

Updates on Antitrust in the USA: Cartels, Leniency, and No-Poach Agreements

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Postscript to Last Week's Lecture

The Google Cases, The Courts, and
the Elections

Update from October 14

- Coming Google Cases
 - US Department of Justice: Filing of complaint expected this week (maybe today)
 - State Governments: Join the DOJ or bring own, broader Google case
- The Courts: Likely Confirmation of Amy Coney Barrett to Join the US Supreme Court
- Election Forecast

Today's Agenda

- Anti-Cartel Policy and Enforcement
- Leniency
- No-Poach Agreements
- Format: Half-hour on Each Topic with 30 Minutes for Discussion at the End
- Caveat: Personal Views Only

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Makan Delrahim:
Assistant Attorney
General for
Antitrust, US
Department of
Justice: 2017 to
Present



Anti-Cartel Policy and Enforcement

New Challenges and New
Programs

Historical Context: Cartel Arms Race

- Modern Improvements in Detection/Sanctions
 - Fines: From \$50,000 in 1955 to \$100M Sherman Act minimum and double the loss, double the gain
 - Prison: From misdemeanor before 1974 to felony and maximum prison term of 10 years
- Continuing Improvements in Cartel Operations and Management
 - Notable advances in methods for forming consensus, detecting cheating, and punishment

US Anti-Cartel Policy: General Outlines

- Emphasis on Criminal Enforcement
 - Focus: individual responsibility
- Active Application of Extraterritorial Jurisdiction and Monitoring Methods
 - E.g., watch lists and border controls
- Willingness to Seek Extradition and Incarceration of Foreign Nationals
 - Scott Hammond's memorable admonition (International Bar Association, Tokyo, 2008)

COVID-19 and Health Care

- Expedited Guidance Mechanism Regarding Proposed Competitor Collaborations
- Highly Publicized Prosecutions in Matters Initiated Before COVID-19 Crisis but Linked to Commitment for Vigilance

Health Care

- William Harwin, Florida Cancer Center (FCS) (September 2020)
 - Conspiracy to allocate oncology treatments
 - FCS deferred prosecution agreement: admission of guilt, \$100M fine, and agreement to waive all non-compete agreements with professional staff
- Indictments Against 7 Generic Drug Producers for Fixing Prices of Generics
 - Latest indictment: Teva (August 2020)

Food

- Broiler Chicken Nationwide Price-Fixing Cartel
 - Ten executives and employees indicted (Latest indictments: October 8, 2020)
- Canned Tuna: Bumble Bee and Starkist
 - Bumble Bee Former CEO (Charles Lischewski) convicted and sentenced to prison for 40 months and fined \$100,000 (June 2020)
 - Starkist: pled guilty and paid \$100M fine
 - Bumble Bee paid \$25M fine

Financial Services

- Michael Murray, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice
 - *The Muscular Role for Antitrust in Fintech, Financial Markets, and Banking: The Antitrust Division's Decision to Lean In* (Remarks Prepared for Discussion at the University of Michigan Law School, October 14, 2020) (online conference)

DOJ Anti-Cartel Enforcement in Financial Services Since the GFC

- Since 2008, 40 Criminal Convictions for Financial Services Collusion and Fines, Restitution, Disgorgement > \$4.5B
- Major Initiatives: Convictions/Guilty Pleas
 - Municipal bonds: 1 bank and 17 individuals
 - LIBOR: 6 banks and 8 individuals
 - Foreign Exchange: 5 banks and 3 individuals

Public Procurement

- Procurement Collusion Strike Task Force (September 2020)
- Antitrust Division, FBI, 13 US Attorneys Offices, Defense Criminal Investigative Service, US Postal Inspectors
- Common Case Development, Training
- Using “antitrust big data”

Resource Intensive Matters: Illustration

- Foreign Exchange Collusion
 - 5 banks paid \$2.5B in criminal fines
 - 2 individuals pled guilty
 - 1 individual (Akshay Aiyer) convicted at trial for conspiring to fix prices and rig bids
 - 3-week jury trial
 - Sentence: 8 months in prison and fine of \$150,000

DOJ Institutional Reforms

- Reorganization and Formation of New Unit: Financial Services, Fintech, & Banking Section (August 2020)
- Memorandum of Understanding signed with Securities and Exchange Commission to Promote Greater Interagency Cooperation (June 2020)

Compliance Reforms

- New DOJ Policy Regarding Impact of Corporate Compliance Programs on Charging and Sentencing (July 2019)
 - Commitment to consider quality of compliance program in charging decisions as well as in sentencing recommendations
 - Consider: requiring ex post study of how cartel was formed and operated (e.g., FCS conspiracy period was 2012-2019)

Artificial Intelligence

- Richard A. Powers, Deputy Assistant Attorney General for Antitrust, US Department of Justice, Remarks at the Cartel Working Group Plenary, Annual Conference of the International Competition Network (Sept.. 17, 2020)
 - For algorithms, “if an intermediary, such as a programmer or platform, facilitates a conspiracy among competitors to use a common algorithm for the purpose of fixing prices, under U.S. law, we could prosecute both the competitors and the intermediary who facilitated the illegal agreement.”

Leniency

Going on 30 Years: New
Directions?

Leniency Revolution

- DOJ Original Leniency Policy: 1970s
 - Applicant fully reveals facts
 - DOJ provides some dispensation from criminal sanctions, but not complete exculpation
 - “Tell us everything, and we’ll give you something”



Anne Bingaman,
Assistant Attorney
General for
Antitrust: 1993-1996

The Greatest Impact on Modern Global Antitrust Enforcement?

- Leniency
- First DOJ Microsoft Case
- NYNEX and ADM (Lysine) Cartel Cases
- 1995 DOJ/FTC Intellectual Property Guidelines

The Bingaman Leniency Reforms

- 1993: Corporate Leniency
 - First in the door
 - Full revelation of information
 - Complete immunity from criminal prosecution
- 1994: Extension to Individuals
- Three Years Before First Applicant
- Breakthrough: Vitamins

Subsequent Refinements

- Leniency Markers
- Leniency Plus
 - Mitigation of punishment for participation in Cartel A where firm reveals other cartels
- Antitrust Criminal Penalty Enforcement and Reform Act
 - Permanent extension adopted: October 1, 2020
 - Single damages in civil suits if successful leniency

Antitrust Criminal Penalty Enforcement and Reform Act

- Single Damages in Civil Cases When Successful Leniency Applicant Cooperates with Private Plaintiffs
- Permanent Extension Signed Into Law: October 1, 2020
- Whistleblower Bounty System Considered but Not Enacted

Persistent Policy Questions

- Is Leniency Losing Its Power?
 - Adaptation and gaming by companies?
- Are Supplementary Methods of Detection Becoming More Important?
 - Screening
 - Monitoring by other institutions (e.g., public procurement)
 - Will the US adopt a variant of the Dodd-Frank or False Claims Act whistleblower mechanisms to pay monetary rewards to cartel informants?

No-Poaching Agreements

The Rediscovery of Labor Markets

Emerging Issues: Employment Contracts

- No-Poaching Agreements
 - DOJ Settlement with tech firms
 - DOJ/FTC Policy Statement for Human Resource Professionals (2016) : DOJ intention to prosecute future cases as per se violations (with possible criminal prosecution)
 - Universities, railway workers, franchisee cases
- Non-Compete Agreements
 - Pending private litigation in federal and state courts
 - Conditionality in some federal prosecutions: e.g., Florida Cancer Center