it "carves out" of a corporate plea agreement. The Antitrust Division no longer releases the names of individual employees who have been carved out of a corporate plea agreement—making it difficult to determine whether any executives carved out of a particular plea agreement are U.S. citizens.

[6] See, e.g., U.S. Dep't of Justice, First Ever Extradition on Antitrust Charge (Apr. 4, 2014), http://www.justice.gov/opa/pr/first-ever-extradition-antitrust-charge.

[7] Plea Agreement, United States v. Parker ITR S.R.L., No. 4:10-cr-00075 (S.D. Tex. Mar. 25, 2010) (ECF No. 17), available at http://www.justice.gov/atr/cases/f257300/257358.pdf.

[8] The Antitrust Division has demonstrated its ability to extradite individuals on counts related to antitrust violations. In the last four years, the DOJ has extradited three other individuals for charges closely related to price-fixing. On March 23, 2010, the DOJ secured the extradition of Ian Norris, a retired British executive, on obstruction of justice charges relating to an antitrust investigation. In February 2012, David Porath, a dual U.S. and Israeli citizen, was extradited from Israel and eventually pled guilty to three charges, including a bid-rigging count. In October 2014, John Bennett, a Canadian citizen, was ordered to surrender himself to U.S. law enforcement for charges including fraud, kickbacks

and bid rigging involving contracts at EPA Superfund sites.

[9] U.S. Dep't of Justice, Former Sea Star Line President Sentenced to Serve Five Years in Prison for Role in Price-Fixing Conspiracy Involving Coastal Freight Services Between the Continental United States and Puerto Rico (Dec. 6, 2013), http://www.justice.gov/atr/public/press_releases/2013/302027.htm

[10] Beth Winegarner, Ex-Sea Star Prez Gets Longest-Ever Antitrust Sentence, Law360 (Dec. 11, 2013), available at http://www.law360.com/articles/495165/ex-sea-star-prez-gets-longest-ever-antitrust-sentence.

[11] Presentation of Frank Peake at 18-21, 26-29, United States v. Peake, No. 3:11-cr-00512 (Dec. 6, 2013) (ECF No. 245).

[12] Id. at 40.

[13] Id. at 105:1-7.

[14] See U.S.S.G. § 2R1.1(b)(1).

[15] See U.S.S.G. § 2R1.1(b)(2)(F).

[16] See U.S.S.G. §§ 2R1.1, app. n.1, 3B1.1(a).

[17] Sentencing Hr'g Tr. at 104:13-17, United States v. Peake, No. 3-11-cr-00512 (Dec. 6, 2013) (ECF No. 235).

[18] See, e.g., Indictment, United States v. Ueda, No. 2:14-cr-20560-GCS-PJK (E.D. Mich. Sept. 18, 2014) (ECF No. 1) (indicting three Mitsubishi Electric Corporationexecutives for conspiracy to obstruct justice and obstruction of justice); Indictment, United States v. Hirano, No. 2:14-cr-20239-GCS-PJK (E.D. Mich. May 22, 2014) (ECF No. 1) (indicting Tokai Rika Co., Ltd. executive for obstruction of justice); Plea Agreement, United States v. Fujitani, No. 2:14-cr-20087-GCS-PJK (E.D. Mich. Mar. 11, 2014) (ECF No. 8) (executive from DENSO Corporation agreed to plead guilty to obstruction of justice).

[19] See U.S.S.G. § 3C1.1 (enhancing sentencing guideline range for obstructing or impeding the administration of justice).

[20] Bill Baer, Assistant Attorney General Antitrust Div., U.S. Dep't of Justice, Prosecuting Antitrust Crimes 8 (Sept. 10, 2014), available at http://www.justice.gov/atr/public/speeches/308499.pdf.

[21] Some of the difference might be explained by DOJ's newly-revised carve out policy, but the dramatic increase seems unlikely to be the result of policy changes alone, especially since many of the early auto parts cases were charged under the old policy.

[22] To calculate the percentage of carve outs prosecuted, we consider only "mature" investigations (i.e., those where the company agreed to plead guilty before December 1, 2013). In addition to the 43 carve outs prosecuted in these mature investigations, DOJ has prosecuted another six executives from Bridgestone Corporation, Showa Corporation, and Toyoda Gosei Co., Ltd. in investigations that are not yet mature.

[23] Excluded from this list are cartel investigations that began before DOJ's Antitrust Division adopted its policy of requiring executives who pled guilty to serve jail time.

[24] Baer, supra note 20 at 7.

[25] Id.

All Content © 2003-2015, Portfolio Media, Inc.