

I N F O C U S

CORPORATE LITIGATION WEBSERIES

Get Ready: A Comprehensive Approach to Antitrust Investigations

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What Triggers a Government Inquiry?

- Amnesty Applicants Dominate Investigations
 - Ringleaders can seek amnesty all over the world
 - Amnesty Plus generates new investigations
- Other Common Sources for DOJ Investigations
 - Disgruntled employees
 - Searching the web
 - Customer complaints
 - Documents that come to light in other investigations (i.e., merger review)



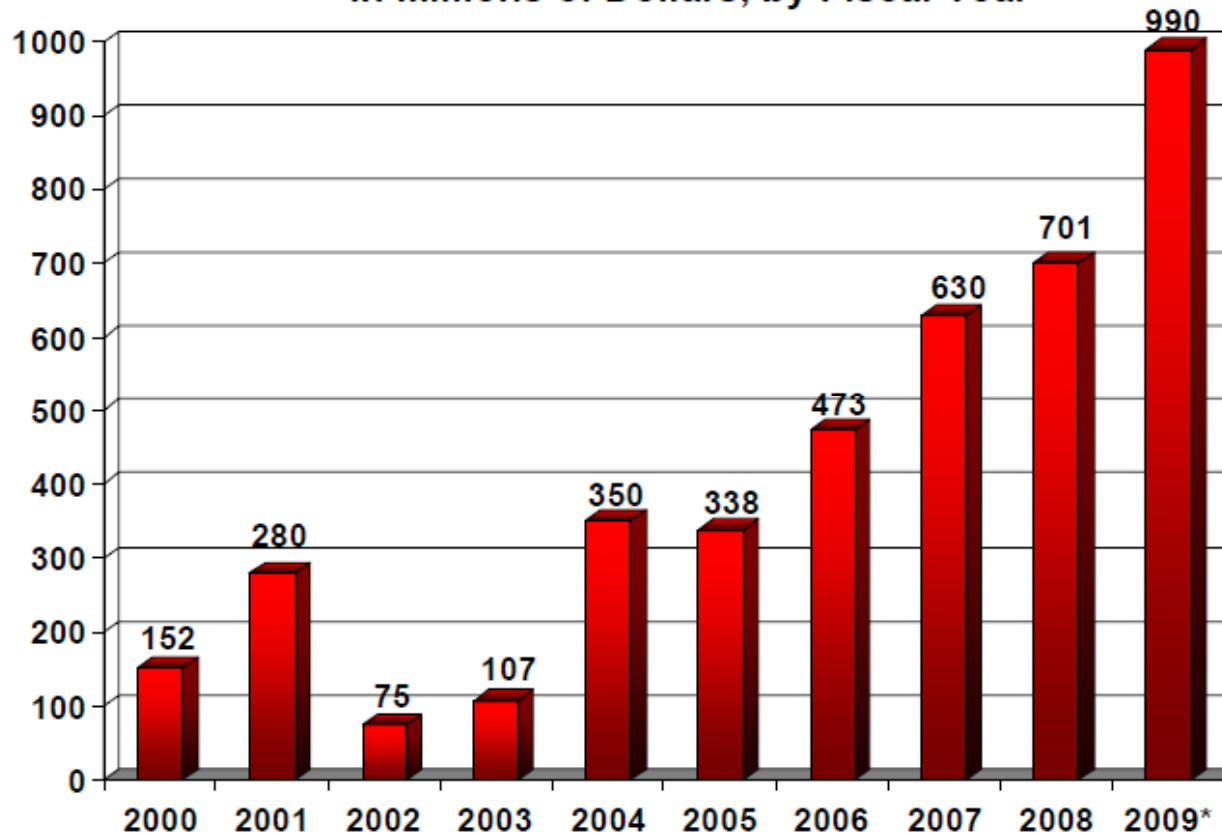
Why You Should Care About Cartel Conduct

- Huge penalties for violations – corporations and individuals
 - Individuals: up to 10 years in prison and \$1M, or double the gain/loss
 - Entities: up to \$100M, or double the gain/loss
 - Private Lawsuits: treble damages, plus attorneys' fees and costs
- Outside the U.S.:
 - EU: aggressive enforcement and large fines
 - Criminal penalties in:
 - United Kingdom
 - Australia
 - Brazil



