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External affairs

Lawrence Zweifach and Eric Creizman of Gibson, Dunn & Crutcher examine the issue of defending corporate executives located outside the United States in investigations and prosecutions by the Antitrust Division of the United States Department of Justice

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EXTERNAL AFFAIRS

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I Introduction

Over the past decade, the Antitrust Division of the United States Department of Justice has pursued a vigorous enforcement policy in prosecuting international cartel offences against both corporate and individual violators, domestic and foreign.[1] The Antitrust Division's aggressive enforcement policy is effectuated by the substantial sentences for antitrust offences set forth in the advisory United States sentencing guidelines.[2] Because guideline sentences are driven by the volume of commerce affected by unlawful price-fixing activity, convictions of international, industry-wide price-fixing cartel offences necessarily result in staggering criminal fines for organisations and severe prison sentences for their executives.

Last year alone, the Antitrust Division obtained criminal antitrust fines of more than a billion dollars, with the 10 highest fines paid by non-US corporations, including a 400 million dollar fine imposed on LG Display for its role in a price-fixing conspiracy in the TFT-LCD flat panel industry,[3] a 120 million dollar fine imposed on Sharp in the same investigation, and a 119 million dollar fine imposed on Cargolux Airlines for price-fixing in the air-cargo industry.[4] The trend continued in fiscal year 2010, when a Taiwanese company, Chi Mei Optoelectronics, agreed to plead guilty to charges of price-fixing in the TFT-LCD industry and pay a criminal fine of 220 million dollars, bringing the total fines obtained in the Antitrust Division's TFT-LCD investigation to more than 880 million dollars.[5]

The Antitrust Division's emphasis on promoting deterrence through individual as well as corporate accountability has been borne out through the stiff prison sentences it has obtained for business executives. In 2009, 80 per cent of all defendants convicted of antitrust offences were sentenced to prison, and those defendants received an average prison term of 24 months.[6] Fiscal year 2009 also marked a milestone in Antitrust Division enforcement when, in January, Peter Baci, a shipping executive who pleaded guilty to participating in a conspiracy to suppress competition in the water-freight transportation services industry, received a 48-month prison sentence, the longest jail sentence ever imposed for a single antitrust charge.[7]

Not only is the Antitrust Division seeking longer prison sentences for individuals, it is prosecuting more individuals than it has in the past. Over the past decade, the Antitrust Division increasingly has been "carving out" greater numbers of executives from the non-prosecution protections contained in corporate plea agreements, thus leaving those executives vulnerable to prosecution.[8] In the 1990s, the Antitrust Division would typically prosecute only the most culpable employee from each company that was prosecuted. Today, it is common for the Antitrust Division to carve out several culpable individuals from corporate plea agreements, even for those companies who co-operate with the Antitrust Division soon after an investigation has gone public. For example, even six years ago, in the Antitrust Division's investigation of price-fixing in the international rubber-chemicals industry, a company that began to co-operate within days after grand-jury subpoenas were issued had three employees carved out from its plea agreement.[9] The next company to plead in that conspiracy had five employees carved out from its plea agreement.[10] The Antitrust Division has taken a similar, aggressive approach to prosecuting executives in more recent corporate plea agreements, such as the agreements in the DRAM and the air-cargo investigations.[11]

The Antitrust Division has made clear that borders will not deter it from seeking substantial jail sentences for non-US nationals. At one time, the Antitrust Division was constrained to provide no-prison deals to non-US nationals in order to persuade the executives to submit to the jurisdiction of the United States and plead guilty. Today, due to enhanced co-operation with law enforcement in other nations, advanced investigative techniques, and the ability to extradite fugitives from countries with criminal antitrust laws, the Antitrust Division now takes the position that "no-jail" deals are a "relic of the past."[12] According to Scott Hammond, Deputy Attorney General for Criminal Enforcement, "division practice now is to insist on jail sentences for all defendants, domestic and foreign. The Division will not agree to a 'no-jail' sentence for any defendant, and our practice is not to remain silent at sentencing if a defendant argues for a no-jail sentence."[13] Indeed, since 1999, more than 40 non-US executives have received prison sentences in the United States for international cartel offences.[14] In the TFT-LCD price-fixing investigation in

