Takeaways From the ABA/IBA International Cartel Workshop

Skadden

03 / 09 / 20

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Tara L. Reinhart
Partner / Washington, D.C.
202.371.7630
tara.reinhart@skadden.com

James Moore, III
Associate / Washington, D.C.
202.371.7337
james.moore@skadden.com

John W. O'Toole
Associate / Washington, D.C.
202.371.7331
john.otoole@skadden.com

One Manhattan West
New York, NY 10001
212.735.3000

1440 New York Avenue, N.W.
Washington, D.C. 20005
202.371.7000

In February, the American Bar Association's Section of Antitrust Law and the International Bar Association's Antitrust Committee hosted the 13th International Cartel Workshop in San Francisco. Over the course of three days, practitioners and competition enforcers from around the world walked through a hypothetical cartel investigation and provided their insights on trends in international cartel enforcement. Among other topics, the panelists discussed the continuing viability of leniency programs around the world, prosecution of no-poach agreements, the use of deferred prosecution agreements by the Antitrust Division of the U.S. Department of Justice and how the effects of Brexit on cartel investigations could impact the British economy.

The workshop highlighted some key takeaways about cartel enforcement going forward. First, leniency is definitely not dead. Enforcers from across the world affirmed their commitment to strong leniency programs. Second, there is no global consensus on how to prosecute no-poach agreements. This will pose difficult strategic decisions, including whether to seek leniency for this conduct. Finally, Brexit means that the U.K. will now act as an independent enforcer. We expect the U.K. to be active in launching cartel investigations and prosecuting cartel conduct.

Key Takeaways

The Status of Leniency Programs

Richard A. Powers, the deputy assistant attorney general for criminal enforcement, began the Antitrust Division's workshop with a speech reaffirming the Antitrust Division's commitment to its leniency program, but also emphasizing that the Antitrust Division's approach to leniency would not be "static"— instead taking into account changes in the broader enforcement environment.

Mr. Powers outlined three key aspects of the leniency program. First, an effective leniency program must be paired with vigorous enforcement. Second, trust from both sides of the counsel table is critical for leniency to flourish. And third, because leniency does not operate in a vacuum, the leniency program must adapt to external factors to ensure that it continues to sufficiently incentivize self-reporting.

Mr. Powers also outlined three elements key to vigorous enforcement: severe, significant sanctions; an increased threat of detection; and transparent, predictable enforcement policies. Regarding the first element, he explained that individual liability, including prison sentences, remains one of the most severe and significant sanctions available for cartel activity. At the same time, fines on corporations are an essential complement to individual liability and must be high enough both to punish companies for illegal gains and to deter others from violating the antitrust laws. In determining these sanctions, however, the Antitrust Division continues to place significant importance on continued, significant cooperation. Regarding the second element, Mr. Powers noted that the Antitrust Division retains a vast toolbox to detect illegal conduct, which includes informants, search warrants, subpoenas, undercover agents and wiretaps. Additionally, the Antitrust Division reinforces its ability to uncover conduct through coordination with other governmental agencies, particularly through the new Procurement Collusion Strike Force, which is focused on prosecuting cartel conduct in the public procurement space. Finally, regarding predictable enforcement, Mr. Powers stated that the leniency program and FAQs continue to guide enforcement decisions.

Addressing the importance of trust, Mr. Powers emphasized that the Antitrust Division strives to adhere to its published policies regarding leniency and to remain as transparent as possible. However, he noted that defendants and their counsel also need to be forthcoming and transparent. This includes "motivated and engaged cooperation throughout the investigation beginning with the grant of the marker until the very last prosecution in that conspiracy." In particular, Mr. Powers highlighted the importance of making witnesses available for interviews with the Antitrust Division rather than merely relying on attorney proffers to satisfy a target entity's cooperation obligations.

Finally, regarding the Antitrust Division's response to external factors, Mr. Powers noted that the Antitrust Division understands that global compliance and cooperation can be costly for a company. In recognition of the impact that potentially duplicative fines can have on the incentives to report, he explained that the Antitrust Division attempts to coordinate with other jurisdictions to align on sanctions. Other enforcers during other presentations at the workshop similarly noted that as more leniency programs have developed around the globe, enforcers are increasingly allocating their scarce resources to focus on cartels affecting their home markets. With respect to private damages actions, Mr. Powers stated that the Antitrust Division supports reauthorization of the Antitrust Criminal Penalty Enhancement & Reform Act (which de-trebles antitrust damages for leniency applicants in civil actions that provide sufficient cooperation with private litigants) and that the time is "ripe for international convergence on the laws governing the intersection of leniency, private damages, and cooperation among enforcers."