The Consequences of Cartel Conduct

USDOJ Antitrust Division -- Criminal Fines Obtained
In Millions of Dollars, by Fiscal Year



* Partial year, October 1, 2008 to June 30, 2009 -- FY2009 ends September 30, 2009

Source: ABA Corporate Counseling
Committee Update, July 2009

Government Investigation: The Grand Jury Subpoena

- Examining the subpoena
- Preservation – general and specific
- What requests to make of the government
- Future litigation consequences of scope decisions
- What to do about privileged documents

Government Investigation: Dawn Raids

- Investigations of undertakings, usually under EU competition law
 - How the dawn raid differs from a subpoena
- Do they always come at dawn?
- A US subpoena may be on its way
 - FBI agents may be fanning out to interview current and former employees
- Coordinate global communications within the company



Example: Marine Hose Industry

- Marine hose is a flexible rubber hose that is used to transport oil between tankers and storage facilities and buoys. The industry is small.
- In May 2007, eight foreign executives attending an industry conference in the U.S. were arrested and charged with conspiring to rig bids, fix prices, and allocate market shares.
- Simultaneous with the arrests, searches were conducted in the United States and in Europe.
- The case was the first to acknowledge use of the DOJ Antitrust Division's wiretap authority.



Example: Air Cargo industry

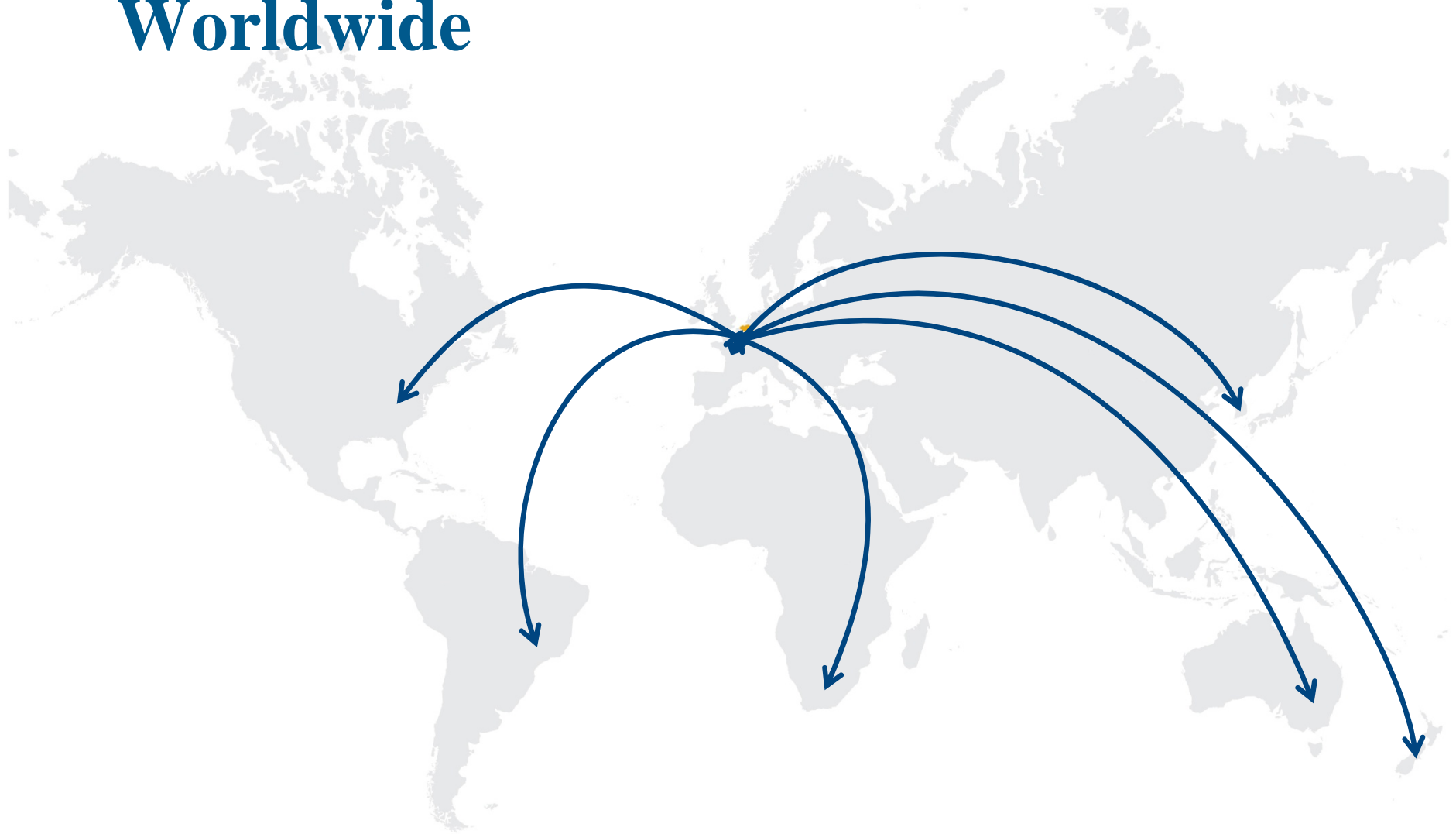
- Involves allegations that airlines throughout the world colluded to raise the price of air cargo by imposing fuel surcharges.



