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Legal Update
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The Cartel Report

COMMENTARY ON ANTITRUST ENFORCEMENT FROM AROUND THE WORLD

Not too long ago, many countries—perhaps even most countries—either did not criminalize cartel conduct or did not enforce the laws prohibiting cartels. In the past 20 years or so, that has changed dramatically. Today, cartels, "the supreme evil of antitrust,"[1] are unlawful throughout much of the world. In addition, national authorities are cooperating more frequently to investigate potential cartel conduct.

While nations increasingly agree on the need to deter cartels, they often disagree on how to accomplish that goal. The United States relies heavily on criminal laws, for example, while other countries rely more heavily on administrative sanctions or civil fines. Leniency programs, while increasingly common, also differ in their requirements and effects. These differing enforcement regimes pose challenges for international businesses, which are now often subject to overlapping investigations and enforcement actions.

Helping businesses to face these emerging challenges is the idea behind *The Cartel Report*. *The Cartel Report* does not collect cases or enforcement statistics—plenty of other publications do that quite well. Rather, it offers commentary about trends and developments in cartel enforcement from Mayer Brown's competition lawyers in Europe, Asia and the Americas.

In this inaugural issue of *The Cartel Report*, we take a look at some of the developments and investigations that are shaping global antitrust enforcement, beginning with a development that was once unthinkable: the extradition of a foreign executive to the **United States** to stand trial on criminal antitrust charges. We then turn our attention to **Europe** (pg. 2), where ongoing investigations into food products are testing the limits of international cooperation. In **Asia** (pg. 4), China has joined the auto parts investigations in a big way. We close with a report from **Brazil** (pg. 6), where the Brazilian authorities recently imposed significant fines and divestments designed to break up a domestic concrete cartel.

We hope you enjoy this issue and welcome your questions and comments.

News from the United States

THE FIRST EXTRADITION OF A FOREIGN NATIONAL ON ANTITRUST CHARGES

The United States has criminalized cartel activity for more than a century. For most of that time, however, foreign executives have been able to violate the cartel laws with near impunity because, to the frustration of the US Department of Justice ("DOJ"), the US government had little or no ability to force foreign executives to travel to the United States to confront the charges or serve a criminal sentence.

Things began to change in the early 1990s, however, when the DOJ began targeting foreign

executives. As part of that effort, the DOJ put in place a set of "carrots" and "sticks," developed in conjunction with its Leniency Program, to convince foreign companies and their executives to plead guilty and to serve time in US prisons. The DOJ's efforts have proven effective: dozens of foreign executives have agreed to be imprisoned in the United States after pleading guilty to antitrust offenses.

Not all foreign executives, however, are willing to return to the United States voluntarily. And, until recently, there was little the DOJ could do about that. Then, earlier this year, the DOJ successfully extradited Romano Pisciotti to the United States to face criminal antitrust charges. This is the first time the DOJ has ever successfully extradited anyone based on antitrust charges.[2]

The story behind Pisciotti's extradition is interesting. According to court documents, Pisciotti worked for Parker ITR Srl ("Parker"), an Italian manufacturer of marine hoses. Parker pled guilty in 2010 to participating in a global price-fixing conspiracy. In the plea agreement with Parker, the DOJ "carved out," or reserved its right to prosecute, Pisciotti. But Pisciotti, who lived and worked in Italy, was not willing to travel to the United States voluntarily. And he could not be extradited from Italy because his conduct was not criminal under Italian law.

The DOJ responded by indicting Pisciotti under seal. It also requested, via a so-called Interpol "Red Notice" letter, that Interpol member nations detain Pisciotti so as to allow the US government to seek his extradition to the United States.

In the meantime, Pisciotti continued to work for Parker. After a business trip took him to Nigeria, he arranged to return to Italy via Frankfurt, Germany. German authorities arrested him while he was waiting to catch his connecting flight. At the US government's request, German authorities then initiated extradition proceedings, which Pisciotti challenged without success. Not long after being extradited to the United States, Pisciotti pled guilty to a conspiracy to rig bids, fix prices, and allocate market shares of marine hose. He 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 growing risks foreign executives face when they decide not to return to the United States to face antitrust charges. Cartel conduct is now criminal in more than 30 countries, including Australia, Brazil, Canada, Israel, Japan, Korea, Mexico, the United Kingdom and Russia. For an executive facing criminal antitrust charges in the United States, travelling internationally—or doing something as innocuous as catching a connecting flight—increasingly poses serious extradition risks. Even an unscheduled stopover in the wrong country could result in extradition proceedings.

