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Handling a Global Price-Fixing Case

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1. The Issue

    1. Enforcement action against international cartels (illegal agreements among competitors worldwide to fix prices and often also to agree volume shares) is at an all time high. Since the beginning of 1997, the US Department of Justice alone has imposed over $1 billion in criminal fines in connection with international cartel prosecutions. Last year, the European Commission set up a special Task Force specifically to deal with cartels and has plans to decentralise more routine cases to the competition authorities of the EU member state countries to enable it to concentrate on detecting and condemning international cartels. The UK recently introduced a tough new competition law regime and describes cartels as an enforcement priority. Next month (November 2000) representatives from numerous competition authorities around the world are meeting in Brighton, England to strategise about the best approach to enforcing the laws against price-fixing and market sharing.

    2. Given the international drive to "crack down on cartels", handling a global price-fixing case has become increasingly complex, requiring a coordinated approach in dealing with competition authorities in multiple jurisdictions and follow on private litigation exposure, primarily in the US. It is no longer sufficient to carry out a damage limitation exercise in the US. Consideration must also be given, simultaneously, it is suggested, to the position in the other major jurisdictions, most notably Canada and the EU. It is no coincidence that the increased success of the world's competition regulators in taking enforcement measures against cartels has occurred following the adoption by most of these regulators of a leniency policy. Such policies involve a promise by the regulator of a reduction in, or even in some circumstances cancellation of, the fine which would have been imposed on a company, in return for complete cooperation by that company. Cooperation involves the provision of evidence (witness testimony or documents) to the regulator. Failing to take a coordinated proactive approach towards cooperation around the world could leave your company in a position where it has "come clean" about its price-fixing behaviour in one jurisdiction, only to find that it is facing a substantial fine in another jurisdiction. Furthermore, it is crucial to understand that disclosures of documentation made during non-US procedures potentially increase your company's exposure to private litigants in the US, who sue for treble damages following a price-fixing determination by the Department of Justice ("DOJ").

    3. In order to develop a strategy for handling a global price-fixing case, it is important to have an understanding of each jurisdiction's cartel law and enforcement scheme, and the relative differences between those schemes.

2. **<u>How a Global Price-Fixing Case Starts</u>**

    1. A global price-fixing case typically starts for in-house counsel in one of two ways: (1) action or contact by a regulator or (2) internal discovery.

    2. In the US, action by the DOJ typically involves the receipt by your company of a subpoena from a Grand Jury investigating a price-fixing case, or a search of your client's premises conducted by the FBI pursuant to a search warrant. In the EU, your company might receive a written request for information from the European Commission (under Regulation 17/62) or, more commonly, is the subject of a "dawn raid", an unannounced inspection visit during which officials from the European Commission demand immediate access to your premises in order to inspect files and records (including electronic material) which may contain evidence of a competition law infringement.

    3. Regulators typically open a price-fixing investigation following a complaint by a customer who becomes suspicious when price hikes appear coordinated, or a disgruntled ex-employee of one of the cartel participants who wishes to cause problems for his ex-employer. Increasingly, however, companies find themselves the subject of a price-fixing investigation which arose because another member of the cartel engaged in "whistleblowing", ie, provided evidence to a regulator proving the existence of the cartel in exchange for lenient treatment when it comes to penalties. More about whistleblowing later.

    4. Assuming no action or contact by a regulator, an in-house counsel may learn internally that his or her company has been or is still involved in a price-fixing cartel in a number of ways. Such discoveries are often made during the roll-out of a competition law compliance programme. A competition compliance policy describes the rules to be observed and gives guidance on how to operate within the rules. Most corporations acknowledge the benefits of effective compliance standards and procedures to be followed by its employees. Having been found guilty of illegal behaviour, a compliance programme may serve to reduce the company's fine in a number

employees. Having been found guilty of illegal behaviour, a compliance programme may serve to reduce the company's fine in a number of jurisdictions, because the existence of such a programme is regarded as a mitigating factor when setting the amount of the fine. This is the case in the EU. The other obvious advantages of a compliance programme, firstly, are that such a programme assists in the prevention of illegal activity in the first place and, secondly, that it facilitates the early detection of any violations which have occurred, thereby creating the opportunity to obtain favourable treatment through early cooperation with the regulators. Once created, the fundamental elements of any compliance programme need to be communicated to the workforce through training and it is often during or as a result of such training sessions that breaches come to light.

