Weil

Cartel Watch

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In this issue of ***Cartel Watch***, we continue our coverage of notable developments in U.S. and international cartel enforcement and provide our Cartel Fine Tracker for Q4 2015.

Implications of the DOJ's Yates Memo in Antitrust Division Enforcement

As noted in the previous edition of Weil's Cartel Watch, on September 9, 2015, the Deputy Attorney General of the United States issued a memo entitled "Individual Accountability in Corporate Wrongdoing."[1] The memo specified the policy of the Department of Justice (DOJ) to focus on prosecuting individual wrongdoing in cases involving corporate misdeeds.

On September 29, 2015, at the Ninth Annual Global Antitrust Enforcement Symposium, the DOJ's top criminal antitrust enforcer, deputy assistant attorney general Brent Snyder, stated that the DOJ's increased focus on individual responsibility would not significantly change the Antitrust Division's practices. Snyder noted that "the antitrust division has long prioritized the prosecution of individuals" and that it "continues to be a fundamental policy of the antitrust division, and both that practice as well as the way we investigate and resolve our cases, we believe, is entirely consistent with the Yates Memo."[2] However, Snyder noted that there may be some changes in the timing of antitrust division investigations. Prior to the Yates Memo, the antitrust division generally charges companies first before bringing charges or indictments against individuals. Snyder said that he thinks "there will probably be some cases where we see earlier prosecution of individuals" but that "there will be other cases where the nature of the investigation and the speed at which companies come in and begin to cooperate will mean companies resolve before individuals do."[3]

In November 2015, the head of the antitrust division, assistant attorney general Bill Baer, reiterated that the antitrust division already follows the guidance of the Yates Memo in its criminal prosecutions. He added that the division will adopt its guidance in its civil antitrust investigations as well.[4] In remarks at the 2015 Fall Forum: Antitrust and Consumer Protection Enforcement, Baer said that in cases where a high-level senior executive is involved in civil antitrust violations, "we are looking and going to be looking forward to see if there ought to be individual accountability." The division is reviewing whether there is "an additional deterrent effect that comes from holding accountable the individuals who adopted a policy that is in violation of the antitrust laws or some other federal statute, in order to make sure there's

not a reoccurrence." Baer noted that the Federal Trade Commission (FTC) and DOJ already do this in some cases, such as those involving violations of the Hart-Scott-Rodino Act.

Criminal Defendant Earns Compliance Program Credit in Fine Calculation

On September 29, 2015, at the Ninth Annual Global Antitrust Enforcement Symposium, the DOJ's top criminal antitrust enforcer, deputy assistant attorney general Brent Snyder, noted that KYB Corp. received a discount on a fine for criminal cartel conduct because it has adopted an effective compliance program. KYB, which pled guilty to price-fixing shock absorbers, was the second company to receive such a discount. In May 2015, Barclays received a discount on its fine for manipulating foreign exchange rates.

In his remarks, Snyder stated that the antitrust division would credit "forward-looking compliance efforts…where we can see that the company has fundamentally taken steps to change its business culture and you can see actual results from the company's efforts in that regard." In such cases, the DOJ has "indicated a willingness to credit that in connection with sentencing…and anticipate[s] that we will be doing so again in the not-so-distant future."

KYB's plea agreement[5] notes that the recommended fine in the case is below the applicable sentencing guidelines. The guidelines calculation of the applicable fine for KYB's conduct was $103.68 million to $207.36 million, but the DOJ recommended a reduced fine of $62 million. The plea agreement notes that a downward departure was warranted due to KYB's cooperation in the case, as well as because of "substantial improvements to the defendant's compliance and remediation program to prevent recurrence of the charged offense." The DOJ later filed a sentencing memorandum[6] further explaining the basis for KYB's fine reduction. The memorandum notes that

> "From the moment KYB received notification of the government's investigation, management committed to instituting policies that would ensure that it would never again violate the antitrust laws. Direction for this change came straight from the top—KYB's president, Masao Usui. He directed a full and complete investigation be conducted and ordered all employees to cooperate fully and truthfully with the investigation."

The memorandum also explains that KYB's compliance policy has the "hallmarks of an effective compliance policy," including taking the following measures:

- Requiring training of senior management and all sales personnel;
- Providing one-on-one training for personnel (such as sales people) with jobs where there is a high risk of antitrust crimes;
- Measuring the effectiveness of training by testing employees' awareness of antitrust issues before and after the training;
- Requiring prior approval, where possible, of all contacts with competitors;
- Requiring reporting of all contacts with competitors to be audited by in-house counsel;
- Requiring sales personnel to certify that all prices were independently determined and that they did not exchange information or conspire with competitors when determining prices; and
- Creating an anonymous hotline so that employees can report possible violations of the antitrust laws.[7]

The DOJ's recommendation of a reduced fine for KYB, as well as Snyder's remarks on the case, show the importance of an effective antitrust compliance program, both in preventing or uncovering potential antitrust violations, as well as limiting a company's exposure even after an antitrust violation has been detected by the DOJ.

