



# Antitrust & Competition REVIEW

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## About Our Practice

Mayer Brown's Antitrust & Competition practice offers up-to-the-minute guidance concerning merger control, cartel investigations, distribution and licensing issues, alleged abusive conduct by dominant firms and state aid. Our group, which includes former US and European enforcement agency officials, has members located in our offices in the Americas, Asia and Europe as well as correspondent and other relationships with antitrust counsel throughout the world that enable us to provide truly global coverage. Our global resources and experience enable us to represent clients in high-stakes litigation, including litigation before the US Supreme Court and the European Courts of Justice; and represent clients in criminal and civil investigations. Further, our antitrust lawyers in Hong Kong and China are skilled at navigating the range of competition laws in the region, and offer clients the benefit of extensive China antitrust filing experience and strong relationships with key competition agencies. Our global capacity also allows us to manage multi-jurisdictional merger filings and advise on the applicability of national merger control regulations and to secure merger control clearances throughout the world.

## Editors' Note

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We are pleased to present the next edition of Mayer Brown's Antitrust & Competition Review. This edition focuses on antitrust compliance efforts and previews recent developments as well as upcoming changes in the United States, Europe and South America.

### Compliance Efforts

**Price Increases.** Implementing price increases can be a stressful time for manufacturers. In addition to the business concerns that accompany an increase, manufacturers must also be wary of the dangers associated with competitor communications at or near the time of the increase. Adam Hudes and Stephen Medlock offer tips on how companies can avoid the antitrust pitfalls associated with price increase announcements.

**Criminal Cartel Enforcement.** In recent years, the US Department of Justice ("DOJ") has significantly increased its efforts to prosecute and penalize corporate executives who engage in cartel conduct. This has resulted in, among other things, an increased focus on foreign nationals and historically long prison sentences for antitrust violations. Bob Bloch, Kelly Kramer and Stephen Medlock analyze the trends and highlight the importance of effective corporate compliance programs.

**Compliance Programs.** Speaking of compliance programs, the fact that a company has such a program is just the beginning. If companies want to reduce the likelihood of antitrust violations or minimize the impact when a violation occurs, it is necessary for the program to be proactive and have "buy in" from the company's top executives. Richard Steuer analyzes recent comments from the US Deputy Assistant Attorney General for Criminal Enforcement at the DOJ Antitrust Division on how to maintain an effective antitrust compliance program.

### Recent Developments and Upcoming Changes

**Private Damages Actions in the EU.** Traditionally, private damages actions for antitrust violations in the European Union ("EU") have been at a very low level compared to the United States. However, in November 2014, the EU issued a directive to make it easier for private citizens and companies to recover damages for violations of antitrust law through litigation before the courts of the Member States. Margarita Peristeraki and Kiran Desai summarize the directive's key provisions and consider the future of such actions in the European Union.

**Promotional Allowances.** The US Federal Trade Commission recently issued revisions to the “Fred Meyer” Guides, which are intended to help businesses ensure that their advertising allowances and promotional payments are in compliance with the price discrimination statute, the Robinson-Patman Act. Richard Steuer reviews the impact of the new amendments.

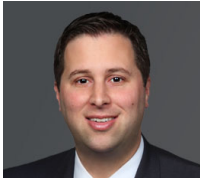
**Natural Gas Industry.** Earlier this year, the US Supreme Court heard oral arguments in a case that could have significant consequences on the regulation of pricing conduct in the natural gas industry. Paula Garrett Lin examines the parties’ arguments and previews what is at stake.

**Merger Control Measures in Brazil.** Finally, Eduardo Gaban evaluates recent announcements by Brazil’s Council for Economic Defense (“CADE”) regarding the upcoming changes to the country’s merger clearance system.

We hope you enjoy this edition of Mayer Brown’s Antitrust & Competition Review, and we welcome your questions and comments. ♦

# Loose Lips: The Danger of Sharing Competitive Information with Competitors

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Increasing prices can be stressful for manufacturers as they consider such questions as: What is the proper price point? How will customers react? What will the competition do? In addition to these issues, manufacturers considering a price increase should also be concerned with antitrust best practices.

There are many well-recognized business reasons to raise prices: increased demand, rising costs, or finding it profitable to follow the price increase of a larger competitor. However, regardless of the intentions, improper communications, suspicious meetings, or the mere presence of executives at trade association meetings around the time of a price increase can give rise to antitrust scrutiny.<sup>1</sup>

As the US Federal Trade Commission's recent consent judgments with AmeriGas and Blue Rhino make clear, communications with competitors at or near the time of a price increase are fraught with danger, especially when competitively sensitive information is exchanged. In order to avoid potential antitrust pitfalls, companies considering price increases should avoid communications with competitors and adhere to antitrust compliance procedures, like carefully documenting

meetings, having corporate counsel present at any trade association or other meeting with competitors, and not announcing price increases further in advance of the effective date than necessary.

## The Applicable Law

Mere "evidence of social contacts and telephone calls among [competitors is] not sufficient to exclude the possibility that the [competitors] acted independently."<sup>2</sup> "The decision by a group of industry players to have a meeting or to talk at a dinner or cocktail reception does not constitute a conspiracy."<sup>3</sup> After all, "[c]ompany personnel do not often operate in a vacuum or 'plastic bubble'; they sometimes engage in the long-standing tradition of social discourse."<sup>4</sup> For this reason courts have rejected as "pure conjecture" the assumption "that the contemporaneous presence of [corporate] officers at a trade association meeting permits an inference of conspiracy."<sup>5</sup>

With that said, communications with competitors around the time of a price increase may raise the specter of price-fixing in certain situations if proper compliance measures are not observed. For instance, some courts

have found nearly contemporaneous trade association meetings and price increases to be suggestive of a conspiracy. In *In re Titanium Dioxide Antitrust Litigation*,<sup>6</sup> a district court denied motions for summary judgment where class plaintiffs tendered evidence showing that manufacturers of titanium dioxide kicked off a series of lock-step price increases shortly after attending meetings of an industry trade association.<sup>7</sup> Moreover, the evidence showed that 88 percent of price increases on titanium dioxide occurred within 30 days of an industry-wide trade association meeting.<sup>8</sup> The court held that “[t]his fact deserves greater attention, as it suggests that the Defendants may have used [trade association] to communicate their pricing plans, coordinate price increases, and to confirm that each competitor would follow the leader on a price increase.”<sup>9</sup>

## AmeriGas

*In the Matter of AmeriGas and Blue Rhino*<sup>10</sup> illustrates the potential antitrust scrutiny that can result from competitor communications at the time of an industry-wide price increase. AmeriGas and Blue Rhino are the largest suppliers of propane tank exchanges at retail locations in the United States.<sup>11</sup> Collectively, they control 80 percent of the US market; no other propane tank provider has more than a 9 percent share.<sup>12</sup> As a practical matter, they are the only companies that have the capacity to provide propane tank exchanges at major national retailers such as WalMart, Lowes and Home Depot.<sup>13</sup> In April 2008, due to increasing input costs, Blue Rhino announced that it would reduce the amount of propane in its tanks from 17 pounds to 15 pounds—effectively, a price increase on its propane tanks.<sup>14</sup> AmeriGas matched Blue Rhino’s fill reduction shortly thereafter.<sup>15</sup>

