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Overview

Thomas F Bush
Locke Lord LLP

The United States Department of Justice Antitrust Division (DoJ) enforces federal antitrust laws through criminal and civil processes. The DoJ has exclusive authority for criminal enforcement at the federal level, and it shares civil enforcement authority with the Federal Trade Commission (FTC).

Criminal enforcement

The DoJ uses criminal enforcement processes only against hard-core cartel violations, which are agreements among competitors to fix prices, allocate markets or customers, restrict production or sales or rig bids. Penalties for these violations include fines for corporate defendants in amounts up to twice the overcharge, and substantial fines and prison sentences for the individuals who have participated in the cartel.

To investigate criminal antitrust violations, the DoJ uses a variety of tools including wiretaps, search warrants and witness interviews. The primary body for criminal investigations is the grand jury, which at the DoJ's request can issue subpoenas compelling the production of documents and appearances to give testimony. Any witness who fears prosecution for cartel activity can refuse to testify by invoking the constitutional privilege against self-incrimination. To encourage the voluntary reporting of cartel violations, the DoJ relies extensively upon the leniency programme, in which the first firm to report a cartel violation will receive complete immunity in return for full cooperation with the investigation. The DoJ also relies on selected grants of immunity from prosecution to cooperating witnesses and on guilty pleas from cartel participants who agree to provide testimony in return for a reduced penalty.

If the investigation turns up sufficient evidence for a prosecution, the DoJ will ask the grand jury to issue indictments charging the corporate target or the individual participants with criminal antitrust violations. The vast majority of indictments end with guilty pleas. If a defendant chooses not to plead guilty, the case will proceed, like any criminal prosecution, to a trial before a jury, where the DoJ is obligated to prove the defendant's guilt beyond a reasonable doubt.

Civil enforcement

The DoJ employs civil enforcement procedures for antitrust violations other than hard core cartels, such as monopolisation, restraints on distribution and anti-competitive mergers, acquisitions and joint ventures. Remedies in civil enforcement actions typically include an injunction against the continuation or renewal of the challenged activity. Frequently, the DoJ seeks additional equitable relief, such as the unwinding of a merger or the dismemberment of a monopoly.

In civil cases, the DoJ relies extensively on the voluntary submission of evidence and information from customers, suppliers and competitors of the target and from the target itself. The DoJ's primary tool for compelling the production of evidence in civil investigations is the civil investigation demand (CID), which can require the production of documents, including electronic documents or tangible things, and also written answers to interrogatories and oral testimony under oath in a deposition. A CID functions in a manner similar to the comparable discovery devices in civil litigation.

If the investigation turns up sufficient evidence for an enforcement action, the DoJ typically seeks to negotiate a consent decree, which is an agreed judgment, made without the admission of a violation, that the court can enforce in the same manner as an injunction. In the absence of a consent decree, the DoJ may seek injunctive or other equitable relief in a civil action tried before the court without a jury.

The DoJ receives a copy of each pre-merger notification filed under the Hart-Scott-Rodino Act. Like the FTC, the DoJ can issue, prior to the expiration of the initial 30-day waiting period, a second request for additional information about the transaction, thereby extending the waiting period. If the DoJ determines that a transaction is anti-competitive, it can file a suit for injunctive relief in the United States District Court.

The DoJ and the FTC have no formal division of responsibilities for civil enforcement of the antitrust laws. Each agency proceeds in accordance with its own enforcement priorities. They have established an inter-agency clearance procedure to ensure that they do not pursue duplicative investigations.

Recent developments

The DoJ has been engaged in vigorous criminal enforcement in recent years. During the fiscal year ending 30 September 2014, the DoJ collected US\$1.86 billion in fines and penalties for antitrust violations, the highest annual total in the DoJ's history. The Department also obtained prison sentences for 21 individuals, with the average sentence at 26 months.

