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Global Forum on Competition

SERIAL OFFENDERS: WHY SOME INDUSTRIES SEEM PRONE TO ENDEMIC COLLUSION

Contribution from United States

-- Session IV --

This contribution is submitted by the United States under Session IV of the Global Forum on Competition to be held on 29-30 October 2015.

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SERIAL OFFENDERS

-- United States --

1. International antitrust enforcers have a history of detecting and investigating multiple cartels involving the same industry. In some cases, those investigations result in one or more companies receiving multiple sanctions for collusion. As discussed below, these repeat sanctions generally do not reflect serial offenses by the same company; rather, they are the result of significant incentives that exist for companies under investigation for a cartel involving one product to simultaneously self-report all other cartels in which they have participated, leading to serial investigations within the industry. There are few recent examples of a company (or industry) initiating new cartel activity after having been sanctioned for previous cartel activity. For this reason, periodic reexamination of industries that have been previously sanctioned for cartel violations is not likely to be an effective use of resources.

2. U.S. antitrust experience shows that some industries have experienced a period of entrenched collusion. In such cases, it is common for companies to simultaneously participate in separate cartels involving more than one product or service. Recent criminal investigations by the Antitrust Division of the U.S. Department of Justice (Division)¹ in the electronic components and automobile parts industries, which exposed multiple cartels involving often overlapping participants, are illustrative.²

3. In some cases, those investigations resulted in the same company being a defendant in multiple criminal prosecutions. The existence of repeat defendants, however, is generally more indicative of the evolution of the Division's investigations than reflective of recidivism by those defendants.

4. The Division's "amnesty plus" program provides significant incentives³ for companies that are under investigation for collusion involving one product to conduct a broad, thorough internal investigation and self-report collusion involving other products or services. Conversely, the Division will seek additional penalties (called "penalty plus") against companies that do not report to the Division other cartels in which the company engaged.⁴ As a result of this incentive structure, numerous prosecutions in a

¹ In the U.S., the Division investigates and prosecutes criminal antitrust violations.

² For example, recent investigations of the electronic components industry have uncovered cartels involving, among other things, computer memory, thin-film transistor liquid crystal displays, cathode ray tubes, and electrolytic capacitors, which are components used to manufacture desktop and notebook computers, computer monitors, televisions, and other consumer electronics products.

³ A company that agrees to plead guilty for collusion related to one product and qualifies for "amnesty plus" credit by self-reporting collusion related to a second product will pay a reduced criminal fine for collusion on the first product and receive complete leniency for self-reporting collusion related to the second product.

⁴ If a company fails to report its participation in a second antitrust offense, and the conduct is later discovered, the Division will seek a significant sentencing enhancement. The Division will recommend a greater penalty for a company that is aware of the second offense but elects not to report it than for one that fails to detect the wrongdoing as a result of an inadequate internal investigation. In assessing the amount of the penalty, the Division will, of course, distinguish between those companies that make every effort to ferret out wrongdoing in their internal investigations and those that simply turn a blind eye.

particular industry are quite common and often reflect a corporate or industry effort to “clean house” and uncover and report cartel conduct. This often results in serial investigations and prosecutions of collusive conduct that was occurring simultaneously. The Antitrust Division has previously reported that roughly half of the Division's current international cartel investigations were initiated by evidence obtained as a result of an investigation of a completely separate market or product.⁵ Thus, while repeat defendants' participation in multiple cartels was largely simultaneous, the Division's detection and prosecution of those cartels was not.

5. For this reason, the fact that the same company is criminally charged in multiple Division investigations does not necessarily mean that the company is a repeat offender. It is, in fact, quite rare in the Division's experience for a company to be criminally prosecuted for cartel conduct and subsequently to initiate participation in a new cartel. While the Division has seen examples where its investigation and prosecution of a company in connection with one cartel did not result in its simultaneous withdrawal from an unrelated, ongoing cartel, the Division is not aware of any recent examples where a company actually initiated participation in a cartel after prosecution for participation in a separate cartel.⁶

6. As a result, multiple past prosecutions within an industry say little about the likelihood of recidivism in that industry or the benefits of periodic reexamination of that industry. Nor are the characteristics of those industries necessarily a good predictor of industries likely to spawn future cartels. When the Division has looked internally for such a pattern in cartels it has prosecuted, there is no one factor, or group of factors, that was present in every cartel. The industry characteristics that facilitate collusion seem to vary dramatically with the facts and circumstances of each case. Our experience leads us to conclude that systematic efforts to identify industries where collusion is likely to occur may lead to false positives, wasted resources, and possible unnecessary burdens on identified industries.

⁵ See Gregory J. Werden, Belinda A. Barnett and Scott D. Hammond, Recidivism Eliminated: Cartel Enforcement in the United States since 1999, Address at the Georgetown Global Antitrust Enforcement Symposium (Sept. 22, 2011) at 1-2, available at <http://www.justice.gov/atr/file/518331/download>.

⁶ Indeed, significant penalties exist for companies that do so. The U.S. Sentencing Guidelines have recidivism provisions that can result in a higher fine range for companies and individuals and a higher prison range for individuals who are antitrust recidivists. U.S. Sentencing Guidelines §§ 4A1.1, 5E1.2(d)(6), 8C2.5(c)(1)-(2) (2014), available at <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf>. The timing of the offenses is critical to the application of the recidivist provisions and the provisions will apply only to defendants who commit offenses within specified timeframes after their prosecution for a similar offense. So a company that is prosecuted for one cartel and is later prosecuted for another cartel that operated at the same time would not necessarily qualify for increased penalties under these provisions. That said, the U.S. Sentencing Commission recognizes the need to punish repeat offenders more harshly, and the Division would recommend harsher penalties for qualifying repeat offenders. These increased penalties act as a deterrent.