Hong Kong Competition Authority Proposed Leniency Policy

On November 19, 2015, the Hong Kong Competition Commission revealed policies related to its planned enforcement of Hong Kong's Competition Ordinance, which was first passed in 2012. The policies include its Enforcement Policy[8] and its Leniency Policy for

Undertakings Engaging in Cartel Conduct (Cartel Leniency Policy).[9] The Commission has announced that enforcement of the Competition Ordinance will be in full effect as of December 14, 2015.

In the Cartel Leniency Policy, the Commission agrees not to pursue financial penalties against the first cartel member to report price-fixing or similar conduct to the Commission, as long as it meets certain other requirements, including full cooperation with any resulting investigation. An entity seeking leniency is required to keep the investigation and leniency confidential, provide continuing cooperation including making all non-privileged materials related to cartel conduct available, and agree to sign a statement of agreed facts admitting involvement in the cartel. Further, when a corporate entity seeks leniency, the leniency policy will normally extend to employees of that entity. However, the Commission has also noted that its policy does not preclude private actions for damages against leniency applicants related to cartel conduct.

In its Enforcement Policy, the Commission noted that its enforcement will focus on three main aspects of competition law: 1) cartel conduct which includes price-fixing, market sharing, output restriction and bid-rigging; 2) other agreements contravening the First Conduct Rule (prohibiting agreements and concerted practices that restrict competition) causing significant harm to competition in Hong Kong; and 3) abuses of substantial market power involving exclusionary behavior by incumbents operating on markets in Hong Kong.

ACPERA Protections Extended to Non-Antitrust Claims

A Court in the United States District Court for the Eastern District of California held that the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)[10] limits exposure to all civil damages arising from anti-competitive conduct, rather than just Sherman Act claims. In *Morning Star Packing Co. v. S.K. Foods, L.P.*,[11] the district court held that the defendants, a company and its President that had entered into a leniency agreement with the DOJ Antitrust Division regarding possible price fixing, bid rigging, and market allocation in the processed tomato products industry, could seek the protection of ACPERA with respect to the civil plaintiffs' claims for damages for alleged RICO claims and other antitrust claims.

ACPERA provides that damages recoverable from a leniency applicant are limited to single damages, rather than the treble damages customarily awarded to successful antitrust plaintiffs, and further provides that leniency applicants are not subject to joint and several liability in civil litigation.[12]

In *Morning Star*, the court found that ACPERA applies where a civil action alleges a Sherman Act violation, but it does not require the civil action to only allege a Sherman Act violation, nor does it exclude actions brought under statutes other than the Sherman Act, where they are based on the same conduct underlying the Sherman Act violation.[13] The court noted that its decision only reached whether ACPERA applied to all of the plaintiffs' civil claims against the defendants, and did not determine that the defendants were eligible for ACPERA, which would be determined at the time the court determines damages.[14]

U.K. Changes Private Antitrust Enforcement Regime

By Neil Rigby

On October 1, 2015, provisions of the U.K. Consumer Rights Act 2015 came into force which introduce a number of important changes to the jurisdiction of the U.K. Competition Appeal Tribunal ("CAT") to hear antitrust damages claims.

A new opt-out collective/class action regime has been introduced, and many of the procedural disadvantages of litigating in the CAT (as compared to the High Court) have been removed. The changes are intended to make the CAT a much more attractive forum in which to litigate private damages claims, and are likely to result in more actions being brought in the CAT and increased potential damages exposure for defendants being sued in the United Kingdom for infringements of U.K. or EU competition law.

New Collective/Class Action Regime

The Act introduces a new collective/class action regime in the CAT providing for opt-out and opt-in proceedings, as existing rules in the CAT and the High Court have not effectively facilitated collective actions. The new regime has the following features:

- **Collective/class actions to be available for all antitrust damages claims.** Collective/class actions can now be brought either where there is no pre-existing infringement decision by a competition regulator ("stand-alone" actions) or following an infringement decision ("follow-on" actions), and can be brought on behalf of businesses and/or consumers.
- **Claims to be subject to certification process.** Actions may be brought only after the CAT has made a collective proceedings order determining that the claims raised "*the same, similar or related issues*" and are "*suitable to be brought in collective proceedings*". The CAT will also need to determine whether specific claims should be brought on an opt-out basis or an opt-in basis.
- **Claims to be brought by a representative claimant or other representative.** Claims can be brought by any representative (whether or not a class member) provided it is "*just and reasonable*", although this person should be a genuine representative of the class (such as a trade or consumer association) and not a law firm, third-party funder or special purpose vehicle.
- **Opt-out claimants to be limited to U.K.-domiciled persons.** Opt-out proceedings may be brought on behalf of all U.K.-domiciled class members (unless the member opted out). Class members domiciled outside the United Kingdom would be able to opt-in to the proceedings.
- **Damages awards to be compensatory.** The CAT would be unable to award exemplary (punitive) or treble damages in collective/class actions.[15]
- **Costs and fees rules.** Unsuccessful parties will be subject to adverse costs awards, consistent with the established "loser pays" principle under English law, but costs will be payable by the representative rather than by other members of the class. Damages-based agreements/contingency fees will not be permitted in collective/class actions (despite being permitted in most other litigation as from April 2013), although conditional fee arrangements[16] and after-the-event insurance for adverse costs will be permitted.
- **CAT-approved settlements of opt-out actions.** Collective settlements will be subject to an order of the CAT and a requirement that the settlement be "*just and reasonable*", and will be binding on the class, unless a class member opts out of the settlement or is not U.K. domiciled and has not opted in.