Pisciotti's extradition will likely embolden the DOJ in cases involving foreign executives. In the past, many foreign executives declined to submit to the jurisdiction of the US courts and instead remained in their countries. Indeed, the DOJ currently has indictments on file against more than 40 executives from Japan, South Korean and Taiwan who have elected not to return to the United States. After Pisciotti's extradition, those executives probably do not feel as safe as they once did.

The DOJ has long viewed jail time for foreign executives as a key deterrent to cartel conduct, and its success in extraditing Pisciotti confirms its growing reach. With an increasing number of countries imposing criminal liability for cartel conduct, extradition for antitrust offenses may become much more common in the coming years.

News from Europe

THE EUROPEAN FOOD INVESTIGATIONS

Since 2007, the prices of agro-food products in Europe have been particularly volatile. This, in

turn, has drawn the attention of policy makers and competition authorities.

Agriculture in Europe is subject to a harmonized framework of subsidies and market intervention tools that are intended to increase productivity, stabilize markets, ensure the availability of supplies, and provide a fair standard of living for the agricultural community, while ensuring reasonable prices to consumers.[3] Market structures are still atomized and local, with approximately 14 million farmers.

At the level of food processors, multinational groups coexist with small and medium-sized companies, supplying food retailers as well as other customers such as hotels and restaurants. While the food processing sector is generally more concentrated, these processors do not enjoy the same protective regulatory framework as farmers, and they are dependent to a wide extent on an even more consolidated food retail sector. In this context, the press started echoing on a regular basis accusations of anti-competitive behavior either on the part of producers or on the part of retailers or, sometimes, on both.

PARALLEL NATIONAL ACTIONS RATHER THAN AN EU-SECTOR INVESTIGATION

Price volatility and alleged anti-competitive behavior could have set the backdrop of a sector investigation by the European Commission. Under Article 17(1) of Regulation 1/2003, such sector investigations can be opened absent a specific presumption of infringement where the "rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market." Under this rule the Commission can use all its investigation powers, including dawn raids, in order to identify the causes of such restrictions and, where relevant, open formal proceedings. Precedents include the pharmaceutical and retail banking industries, where the sector investigation resulted in a full review of practices in the sector and in individual infringement cases.

But the European Commission has not opened a sector investigation so far. As early as October 2009, the European Commission released a communication titled "A better functioning food supply chain in Europe," calling for a strengthening of the application of competition rules in food markets. The report advocated a coordinated approach of the National Competition Authorities and the Commission within the European Competition Network ("ECN").[4]

In January 2012, the European Commission followed up with the creation of an internal "Food Task Force" in order to review the enforcement actions at the national level and determine if investigations were to be undertaken at the EU level.

Several individual cases have been opened at the EU level. One of the most recent examples concerns the canned vegetable sector where the European Commission imposed fines totaling €32.3 million on canned mushroom producers that were attempting to stop the decrease in purchase prices set by retailers for their private label products. The decision, dated June 25, 2014, is expected to be followed another one, as the main mushroom producer affected by the first decision has applied for leniency for other alleged practices.

But the overwhelming majority of cases are handled at the national level, including food and retail sector investigations in a number of Member States. New cases are opened on an almost daily basis.

For example, in France, distressed pork slaughterers were fined a total of €4.5 million for agreeing to parallel reductions of supplies in order to obtain better prices from their suppliers, as well as for calling within their trade union for not agreeing to sell to food retail chains below a minimum reference price.[5] Poultry producers and private label dairy producers are being investigated on similar grounds.

In Germany, sausage manufacturers were fined by the Bundeskartellamt for concerted behavior that sought to obtain higher prices from retailers.[6] The Bundeskartellamt took into consideration the fact that they were facing highly concentrated industry players both upstream (meat trade) and downstream (food retail), but fines nonetheless reached a total of €338 million.

THE LIMITS OF PARALLEL ACTIONS WITHIN THE EUROPEAN COMPETITION NETWORK

In the 10 years after the regulation decentralizing the implementation of EU antitrust rules and despite many efforts to promote convergence, substantial differences remain between EU and national systems in terms of investigatory powers, procedural safeguards, the determination of fines, the conditions for leniency and settlements, legal privilege, etc.