2009, non-US executives who agreed to plead guilty and serve jail sentences included: (i) Bock Kwon (one year) and Chang Suk Chung (seven months), executives of LG; and (ii) Chieng-Hon "Frank" Lin (nine months), Chcih-Chun "CC" Liu (seven months), and Hsueh-Lung "Brian" Lee (six months).[15] In addition, in 2009, Franciscus Johannes de Jong, an executive of Martinair, pleaded guilty and agreed to serve eight months in prison for his participation in the air-cargo price-fixing conspiracy.[16] In 2008, three British executives, Peter Whittle, Bryan Allison and David Brammer, entered plea agreements with the Antitrust Division requiring them to serve prison sentences in Great Britain of 30 months, 24 months and 20 months respectively, the longest prison sentences served by any foreign nationals for US antitrust offences.[17]

This article provides an overview of the Antitrust Division's policy on prosecuting individuals and the investigative tools employed by it in prosecuting business executives located outside the United States. It also summarises some of the difficult issues defence counsel for a non-US executive must consider from the inception of an antitrust investigation through the resolution of formal criminal charges, including the relevant features of the US criminal justice system that bear on these issues.

II Antitrust Division investigative tools and strategies

The Antitrust Division's steadily increasing effectiveness over the years in prosecuting international cartels is attributable to its aggressive use of all available investigative tools at its disposal, its co-operation and co-ordination with law enforcement in other countries, and the growing trend of other countries enacting or enhancing criminal sanctions for cartel-related conduct.

A Investigative tools

The Antitrust Division employs an arsenal of tools in international cartel investigations that assist it in "gathering evidence, in shrinking the safe harbours for executives who have engaged in cartel offences, and in providing strong incentives for those executives to accept responsibility and co-operate with Division investigations."[18] One tool that has proved effective in "shrinking safe harbours" is the Division's practice of putting foreign witnesses, targets and defendants on its border watchlist. When a person on the border watchlist enters the United States, US law-enforcement agents are immediately dispatched to conduct interviews, serve process, or make arrests on a criminal complaint or indictment. If a fugitive defendant is caught on a border watch, the Antitrust Division will likely seek to have him detained through the resolution of his case.[19] In order to further restrict a fugitive defendant's ability to travel, beginning in 2001, the Antitrust Division implemented a policy of placing names of individuals on a "Red Notice" list maintained by the International Criminal Police Organization (Interpol).[20] An individual listed in a Red Notice is subject to provisional arrest in any of the 184 countries who participate in Interpol.[21] The Antitrust Division's policy is to seek the extradition of fugitive defendants arrested through the Interpol Red Notices.[22] The use of border watches and Red Notices are designed to restrict a non-US executive's travel so that it becomes a "significant and unacceptable burden on the defendant's business and personal life."[23] According to the Deputy Attorney General for Criminal Enforcement, these travel restrictions have "contributed to the decision of many individual defendants to accept responsibility for their cartel offences, plead guilty, and negotiate plea agreements."[24]

Domestically, the Antitrust Division has been able to gather significant evidence in its investigation of cartels by the use of sophisticated audio and video surveillance techniques. One well-known example was the use of a confidential informant to take audio and video recordings of price-fixing meetings among members of the lysine cartel, a story that is chronicled in Kurt Eichenwald's best-selling book, *The Informant*. In 2006, the United States Congress provided the Antitrust Division with another weapon for investigating cartels when it authorised the Antitrust Division to apply to a federal judge for an order approving the use of wiretaps to record communications among cartel members.[25] The relatively low barriers to obtaining electronic surveillance make it likely that the Antitrust Division will use this tool regularly in its investigations of antitrust offences. Indeed, federal judges routinely grant wiretap applications in criminal investigations.[26] As the Deputy Attorney General for Criminal Enforcement has said, the Antitrust Division's use of audio and video surveillance tools is designed "to instill a genuine fear of detection among executives."[27]