Mr. Powers and antitrust enforcement officials from other countries rejected claims that the value of leniency programs is diminishing. While the number of leniency applications in some countries has fallen, enforcers considered that leniency applications often come in waves and that a few slow years should not be viewed as the death knell of leniency. Discussion confirmed that international enforcers — including the U.S. Antitrust Division — continue to view leniency programs as, on balance, beneficial and successful.

Criminal Prosecution of No-Poach Agreements

Both the hypothetical and the other panels at the workshop focused on potential criminal prosecution in the United States of no-poach agreements, which are agreements not to hire employees from competitors. While the Antitrust Division has not yet brought a criminal case for no-poach conduct, multiple panelists from the Antitrust Division emphasized that this conduct is similar to any other agreement to allocate customers or markets, and it is therefore per se illegal.

Enforcers from a number of non-U.S. jurisdictions, however, indicated that they do not, at least currently, consider no-poach agreements to be criminal violations of competition laws. Several members of the defense bar recognized that this discrepancy among jurisdictions will inevitably lead to different cooperation strategies globally, specifically impacting the decision to apply for leniency.

Panelists also discussed practical aspects of enforcement actions against no-poach agreements. For example, confusion arises when attempting to determine the appropriate fines. Typically, the value of the commerce affected by a cartel agreement is a critical variable in determining the size of the fine, but in the no-poach context, the relevant value of commerce is unclear. Do you use wages of employees? Starting when? Which employees are included? Do you instead use sales affected by the no-poach conduct? Until the Antitrust Division brings a criminal no-poach case to clarify these answers, companies should understand that the Antitrust Division views no-poach conduct as particularly serious and should update their compliance programs to address this recent development to ensure strict compliance with the antitrust laws.

The Antitrust Division's Use of Deferred Prosecution Agreements

Historically the Antitrust Division has not utilized deferred prosecution or nonprosecution agreements in resolving cartel conduct prosecutions, focusing instead on the leniency program's incentives for cooperation. Recently, however, the Antitrust Division has entered into deferred prosecution agreements with target companies. Despite recent interest in the bar regarding these settlements, representatives of the Antitrust Division noted simply that deferred prosecution agreements have been used only in extraordinary circumstances where the defendants would be uniquely disadvantaged by prosecution and where defendants' cooperation was full and complete.

In particular, Mr. Powers acknowledged that the use of the deferred prosecution agreements had led to some confusion, especially regarding its effect on leniency applications. He explained that the Antitrust Division will look at a company's compliance programs, in addition to a number of other factors, when determining whether to use a deferred prosecution agreement and will only give credit to compliance programs that meaningfully impact conduct when making sentencing or sanction determinations. While the Antitrust Division has expressed some willingness to explore the use of deferred prosecution agreements in unique circumstances, Mr. Powers emphasized that the leniency program continues to offer a far more robust set of benefits. Accordingly companies should not expect deferred prosecution agreements to be widely available or to replace the leniency program.

Takeaways From the ABA/IBA International Cartel Workshop

Brexit's Effects on Cartel Enforcement

The senior director of Cartels at the U.K. Competition and Markets Authority (CMA), Howard Cartlidge, spoke about Brexit's impact on cartel enforcement. Despite delays in the U.K.'s official departure from the European Union, the transition period between the European Commission and CMA is still set to expire on December 31, 2020, meaning that in 2021 the CMA will operate independently from the Commission.

Despite concerns about the effects of Brexit raised by members of the defense bar, Mr. Cartlidge explained that Brexit is not expected to result in significant changes in the enforcement environment. For example, the Commission currently does not criminally prosecute cartel conduct. Instead individual member states retain jurisdiction to criminally prosecute individuals for cartel conduct, in parallel with the Commission's civil enforcement actions. Furthermore, even though the U.K. officially separated from Europe, it continues to apply EU law and will continue to apply its own laws consistent with EU law. As such, post-Brexit cartel enforcement by the CMA is unlikely to lead to significant changes in enforcement practices.

Mr. Cartlidge also spoke about the division of labor in cartel investigations over the next year and beyond. The Commission and the CMA have agreed that the Commission will maintain jurisdiction over all current and pending cartel investigations. Therefore, until the transition period is concluded, the CMA can only initiate an investigation where the Commission is not already investigating. Looking forward, Mr. Cartlidge noted that the CMA will focus on cartels that involve or affect the U.K. and will prioritize its investigations accordingly. Nevertheless, now that the CMA will operate as an independent enforcer, we expect it to launch an increased number of independent investigations.

Finally, Mr. Cartlidge noted that whether EU cartel law will have precedential effect in U.K. courts has not yet been determined. Whether Commission decisions can or will be used to argue against a U.K. enforcement action remains to be seen, and this will be a key issue for the CMA moving forward.

We will continue to follow and report on global developments in international cartels and any resulting antitrust scrutiny.