

Q&A WITH SCOTT HAMMOND

What do you think is the most important development in U.S. cartel enforcement in the last year?

The globalization of cartel enforcement continues to be the most significant development in U.S. cartel enforcement and antitrust compliance. Readers of GDC's 2013 Criminal Antitrust Update will undoubtedly be struck by the breadth and magnitude of the developments in cartel enforcement taking place around the world. Everywhere you turn it seems there is news of another jurisdiction adopting new legislation, introducing criminal sanctions, expanding its investigative powers, or obtaining record sanctions. The impact of these developments abroad on companies around the world is two-fold. First, companies that might once have sought to avoid U.S. enforcement by operating in safe harbors now find their risk of prosecution is global. Second, Antitrust Division investigations are more dangerous for international companies as the DOJ has stronger enforcement partners abroad who are better positioned to assist its investigations. The globalization of cartel enforcement therefore continues to raise the stakes for companies competing in the global marketplace and puts an even greater premium on ensuring that corporate compliance measures are comprehensive and up-to-date. It also means that companies must quickly develop a comprehensive and integrated global strategy to assess and mitigate their exposure when they discover conduct that puts them at risk of criminal and administrative sanctions from enforcement agencies working in tandem across the globe.

The Japanese Fair Trade Commission's (JFTC) role in advancing the Antitrust Division's massive auto parts investigation is a prime example of how the government has benefitted from stronger enforcement abroad. The Department has publicly stated that the auto parts matter is the largest criminal antitrust investigation ever both in terms of the breadth of the suspected harm to U.S. commerce and the number of companies under investigation. In September 2013, the Attorney General announced that nine Japanese-based companies had agreed to plead guilty and pay fines totaling more than \$740 million. The running total currently stands at 23 convicted companies and more than \$1.8 million in criminal fines. At the Attorney General's recent press conference, it was revealed that the JFTC played a major role in the Department's investigation, both as the first competition authority to detect some of the charged wrongdoing and then as part of a larger team of enforcement authorities joining the Antitrust Division in carrying out a covert investigation culminating in the simultaneous execution of search warrants around the globe. This demonstrates how the investment that the Antitrust Division has made in promoting more vigorous enforcement and strengthening its cooperative ties with Japan and other jurisdictions is now paying dividends.

What factors are primarily responsible for this global trend?

There are many factors, but they are rooted in the development of an international consensus that price-fixing, bid-rigging and market-allocation agreements are harmful to businesses and consumers wherever such activity occurs and greater international cooperation and coordination is required for detection and deterrence. It seems like a long time ago now, but many of the Antitrust Division's strongest international partners today once routinely declined to respond to assistance requests by referring to national blocking statutes, if they



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As the former U.S. Department of Justice Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement, Mr. Hammond supervised the Division's domestic and international criminal investigations and prosecutions, including overseeing the Corporate and Individual Leniency Programs. As DAAG, he led the Division's enforcement efforts in a number of industries, including auto parts, LCD panels, air transportation, real estate foreclosure auctions, municipal bonds, construction, chemicals and coastal freight. Mr. Hammond also worked to increase international cooperation in cartel enforcement with other jurisdictions, including the European Union, Australia, Brazil, Canada, Germany, India, Japan, Korea, Mexico, New Zealand, South Africa and the United Kingdom.

Mr. Hammond joined the Antitrust Division through the Attorney General's Honors Program immediately following law school in 1988. In 1995, he was promoted to Senior Counsel to then Deputy Assistant Attorney General Gary Spratling. In 2000, he was promoted to Director of Criminal Enforcement. In 2005, he was named Deputy Assistant Attorney General, a position he held for the next eight years.

Mr. Hammond served as Co-Chair of the Cartel Working Group of the International Competition Network (ICN) from 2005 to 2013. He acted as the Antitrust Division's liaison with the International Cartel Task Force of the American Bar Association's Antitrust Section. He has spoken at major conferences in 26 foreign countries, and has regularly been a featured speaker at the ABA Antitrust Section's annual spring meetings. He has also served multiple times as a co-chair of the International Cartel Workshop, a bi-annual workshop sponsored by the ABA and the International Bar Association.

responded at all. The successful prosecution of the international lysine cartel, and particularly the government's publication and circulation of the FBI's covert tape recordings to global competition enforcers as well as parliamentary officials, private practitioners, academics and the business community was the single greatest impetus for change. The tapes capture the lysine cartel members fixing prices down to the penny per pound around the world, effective the very next day. The egregious nature of the conduct began to change the way many people viewed cartel activity. And when the Antitrust Division cracked the global, decade-long vitamins cartel a few years later with the help of a Corporate Leniency applicant, the exporting of the tools utilized by the Department in its criminal antitrust investigations accelerated exponentially. And so today, businesses operate in an environment where competition authorities prioritize cartel enforcement, impose stiff sanctions (while also offering incentives for self-reporting and other timely cooperation), employ all available investigative tools, and cooperate and coordinate with other enforcement agencies to the greatest extent possible. Some important distinctions among the United States and many of its key allies remain, most notably the fact that the majority of jurisdictions continue to treat cartel offenses as civil rather than criminal violations. However, even that distinction is likely to be lost on companies that are facing massive punitive civil fines, such as those imposed by the European Commission.