WalMart rejected Blue Rhino’s price increase.<sup>16</sup> According to the FTC’s administrative complaint, Blue Rhino and AmeriGas responded by conspiring to

make the price increase “stick.” From June to September 2008, Blue Rhino and AmeriGas executives spoke several times via telephone and email, allegedly to coordinate their responses to WalMart.<sup>17</sup> The FTC claimed that WalMart was ultimately forced to accept the fill reductions due to the coordination between Blue Rhino and AmeriGas.<sup>18</sup>

On October 31, 2014, AmeriGas and Blue Rhino entered into consent orders that ban each company from communicating competitively sensitive non-public information to any competitor.<sup>19</sup> In his concurrence accepting the consent orders, Commissioner Joshua Wright observed: “No antitrust practitioner would counsel his or her client to engage in the direct competitor communications and concerted actions that are alleged to have occurred between Blue Rhino and AmeriGas. This is with good reason: such conduct is plainly anticompetitive and unlawful under Section 1 of the Sherman Act.”<sup>20</sup>

## Avoiding Antitrust Pitfalls

*In the Matter of AmeriGas and Blue Rhino* is an example of what not to do. Companies can minimize the risk of similar government investigations and civil litigation by adopting a few simple antitrust compliance procedures. While every company and industry is different, some of these steps are:

- Providing regular antitrust training to employees with pricing responsibility and those that attend trade association meetings;
- Limiting the number of employees who are aware of future pricing actions;
- Not announcing price changes further in advance of the effective date than necessary;
- Creating a detailed, written agenda before each trade association meeting and ensuring that the participants at the meeting stick to it;
- Having legal counsel attend trade association meetings;

- Insisting that any trade association adopt an antitrust compliance policy and that it be read before each meeting;
- Avoiding discussions with competitors regarding prices, costs, or other competitive sensitive information and seeking input from antitrust counsel before attending any meeting where competitively sensitive information may be discussed;
- Avoiding side meetings or social gatherings outside of the trade association meeting that antitrust regulators or plaintiffs' counsel may later claim were a forum for collusion; and
- Consider skipping industry meetings at or near the time of a price increase.

With some or all of these compliance measures in place, companies can significantly reduce the risks highlighted by *AmeriGas*. ♦

## Endnotes

- 1 See, e.g., *In re Urethane Antitrust Litig.*, 2013 WL 65988 (D. Kan. Jan. 4, 2013) (denying summary judgment where there was evidence that “high-ranking executives at the companies socialized and communicated with each other, including at or near times of lockstep price increases, including at trade association meetings that provided ample opportunities for pricing discussions”); *Kleen Prods., LLC v. Packaging Corp. of Am.*, 775 F. Supp. 2d 1071 (N.D. Ill. 2011) (“Plaintiffs also stress as an additional factor the temporal proximity of price increase and capacity reductions to trade association and industry events”); *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 637 (E.D. Pa. 2010) (plaintiffs alleged that leading blood reagent companies were members of the same trade association and engaged in inter-company hiring of high-level executives); *In re Brand Name Prescription Drugs Antitrust Litig.*, 1999 WL 1024547 (N.D. Ill. Nov. 5, 1999) (plaintiff claimed that pharmaceutical manufacturers pledged to peg future price increases to the consumer price index at a trade group meeting).
- 2 *In re Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999); see also *Tose v. First Penn. Bank, N.A.*, 648 F.2d 879 (3d Cir. 1981) (“Proof of opportunity to conspire, without more, does not create a jury question on the issue of concerted action.”); *Am. Chiro. Ass’n v. Trigon Healthcare*, 367 F.3d 212 (4th Cir. 2004) (holding that “mere contacts and communications, or the mere opportunity to conspire ... is insufficient evidence of an anticompetitive conspiracy.”); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003) (“[T]he opportunity to fix prices without any showing that [the defendants] actually conspired does not tend to exclude the possibility that they did not avail themselves of such an opportunity.”); *Weit v. Continental Ill. Nat’l Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981) (observing that “the mere opportunity to conspire, even in the context of parallel business conduct, is not necessarily probative evidence.”).
- 3 *In re Text Messaging Antitrust Litig.*, 2014 WL 2106727 (N.D. Ill. May 19, 2014); see also *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 2014 WL 4083938, at \*33 (N.D. Ill. Aug. 18, 2014) (although defendants communicated at or near the time of price increases, there was no evidence they discussed pricing intentions).
- 4 *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 133 (3d Cir. 1999).
- 5 *In re Chocolate Confectionary Antitrust Litig.*, 999 F. Supp. 2d 777, 804 (M.D. Pa. 2014); see also *In re Text Messaging Antitrust Litig.*, --- F. Supp. 2d ---, 2014 WL 2106727, at \* (N.D. Ill. 2014) (granting summary judgment where plaintiffs were “unable to point to anything beyond [their] own speculation to establish that defendants’ executives discussed collusive price increases” at trade association meetings).
- 6 959 F. Supp. 2d 799 (D. Md. 2013).
- 7 *Id.* at 807-08.
- 8 *Id.* at 809.
- 9 *Id.*
- 10 See Complaint, *In the Matter of Ferrellgas Partners, L.P.*, Docket No. 9360 (Mar. 27, 2014).
- 11 *Id.* at ¶¶ 2, 35.
- 12 *Id.* at ¶ 2.
- 13 *Id.* at ¶¶ 2, 35.
- 14 *Id.* at ¶¶ 3, 30, 32.
- 15 *Id.* at ¶ 40.
- 16 *Id.* at ¶¶ 37-39.
- 17 *Id.* at ¶ 50.
- 18 *Id.* at ¶ 53.
- 19 On January 7, 2015, the Federal Trade Commission approved a final order barring AmeriGas and Blue Rhino from agreeing to restrain competition. See Decision and Order, *In the Matter of Ferrellgas Partners, L.P.*, Docket No. 9350 (Jan. 7, 2015), available at <http://www.ftc.gov/system/files/documents/cases/150109bluerhinodo.pdf>.
- 20 Concurring Statement of Commissioner Joshua D. Wright, *In the Matter of Ferrellgas Partners, L.P.*, Docket No. 9360 (Oct. 31, 2014), available at [http://www.ftc.gov/system/files/documents/public\\_statements/596831/141031\\_amerigas-wrightstmt.pdf](http://www.ftc.gov/system/files/documents/public_statements/596831/141031_amerigas-wrightstmt.pdf).



# Executives Beware: Trends in Criminal Cartel Enforcement

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After racking up record corporate criminal fines in three of the last four years, one might think that the Antitrust Division of the Department of Justice (“DOJ”) 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 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 DOJ’s crosshairs than they are today.