B Co-operation and co-ordination among enforcers internationally

The Antitrust Division depends on the close co-operation of law-enforcement authorities in other countries to successfully investigate and prosecute international cartels. Co-operation between the Antitrust Division and other law-enforcement agencies is accomplished through both informal and formal means. Informal co-operation permits the Antitrust Division and other law-enforcement agencies to share leads, information, evidence and strategies freely, without the need for judicial or legislative approval in their respective jurisdictions. This "co-operative, 'pick-up-the-phone' relationship" permits a cost-effective, timely and efficient means of investigating cartel activity.[28]

The Antitrust Division also has formalised its co-operation with cartel-enforcement agencies around the world through agreements to share information and evidence in the investigation and prosecution of cartel activity.[29] In addition, global anti-cartel enforcement agencies participate in a forum

through which they can share investigative techniques and strategies for combating cartel activity, called the International Competition Network Cartel Working Group.[30]

As a result of this enhanced co-operation, co-ordinated investigations between the Antitrust Division and other law-enforcement agencies are becoming commonplace, and often include simultaneous searches, subpoenas and arrests, in both the United States and other jurisdictions. For example, in 2007, on the same day that the Antitrust Division conducted multiple searches and arrests in its investigation of price-fixing in the marine-hose industry, the United Kingdom and other European antitrust authorities conducted searches of locations in Europe.[31] Similarly, just last year, the Antitrust Division, European Union and Brazilian antitrust enforcement authorities conducted co-ordinated dawn raids of refrigeration-compressor manufacturers in their respective jurisdictions.[32]

C Criminalisation of cartel activity outside the United States

Over the past decade, numerous countries have adopted criminal antitrust laws, including the United Kingdom, Denmark, Ireland, Israel, Japan, South Korea and Brazil.[33] Other countries recently have adopted, or are considering adopting, criminal antitrust laws, including Australia, Chile, the Czech Republic, Greece, Mexico, the Netherlands, New Zealand, Russia and South Africa.[34] Criminalisation of cartel conduct in other countries significantly bolsters the Antitrust Division's ability to investigate and prosecute international cartels. As an initial matter, criminalisation of antitrust offences enhances domestic investigative powers and creates greater incentives for individuals to co-operate with investigations in multiple jurisdictions, thus making co-ordinated investigations more effective.[35]

By rigorously and continually analysing all available options, defence counsel can help the client achieve the best outcome

Furthermore, the criminalisation of cartel conduct in a country permits the Antitrust Division to use Mutual Legal Assistance Treaties (MLAT) to facilitate its access to evidence, both documentary and testimonial, in that country. MLATs simplify the process for obtaining information in another country by permitting access to documents, testimonial evidence, or other information on the basis of a formalised request from one government to the other.[36] Where a country does not criminalise cartel conduct, unless it can obtain the information through informal means, the Antitrust Division must request evidence from that country through letters rogatory, a formal written request sent by a US court to a foreign court, which is a time-consuming and cumbersome way to obtain evidence.[37]

Criminalisation of cartel conduct in other countries provides the Antitrust Division with perhaps it most potent weapon: the ability to obtain extradition of non-US fugitives. This is because the vast majority of extradition treaties contain a "dual criminality" requirement, which provides that a national will be subject to extradition to the requesting jurisdiction only if the offence for which the requesting party seeks extradition is also a crime under the requested party's law.[38] The enhanced ability of the Antitrust Division to extradite non-US nationals gives it a stronger bargaining position in negotiating pleas by non-US nationals by incentivising foreign executives to enter into plea agreements and voluntarily submit to the jurisdiction of the United States, so as to avoid the harsher sentences they may receive if they are extradited to the United States to face charges.