European regulators are particularly aware of these differences.[7] In 2013, the European Competition Network endorsed seven recommendations on key enforcement powers. However, it will be necessary to go further to create a truly common competition enforcement area in the EU if sector investigations are now carried out through parallel actions of national competition authorities. Thus far, no concrete measures have been proposed to move forward in that regard.

In addition, the dissemination of cases among a dozen national competition authorities results in a perceived lack of coordination in addressing the complex issues behind such cartel conduct. Hence, coordination among regulators and guidance from the top on the substance is needed for at least two reasons.

First, the fact that upstream food markets are covered by the common agricultural policy, and that competition rules do not apply as broadly in this sector than in other economic sectors, raises complex issues that cannot be ignored when assessing behaviors downstream.

The interplay between competition and agriculture policies remains an opaque area, where more precise guidance would be appreciated at EU level considering the number of pending cases. Some governments have even intervened directly on the price of some products, with potential impacts throughout the chain of production and distribution which cannot be ignored when applying competition rules.[8]

Second, all these cases raise the issue of buying power, and fining distressed farmers and processors might not provide a sufficient solution. Apparently, regulators are only starting to coordinate on this front.

In July 2014, the European Commission released a communication titled "Tackling unfair practices in the B2B food supply chain" in which it is "encouraging Member States to look for ways to improve protection of small food producers and retailers against the unfair practices of their sometimes much stronger trading partners."[9] However, the change of EU Commission presidency means that such sensitive political issues will not be addressed for a number of months, when the Juncker Commission effectively takes office.

In the meantime, additional enforcement decisions will nonetheless be adopted and companies fined to varying degrees, depending on the characteristics of the markets concerned and how the agricultural exception is considered by the acting national authority.

Developments in Asia

NEW CARTEL ENFORCEMENT

In China, the National Development and Reform Commission ("NDRC")[10] and the State Administration for Industry and Commerce ("SAIC")[11] have shown an increasing willingness to investigate and sanction international cartel activities.

As part of the global crackdown on the price fixing of auto parts, the NDRC recently

completed two price-fixing investigations into 12 Japanese auto parts makers. The investigations culminated in fines, handed down on August 20, 2014, totaling RMB 1.235 billion (approx USD 200 million) imposed on 10 of the 12 makers.

The first investigation involved eight auto parts companies, which were found to have fixed the prices of 13 auto parts and components—including starter motors, alternators, throttle bodies and wire harnesses—sold in China to manufacturers such as Toyota, Ford, Honda, Nissan and Suzuki. The companies were found to have held frequent meeting from January 2000 to June 2011 in Japan to negotiate price quotations. The first company to report the cartel to the NDRC fulfilled the requirements of the leniency mechanism provided for in the Anti-Monopoly Law ("AML") and the NDRC procedural regulations and was exempt from fines. The second company to report the cartel received a reduced fine of 4 percent of its relevant turnover[12] for the previous year. The remaining six companies party to the cartel were fined between 6 and 8 percentof their relevant turnover for the previous year with highest individual fine totaling RMB 290.4 million (approx. USD 47.2 million).

The auto parts case marks the first investigation, and first fines handed down, by a Chinese agency for international cartel activity pursuant to the AML.

The NDRC's auto parts investigation began in late 2013 but was only formally opened in May 2014. Although investigations into auto part makers in the United States, Europe and Japan began in early 2010, there appears to have been no rush to apply for full leniency in China. This hesitation may have been, in part, due to the lack of clarity regarding the issue of leniency and immunity. According to press reports, it was not until April 2014 that the cartel was first reported to the NDRC, after the reporting company had been subject to an NDRC raid regarding a different case in March 2014.

With the rise in the number of cartels with an international scope, companies should be aware that competition agencies in different jurisdictions frequently cooperate with each other to ensure successful domestic enforcement of cartels. Moreover, companies that have been subject to investigations in one jurisdiction must be cognizant of the risk of investigation and enforcement in other jurisdictions and should assess whether they can benefit from leniency programs in those other jurisdictions.