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.<sup>1</sup> 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, DOJ has been steadily escalating the pressure it places on executives. In the 1990s, as part of its leniency programs, 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.<sup>2</sup> In that same era, DOJ abolished “no jail time” plea agreements for foreign executives.<sup>3</sup> 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, 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.<sup>4</sup>
- At the end of 2013, 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 January 20, 2009, DOJ has prosecuted 372 individuals. At least 65% of these individuals were US citizens. 102 individuals were prosecuted in DOJ's real estate foreclosure investigations—all of whom were US citizens. Of the remaining 270 individuals, more than 50% were US citizens.<sup>5</sup>
- In the ongoing investigation of the auto parts industry, DOJ has filed charges against 49 executives—a surprisingly large number when compared to 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 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 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, DOJ announced that Germany had agreed to extradite Romano Pisciotti, an Italian citizen, to face US antitrust charges.<sup>6</sup> Pisciotti is the first person ever to have been extradited to the US based solely on antitrust charges.

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

In Parker's plea agreement, 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, DOJ secured an indictment against Pisciotti, alleging that he participated in a global

price-fixing conspiracy among manufacturers of marine hoses. Notably, DOJ filed the indictment under seal, presumably because Pisciotti refused to travel to the United States to face the charges.

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.) 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 US 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 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 non-starter. 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.<sup>8</sup>

### 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.<sup>9</sup> 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.<sup>10</sup>

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 A.U. Optronics 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.<sup>11</sup> Peake argued that an appropriate sentence would be probation, a period of house arrest, community service and a \$20,000 fine.<sup>12</sup>

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.<sup>13</sup>

But it noted that Peake's sentence should reflect that his conduct involved non-competitive bids,<sup>14</sup> a significant amount of commerce (over \$500 million)<sup>15</sup> and the fact that he played a leadership role in the conspiracy.<sup>16</sup> 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."<sup>17</sup>

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. 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 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 anticompetitive conduct of foreign executives affected the US market. In these investigations, DOJ has carved out 250 executives from corporate plea agree-

ments. Of these executives, the majority were not US citizens, but had US pricing authority or responsibility for sales into the United States.

DOJ has several tools at its disposal when prosecuting foreign executives. DOJ has increasingly leveraged the 1996 Memorandum of Understanding between 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, DOJ is increasingly bringing fraud and obstruction of justice charges related to executives' cartel conduct.<sup>18</sup> Even when DOJ decides not to bring charges for obstruction of justice, it can use obstruction of justice to gain leverage in plea bargaining negotiations.<sup>19</sup>

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.”<sup>20</sup>

### Increasing Prosecution of “Carve Outs”

Pisciotti's extradition, Peake's lengthy sentence and 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

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%
<b>Total<sup>22</sup></b>	<b>43/72</b>	<b>59.7%</b>

Other International Cartel Investigation	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%
<b>Total</b>	<b>67/178</b>	<b>37.6%</b>

the DOJ's prosecution decisions in the auto-parts investigation: the record to date shows DOJ's strong drive to prosecute executives. Thus far, DOJ has brought public charges against 59.7% 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 that begins on page 7. By contrast, it brought public charges against only 37.6% of carve-outs 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).<sup>21</sup>

## Conclusion

The trends are clear. Executives who are involved in price fixing have never faced more serious personal risks. Executives 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 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.

DOJ's increasing focus on prosecuting foreign executives places a premium on corporate compliance efforts. As DOJ has noted, "the easiest way for companies and their executives to avoid prosecution is not to commit crimes."<sup>24</sup> 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 anticompetitive conduct will be discovered early enough to qualify for corporate leniency or otherwise receive significant benefits through cooperating with a DOJ investigation.<sup>25</sup> ♦

## Endnotes

- 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, US 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 US 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., US 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 US citizens.
- 6 See, e.g., US 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, DOJ has extradited three other individuals for charges closely related to price fixing. On March 23, 2010, 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 US 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 US law enforcement for charges including fraud, kickbacks and bid rigging involving contracts at EPA Superfund sites.
- 9 US 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](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 USS.G. § 2R1.1(b)(1).
- 15 See USS.G. § 2R1.1(b)(2)(F).
- 16 See USS.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 Corporation executives 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 USS.G. § 3C1.1 (enhancing sentencing guideline range for obstructing or impeding the administration of justice).
- 20 Bill Baer, Assistant Attorney General Antitrust Div., US 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.*

# A New Take On Compliance Programs

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Brent Snyder, the Deputy Assistant Attorney General for Criminal Enforcement at the US Department of Justice's Antitrust Division, recently provided advice on maintaining an effective antitrust compliance program. Some of the advice is familiar but much of it is new and noteworthy. All of it merits attention.

First, he emphasized the importance of buy-in at the top, and recounted a story about a company in which the CEO and senior executives diligently attended compliance sessions, only to walk out and fix prices regularly. In the eyes of the Justice Department, adequate buy-in from the top requires (i) becoming "knowledgeable" about the compliance program; (ii) committing enough resources; and (iii) assigning the right people to the job.

Second, the entire organization must be included in compliance training. According to Snyder, this includes "most employees," especially those with sales and pricing responsibility, as well as, when "appropriate," a company's "subsidiaries, distributors, agents, and contractors." (Snyder did not elaborate on when this step becomes appropriate.) Plus, there must be an opportunity for employees to report violations anonymously and to seek guidance without fear of retaliation.

Third, the company must be "proactive" by assuring that "at risk" activities are regularly "monitored" and "audited," and regularly evaluated to determine what can be improved. (Details were not provided as to the types of activities the Division considers "at risk," or what degree of monitoring and auditing would be considered suitable.)

Fourth, the company must be prepared to discipline employees who either commit criminal violations themselves "or fail to take the reasonable steps necessary to stop the criminal conduct in the first place." The Antitrust Division's policy has been to stay out of personnel decisions. At the same time, the Division's leaders believe that a company's retention of violators in positions in which they can impede internal investigations or influence potential witnesses "raises serious questions" about the company's commitment to compliance. In a speech concerning application of the Division's leniency program, Assistant Attorney General Bill Baer echoed this same position:

If any company continues to employ such individuals in positions of substantial authority; or in positions where they can continue to engage directly or indirectly in collusive conduct; or



in positions where they supervise the company's compliance and remediation programs; or in positions where they supervise individuals who would be witnesses against them, we will have serious doubts about that company's commitment to implementing a new compliance program or invigorating an existing one.

Finally, according to Snyder, a company that discovers antitrust violations should take steps to prevent a recurrence, which usually includes changing the compliance program that failed to prevent the illegal conduct in the first place.

Snyder emphasized that the mere existence of a compliance program almost never enables a company to avoid criminal antitrust charges, and that the Division almost never recommends that companies should receive credit at sentencing just for having had a compliance program. The Sentencing Guidelines provide for lower culpability scores for companies that have "effective" compliance programs, and the Division does not consider a company eligible for such credit unless it has discovered and self-reported the violation by turning itself in under the Division's leniency program.

Nevertheless, implementation of an effective compliance program may benefit a company even if the company does not qualify for full leniency under the leniency program (because a competitor turned itself

in first, for example). A company that pleads guilty without the benefit of full leniency, but can show that it adopted or strengthened a compliance program, may be able to avoid court-supervised probation and the appointment of a compliance monitor, which comes at the company's expense. (A "second in" leniency applicant also may qualify for a lighter sentencing recommendation by providing valuable assistance to the Division in uncovering additional wrongdoing.)