III Defending the non-US executive in a United States criminal prosecution

A fundamental principle of the United States criminal justice system is that a defendant may not be convicted of a crime unless he or she pleads guilty to the offence or the government proves to a jury beyond a reasonable doubt that the defendant committed the crime with which he or she is charged. Another fundamental principle is that an individual cannot be compelled to incriminate himself. Thus, from the outset of any criminal investigation, a defence lawyer must continuously investigate the facts, assess the government's likely proof at trial, and evaluate whether it is in the client's interests to: (i) prepare a defence and contest the charges; (ii) persuade the government it should not bring a criminal case; (iii) co-operate with the government's investigation, and thus, waive the client's privilege against self-incrimination; or (iv) negotiate a disposition of the case by plea, with no co-operation.

In criminal antitrust investigations, it is critical to make these evaluations at a very early stage, because under the Antitrust Division's amnesty and leniency policies, an individual can substantially reduce his or her exposure to criminal penalties, including the length of any prison sentence.[39] Although co-operation offers potentially significant rewards, there are potential perils facing the client who co-operates. In order to obtain a co-operation agreement, an individual usually is required to participate in one or more interviews with attorneys for the government, also known as "proffer sessions," in which the government will evaluate his credibility, truthfulness, and ability to assist the government in investigating and prosecuting others. In the event that the individual seeking to co-operate is not successful and instead goes to trial, the statements made during those interviews can, under certain circumstances, be

used against him later at trial and, in the worst-case scenario, create more problems for himself than when he started, including potential charges of obstruction of justice and making false statements to the government if the government can prove the client was deliberately untruthful. In addition, it is typically a condition of any co-operation agreement that the co-operator (unless "first in the door") plead guilty to a felony offence. Furthermore, if the client is not the first individual to co-operate, no matter what level of co-operation the client provides, the Antitrust Division's standing policy is to insist upon a sentence that includes a prison component.[40]

Further complicating matters, the Antitrust Division considers a corporation's efforts to co-operate with it in deciding whether to pursue criminal charges against the corporation, or to extend it leniency in negotiating a plea. As a result, an executive embroiled in a criminal antitrust investigation could face substantial pressure by his employer to submit to interviews by lawyers retained by the company to conduct an internal investigation. Although conversations with corporate counsel conducting the investigation are subject to the attorney-client privilege, investigating counsel represent the corporation, not the executive, and the privilege therefore belongs to the corporation and the corporation alone. If the company deems it advantageous to share the statements or the substance of the employee's statements with the government, it can and will do so. Thus, if the executive agrees to be interviewed by internal investigators, he may later face having those statements used against him by the government in a future prosecution. A defence lawyer must help the client evaluate the potential risks and benefits of co-operating with the government or in an internal investigation, so that the client may make an informed decision in these circumstances.

A defence lawyer must also help his client evaluate whether and to what extent the lawyer should communicate with the government, to either persuade the government not to bring charges, or to negotiate a favourable plea agreement. Among other things, counsel may make arguments to the Antitrust Division concerning the weaknesses of its case, both legal and factual, and any mitigating circumstances concerning the client, with respect both to the conduct under investigation, and to the client's age, financial circumstances or health. A detailed factual presentation may persuade prosecutors that they cannot prove a criminal case against the client or that they should offer the client a favourable plea disposition. At the same time, if the defence lawyer and the client believe that the prosecutors are resolved to pursue criminal charges against the client and will not likely believe the client's account of the events, it may not be sensible to give prosecutors an advance preview of the client's defence at trial. All of these considerations require careful analysis.

If formal criminal charges are brought against the client, the individual's case is governed principally by the Federal Rules of Criminal Procedure. Some of the key stages in the United States federal criminal process are discussed below.