The severity of the price-fixing offences in the auto parts case, which persisted for more than 10 years, prompted the NDRC to impose the largest fine to date by a Chinese antitrust agency. The total fine of RMB 1.235 billion is almost double the RMB 670 million imposed on six baby formula makers in 2013 for resale price maintenance. As noted above, the NDRC, which can fine a company up to 10 percent of its turnover in the preceding year, imposed fines on five offending companies that were equivalent to 8 percent of their turnover in the preceding year.

The auto parts investigation has provided some clarity with regard to the issue of leniency in the context of NDRC investigations. The NDRC appears to have applied the fine reductions provided for in its procedural regulations, exempting the first reporting entities from monetary fines and reducing the fines levied on the second reporting entities. This should provide firms with greater certainty regarding the NDRC's leniency program going forward. Unfortunately, the case does not provide any further guidance regarding the nature of the material evidence that must be provided to the NDRC by a business concerning a monopoly agreement to which it is a party in order for the leniency provisions to apply. The NDRC rules merely stipulate that the evidence provided must be sufficient for the NDRC to determine the existence of a monopoly agreement.

In contrast, the SAIC procedural regulations indicate that the evidence must play a pivotal role in the initiation of an investigation by the

SAIC or have a significant bearing on the establishment of an infringement. The SAIC regulations on the prohibition of monopoly agreements also clarify that material evidence includes:

- Information on the business operators party to the monopoly agreement and products involved;
- Details of the contents of the relevant agreement;
- Information on how the relevant agreements were entered into; and
- Details of how the agreements were implemented.

Another issue that requires further clarification is the eligibility of applicants who are "ringleaders" or "initiators" of a cartel. While the SAIC procedural regulations make it clear that leniency will not be available for the "initiator" of a cartel the NDRC regulations are silent on this point. This is another example of an area where potential inconsistency is evident in the approach of the different enforcement agencies.

ARE FOREIGN COMPANIES BEING TARGETED?

Investigations into the conduct of multinational corporations have become controversial amidst allegations that the Chinese authorities are using antitrust enforcement as a tool of protectionism, disproportionately targeting foreign companies to the benefit of local Chinese complainants. The Ministry of Commerce and the State Administration for Industry and Commerce ("MOFCOM"), one of three anti-monopoly enforcement agencies in China, issued a press release in response to these allegations stating that China's antitrust probes were not targeting foreign companies, urging foreign investors and companies to "strictly obey" Chinese laws and regulations.

While allegations of enforcement bias may not be entirely unfounded, they have likely been exaggerated. Antirust enforcement has not been entirely one-sided: domestic companies, including Chinese state-owned enterprises, have also come under scrutiny. Not to be overlooked is the fact that foreign companies targeted in China have also been the subject of antitrust investigations and enforcement in foreign jurisdictions. Concurrent investigations are also the mark of effective inter-agency cooperation with Chinese authorities eager to demonstrate their mettle in the international arena, by taking part in the global crackdown on anti-competitive conduct.

Developments in Brazil

BREAKING UP THE CEMENT AND CONCRETE CARTEL

In Brazil, the Ministry of Justice's Economic Law Office ("SDE")[13] has broken up a cartel in the Brazilian cement and concrete market through its actions against six major companies, two associations and six individual managers.

The SDE's investigation began when a former employee of a cement company made a detailed complaint about the operation of a cartel. The whistleblower provided SDE with several documents suggesting that the cement manufacturers were: (i) fixing prices and cement quantity, and dividing the regional cement and concrete markets in Brazil; (ii) allocating clients and agreements not to compete; (iii) raising barriers to entry for new competitors in the cement and concrete markets; (iv) dividing of the concrete market, through shares equivalent to the market shares in the cement market; and (v) coordinating control of the source of cement supplies, in particular the blast furnaces.

Based on the whistleblower's complaint and documents, SDE obtained a warrant to conduct dawn raids at the companies' head offices; the raids took place in February 2007. Many of the defendants tried, without success, to judicially bar SDE's investigation based on supposed procedural errors related to the dawn raids. Months after the raids, SDE started an administrative procedure to investigate

anticompetitive conduct, alleging that the companies had breached Article 20 and Article 21(i), (ii), (iii), (iv) and (viii) of Law No. 8884/94.