Naturally, speeches of this kind are designed to strike a certain amount of fear into the hearts of compliance officers, but they provide important insight into the government's priorities and must be taken seriously. It makes little sense to fashion a costly, state-of-the-art compliance program only to find that the government deems the implementation of that program to have been inadequate.

**Bottom Line:** It is not enough simply to have a compliance program. If someone within a company engages in fixing prices, rigging bids, limiting output or dividing customers with competitors, the company will need to demonstrate that it had a top-down, broad-based, proactive program, with teeth as well as safeguards, if it expects any empathy on the part of the Antitrust Division. ♦

# Damages Actions for Competition Law Infringements in the EU – New Law Finally Adopted

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On 26 November 2014 the EU adopted a Directive on certain rules governing actions for damages under national law for infringements of competition law<sup>1</sup>. The Directive seeks to harmonize the relevant laws across the EU by setting the procedural framework under which such actions can be brought in any of the EU Member States. The Member States must transpose the Directive's provisions into their own legal systems and, thus, adopt relevant national laws by the 27 December 2016.

## Background

The Directive is the culmination of a long process that was triggered by a seminal judgment rendered by the EU Court of Justice in 2001. In *Courage and Crehan*<sup>2</sup>, the highest Court of the EU ("CoJ") ruled that the right to seek compensation for loss caused by infringements of competition law rules is open to any individual. Such compensation is foreseen for all antitrust infringements, *that is* both for abusive conduct by dominant companies and for cartel-like behavior.

In the EU, damages actions for antitrust infringements have been (and arguably still are) the exception. Competition law enforcement had traditionally been considered as an administrative task and, hence, the fines imposed by the competent author-

ities (which are amongst the highest around the world) were seen as the only threat for companies involved in anticompetitive conduct. Moreover, elements such as the diverse legal systems around the EU (that is common law and civil law systems), or the lack of knowledge on the part of the potential claimants of their rights rendered such actions scarce. In recent years, such actions have increased but they remain at a very low level, with only 25 percent of antitrust infringements being followed by such actions according to the Commission.<sup>3</sup> The Commission has estimated that because of ineffective private enforcement, antitrust victims forgo up to an estimated EUR 23 billion in compensation every year.<sup>4</sup>

The Commission considered that the introduction of private damages actions is an important element that would complement its enforcement powers against illegal antitrust conduct. However, the Commission recognized that its plan to encourage such actions faced both difficulties and complexities. On the one hand, it had to bring together the very different legal traditions of its 28 Member States and deal with an array of process issues, such as limitation periods and the quantification of the harm caused by the contested antitrust conduct. On the

other, the Commission has to ensure that such actions would not undermine the effectiveness of existing tools in the fight against cartels, such as the Commission's leniency program or the settlement procedure, which could be compromised by litigation discovery rules. More precisely, the Commission's leniency programme requires that a member of a cartel makes statements, often self-incriminatory, in exchange for full or partial immunity from fines. Similarly, settlements are based on such statements. If these self-incriminatory documents were discoverable through litigation, there was serious concern that companies would be unwilling to make such statements. The Directive appears, at least at first sight, to have made all ends meet. The key provisions are listed below.

### Compensation

The Directive establishes the right to compensation for victims of antitrust infringements. In this regard, it provides for full compensation for the actual harm suffered by the claimant. It explicitly rules out over-compensation whether by means of punitive, multiple, or other types of damages.<sup>5</sup>

At the same time, mechanisms other than litigation are identified to obtain compensation such as out-of-court dispute resolutions (arbitration, mediation, settlements) and to this end the Directive provides for the process issues that would help such mechanisms to be successful.<sup>6</sup>

### Easier Access to Evidence

Under the Directive, national courts have the power to order defendants or third parties to disclose evidence containing confidential information where they consider it relevant to the action for damages brought before them. Such disclosure can occur upon request of the claimant and shall be granted if it is

justified and proportionate, taking into account the legitimate interests of all parties involved and of third parties concerned.<sup>7</sup>

National courts will also have the power to impose penalties on the parties concerned and on their legal representatives in the event that they fail or refuse to comply with a disclosure order or they destroy relevant evidence.<sup>8</sup>

Currently, disclosure rules in litigation are diverse around the EU, with the UK being recognized as the jurisdiction with the most generous disclosure regime (though still not as generous as the US system). This asymmetry to access to information at best leads to forum shopping and at worst discourages potential claimants from bringing an action. Under the Directive access to evidence is clearly established with consistent disclosure rights around the EU and specific limitations to such rights.

The only type of evidence under the Directive that enjoys unequivocal protection from disclosure concerns certain categories of documents produced in the context of competition law proceedings, such as leniency and settlement statements.<sup>9</sup> To date, the protection of such documents from disclosure was left at the discretion of the national judge who was expected to conduct a balancing of interests exercise on a case-by-case basis prior to ordering such disclosure.<sup>10</sup> This situation arguably created uncertainty as to the protection of leniency documents and raised fears that it could hamper the incentive of infringers to cooperate with the competition authorities. By expressly shielding such documents from disclosure, this concern has been specifically dealt with in the Directive.

## Effect of National Decisions

Under the Directive, a claimant is able to establish the occurrence of an infringement of competition law based on the final decision of any EU national competition authority (Commission findings are already binding on national Courts). In the context of harmonization, under the Directive a decision adopted by the national competition authority in one Member State shall be binding on the national court of any other Member State. This will make it easier for potential claimants to provide prima facie evidence to build their case.<sup>11</sup>

## Limitation Periods

Under the Directive, the period of time within which victims can bring a damages action shall be at least five years from the moment that the claimant knows or is reasonably expected to know of the infringement and of the harm it suffered.<sup>12</sup>

For follow-on actions (namely, those that rely on a prior decision by a competition authority), the limitation period of five years would be suspended or interrupted from the moment a competition authority starts investigating an infringement until at least one year after the infringement decision has become final. For stand-alone damages actions (namely, those brought without relying on a prior decision by a competition authority), the minimum limitation period provided by the Directive suggests that existing national rules that provide for longer limitation periods will prevail. This allows potential claimants to choose to bring their action in the EU Member State, where the limitation period is the longest.

It is also worth noting that the limitation periods are suspended for the duration of any consensual dispute resolution process vis-à-vis those parties that are involved in such dispute resolution.<sup>13</sup>

It follows from the above that it will take several years before a company that is involved in an antitrust

infringement will know with certainty which claims it will have to deal with, whilst it would have to gather and maintain exonerating evidence in detail to use it in its defense several years after the facts.

## Joint and Several Liability

Under the Directive, cartel members are jointly and severally liable for the harm caused by the illegal conduct of the cartel in full. This means that each cartel member is bound to compensate for the total loss suffered by a claimant until the latter is fully compensated.<sup>14</sup>

There are two exceptions to this rule: the first concerns small companies who under certain conditions are liable only for the harm caused to their own direct and indirect purchasers. The second concerns immunity recipients who are only liable for the harm caused to their direct or indirect purchasers. However, immunity recipients are liable to other claimants only if the claimants have been unable to obtain full compensation from the other cartel members.