A Bail

The defendant is entitled to an initial appearance shortly after his arrest, at which he is advised of the charges and of his rights, including the right to counsel and the right to remain silent under the Fifth Amendment, as well as the question of bail.[41] The Bail Reform Act of 1984 creates a presumption in favour of release pending trial in most cases. A defendant may be detained pending trial only if the judicial officer determining bail finds that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."[42] Because a defendant in an antitrust case rarely poses a danger to the community or has any criminal record, he is often released on personal recognisance or an unsecured appearance bond. For a non-US citizen who is charged with an antitrust offence, however, the government often raises the concern that the defendant poses a risk of flight.

Prosecutors bear the burden of proving that the defendant is a flight risk. Courts will consider as relevant to this analysis: (i) the defendant's ties to the United States, as well as his ties to other countries; (ii) whether the defendant has the means to flee the United States, including access to funds outside the jurisdiction of the United States if he does flee; (iii) the defendant's history in this case in submitting to the jurisdiction of the United States with knowledge of impending or actual charges; (iv) the likelihood of extradition if the defendant flees to his home country or another country with which he has close ties; (v) the weight of the evidence against the defendant; and (vi) the defendant's potential sentence, if convicted of the charges.

In the ordinary case, a non-US citizen who is charged with antitrust offences generally will obtain pretrial release with certain conditions, including, at a minimum, an appearance bond co-signed by financially responsible sureties, as well as regular reporting requirements to United States Pretrial Services. Other common conditions imposed include restrictions on travel, and surrender of the defendant's passport and other travel documents. In some cases, the court may additionally require that the defendant or one of his sureties post real property to secure the bond. In addition, the court may impose stricter conditions, such as that the defendant reside at a particular address, abide by curfew restrictions; agree to home detention with electronic monitoring; and agree to waive extradition. In some cases, where the government believes that a wealthy defendant has access to hidden assets outside the United States, it has argued that the defendant should be ordered to provide the government with a schedule of all of his assets, or repatriate his assets to the jurisdiction of the United States. There is little case law supporting the government's argument in these circumstances, and defence counsel should

vigorously challenge these requests on the grounds that requiring the defendant to reveal the source and location of assets in a financial-crime investigation effectively forces him to incriminate himself.

B Discovery

Defendants in federal criminal cases are afforded very limited discovery rights prior to trial. Indeed, "there is no general constitutional right to discovery in a criminal case."[43] That said, the defendant has a Constitutional right to information that is materially exculpatory. The prosecutor, however, in the first instance, makes the determination as to whether an item is "materially" exculpatory. The Federal Rules of Criminal Procedure also provide the defendant with the right to certain materials before trial. In broad terms, the defendant has the right to: his or her prior statements, prior criminal record, documents and other tangible objects that are material to preparing the defence, documents or other tangible objects that the prosecution intends to use in its case-in-chief, reports of scientific examinations and tests, and summaries of the anticipated testimony of government witnesses.[44] The defendant is also entitled to review prior statements of government witnesses, but only after the government witness testifies at trial.[45]

Effective defence counsel do not rely solely on the discovery mandated by the United States Constitution and the Federal Rules, but conduct their own investigation in order to prepare adequately for trial, including using forensic accountants to analyse financial documents and private investigators to research and interview potential adverse witnesses. Defence counsel will also serve subpoenas on third parties for potentially exculpatory information.

C Pretrial motions

Defence counsel have an array of pretrial motions that they may use to: (i) attempt to obtain more information about the government's charges or proof; (ii) limit the evidence that the government can prove at trial; (iii) sever trials on charged counts or as to charged defendants because they were joined in violation of the Federal Rules or to avoid possible prejudice; and (iv) dismiss the indictment. Defence counsel can use motion practice not only to achieve the relief requested, but also to educate the court about the defence and to cause the government to disclose additional information about its case.