- Lufthansa – a major participant in the alleged cartel – has implicated co-conspirators in exchange for amnesty. It has done this in:

United States	European Commission
Brazil	South Korea
Australia	New Zealand
South Africa	

Example: Lufthansa Seeks Leniency Worldwide



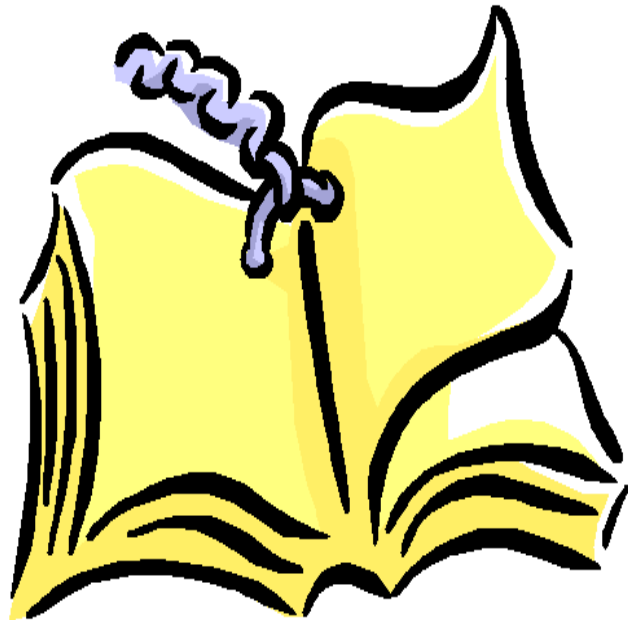
When a Crisis Hits:

How quickly will you be able to identify and reach key persons both within and outside the company?



Internal and External: Call Lists

- Identify now all the potential persons who may need to be notified quickly in the event of a crisis.
- For each person, identify a backup person.



- For each person, obtain work, home and cell numbers.
- Update the call list regularly.
- Keep the call list in a place where it is easily accessible 24 hours a day (and not dependent on computer access)

Early Notification: Possible Internal and External Audiences

POSSIBLE INTERNAL

CEO

In-house Counsel

CFO/Treasurer/Senior
Management

Investor Relations/Corporate
Communications personnel

Disclosure Committee/
Board members

Security personnel

Key HR/IT Personnel

POSSIBLE EXTERNAL

Outside Counsel

Media Relations
Consultants

Crisis Management
Consultants

Auditors

IT Specialists

Advising Employees about Possible Investigation

- General description of the investigation and employees' rights and employee rights
 - We have been informed that the Department of Justice (through the Federal Bureau of Investigation) has attempted to interview participants in [the Company's] industry. It is possible that executives and employees from [industry] manufacturers, including the Company, will be visited at work or home. You should be aware of your legal rights in the event that you are approached by a government official.
 - Any individual receiving a request for an interview – whether approached at home or work – has the right to decide whether or not to agree to that request. The choice is entirely yours. You are not legally required to submit to an interview, but you may do so if you wish.