On the basis that a culpable cartel member should in principle only be liable for the harm it has caused, but recognizing that the above provisions could result in “overpayment” in damages by a cartel member, under the Directive cartel member will be able to recover a contribution from any other cartel member for the overpayment. The amount of the contribution will be determined based on the relative responsibility of that party for the harm caused. Again, the contribution allocated to immunity recipients will not exceed the amount of the harm caused to their own direct or indirect purchasers or providers.

The complexity in this provision lies in the methodology to be used to calculate the contribution of each infringer. The Directive does not provide any further guidance as to how this quantification shall be made, and thus it remains to be seen how this element will evolve in practice.

## Passing On

Under the Directive, the defendant in an action for damages should be allowed to defend itself against a claim by arguing that the claimant passed on the whole (or part) of the higher cartel price (the “overcharge”) to its customers.<sup>15</sup> The burden of proving that the overcharge was passed on would be on the defendant, who may in its turn require disclosure from the claimant or from third parties of evidence of this passing on. The counter-balance to this defense, however, is that a downstream customer who had paid this passed-on overcharge (the “indirect purchaser”) or believes that it has paid an overcharge has a claim for damages, but here the claimant has the burden of proving the existence and scope of such passing-on.

Under the Directive Member States must put in place appropriate procedural rules to avoid situations of overcompensation or under compensation of the victims as a result of the passing on defense. However, detailed guidance is not provided.

## Quantification of Harm

Under the Directive a rebuttable presumption exists that cartel infringements cause harm. It also provides that where the quantification of the harm suffered by a claimant is practically impossible or excessively difficult to be undertaken, the national courts shall be able to estimate the amount of such harm.<sup>16</sup>

However, the Directive does not contain any guidance to national courts as to how to quantify the harm in question. In this regard the Commission has published a separate Communication for the quantification of damages in antitrust infringements<sup>17</sup> and a practical guide<sup>18</sup> that describes the main methods and techniques available to quantify the harm resulting from antitrust infringements and the underlying basic assumptions. These documents are expected to be used as guidance by national judges and interested parties for the purpose of this exercise.

## What Next?

Private enforcement of competition law is still a relatively nascent area in the EU. The Directive should be an encouragement for potential claimants to step forward. Moreover, the Commission encourages collective actions for damages with the view to help particularly small and medium-sized enterprises (“SMEs”) and individuals with low value damage claims pursue antitrust offenders. To this end the Commission published a non-binding recommendation that complements the Directive.<sup>19</sup>

As indicated above, there are already a number of private damages actions introduced in recent years in the EU and in particular in the jurisdictions that are considered to be more claimant friendly, such as the United Kingdom. The compensation amounts so far have not been as eye-watering as those typically awarded in US proceedings (where treble and punitive damages exist) but can still be significant. In any event, the inconvenience caused by resource-intensive litigation and the reputational damage that accompanies it should not be underestimated and the greatest contribution that the Directive might make in ensuring compensation for victims of breaches of competition law is the creating of a strong legal framework that encourages settlement by the infringers.

It remains to be seen whether the litigation landscape in the EU will change shape in the coming years. For the moment, there are still important issues to be decided, such as the amount and details of evidence that a party would need to produce before the national court or the methodology to quantify the harm suffered. A November 2014 ruling of the Brussels Commercial Tribunal, which dismissed the Commission’s damages action against members of the elevators’ cartel, was a reminder of the obstacles that exist in practice. In that case, the Commission claimed €6 million in damages for elevators it had

purchased and installed in its premises during the cartel period. The Brussels Commercial Tribunal dismissed the damages action on the basis that the Commission had failed to provide sufficient evidence to establish a causal link between the cartel and the allegedly higher prices of the contracts it had entered into. In other words, the Commission failed to provide sufficient evidence on the actual harm it suffered<sup>20</sup>

It is believed that the outcome of this case would have been different if it had been brought to Court under the new regime given that the Directive provides for a rebuttable presumption that a cartel causes harm—but this remains to be seen. In any event, private damages actions for antitrust infringements in the EU are expected to increase. This would not only come as a result of the Directive, but also because of the better education of cartel victims and the facilitation of such claims by specialized litigation bodies (such as litigation funds, or other private litigation organizations) that have made their appearance in the EU in the recent years. ♦

## Endnotes

- 1 Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.
- 2 Judgment of the Court of 20 September 2001 in Case C-453/99, *Courage Ltd v. Bernard Crehan and Bernard Crehan v Courage Ltd and Others*.
- 3 Presentation by Dr. Till Schreiber, CDC Cartel Damage Claims, “Private Antitrust Enforcement”, European Competition Day, Vilnius, 3 October 2013.

- 4 See, Impact Assessment Report in relation to damages actions for breach of EU antitrust rules, accompanying the proposal for the Directive, paragraph 67, page 23, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/impact\\_assessment\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/impact_assessment_en.pdf) ,.
- 5 Directive, Article 3.
- 6 Directive, Articles 18,19.
- 7 Idem, Article 5.
- 8 Idem, Article 7.
- 9 Idem, Article 6.
- 10 See Judgment of the Court of Justice of 14 June 2011 in Case C-360/09 *Pfleiderer*; see also judgment of the Court of Justice of 6 June 2013, in Case C-536/11, *Donau Chemie and Others*.
- 11 Directive, Article 9.
- 12 Directive, Article 10.
- 13 Directive, Article 18.
- 14 Directive, Article 11.
- 15 Directive, Articles 12 *et seq.*
- 16 Directive, Article 17.
- 17 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union. OJ C(2013) 3440, 11.6.2013.
- 18 Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11.6.2013.
- 19 See, Commission memo, of 11 June 2013, “Frequently Asked Questions: Commission proposes legislation to facilitate damage claims by victims of antitrust violation”, available at [http://europa.eu/rapid/press-release\\_MEMO-13-531\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-531_en.htm).
- 20 Decision of the Rechtbank van koophandel te Brussel (Commercial Tribunal of Brussels) of 24 November 2014, in case A/08/06816 brought by the European Commission against Otis NV, General Technic-Otis Sàrl, Kone Belgium NV, Kone Luxembourg Sàrl, Schindler NV, Schindler Sàrl, ThyssenKrupp Liften Ascenseurs NV, ThyssenKrupp Ascenseurs Luxembourg Sàrl. The Commission lodged an appeal against this decision.



# US FTC Revises “Fred Meyer” Guides to Promotional Payments and Services

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On September 29, 2014, the Federal Trade Commission issued revisions to its Guides for Advertising Allowances and Other Merchandising Payments and Services, popularly known as the “Fred Meyer” Guides, after the 1968 US Supreme Court case that prompted the Guides’ creation. The FTC characterized the revisions as “modest,” leaving some critics wondering whether this was a missed opportunity to change more.