One area where there has been a lack of convergence among jurisdictions is the exposure companies face for private antitrust damages actions. While a number of jurisdictions are considering ways to facilitate private actions, no jurisdiction is currently seeking to adopt an approach to match the U.S. system. That said, the most notable movement with regard to the development of private damages actions is in Europe. The European Commission's efforts to facilitate private actions against infringers of EU competition law at the national level is once again gaining steam, as is the U.K.'s development of class action lawsuits. With the European Commission recently raising the bar again in its LIBOR investigation with the largest fines ever imposed in any jurisdiction, and the looming potential for private damage actions in Europe and class action lawsuits in the U.K., the already potentially perilous risk for companies who violate European competition laws continues to rise.

What do you consider to be the international "hot spots" where you would expect to see major developments in the next year?

I expect that we will continue to see major changes around the world, but the continued developments in Asia and South America will likely have the greatest impact on U.S. and global cartel enforcement. A high percentage of international prosecutions by the United States, the European Commission and other enforcers on the global stage have recently been centered on Asia-based corporations. This enforcement trend can be attributed to the increased effectiveness of the JFTC, the Korean Fair Trade Commission, and other Asian enforcers, together with increased cooperation among competition authorities, leading to greater detection and information sharing. In response to the stiff sanctions being imposed, Asian companies competing internationally appear to be moving in significant numbers to ensure that their business practices comply with antitrust and competition laws wherever they do business. U.S. companies were at the forefront of investing heavily in global corporate compliance measures, and I believe there is a growing appreciation among Asian companies operating internationally that they will act at a competitive disadvantage if they do not match that investment. The costs associated with being embroiled in an international investigation are just too great. The rise in compliance training by Asian companies is resulting in greater detection of ongoing or past violations of the antitrust laws which, in turn, is leading to increased self-reporting. When wrongdoing is detected, Asian companies are far less hesitant than in the past to take advantage of immunity programs offered by global enforcers, even if that means implicating other Asian companies. This transition is most evident in Japan and Korea due in large part to the burgeoning enforcement efforts of the Japanese and Korean competition authorities. With competition authorities in China, India, Taiwan, and Singapore gaining strength, Asia is likely to remain a hot spot for cartel enforcement developments in the foreseeable future.

Several South American authorities are similarly moving to the forefront of global enforcement, and companies operating there need to be mindful of local competition laws. Brazil's competition authority, CADE, has been making waves in the international cartel enforcement pool for a number of years. CADE's leadership has made clear that the agency will aggressively seek to prosecute international violations, and they delivered on that promise again this year by bringing three such cases. Brazil also recently significantly revised its settlement procedures to bring its practices closer in line to the terms found in U.S. plea agreements. Chile is following close in Brazil's footsteps. Chile's competition authority, FNE, has its leniency program up and running, and was emboldened by a recent monumental decision by the nation's Supreme Court declaring that Chile's Competition Act extends to conduct that takes place entirely outside Chilean borders if the conduct directly affects the Chilean market. The return of Chile's newly re-elected President, Michelle Bachelet, for a second term will likely ensure that cartel enforcement will continue to surge. President-elect Bachelet was a vigorous supporter of cartel enforcement in her first term when she promoted the criminalization of cartel offenses and declared a national Competition Day.

With so many jurisdictions sanctioning the same defendants for the same conduct, what are the US DOJ and other enforcers doing to address the risk of overlapping and duplicative sanctions?