The first relevant aspect of this case, in terms of trends, is that two companies applied for a cease and desist agreement ("TCC"). This was the first TCC approved by CADE[14] under the recently established regulatory framework. In accepting the TCC, CADE calculated the present value of the expected sanction, which it calculated after considering both the likely amount of the fine and the probability of conviction. In this case, as part of the TCC, CADE imposed a fine of 15.5 percent of the company's gross annual revenue in the fiscal year prior to the beginning of the investigations.

The case proceeded against the other parties. In November 2011, SDE issued a non-binding opinion to CADE, recommending the conviction of seven companies, two associations, the National Union of the Cement Industry and six individuals. According to SDE's opinion, the evidence (which comprised 12,000 pages and 820 electronic files) showed a sophisticated cartel in the domestic cement and concrete markets. SDE found that, through meetings, emails, and information exchanges, the cartel participants fixed prices and production quotas, divided markets and clients, coordinated the control of inputs, performed asset exchange transactions and coordinated actions to squelch competitions from outside the cartel.

SDE recommended not only a fine, but also that the companies be required to divest certain assets so as to re-establish free competition in the market. In other words, SDE recommended that CADE reconsider some of its earlier decisions approving concentration within the cement market. SDE also later opened a separate investigation in the sector to become better acquainted with the cement input supply conditions and to analyze measures to foster the entry of new companies in the sector.

In October 2012, ProCADE[15] issued an opinion supporting SDE's recommendations and urging the conviction of the accused companies and individuals. According to CADE's General Attorney's Office, the cartel operated from at least 2002 until 2006 and generated gains of approximately BRL 6 billion (US$2.5 billion) for the participants.

In May 2014, CADE unanimously condemned the six companies, six individuals and three associations, and imposed fines totaling BLR 3.1 billion (US$1.3 billion)—the largest penalty ever imposed by CADE in a cartel case. To dismantle the cartel, CADE also imposed behavioral measures, such as ordering the cartelists to divest certain plants and by barring them from participating in the cement and concrete sector until 2019. This was the first time that CADE ordered divestment as a part of a cartel sanction. At least some of the companies have indicated that they will appeal the sanctions to the judiciary.

If you have any questions about any of the topics raised in this legal update, please do not hesitate to contact any of the following.

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Endnotes

[1] Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004).

[2] In March 2010, the DOJ secured the extradition of Ian Norris, a retired English executive, on obstruction of justice charges relating to an antitrust investigation. Notably, however, the United Kingdom refused to extradite Norris on antitrust grounds. The House of Lords reasoned that Norris could not be required to stand trial on antitrust charges in the United States because, at the time of the alleged offense, price fixing was not a criminal offense in the United Kingdom. Pisciotti's extradition thus represents the first (and thus far only) time that DOJ has successfully extradited an individual on antitrust charges.

[3] Article 39 of the Treaty on the Functioning of the European Union.

[4] Communication dated October 20, 2009, COM(2009) 591 final.

[5] French Competition Authority, decision n°13-D-03 dated February 13, 2013.

[6] Bundeskartellamt, press release dated July 15, 2014.

[7] Communication dated July 9, 2014, Ten Years of Enforcement under Regulation 1/2003, COMP(2014)453.

[8] For an example, see in France the press release of the Ombudsman for agriculture trading relationships concerning milk price dated April 26, 2013.

[9] Communication dated July 15, 2014, COM(2014) 472 final.

[10] The NDRC is primarily responsible for enforcing the AML provisions on price-related anticompetitive conduct.

[11] The SAIC is responsible for enforcing the AML provisions on non-price related conduct.

[12] Although the NDRC does not make it clear in its decision, it is understood that the fines were imposed based on the turnover derived from sales in China.

[13] When this case was investigated, SDE was one of the three Brazilian competition authorities under the Brazilian System of Competition Defence. At that time, it had jurisdiction to investigate behavioral claims, and issue non-binding opinions to CADE, as well as to carry out the first assessment in merger clearance procedures. With the enactment of Law N. 12.529/12, most of SDE's competition responsibilities were absorbed by the new CADE. Today, SDE enforces consumer laws and regulations.

[14] CADE is the Brazilian competition agency. Under prior law, CADE served as an administrative court with authority to hear cases involving anti-competitive conduct or merger clearances. Under current law, CADE is Brazil's major competition agency having succeeded to most of SDE's powers.

[15] ProCADE is the General Prosecutor's division within CADE. They focus on guaranteeing that CADE's acts are practiced in accordance with the applicable laws and regulations.

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