The Guides were released in 1969 to help businesses comply with sections 2(d) and 2(e) of the Robinson-Patman Act, addressing discrimination in the provision of promotional allowances and other promotional support, termed “services and facilities.” (Price discrimination is covered by section 2(a) of the Act.) Many of the new revisions reflect the widespread adoption of electronic commerce since the Guides were last revised in 1990. Another change reflects the Supreme Court’s most recent interpretation of the Robinson-Patman Act, emphasizing that the Act is geared to prevent harm to competition more than the harm to individual competitors.<sup>1</sup> Some changes simply correct typographical errors. The FTC made clear that it did not consider the process of reviewing its guidelines to be an appropriate occasion for making more substantive changes to the rules.

The following are some of the most significant changes.

**Slotting Allowances.** The Commission added an example to section 240.7 of the Guides that illustrates the services and facilities covered by the Robinson-Patman Act. The Commission did this to make clear that a payment to a retailer to add a new product constitutes a discount that is subject to the rules on price discrimination, while payment to the retailer to display the product in a prominent position within the store constitutes a promotional allowance that is subject to the rules on discrimination in providing promotional support. A claim for violation of the statutory provisions on price discrimination requires a showing of likely injury to competition, while violation of the provisions on discrimination in providing promotional allowances, services or facilities is a *per se* offense and does not require such a showing.

**Special Packaging.** The Commission added two other examples to section 240.7 to clarify that special packaging primarily designed to promote sales—such as Halloween packaging—constitutes a promotional service or facility subject to the Robinson-Patman Act, while packaging primarily

designed to make stacking and shipping more efficient does not, and is therefore outside the coverage of the Act. (Within weeks of the appearance of these Guides, a lawsuit was filed in the Western District of Wisconsin claiming that Clorox's refusal to sell "club packs" to a warehouse-sized supermarket, while selling them to nearby club stores, violated sections 2(d) and 2(e) of the Act, citing the new Guides.)

**Online Advertising.** The Commission added "online advertising" to its list of promotional services and facilities covered by the Robinson-Patman Act, which also includes cooperative advertising, handbills, displays and special packaging. The Commission never defined "online advertising" but, if experience with other forms of advertising is any guide, presumably it would include both the actual provision of online advertising and reimbursement for the expense of online advertising, whether on the buyer's or seller's website or on third-party websites.

**Alternative Arrangements.** The Commission changed section 240.8, which had provided that alternative support should be made available to customers that cannot, in a practical sense, take advantage of "some" of the seller's promotional offerings. The section now provides that alternative support should be made available to customers that cannot take advantage of "any" of the seller's offerings. If a customer can take advantage of some of the offerings, there is no need to provide others.

**Featured Customers.** The Commission revised section 240.9, which had provided that a seller should not feature certain customers in its own advertising without making the "same service" available on proportionally equal terms to all competing customers, by changing the "same service" to the "same, or if impracticable, alternative services." The Commission recognized that featuring all of a seller's customers may be impracticable when those customers are too numerous.

**Availability to E-tailers.** The Commission revised its first example under section 240.10, which illustrates how sellers can make alternative promotional support available to customers that are unable to use some of the alternatives being offered. The Commission previously had instructed sellers to offer "alternative(s) on proportionally equal terms that are useable in a practical sense" by those customers that could not use the other alternatives. Now, the Commission specifically added that "some customers are online retailers that cannot make practical use of radio, TV, or newspaper advertising. The manufacturer should offer them proportionally equal alternatives, such as online advertising, that are useable by them in a practical sense." Again, the term "online advertising" is not defined.

In the third example under section 240.10, the Commission added allowances for "websites" to the list of "allowances for other media and services" that may be offered to small customers as alternatives to allowances for newspaper advertising. The Commission did not specify whether "websites" refers to allowances for creating or improving the customer's own website, allowances to pay for advertising on third-party websites, both, or something else.

**Notice.** The Commission clarified that despite the widespread use of the Internet, the seller's obligation to provide notice to customers of the availability of promotional support may not be satisfied simply by posting notices on the seller's website. However, the Commission added that it is permissible to provide such notice on shipping containers or other packaging with directions to check the seller's website for further details.

**Buyer Liability.** The Robinson-Patman Act makes buyers liable for inducing unlawful price discrimination in their favor, but is silent on inducing discriminatory promotional support. However, the FTC has pursued such conduct as violating the FTC

Act. This has created an issue as to whether there must be a showing of likely injury to competition to support such a claim, since the Robinson-Patman Act requires such a showing for a claim of price discrimination but not for a claim of discrimination in providing promotional support. The Commission took this opportunity to clarify that it will proceed under the FTC Act against a customer that knowingly accepts discriminatory promotional support only “where there is likely injury to competition.”

**Disguised Price Discrimination.** The Commission clarified that, as several courts previously have held, a purported promotional allowance may be re-classified as a discount where the customer is not required to perform commensurate promotional activity in order to receive the money. Because inducement of such a payment could expose a buyer to suits for private damages for price discrimination (under section 2(f) of the Robinson-Patman Act), the Commission found it appropriate to “remedy the Guides’ possible implication to the contrary.” The Commission added, in section 240.13, that “the giving or knowing inducement or receipt of proportionally unequal promotional allowances may be challenged under sections 2(a) and 2(f) of the Act, respectively, where no promotional services are preformed in return for the payments, or where the payments are not reasonably related to the customer’s cost of providing the promotional services.”

The Commission also added two references to “the Internet” in section 240.13, describing the potential liability of customers and third parties for the use of fictitious rates to induce undeserved (and therefore discriminatory) advertising allowances. The Commission added “the Internet” to its list of “adver-

tising medium” and observed that there can be fictitious rates submitted by customers for “the purchase of advertising with a newspaper or other advertising medium, such as the Internet” and by an “advertising medium” itself, “such as the Internet, a newspaper, broadcast station, or printer of catalogues.”

Section 240.13(b) now provides, “An advertising medium, such as the Internet, a newspaper, broadcast station, or printer of catalogues, that publishes a rate schedule containing fictitious rates” may violate section 5 of the FTC Act. This seems a curious use of the term “the Internet,” since “the Internet” does not publish a rate schedule. Thus, although the Commission emphasized that “the emergence of the Internet as an important retail sales and communications channel” was a prime motivation for revising the Guides, its use of the assorted terms “online advertising,” “Internet advertising,” “website” and “the Internet” could prove confusing in application.

The comments that the Commission invited last year urged many other changes, and many of those might have made compliance easier. Instead, the Commission limited itself to “modest” corrections and clarifications, specifically rejecting some proposals and more broadly observing that the periodic review of FTC guides is not the proper occasion for a substantive rewrite. Until such an occasion presents itself, the business community will need to continue operating under the Fred Meyer playbook. ♦

## Endnote

- 1 *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 US 164 (2006).