Duplicative sanctions are an issue that is getting increased attention among enforcers pursuing international cartel cases. In particular, enforcers are becoming increasingly sensitive to the notion that if the costs for cooperation become so great that the calculus favoring early cooperation changes, then enforcement will backslide. I think the international enforcement community generally appreciates that imposing duplicative sanctions runs the risk of tilting that balance. For the most part, the Antitrust Division has avoided criticism for double counting or imposing duplicative sanctions by limiting its fine calculations to conduct affecting U.S. commerce. Similarly, the European Commission, the heaviest hitter for criminal fines, looks to turnover in the European Competition Network when setting its fines. However, there are fact patterns that fall into the margins. For example, in the air cargo cases, defendants were charged with fixing air cargo rates and surcharges on shipments that passed from one jurisdiction to another. Because more than one jurisdiction was arguably affected every time a shipment subject to the conspiracy traveled from one jurisdiction to another, the Antitrust Division, the European Commission, and other competition authorities closely coordinated their fine methodologies to limit double counting. That type of cooperation has been repeated in other international investigations, and I have no doubt that it will continue, although I am also certain that targets of enforcement efforts will continue to express concerns about duplicative penalties. In particular, there are times when two authorities investigating the same overarching conspiracy will lay claim to the same rigged transaction and not agree on how to allocate the commerce from that transaction to the respective jurisdictions arguably affected. For example, this scenario typically occurs when an authority believes that the effect of a conspiratorial agreement is felt more directly in the jurisdiction where the end product is sold than in the jurisdiction where the initial transaction subject to the conspiracy takes place. To avoid changing the cooperation calculus, enforcement officials will need to continue to work together not only to detect antitrust offenses but to sufficiently reward companies who come forward and provide timely cooperation.

Does the focus on international cartels cause the DOJ to neglect domestic cartels because of its limited resources?

Like the rest of the federal government, the Antitrust Division's resources are being severely pinched, and so it will allocate its resources to go after conduct where it believes the suspected harm to U.S. businesses and consumers is greatest. The international cartels that the Antitrust Division prosecutes typically touch a greater number of consumers than domestic conspiracies, so it makes sense for the Division to invest more resources on international matters. However, that does not tell the whole story. The fact that there is a lower percentage of domestic investigations today than in some previous years is also due to the rise in antitrust corporate compliance in the United States – an achievement for which the Division, the private bar, and the business community can all take equal credit. When I started at the Department, the Antitrust Division's docket was full of public procurement bid-rigging cases. I hope I am not naïve, but I believe that the cumulative deterrence impact of the Antitrust Division's prosecution of these cases over the years, together with the government's and the private bar's proactive outreach and education of the procurement community, has dramatically reduced the incidence of bid rigging on public procurement contracts. That is not to say, of course, that domestic bid rigging cases are a relic of the past. The Antitrust Division's nationwide crackdown on bid rigging at real estate foreclosure and tax lien auctions, which has already resulted in the prosecution of over 70 individuals in five states, is proof that such conduct lives on. But it is also evidence that the Antitrust Division is on the lookout for and will vigorously investigate domestic cartels.

In 2013, the Antitrust Division entered into its first two Deferred Prosecution Agreements (DPAs) in the LIBOR investigation. Do you expect that the Antitrust Division will continue to utilize these agreements outside of that investigation?

The Antitrust Division said at the time the first DPA was entered that the DPA did not signal a change in the Antitrust Division's policy of disfavoring the use of DPAs for corporate antitrust resolutions, and I do not anticipate a change to that policy. The prosecution of antitrust offenses has historically been treated differently than other federal crimes under the Department's Principles of Federal Prosecution of Business Organizations because "antitrust violations, by definition, go to the heart of the corporation's business." In addition, I expect the Antitrust Division to be cautious not to undermine its Corporate Leniency Program, which remains the Department's most generous and most successful voluntary disclosure program. The Antitrust Division has historically been concerned that offering DPAs as a consolation to companies that lose the race for leniency runs the risk of watering down the existing incentive structure that has made the Corporate Leniency program so successful. Thus, while I believe that there will continue to be exceptions where the Antitrust Division enters into DPAs in the future, I expect that those exceptions will be largely limited to defendants operating in highly-regulated industries where a criminal conviction may impair the company's eligibility to continue to do business.

The Second Circuit recently reversed the trial convictions of three defendants in the Antitrust Division's municipal bonds investigation by rejecting the government's theory that rigged interest payments during the applicable limitations period by the defendants' employer constituted overt acts within the limitations period. Assuming the decision stands, how would you expect the decision to impact the Antitrust Division's charging decisions going forward?

Regardless of how this particular case turns out, I do not believe that we will witness a significant change in the government's charging practices going forward. I say that because the Antitrust Division has brought very few cases historically that rely on a payments theory. Not because those matters were considered to be legally barred—in fact, the law in this area is very favorable to the government, particularly with respect to the affirmative burden placed on a defendant to demonstrate withdrawal in conspiracy cases. Rather, the Antitrust Division has been quite conservative in charging cases that rely on a payments theory because of jury appeal concerns. Invariably, any case that relies on a payments theory will involve events that took place far back in time, when recollections are often faulty and subject to spirited impeachment. Staleness never works in the government's favor, as jurors begin to question why they are taking time away from their work and their families to hear about events that are ancient history. Moreover, even where the law in this area is favorable to the government, that does not always mean that jurors will understand it or will agree with it. Therefore, there is a higher risk of jury confusion or jury nullification in cases that rely on a payments theory. In the municipal bonds cases that went to trial, the Antitrust Division clearly believed that its proof, including the tape recordings of the defendants that helped preserve the evidence in time, was sufficiently compelling to overcome these concerns. The return of guilty verdicts against all six defendants in the two cases that went to trial suggests that the government got it right, at least with respect to the jury appeal of these indicted cases. However, I view these cases as exceptional. While cases predicated on a payments theory are exceptional, it will be interesting to see if the Department files an appeal in this matter.