5. Another way in which an in-house counsel may learn of illegal activity within the company is by conducting a competition audit. This may involve a review of both paper and electronic files by legal staff or outside counsel who are looking for evidence of possible or probable breaches. It often also includes interviews with front-line and bidding personnel to test their level of understanding and observance of the competition laws.

6. Whether the price-fixing issue arises as a result of action or contact by a regulator or because of internal compliance activity, in-house counsel must conduct an immediate and thorough factual investigation in order to determine whether there is sufficient evidence of price-fixing. As part of this investigation, it is important to establish whether there is evidence of price-fixing in respect of other products which would be likely to surface during any cooperation with the regulators, because this affects the decision as to whether or not to cooperate. The investigation could take the form of witness interviews and document review. Any "hot documents" (ie. contemporaneous documents proving the existence of the cartel) should be collected and kept together.

3. Immediate Action

1. Assuming that your factual investigation confirms that your company has in the past and perhaps still is engaging in a global price-fixing arrangement with its competitors, there are some immediate steps which must be taken.

2. Firstly, if the cartel arrangement is still in existence, terminate it immediately. This is not as straightforward as it sounds. It is usually a condition to obtaining the benefit of each of the various antitrust leniency policies around the world that the illegal activity must have ceased either once the company (its board of directors or legal counsel) became aware of it or before an approach is made to the regulator. Therefore, it is important to be able to prove positively that your company withdrew from the cartel. In the EU, this is usually secured by a communication by your company to the other cartel participants, although sending a letter referring to the cartel you are terminating creates documentary evidence of the existence of the cartel which would be extremely damaging to your company's defence against third party damages actions if it found its way into the wrong hands. In the U.S., authorities have taken the position that termination does not require announcement of withdrawal from the illegal activity to the other participants in the activity (although that would constitute one means of termination). Termination can also be effectuated by reporting the illegal activity to the DoJ, offering cooperation with the investigation of the illegal activity, and refraining from further participation unless continued participation is with DoJ approval. Thus, in the U.S. an approach to the DoJ prior to communicating to other cartel members that your client is terminating its participation in the illegal conduct is appropriate and diminishes the risk that one of the other cartel members will offer report the cartel before you do based on their knowledge of your plans. In order to obtain the full benefit of the leniency programmes in the US and EU, you need to be the first company to cooperate with the relevant regulator (US) and the first to provide decisive evidence of the illegal agreement (EU).

3. The second immediate step you should take is to preserve the documentary evidence of the existence of the cartel. This may appear counter-intuitive. The instinctive approach may be to rush to the shredding machine. However, there are good reasons not to destroy hot documents. Firstly, in the US, this is illegal once a Grand Jury investigation is underway. Secondly, the European Commission is required to prove its case against an illegal cartel by reference to documentary evidence. Therefore, cooperation in return for a fine reduction under the EU leniency programme should be equated with the handing over of hot documents. By destroying such documents, you seriously prejudice the extent to which you can cooperate with the Commission.

4. Having gathered the hot documents together, you may wish to consider removing them from the company's premises to, for example, the offices of your outside counsel. This would not be illegal in either the EU and the US. The advantage is that the hot document collection will be carefully preserved for use in cooperating with the regulators, if that is what the company chooses to do.

4. Cooperation Considerations

1. Having taken immediate steps to "put out the fire", it is tempting to reach for the leniency policy of the regulator in your jurisdiction, calculate what reduction in the likely fine you would receive if you "confessed" and contact that regulator. Admittedly, it is generally important to take damage limitation action quickly. However, it is also crucial that you carry out a risk assessment before "going in" to ensure that this is indeed the correct course of action to take. If you do determine that cooperation is the best way forward, you then need to work out a strategy for cooperation with the appropriate regulators around the world.

2. A good place to start is with an assessment of your company's exposure. Work out where the cartel was put into effect. The antitrust laws of any particular country are only likely to be applicable when local businesses and consumers have been adversely affected. In the US, the test is whether US commerce has been affected by the price-fixing agreement. In the EU, the legal threshold is that the restrictive agreement must have been implemented in the EU. If your subject is a global price-fixing operation, the most important jurisdictions are likely to be the US, the EU and Canada. There are other important countries with strong competition laws such as Japan and Australia, but to date there is no statutory leniency programme in these countries. Here we will focus on the US and EU.