# ONEOK, Inc. v. Learjet Inc.: Testing the Boundaries of State and Federal Regulatory Authority in the Natural Gas Industry

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On January 12, 2015, the Supreme Court heard arguments in *ONEOK, Inc. v. Learjet Inc.*, a case concerning the jurisdictional line between federal and state regulation of pricing conduct in the natural gas industry. In *ONEOK*, the Court will determine whether the Natural Gas Act, 15 USC. § 717 *et seq.* (“NGA”)—which gives the Federal Energy Regulatory Commission (“FERC”) exclusive authority to regulate wholesale rates for natural gas transactions—preempts state antitrust claims based on price manipulation, where those claims were brought by purchasers of natural gas in transactions falling outside of FERC’s authority, but where the conduct at issue also affected wholesale gas prices within FERC’s jurisdiction.

The case arises out of the energy crisis of 2000-2002. The respondents, retail purchasers of natural gas, allege that the petitioners, natural gas traders, manipulated the price of natural gas in violation of state antitrust laws by reporting false information to published price indices and by engaging in wash sales. In 2011, the district court found that Section 5(a) of the NGA—which confers FERC with jurisdiction over “practices” affecting wholesale rates—preempted state law antitrust

claims, and entered judgment against the respondents. On appeal, the Ninth Circuit reversed and reinstated the lawsuits, holding that the district court’s reading of Section 5(a) was too broad and conflicted with the express limitations on federal jurisdiction set forth in Section 1(b). *Learjet, Inc. v. ONEOK, Inc.*, 715 F.3d 716, 729 (9th Cir. 2013). The Supreme Court granted certiorari on July 1, 2014.

Section 1(b) of the NGA, 15 USC. § 717(b), grants FERC the authority to regulate rates charged by natural gas companies in wholesale transactions, but the Act is explicit that FERC’s regulatory power does not extend to retail sales or to so-called “first sales,” or sales of natural gas that are not preceded by a sale to a pipeline, local distribution company or retail customer.<sup>1</sup> FERC is charged with ensuring that rates in transactions falling within its jurisdiction, known as “jurisdictional transactions,” are just, reasonable and not unduly discriminatory or preferential; Section 5(a) of the NGA also gives FERC the authority to regulate practices and contracts affecting jurisdictional transactions.<sup>2</sup> Since 1992, FERC has issued blanket marketing certificates that authorize natural gas companies transacting within FERC’s

jurisdiction to sell at market-based rates upon a showing that the company lacks market power.<sup>3</sup> These blanket certificates permitted natural gas companies subject to FERC's jurisdiction to charge market-based rates, rather than rates filed with and approved by FERC.<sup>4</sup> In the wake of FERC's use of these certificates, the industry used published indices as reference points for setting prices in natural gas transactions, both in wholesale transactions within FERC's jurisdiction, and in retail and first sales falling outside FERC's jurisdiction.<sup>5</sup>

On summary judgment, the district court held that because the same price indices are used to set prices in transactions falling within and outside FERC's jurisdiction, any manipulation of these indices fell within FERC's exclusive jurisdiction under Section 5(a) of the NGA.<sup>6</sup> Section 5(a) provides, in pertinent part:

Whenever the Commission . . . shall find that any rate, charge, or classification . . . or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.<sup>7</sup>

The district court determined that the NGA preempted the respondents' state law antitrust claims because the petitioners were jurisdictional sellers under the NGA, and their alleged pricing practices directly affected FERC jurisdictional rates, since industry participants set wholesale rates by reference to the same indices that the respondents accused petitioners of manipulating.<sup>8</sup>

On appeal, the Ninth Circuit disagreed, and held that FERC's jurisdiction over practices affecting wholesale rates did not preempt state antitrust claims when the complained-of price manipulation was associated

with transactions falling outside of FERC's jurisdiction.<sup>9</sup> It determined that the district court's reading of Section 5(a) conflicted with the Congressional intent regarding the reach of the jurisdictional provisions of Section 1(b), which expressly gives states authority over natural gas transactions not subject to FERC jurisdiction.<sup>10</sup> Based on a review of the statutory language as well as case law from the Supreme Court and from other circuits, the Ninth Circuit determined that the district court erred in reading the word "practices" in Section 5(a) of the NGA to impliedly preempt the application of state laws to the same transactions, and found that Section 5(a) only comes into play after FERC has made a determination that a rate in a jurisdictional transaction is unjust or unreasonable.<sup>11</sup>

The Ninth Circuit also rejected the petitioners' argument that the fact that FERC promulgated a Code of Conduct in 2003 addressing market manipulation by jurisdictional sellers was evidence that FERC had regulatory authority over the conduct at issue.<sup>12</sup> It found, first, that Congress's enactment of the Energy Policy Act of 2005, which prohibits market manipulation and authorizes FERC to promulgate rules and regulations to protect natural gas purchasers, necessarily suggested FERC did *not* have the regulatory authority over the conduct at issue in this case prior to 2005.<sup>13</sup> But more importantly, said the Ninth Circuit, the code of conduct itself limited its reach to sales within its jurisdiction.<sup>14</sup>

In their brief to the Supreme Court, the *ONEOK* petitioners argue that the Court has long interpreted the NGA to occupy the field with respect to both jurisdictional gas rates and practices by jurisdictional sellers that directly affect those rates.<sup>15</sup> They contend that the respondents may not maintain state-law suits that will have the effect of regulating any practices that are subject to the NGA's field of authority.<sup>16</sup> In the petitioners' view, the Ninth Circuit's preemption



analysis was fundamentally flawed, in that it ignored Supreme Court precedent holding that FERC may regulate practices that directly affect jurisdictional rates, but may not regulate practices that only indirectly do so.<sup>17</sup> The petitioners also argue that the Ninth Circuit's concern that FERC might attempt to regulate non-jurisdictional sales as a "practice" affecting jurisdictional rates is misplaced, because the "direct affect" requirement would prevent such overreaching, and also because Section 1(b) of the NGA is clear in prohibiting federal regulation of anything but "the sale in interstate commerce of natural gas for resale."<sup>18</sup>

The respondents' primary argument is that their suits seek to apply state law only in the context of retail transactions, which the NGA expressly reserves to the states.<sup>19</sup> They refute the argument that the Court has adopted a rule requiring preemption where practices directly affect jurisdictional rates, and assert that NGA field preemption exists only when (i) a state attempts to regulate wholesale transactions, and (ii) state law is directed at the natural gas industry and is capable of affecting FERC's ability to comprehensively regulate the transportation and sale of natural gas.<sup>20</sup> They argue that the NGA does not preempt their claims because the respondents seek to apply state antitrust law only in the context of retail transactions firmly outside the scope of the NGA, and their claims, which are grounded in traditional state antitrust law, do not run afoul of FERC's authority.<sup>21</sup> Separately, they contend that even accepting the petitioners' views on the scope of preemption, the Court must affirm, because the alleged collusion does not "directly affect" wholesale rates since there is no rule or regulation requiring sellers to price wholesale transactions in the same manner as retail transactions.<sup>22</sup>

How the Supreme Court resolves this issue remains to be seen, but the outcome—in particular, a ruling that goes as far as recognizing state regulatory authority

over conduct affecting transactions within FERC's jurisdiction—potentially could lead to changes in the regulatory landscape that US natural gas industry participants must navigate. The forthcoming decision is all the more notable in that it will come at a time of increased domestic supply and industry expansion,<sup>23</sup> and in the midst of newly-announced federal environmental regulations of the oil and gas industry.<sup>24</sup> ♦

## Endnotes

- 1 Section 1(b) of the NGA states:

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

15 USC. § 717(b). *See also* 15 USC. § 3301(21) (defining "first sale"); *E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1037 (9th Cir. 2007) (discussing definition of "first sale").