The ongoing investigation of price-fixing in auto parts markets contributed a total of US\$785 million to 2014's fines and penalties. The year's largest single fine was paid by Bridgestone, a total of US\$425 million. In negotiating Bridgestone's fine, the DoJ took account of Bridgestone's failure to disclose its price-fixing of auto parts in 2011, when it pleaded guilty to fixing prices in the marine hose industry. Under the DoJ's penalty-plus policy, if a company fails to make a full disclosure of cartel activity when pleading guilty, penalties will be enhanced for cartel activity discovered later. Since the *Auto Parts* investigations first became public in early 2010, they have led to charges against 33 companies and 52 individuals and have generated fines in excess of US\$2.4 billion. Already the largest criminal antitrust investigation in history, the *Auto Parts* investigations are expected to continue.

Other areas where the DoJ has targeted cartel investigations recently have included LIBOR benchmark interest rates, foreign exchange markets, capacitors, real estate foreclosure auctions, investment contracts for municipal bonds, municipal tax liens, ocean shipping, and coastal shipping between Puerto Rico and the continental United States.

In April 2014, an Italian national who had been arrested in Germany on charges of price-fixing of

marine hoses was extradited to the United States, marking the DoJ's first successfully litigated extradition on an antitrust charge. The defendant subsequently pleaded guilty and was sentenced to two years in prison, with credit for the time of his incarceration in Germany pending the extradition.

In a civil action, the DoJ went to trial during 2014 against American Express, charging an antitrust violations in terms that American Express included in its agreements with merchants to prevent them from steering customers to other credit cards. The District Court recently found for the DoJ and is now considering remedies, which are likely to include an injunction against American Express's continued use of the challenged practices and oversight for compliance. The DoJ brought similar charges against Visa and MasterCard and reached agreements with both for consent decrees prohibiting anti-steering practices.

In the merger area, the DoJ obtained consent decrees in 2014 requiring parties to five transaction to divest certain assets as a condition to closing. Parties agreed to terminate another three transactions following challenge by the DoJ. In one of the terminated transactions, involving manufacturers of flakeboard, the DoJ charged the parties with illegal coordination during the merger review process, by agreeing to close one plant and to serve customers out of another. The parties settled the charges by agreeing to a fine of US\$3.8 million and a disgorgement of US\$1.15 million in profits. The DoJ obtained an agreement from Berkshire Hathaway Corporation to pay a fine of US\$896,000 for stock acquisitions made without filing the required notification.



Thomas F Bush
Locke Lord LLP

Thomas F Bush is a partner in the Chicago Office and co-chair of the antitrust/competition practice group of Locke Lord LLP. He has more than 30 years of experience in a wide range of antitrust matters, including price-fixing litigation, criminal investigations, merger control, and consulting and litigation relating to vertical restraints and patent issues. Tom also has extensive experience with antitrust issues relating to the insurance industry and with counselling and representing Asian clients on antitrust matters.



111 South Wacker Drive
Chicago
IL 60606
United States
Tel: +1 312 443 0700
Fax: +1 312 443 0336

Thomas F Bush
tom.bush@lockelord.com

www.lockelord.com

Locke Lord is a full-service, international law firm that ranks among *The American Lawyer's* top US law firms. Our team of approximately 1,000 lawyers has earned a solid reputation in their work in antitrust, private equity, venture capital, life sciences and biotech, corporate and finance, complex litigation, insurance and reinsurance and intellectual property.

Our breadth of antitrust experience includes litigation involving civil and criminal antitrust violations, as well as merger enforcement and the transactional implications of antitrust law. We have acted as a negotiator working with federal and state antitrust enforcement agencies to resolve merger disputes, a counsellor on the antitrust implications of business contracts and an internal investigator of antitrust compliance.

Locke Lord antitrust lawyers have the extensive knowledge of business, economics and law needed to litigate cases involving claims of alleged price fixing, customer allocation agreements, group boycotts, dealer termination, price discrimination, predatory pricing, illegal standard setting, tying issues, bundled discounts, monopolisation and attempted monopolisation. We have unique, extensive antitrust experience in industries including energy, financial services, insurance, pharmaceuticals and health care. That background pays immediate dividends, as we can more efficiently investigate new cases and develop litigation strategies. In both antitrust litigation and in advising on mergers and acquisitions, we have significant experience negotiating with federal and state regulators, defending clients during civil investigations by these entities, and negotiating compliance packages and consent decrees.