You recently left the Antitrust Division after 25 years of service. What was the single greatest change that you observed during your tenure?

The introduction of the Corporate Leniency Program in 1993 was the single biggest game changer for criminal antitrust enforcement and compliance not just in the United States but around the world. But, I think the Antitrust Division's greatest achievement was creating a series of novel, interrelated policies and strategies designed to change the way that companies respond to antitrust criminal investigations, even when amnesty is no longer available for the conduct under investigation. First came the development of the Amnesty Plus program, which offers cooperating companies unique rewards not found elsewhere in the DOJ. That program reinforces the value to businesses in conducting thorough internal investigations designed to root out the full scope of any antitrust exposure. Next came the creation of cartel profiling strategies employed to detect additional wrongdoing in related (and sometimes seemingly unrelated) markets as well as the adoption of a Penalty Plus program. Given those strategies, a company electing not to take advantage of the Amnesty Plus program by uncovering and self-reporting any additional wrongdoing before it is discovered by the government faces potentially harsher penalties than it might have otherwise. Simultaneously, the Antitrust Division implemented policies designed to assist companies by providing the tools they would need to conduct effective internal investigations. For example, while Department of Justice prosecutors routinely insisted on waivers of attorney-client privilege as a condition of cooperation until 2008, the Antitrust Division already had in place a long-established practice of not seeking such waivers in order to facilitate the ability of companies to mine their employees for information. In addition, because the interests of employer and employees are aligned when both stand to gain from obtaining Amnesty Plus protection, the Antitrust Division will not typically object to corporate counsel representing corporate employees in conducting the internal investigation and in dealings with the Antitrust Division. All of these interconnected strategies led to what I always thought was one of the most telling Antitrust Division statistics – that more often than not, when the Department opens an international criminal antitrust investigation, it leads to the detection of another completely separate antitrust conspiracy.

What underscores the significance of these strategies is how they have changed the way that companies respond to Division investigations by rewarding companies who are committed to rooting out all wrongdoing in order to benefit from the Antitrust Division's policies and get past the investigation. The Antitrust Division encountered a number of European companies that were frequent flyers moving from one investigation to another in the United States and Europe that subsequently responded to the implementation of these policies by totally cleaning house, reporting any wrongdoing and obtaining substantial cooperation savings. Those companies have had no run-ins with competition officials on cartel matters since. As I noted earlier, there is a similar transition taking place now in Asia.

What do you think will be the focus of the cartel enforcement program under AAG Bill Baer's leadership?

Companies will face no respite from aggressive cartel enforcement under Bill Baer. He will continue to build on the criminal enforcement program's success, and Antitrust Division prosecutors will benefit greatly from his full support and wealth of experience. One of his immediate challenges is to manage the Antitrust Division's workload in times of shrinking government spending. In a recent congressional oversight hearing, Bill made a strong case to Congress for entrusting more resources to the Antitrust Division. He highlighted the fact that the Antitrust Division's criminal cases have brought in more than ten times the annual direct appropriation over the last ten years. Plus, he re-affirmed his commitment to focusing the Antitrust Division's resources on matters that have the greatest impact on American businesses and consumers, and he showcased the auto parts, LCD, municipal bonds, and real estate foreclosure auction bid-rigging cases to demonstrate how the Antitrust Division is delivering on that promise. Bill is a terrific advocate for the Antitrust Division interests, and I would bet on him securing additional funding.

A second challenge is integrating the new yet very experienced leadership team in the Antitrust Division's criminal enforcement program. In the last six months, the Antitrust Division has experienced a change in leadership at my old position as well as with the heads of three of the four offices that handle criminal antitrust matters. Bill has carefully put together an impressive new management team with vast experience investigating and prosecuting criminal antitrust matters which will make the transition far easier. The new Criminal Deputy, Brent Snyder, is a highly-skilled trial attorney who has led a number of the Department's biggest criminal antitrust cases since he arrived a decade ago after gaining experience in private practice. I believe the private bar will find Brent to be tough but consistently fair in how he manages the Antitrust Division's criminal docket. Similarly, Marc Siegel, Frank Vondrak, and Jeffrey Martino, the three chiefs that were named to lead the San Francisco, Chicago and New York Offices, have over 60 years of prosecutorial experience between them. The new management team will be the beneficiaries of Bill's full support and will quickly adapt to their new responsibilities.