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3. In a case where in-house counsel discovered the price-fixing agreement internally (as opposed to as a result of action or contact by a regulator) the crucial question to answer is whether or not it is likely that, absent your volunteering evidence about the cartel, the regulators would ever find out about it (assuming they have not done so already). There are two main ways in which this might occur. Another cartel participant might decide to whistleblow. Alternatively, the US authorities in particular, may find out about it during the course of cooperation by one of your co-conspirators in respect of another cartel. In any price-fixing case, it is common practice for the US Department of Justice to ask the company's witness, as part of the company's required cooperation in return for leniency, whether they have knowledge of any illegal agreements involving other products. Therefore, it is important to try and ascertain whether the individuals involved in the cartel with which you are dealing have been or are likely to be interviewed by the DOJ as part of a cooperation programme in respect of a separate price-fixing investigation.

4. A different but related point in a case where in-house counsel discovered the agreement internally is that the individuals working for your company who were involved in the illegal agreement may well have been party to illegal agreements in respect of other products. They will be asked about whether they know about illegal agreements in respect of other products during the course of the US witness interviews in your case. If such agreements did or do exist, they will be uncovered through cooperating in the present case. The company needs to be aware of and manage this additional exposure.

5. In the case where in-house counsel discovered the price-fixing agreement as a result of action or contact by a regulator, the analysis is slightly different as enforcement action is more or less inevitable. The logic for cooperating is much stronger, unless you consider for some reason that the regulators will find it difficult to prove the existence of the price-fixing agreement.

6. In any event, whether the price-fixing agreement was discovered internally or externally, an important factor in deciding whether to cooperate is the extent to which you will receive lenient treatment under each of the relevant leniency programmes. Each such programme has a number of conditions which must be fulfilled before you can expect various levels of a reduction in the fine which would ordinarily be imposed. By way of example, in the EU, a reduction of over 50% is not available to a company which coerced another into joining the cartel or played a leadership or determining role in the illegal behaviour. In the U.S. coercing another into joining the cartel is also a disquailfier. However, only the leader of a cartel is disqualified from receiving amnesty in the U.S. A copy of the European Commission's Leniency Notice and the DOJ's Corporate Amnesty Policy are attached to this paper.

7. In the case of a global price-fixing agreement, the decision to cooperate usually amounts to a decision to cooperate with every relevant regulator. However, there are circumstances where you may decide that it is not necessary to cooperate in one particular jurisdiction. For example, the agreement may benefit from a peculiar substantive exemption under the antitrust laws in that jurisdiction. Alternatively, if the company has no assets in a particular country and makes only indirect sales there, it may conclude that the risk of enforcement action is low, given the inevitable difficulties the regulator in that country will face in trying to collect a fine.

8. Absent these special circumstances, it is usually sensible, however, to treat the various regulators as one for the purposes of this decision, because of the extent to which they share information and cooperate with each other. In the case of the US and the EU, this relationship has been formalised. In 1991, the DOJ, Federal Trade Commission ("FTC") and European Commission signed an Antitrust Cooperation Agreement. This was recently supplemented by a more specific agreement on positive comity. As a result of these agreements, the US and EU have a duty to inform each other about illegal activity of which they become aware and which affects the important interests of the other. It is therefore not safe to assume that you can cooperate under the leniency programme of one jurisdiction without starting an investigation in another. However, the competition authorities have adopted a policy of strict confidentiality with respect to the identity of, and information provided by, an amnesty applicant. The DoJ has stated that it holds the identity of amnesty applicants in strict confidence, much like the treatment afforded to confidential informants. Therefore, the DoJ will not publicly disclose the identity of an amnesty applicant or any information provided to the DoJ by the applicant, absent prior disclosure by the applicant, unless required to do so in connection with litigation. There are a number of other antitrust cooperation arrangements in place. The EU, for example, has signed such an agreement with Canada and proposes soon to conclude one with Japan.

5. Cooperation in Practice

1. Having made the decision to cooperate, the next issue to decide is which regulator to approach first for leniency. Usually, DOJ would be approached first. This is because, in the US, it is possible definitively to negotiate a deal if you make the approach before your co-conspirators, so timing is of the essence. Also, the risk is greater in the US, given that antitrust violations such as price-fixing are criminal and can result in jail time for individuals. However, another significant factor is the company's relative exposure in each jurisdiction. For example, if the price-fixing agreement was centred in the EU but also touched the US, the company might have significantly greater exposure in the EU so that the most pressing task is to cooperate with the European Commission. In any event, best practice is to approach the regulators on both sides of the Atlantic simultaneously.

2. What you are trying to achieve vis-à-vis the European Commission, is to be the first company to provide the Commission with decisive evidence of the cartel, because this is a prerequisite to achieving the highest level of lenient treatment. In the US, in contrast, in order to achieve the highest level of lenient treatment, you simply need to be the first through the door.