D Trial

A trial begins with the selection of a jury of 12 individuals. Because the government bears the burden of proving guilt beyond a reasonable doubt throughout the trial, the defence has no obligation to put on its own case. Moreover, a defendant may not be compelled to testify at trial under the United States

Footnotes

1 See Belinda A. Barnett, Senior Counsel to the Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, Criminalization of Cartel Conduct – Thee Changing Landscape, address before the Joint Federal Court of Australia/Law Council of Australia (April 3, 2009), available at http://www.justice.gov/atr/public/speeches/247824.htm.

2 See U.S.S.G. § 2R1.1.

3 "TFT-LCD" is an acronym for Thin Film Transistor-Liquid Crystal Display.

4 David Burns, Joshua Hess, Geoffrey Weien, and Russell Gold, 2009 Year-End Criminal Antitrust Review, Global Competition Review, at 19 (Feb. 2010), available at http://www.gibsondunn.com/publications/pages/2009YearEndCriminalAntitrustReview.aspx.

5 See Press Release, Antitrust Division, Taiwan LCD Producer Agrees To Plead Guilty And Pay $220 Million Fine For Participating In LCD Price-Fixing Conspiracy (Dec. 3, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/252936.htm.

6 See Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, address before the National Institute On White Collar Crime, at 8-9 (Miami, Florida, Feb. 25, 2010), available at http://www.justice.gov/atr/public/speeches/255515.htm.

7 See Press Release, Antitrust Division, Former Shipping Executive Sentenced to 48 Months In Jail For His Role In Antitrust Conspiracy (Jan. 30, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/242030.htm.

8 See Scott D. Hammond, The U.S. System of Negotiated Plea Agreements: A Good Deal With Benefits For All, address before the OECD Competition Committee Working Party #3, at 15 (Paris, France, Oct. 17, 2006), available at http://www.justice.gov/atr/public/speeches/219332.pdf.

9 Hammond, Evolution of Criminal Antitrust Enforcement, at 10, n.16.

10 Hammond, Evolution of Criminal Antitrust Enforcement, at 10, n.16.

11 See Gary R. Spratling & D. Jarrett Arp, Making The Decision: What To Do When Faced With International Cartel Exposure, address before the 2010 International Cartel Workshop, American Bar Association and the International Bar Association, at 27 (Paris France, Feb. 10-12, 2010), available at http://www.abanet.org/antitrust/at-committees/at-s1/pdf/spring-materials/2006/spratling06.pdf.

12 See Hammond, Evolution of Criminal Antitrust Enforcement, at 7.

13 See Hammond, Evolution of Criminal Antitrust Enforcement, at 7.

14 See Hammond, Evolution of Criminal Antitrust Enforcement, at 7.

15 See Press Releases, Antitrust Division, Four Executives Agree To Plead Guilty In Global LCD Price-Fixing Conspiracy (Jan. 15, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/241541.htm; Korean Executive Agrees To Plead Guilty And Serve One Year In Prison For Participation In LCD Price-Fixing Conspiracy (Apr. 27, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/245215.htm.

16 See Press Release, Antitrust Division, Dutch Airline Executive Agrees To Plead Guilty For Fixing Prices On Air Cargo Shipments (Apr. 29, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/245298.htm.

17 See Scott D. Hammond, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, address before the ABA Section of Antitrust Law, 56th Annual Spring Meeting, at 19 (Washington, D.C., March 26, 2008), available at http://www.justice.gov/atr/public/speeches/232716.htm.

18 See Scott D. Hammond, Charting New Waters In International Cartel Prosecutions, address before the National Institute On White Collar Crime, ABA Criminal Justice Section, at 7 (San Francisco, Cal., Mar. 2, 2006), available at http://www.justice.gov/atr/public/speeches/214861.htm.

Constitution. At trial, lawyers for the government and the defence are permitted to make opening and closing statements, call witnesses, and cross-examine the other party's witnesses. A jury conviction or acquittal may only be obtained where the jurors unanimously agree on the verdict. If there is an acquittal, the government is barred from bringing the same charges a second time under the Constitutional protection against double jeopardy. If the members of the jury cannot agree on a verdict, the court may rule that the jury is "hung," and the government has the option of trying the defendant again on the same charges.

