Insights Conversations: Cartels

Skadden

January 2015

This article is from Skadden's *2015 Insights* and is available at skadden.com/insights.

Contributing Partners

Warren Feldman
New York

Steven C. Sunshine
Washington, D.C.

Ingrid Vandenborre
Brussels

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

With improved coordination among agencies and across borders and the threat of dual criminal and civil enforcement, companies facing cartel investigations must navigate an increasingly complex environment. Skadden partners Warren Feldman, Steven C. Sunshine and Ingrid Vandenborre examine the current trends and issues in this area.

In the last several years, the Antitrust Division of the U.S. Department of Justice has been developing criminal cases in conjunction with the Fraud Section. Do you see this trend continuing?

Warren: Absolutely. The LIBOR and foreign exchange investigations and resolutions as well as Foreign Corrupt Practices Act matters illustrate that they are working collaboratively to investigate and prosecute cases in ways not seen in the past. The investigations relating to financial benchmarks have included allegations relating to collusion across banks as well as manipulation and fraud within banks. This has caused both arms of the DOJ to have to work together and in conjunction with various bank regulators, the Commodity Futures Trading Commission and the Securities and Exchange Commission, not to mention agencies around the world. One investigation seems to be bleeding into the next. There is also great potential for crossover between Antitrust and Fraud in FCPA cases.

Dual criminal and civil enforcement also seems to be a topic of much discussion in this area. If a company chooses to cooperate in a criminal investigation, what effect does cooperation have on civil enforcement, including private litigation?

Steve: In the U.S., a criminal conviction, including as the result of a guilty plea, is generally admissible in subsequent civil litigation. In the U.S. antitrust context, criminal convictions are *prima facie* evidence of a violation for all matters covered by the judgment. As a result, civil litigation almost always follows a criminal antitrust conviction. During the civil suit, the convicted entity can still contest damages or conduct outside the plea agreement, but not liability inside the plea agreement.

Criminal and civil liability are limited, however, for companies that are first in the door to report antitrust violations. First-in leniency recipients receive complete amnesty from criminal fines. In the civil context, leniency recipients also limit their liability to single — as opposed to treble — damages and receive relief from joint and several liability.

Ingrid: Outside the U.S., the risk of criminal liability varies, resulting in complex interactions between criminal and administrative enforcement proceedings. For instance, the European Commission does not prosecute antitrust violations criminally, but cartel behavior may qualify as a criminal offense in certain jurisdictions within the EU, like the United Kingdom. This can result in important procedural distinctions in relation to, for example, the extent to which information can be exchanged between the agencies. While evidence typically can be exchanged between different EU member states in the context of an administrative procedure, this is not permitted in the context of potential criminal enforcement where different protection rights apply. Moreover, employees with criminal or

civil exposure may require separate counsel and warrant judicious treatment by their employer and its counsel. These complications may affect a company's ability to effectively cooperate with an investigation and require particular vigilance on the part of counsel.

Additionally, the recently adopted EU Directive on Antitrust Damages Actions is anticipated to increase the scope of potential civil liability for cartel conduct, which may affect immunity applicants first and foremost, further complicating a company's assessment of the best course of action. In the EU, amnesty does not affect the scope of potential civil liability for damages. The EU directive provides that a final and definitive finding of an infringement by cartel participants, including the amnesty recipients, serves as *prima facie* evidence in subsequent damages actions. Unless an amnesty recipient appeals, the finding of infringement will typically become definitive years before those of other defendants, which are likely to appeal a cartel finding.

While the directive seeks to improve the position of amnesty recipients by providing that they carry joint and several liability only for damages suffered by their own direct and indirect purchasers, it also creates uncertainty by allowing claimants other than direct or indirect purchasers to seek compensation from the amnesty recipient if they otherwise risk not getting compensated. All of these factors indicate that companies need to carefully weigh all implications of cooperation. Even if a decision to cooperate is made, the increased likelihood of private litigation in the EU, with corresponding discovery, should be taken into account in the company's approach to the agency. This includes the ways in which information is submitted that will ultimately appear in the agency's records and potentially be made accessible to civil plaintiffs.

How do you foresee the evolution of the increasing levels of cooperation between U.S. and foreign regulators in cases such as the foreign exchange investigation?