Expanded Jurisdiction for the CAT

Previously, there were significant restrictions on the ability of the CAT (compared to the High Court) to hear claims particularly on issues such as the identity of defendants that may be sued, the infringements that may be litigated, the time when proceedings may be commenced, and the inability to issue injunctions to terminate infringements. These restrictions created jurisdictional risks, imposed delays and prevented certain claims from being heard, all of

which substantially undermined the attractiveness of the CAT as a forum to litigate in England. The changes introduced under the Act remove these disadvantages, as noted below.

Allowing stand-alone claims

The CAT will now have jurisdiction to hear any claims for damages, including both claims based on a prior infringement decision and stand-alone claims based on an alleged infringement, and will be able to grant injunctions to terminate infringements. This will address the difficulties that have arisen because the CAT does not have jurisdiction to hear claims if a regulator has not already established an infringement in respect of the specific conduct and the specific parties at issue in the claim. This restriction has significantly reduced the range of cases that the CAT could hear, even if there was a prior infringement decision, because issues that are important for damages claims may not have been fully explored in the infringement decision. The CAT will now be able to make its own findings as to whether an infringement had been committed in respect of specific products or by specific defendants, even if the infringement decision failed to make definitive findings on these issues.

Reducing delays in commencing claims

Actions in the CAT will now be subject to the same timing restrictions that apply to the High Court – there will be no requirement to delay commencing proceedings pending appeal of the infringement decision (or even pending completion of an on-going regulatory investigation), and claims will be subject to the same limitation period as that applicable in the High Court (six years from the date on which the cause of action arose, or five years in Scotland). This should remove the significant disadvantages that arose previously, as claims in the CAT could be brought only after an infringement decision had been adopted (and permission was required to bring claims pending any appeal of the decision) – a restriction that significantly impaired the ability of claimants to proceed expeditiously and provided opportunities for other claimants to commence pre-emptive litigation in other jurisdictions.

Cartel Fine Tracker – Q4 2015 (October-December)

Jurisdiction	Fines Imposed
U.S. Department of Justice	**$2.35 million**
JFTC	**¥1.03 billion**
European Commission	**€116 million**

1. Sally Quillian Yates, "Individual Accountability in Corporate Wrongdoing," September 9, 2015.
2. Leah Nylen, "'Yates Memo' won't change DOJ criminal antitrust investigations, Snyder says," MLex, Sept. 29, 2015.
3. Id.
4. Leah Nylen, "DOJ looking at individual liability for civil antitrust violations in wake of Yates memo, Baer says" MLex, Nov. 12, 2015.
5. Plea Agreement, United States v. Kayaba Corp., S.D.Ohio, No. 15-cr-00098, Dkt. 9, Sept. 16, 2015.
6. Sentencing Memorandum, United States v. Kayaba Corp., S.D.Ohio, No. 15-cr-00098, Dkt. 21, Oct. 5, 2015.
7. Id.
8. Available at http://www.compcomm.hk/en/media/press/files/Enforcement_Policy_Eng.pdf
9. Available at http://www.compcomm.hk/en/media/press/files/Leniency_Policy_Eng.pdf
10. Pub.L. No. 108–237, § 213 (2004), 118 Stat. 661, 665–67 (2004) (codified at 15 U.S.C. § 1 n. 1).
11. No. 09-cv-00208-KJM, 2015 WL 3797774, (E.D. Cal., June 18, 2015).
12. "[I]n a civil action alleging a violation ... of the Sherman Act ... or any similar state law" "based on conduct covered by a currently effective leniency agreement" ... "shall not exceed the portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation." ACPERA § 213.
13. 2015 WL 3797774 at *5.
14. 2015 WL 3797774 at *7.
15. It is possible for the CAT and the High Court to award exemplary damages in other claims if fines have not been imposed by a regulator, although such awards are rare.
16. Arrangements in which fees typically are increased by up to 100% for a successful outcome, or reduced to zero for an unsuccessful outcome. The fee uplift for success is not recoverable from the other party.

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