Advising Employees about Possible Investigation

- **Reminder to tell the truth**
 - If you decide to participate in an interview, you must tell the truth. Providing false or misleading information during such an interview can be a criminal offense, so it is critical that you treat any interview seriously, not as a casual conversation, no matter how informal the interview may seem. It doesn't matter that you are not under oath.
- **Request to Notify the Company**
 - Before deciding whether to agree to an interview, you may obtain legal advice from Company's Legal Department or from an attorney of your own choosing, so that you can understand the potential legal consequences of such a government interview. Whether you ultimately agree to the interview or decline the request, we ask that you contact Company's Legal Department immediately upon receiving the request from the government. This will help Company ensure that it complies with any obligation it may have to preserve relevant evidence.



Advising Employees about Possible Investigation

- Right to have counsel present for interview
 - You have the right to have an attorney present during this interview. This also will be helpful if there ever is any misunderstanding about what you said or what you were asked.
- Information to employees to request of government investigator
 - ask for identification and a business card to confirm the identity of the individual
 - determine precisely why the individual wishes to speak with you and whether you want to go forward with the interview
 - consider telling the individual that you want to schedule the interview for a date that will give you sufficient time arrange for the Company attorney or some other attorney to be present if you so desire.

Preservation: Documents, Data and Email

What Can Go Wrong?

Plenty – if you are not prepared!

- Employees do not comply with the preservation directive
- Company does not send preservation notice to third parties who possess responsive materials over which the company has control or legal right.
- Company does not comply with e-discovery protocols developed to preserve relevant information.
- Failure to preserve pertinent materials may lead to spoliation claims and even obstruction charges

Important Steps to be Ready for the Challenge

Designating Someone Who “Owns” This Issue
Within Your Team **BEFORE** the Crisis Hits

Designated Person

- Savvy about litigation and IT perils and speak the language of both groups
- Detailed knowledge about the company’s IT environment – knowing where data are stored, by whom, and how
- An appreciation for the capability, timing, and cost associated with matter-specific e-discovery
- Be aware of foreign compliance issues

Government Investigation: Employee Home Interview

Common practice in an investigation – interview employees at their homes, outside business hours, just before (or contemporaneous with) the search warrant or dawn raid.

- No advance warning
- Less chance employee will ask to have an attorney
- No company lawyers or supervisors to consult
- Even if employees wanted to call a lawyer, do they know who to call and have a phone number?

Advising Employees Who Are Subjected to Border Stops

- Would you know what to do if you were detained at the airport while vacationing in Europe?
- Would you know what to do if a French or Portuguese colleague were detained at the airport in the US?
 - Advance planning for anyone involved in business under investigation
 - Internal contact information in the region
 - Notify/engage outside counsel
 - May need individual counsel
 - Understand that criminal penalties may apply



Internal Investigations

- Obligations to Shareholders to assess liability
- Making important strategic calls
- Early and Accurate Assessment critical to liability
- A corporation can be held criminally liable for wrongful actions of any employee IF the act:
 - (1) Occurs within the scope of employment,

AND

 - (2) Was done for the benefit of the corporation (at least in part)

Conducting an Internal Investigation

Before conducting any factual investigation, consider:

- Who should oversee the investigation?
- Who should conduct the investigation?
- What should employees be told before and after they are interviewed?
- What should be written down and how (will it be discoverable?)



Conducting Interviews

- **Tread cautiously:** Think of overall plan and potential issues before interview
- Review key documents first (when possible)
- Have someone "witness" the interview
- Request person to maintain confidentiality
- Don't forget Upjohn warnings



Employee Interviews

In the course of conducting an internal investigation, employees are interviewed by counsel.

Are the communications and notes subject to any privilege or protection?