Steve: Cooperation in international cartel investigations is on the rise largely because the number of antitrust enforcers across the globe, and their enforcement activity, continues to grow. Many of the active enforcers offer leniency or amnesty programs. As a result, the first company to recognize a violation has an incentive to approach all relevant jurisdictions. Companies also may benefit from a coordinated approach to the various regulators, which can ensure consistency in approaches and requirements for leniency.

As background, the modern era of international cooperation in cartel investigations is a relatively recent phenomenon. It can be traced to February 2003, when authorities from the United States, European Union, Canada and Japan first conducted a coordinated raid. The trend toward coordination has continued recently in the auto parts investigation — the largest criminal investigation in the antitrust division's history — which involved coordination with the Japan Fair Trade Commission, Korean Fair Trade Commission and the European Commission, among others.

Warren: The market manipulation cases are a good illustration of how this cooperation has evolved. In LIBOR, the cases have been investigated for a lengthy period around the world,

and resolutions are still being rolled out years after Barclays was the first to settle. By contrast, in the foreign exchange matter, the Financial Conduct Authority worked out a resolution with a series of banks after less than an 18-month investigation and apparently worked in a coordinated way with the CFTC and the Office of the Comptroller of the Currency to roll out simultaneous resolutions. It is worth noting, however, that there have been no resolutions of publicly reported DOJ and EC investigations as of yet, so the coordination appears to have some limits.

Ingrid: I agree, and I think this uptick in coordination is the new normal. Enforcers are realizing the benefits of coordination, and mechanisms to facilitate cooperation continue to rise. In fact, key regulators have lauded the benefits of international coordination in recent remarks, suggesting there is more to come. The U.S. is party to countless mutual legal assistance agreements and soft antitrust cooperation agreements with nations with growing enforcement such as Brazil, Israel and Japan. Additionally, the International Competition Network now has members from over 100 national and multinational competition agencies and maintains an active working group dedicated to cartel offenses.

Given the expansion of global enforcement, how can companies control the scope and cost of a worldwide investigation?

Warren: The sweeping scope of global cartel investigations places enormous burdens on the companies under investigation. The witnesses and documents are typically spread around the world and are costly to collect and review. In my experience, the key to preventing the costs of investigation from spiraling out of control is to maintain a seamless team of lawyers capable of advising on the investigative tactics and issues globally. It is typically helpful to engage in a robust dialog with the prosecutors and regulators to try to get an agreement on appropriate limits on investigative scope.

Steve: It's also worth noting the importance of compliance programs that detect and potentially resolve issues before they result in liability — helping reduce the potential for significant expenses and loss of time that occur with global investigations. Authorities expect modern multinationals to have rigorous compliance programs in place. Policies alone won't excuse the company of a violation, but their absence may be a factor against the company.

Ingrid: There is an ongoing debate as to whether the existence of a compliance program should be a factor in assessing the company's liability when an infringement has occurred in violation of the program. While the EU Commission has been unwilling to acknowledge the existence of a compliance program in the determination of the fine level, certain EU member states like the U.K. and France have taken into account compliance programs when assessing liability and remedies and issuing guidance on what an effective compliance program should cover. The debate underscores the importance of an effective compliance program.

With coordination among regulators and the proliferation of civil litigation, when can a company expect to have a global investigation wholly resolved?

Steve: Resolution of cross-border investigations takes time, whether referring to the close of

a grand jury or commission investigation. For example, we're aware of investigations that proceed for two years and then close. It depends on myriad factors, such as the products and customers at issue, the number of jurisdictions involved, and even the tendencies of the individual case handlers within the various regulators. Of course, once a company enters a plea, there is another cycle for the civil litigation.

When an investigation begins, companies should employ a lean and experienced cross-border team to control the scope of the investigation and push for efficient resolution. The availability of an interdisciplinary team is also important since, as Warren noted, FCPA and antitrust investigations have and will continue to overlap. Companies benefit from access to experts in both fields to help identify and resolve issues as they arise.

Ingrid: Agreed. A robust assessment of potential exposure across jurisdictions is key to a swift resolution. Also, companies should bear in mind that an investigation, by its very nature, is iterative. It requires flexibility on the part of companies and their counsel to continuously reassess the best course of action throughout the investigation, taking into account the need for a coordinated approach to numerous interested and potentially interested regulators, and implications for the scope of administrative, criminal and civil exposure in each jurisdiction.