3. As the European Commission's Leniency Notice and the DOJ's Corporate Amnesty Policy make clear, the essence of cooperation in return for leniency is the delivery of evidence proving the existence of the price-fixing agreement. It is important to understand the

difference in the way evidence is given in the course of cooperation to the various regulators. The DOJ takes evidence primarily through witness interviews. The European Commission, on the other hand, does not conduct witness interviews and instead requires contemporaneous documents in order to prove the existence of the cartel. The Commission does realise, however, that there may not be documentation created at every meeting of the cartel or correspondence between the conspirators and that, even if such documentation existed, the documents in one company's possession would be unlikely to cover the entire life of the conspiracy. Therefore, the Commission will often request a statement from the company at least filling in the details missing from gaps in the documents, but preferably comprising a complete statement of the company's knowledge of and involvement in the conspiracy, attaching whatever contemporaneous documentation exists.

4. The problem with a requirement by the European Commission for a written statement in the absence of complete document covering the entire life of the price-fixing agreement is that it is essentially an admission by your company of the existence of the cartel. Such a statement could be used as evidence by the plaintiffs in US treble damages litigation. The written statement is likely to be discoverable in US civil litigation: it is not privileged under US or EC law and, as a copy of the statement is likely to have been kept by the company's counsel, it would be called for by a document request in US civil litigation. The European Commission has shown that it is sensitive to this problem and it is, for example, amenable to having the statement refer only to the illegal activities insofar as they relate to the EU, with no reference to the fact that those or other activities may have affected US commerce.

5. In both the US and the EU, in order to benefit from the leniency programme, the company is required to cooperate completely and continuously throughout the regulator's investigation. A failure to provide all the evidence about the cartel in your company's possession will prejudice your company's right to leniency.

6. What you can expect

1. In the US, DOJ's policy offers automatic "Part A" amnesty where there is no pre-existing investigation when your company commences its cooperation. Assuming all of the conditions in Part A are met, amnesty is automatic. This is not the case in the EU for two reasons. First of all, the directorate for competition is not able to do a deal because decisions in competition cases are adopted by the college of European Commissioners at the very end of a price-fixing case. The staff with whom you cooperate cannot, therefore, give you any legally binding commitment that you will receive lenient treatment. Secondly, the highest category of lenient treatment results in a reduction in the fine which would otherwise be imposed of 75%-100% but the Leniency Notice contains no guidance as to when total amnesty (ie. a 100% reduction) as opposed to a 75% reduction would be appropriate, leaving the Commission with wide discretion in relation to this issue.

2. In the US, Part B of the Corporate Leniency Policy allows for total amnesty after the DOJ's investigation has begun if certain conditions are met. Under the EU Leniency Notice, in contrast, although a company may receive some reduction in its fine if it decides to cooperate after a Commission investigation has begun, it cannot qualify for a reduction of 100% (ie. total amnesty).

3. Assuming you have negotiated total amnesty in the US for your company, it will not be prosecuted and convicted of a criminal offence, nor will any of your client's culpable executives who cooperate with the U.S. authorities be subject to a separate investigation and prosecution. In the EU, whatever the extent of cooperation, the European Commission's investigation will culminate in a formal decision which will declare that all of the participants in the cartel, including any cooperators, were party to an illegal price-fixing agreement. The decision will, however, include a description of the application of the Leniency Policy in your case.

7. Follow-on Civil Litigation

1. US class actions riding on the tails of the US criminal proceedings in connection with a price-fixing conspiracy are a virtual certainty. Customers of the conspirators are seeking damages in respect of the higher prices they paid as a result of the price-fixing agreement. A company can count on at least 5 to 10 class actions, perhaps more. Defending these cases effectively presents a major challenge to in-house counsel.

2. Third party damages cases in Europe are rare for the following reasons. Firstly, there is no provision for treble damages, a major incentive to suing. Secondly, the legal systems of each of the EU countries do not generally cater for lawyers to take competition law cases on a continency fee (no win no fee) basis. Given the difficulties involved in proving damage suffered as a result of a price-fixing agreement, most third parties are unwilling to spend the fees on taking a case to court.

8. Conclusion

1. As antitrust law enforcement becomes increasingly global, with cooperation among regulators, it is crucial for a company involved in a global price-fixing case to take a coordinated approach to the risks which arise in the various jurisdictions involved. An understanding of and familiarity with the cartel law and enforcement scheme of each jurisdiction into which your company sold the fixed price product, is vital, and the effect of each step taken around the world on the US private litigation exposure needs to be carefully considered.

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