- 2 See 15 USC. § 717d(a) ("Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.") *See also* 15 USC. § 717c(a) ("All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful."); 15 USC. § 717c(b) (prohibiting undue preferences and unreasonable rates and charges).



- 3 See *ONEOK*, 715 F.3d at 726-27 (discussing FERC's use of blanket certificates).
- 4 See *id.*
- 5 See *ONEOK, Inc. v. Learjet, Inc.*, No. 13-271 (S. Ct.) Brief for United States as Amicus Curiae Supporting Petitioners ("US Br."), at 4.
- 6 See generally *In re Western States Wholesale Natural Gas Antitrust Litigation*, 2011 WL 2912910, \*17-\*21 (D. Nev. July 18, 2011).
- 7 15 USC. § 717d(a).
- 8 See *In re Western States Wholesale Natural Gas Antitrust Litigation*, 2011 WL 2912910, at \*17-\*21.
- 9 *ONEOK*, 715 F.3d at 733.
- 10 *Id.* at 729-31.
- 11 *Id.* at 729-35.
- 12 *Id.* at 736.
- 13 *Id.* at 735.
- 14 *ONEOK*, 715 F.3d at 735-36.
- 15 See *ONEOK, Inc. v. Learjet, Inc.*, No. 13-271 (S. Ct.) Brief for Petitioners ("Pet. Br."), 19-20.
- 16 *Id.* at 23-29.
- 17 *Id.* at 35-37.
- 18 *Id.* at 38.
- 19 See generally *ONEOK, Inc. v. Learjet, Inc.*, No. 13-271 (S. Ct.) Brief for Respondents Learjet Inc. et al. ("Resp. Br."), 16-35.
- 20 *Id.* at 17-27.
- 21 *Id.* at 28-32.
- 22 *Id.* at 36-38.
- 23 See, e.g., Amy Harder, Oil and Gas Regulatory Push Coming from Obama Administration, Wall St. J., Dec. 30, 2014, available at <http://www.wsj.com/articles/oil-and-gas-regulatory-push-coming-from-obama-administration-1419890081> (noting that the US is now the world's largest producer of natural gas, and on track to become the world's largest oil producer in 2015).
- 24 See generally *id.* (discussing the Obama administration's plans to regulate, *inter alia*, methane emissions and hydraulic fracturing, among other environmental regulations).

# Upcoming Changes Involving Brazilian Merger Control Announced at FIESP

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After a little over two years since the enactment of Law No. 12,529/11 (the Brazilian Antitrust Law), which replaced the previous merger notification system, the practical experience of the Administrative Council for Economic Defence (CADE) is leading towards clarifications of those aspects of Brazil's new merger notification system that require adjustment to allow for a more transparent, consistent and efficient manner to address antitrust assessments. On September 25, 2014, the Federation of Industries of the State of São Paulo (FIESP), one of the most relevant forums for the discussion of important economic and industrial issues in Brazil, hosted a seminar, which was attended by renowned academics, lawyers and industry representatives, to discuss the most relevant aspects of Brazil's current antitrust policies.

## Institutional Agenda

One of the panelists was CADE's President, Vinícius Marques de Carvalho, who stated that minor, but significant changes were on their way, beginning with the three public consultations published in early 2014 and including a few other consultations planned to be announced in 2015.

Officials have been speaking generally about such changes in recent seminars and events throughout Brazil, and formal announcements are expected by CADE in one of its upcoming plenary sessions.

The changes aim at addressing material and procedural aspects of the merger clearance system, as well as behavior- and compliance-related aspects that may not have been addressed sufficiently by the Brazilian Antitrust Law or its regulations, and could, therefore, be further detailed to bring more certainty and increase CADE's level of predictability in tackling such issues.

## About Merger Control

**New regulations.** Concerning the impact that such measures may have on merger control, President Carvalho has announced that the regulation drafts that shall be submitted for public consultation will provide clearer grounds concerning the procedures to be observed in pre-notification consultations and general consultations. The drafts also will establish a proper procedure for assessing supposed gun-jumping infractions and post-merger notifications (until one year after transactions were executed).

Guidelines that define what is *not* considered gun jumping are also in the CADE's agenda. And, while CADE does not intend to define what gun jumping is, as the concept is intended to be left open to interpretation, there will be efforts to more clearly signal the limits within which parties to a concentration may coordinate prior to merger approval. Carvalho highlighted the important role of clear terms in pre-merger activities and that CADE may authorize what CADE has called a "parlour room" (similar to a data room in the US) where financial aspects of common interests may be discussed, excluding market behavioral strategies.

**Clear Formal Statements.** CADE's initiative seems aimed at providing clear, formal statements so as to avoid creative interpretations by some lawyers, as has happened with some recent threshold guidance. Such interpretations by lawyers have, for example, sought to create a third criterion in the effects test in the Brazilian Antitrust Law and its regulations. This third criterion would require a transaction to have effects in Brazil, even when objective thresholds were met, in order to attract CADE's jurisdiction to assess the transaction. According to Carvalho, this effects test does not exist in either the Brazilian Antitrust Law or related regulations.

Similarly, some lawyers have misinterpreted guidance regarding private equity funds. This has been a recurrent question, and Carvalho stated that the thresholds provided by the Brazilian Antitrust Law—turnover and volume of business - shall be construed in a way to comprise only the productive business (or operational business) in Brazil, whether local or through exports to Brazil. Investments shall not be regarded as "volume of business" for the purposes of the merger control threshold provisions.

**Amendments to Merger Filings.** Carvalho also commented on the amendments to merger filings, saying that amendments may be required not only

when the parties do not duly provide what is requested in the notification forms. Amendments also may be required regardless of the parties' information provisions, whenever CADE deems such information relevant to conduct a deeper assessment of the markets involved in a given transaction, even if the parties already have provided information required by the merger notification form.

### Additional Information Discussed at the Seminar

In addition to the above mentioned topics, officials from CADE also discussed that some subjects will be tackled later. These subjects include guidelines for remedies, compliance and horizontal overlaps.

In the plenary session that took place in October 1, 2014, CADE revealed the results of the public consultations from early 2014 and published what has been enacted in the new regulations. The subjects therein include: stock exchange transactions and when they should or should not be notified; the associative agreements regulation that might be ruled on later, but still in 2014; the definition of economic groups for investment funds applicable for the purpose of calculation turnover figures; the notification of transactions involving the acquisition of convertible bonds; and a few minor changes in the notification forms.

### Behavioral Aspects

The efforts to increase CADE's transparency also will impact the regulations involving behavior infringements. One measure mentioned was the proposal to develop a clearer and more secure procedure for negotiating leniency agreements.

### Conclusion

Such recently announced measures are welcome by the sector, and should serve to better define some key elements of antitrust assessments in Brazil. ♦

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