Privilege Considerations

Privilege varies by jurisdiction

- What law governs? Federal law and/or law in a particular state?
 - In certain states, only an attorney’s communications with the “control group” are privileged.
- Former Employees
 - Communications that were privileged during employment likely retain that privileged status even after employee leaves company.
 - Courts are divided as to whether communications with a former employee that occurred post-employment are privileged.

International Law: Privilege

Caution: Privilege laws in foreign countries may be quite different from those in the United States.

It is not always clear which country's privilege laws will be applied (choice of law issue).

Employee communications with in-house lawyers will not be treated as privileged in certain countries.

Akzo Nobel (Sept. 2007) – no uniform support among member-states to accord in-house counsel with same privilege rights as outside counsel.

Waiver: General Rule

- The general rule is that once the client waives the attorney-client privilege, it is waived as to all third parties
- Unlike the attorney-client privilege, the protection of the work product doctrine is not automatically waived by disclosure to *any* third persons
- Courts will find waiver of work product doctrine only if:
 - the disclosure is made to an adversary, or
 - the disclosure substantially increases the opportunity for potential adversaries to obtain the information.

Waiver Scenarios

Assuming your communications are privileged, will you waive the privilege if you share information with:

- Representatives of a parent or wholly-owned subsidiary?
- Auditors?
- Insurance carriers?
- Media consultants?

Working with Government Antitrust Investigators

Best Practices:

- Be reasonable, but demand reasonableness
- Be responsive, but seek dialogue
- Be polite, but push back
- Go beyond what is required to show good faith
- Put the government to its proof



Working with Government Investigators

- Leniency means investigations commence with amnesty seekers or spin-offs from settlers
 - Prosecutors begin with more information
 - Still bluff
 - More leniency may mean less experienced trial advocates
- Antitrust Enforcers Demand Respect for their Process
 - Recent actions to enforce process
 - FTC v. Tarriff (D.C. Cir.)
 - FTC v. BoehringerIngehheim Pharmaceuticals, Inc. (D.D.C)
 - U.S. v. Iconix (consent)



Managing Civil Litigation

Civil litigation almost always follows announcement of a government investigation

- Air Cargo – over 100 suits
- TransAtlantic Passenger cases – over 100 suits

Suits filed within hours of announcements

Plaintiffs will often coordinate filings BUT

- Venue may be a basis for lead counsel battles
- No plaintiff can allow her case to fall behind the others

Managing Civil Litigation: Best Practices

Keep the cases organized and equal

- No case gets ahead of any other case

Engage in the MDL process to identify best jurisdiction for case

No reason to give up too early

- Motions to dismiss are viable, particularly in light of *Twombly* and *Iqbal*
- Plaintiffs face issues, such as injury to U.S. competition and class certification, that government does not

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Experience

- ◆ Handles and manages commercial litigation and antitrust litigation for United Airlines.
- ◆ Handles and manages government investigations initiated by the U.S. Department of Justice for United Airlines.
- ◆ Counsels and conducts antitrust compliance training worldwide for United Airlines employees.
- ◆ Former partner at Chicago law firm, with significant antitrust experience on both defense and plaintiffs side.

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Experience

- ◆ One of Firm Practice Leaders for Mayer Brown's Global Litigation Group
- ◆ Defends corporations in criminal price fixing matters investigated by the United States Department of Justice's Antitrust Division
- ◆ Represents national and multinational clients in civil antitrust litigation and complex commercial litigation, including price fixing, market allocation, conspiracy, monopolization and attempted monopolization cases.
- ◆ Co-authored the "United States" chapter of Global Competition Review's "Private Antitrust Litigation 2010" treatise.
- ◆ Authored "Empagran and the Globalization of the Sherman Act", which was published in the International Bar Association's journal, Business Law International (Sept. 2003 issue).

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Experience

- ◆ Defends corporations and individuals in criminal antitrust matters investigated by the United States Department of Justice's Antitrust Division.
- ◆ Represents corporations in investigations initiated by and litigation against the Federal Trade Commission.
- ◆ Represents companies in multi-district antitrust litigation.
- ◆ Former Staff Attorney with the Federal Trade Commission, where he conducted two antitrust trials.