E Sentencing

The court's determination of sentence involves two principal components: (i) a calculation of the advisory federal sentencing guidelines, and (ii) a review of the statutory purposes of sentencing that were enacted by Congress. Sentences under the advisory guidelines are based on two primary factors: (i) a defendant's particularised "offence conduct," in antitrust cases, driven largely by the "volume of commerce" affected by the offence; and (ii) a defendant's criminal history. At a sentencing hearing, disputed factual issues are litigated with the judge resolving factual issues. After the judge determines the advisory guideline range of imprisonment, the judge considers the statutory factors of sentencing enacted by Congress which include: the nature and circumstances of the offence, and whether the sentence (i) adequately reflects the seriousness of the offence; (ii) promotes respect for the law; (iii) provides just punishment; (iv) provides specific and general deterrence; (v) promotes rehabilitation; (vi) avoids unwarranted sentence disparity; and (vii) provides restitution to victims of the offence.[46]

IV Conclusion

A non-US executive embroiled in an Antitrust Division investigation faces a determined and powerful adversary. The increased co-operation among law-enforcement authorities around the globe has enhanced the effectiveness of the Antitrust Division's investigative powers. The role of defence counsel is to help navigate the non-US executive through these unfamiliar waters. From the inception of the investigation through the resolution of any criminal charges, defence counsel must constantly evaluate the government's likely case, the defence strategy and tactics, and the client's options, and advise the client as to the potential risks and benefits of all the difficult choices that must be made throughout the engagement.[47] By rigorously and continually analysing all available options, defence counsel can help the client achieve the best possible outcome. ■

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19 See Hammond, Charting New Waters, at 7.

20 See Phillip Mason, Handbook of Research in Trans-Atlantic Antitrust 481 (2006).

21 See Neal R. Stoll & Shepard Goldfein, Crossing the Border: U.S. Antitrust Agencies Take Action Globally, NYLJ, July 18, 2006.

22 See Hammond, Evolution of Criminal Antitrust Enforcement, at 14.

23 See Hammond, Charting New Waters, at 8.

24 See Hammond, Charting New Waters, at 8.

25 See 18 U.S.C. § 2516(1)(r) (authorizing wiretaps where it would uncover evidence of "any criminal violation of section 1 . . . , 2 . . . , or 3 . . . of the Sherman Act").

26 See Mark D. Alexander & Peter A. Barile III, Antitrust's New Big Brother: Feds Now Can Wiretap Suspected Offenders, ABA Section of Business Law, 15 Business Law Today 6 (Jul./Aug. 2006), available at http://www.abanet.org/buslaw/blt/2006-07-08/barile.shtml.

27 See Hammond, Evolution of Criminal Antitrust Enforcement, at 13.

28 See Barnett, Criminalization of Cartel Conduct, at 2.

29 See, e.g., U.S. Department of Justice, Press Release, U.S. And Canada Sign Agreement To Provide For Enhanced International Antitrust Cooperation (Oct. 5, 2004), available at http://www.justice.gov/atr/public/press_releases/2004/205675.pdf.

30 See Hammond, Evolution of Criminal Antitrust Enforcement, at 14.

31 See Hammond, Evolution of Criminal Antitrust Enforcement, at 15.

32 See Neelie Kroes, European Commissioner for Competition Policy, Tackling Cartels – A Never-Ending Task, address before Anti-Cartel Enforcement: Criminal and Administrative Policy – Panel session, Brasilia (Brazil, Oct. 8, 2009), available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/454&format=HTML&aged=0&language=EN&guiLanguage=en.

33 See, e.g., Hammond, Evolution of Criminal Antitrust Enforcement, at 12.

34 See, e.g., Hammond, Evolution of Criminal Antitrust Enforcement, at 12.

35 See, e.g., Barnett, Criminalization of Cartel Conduct, at 4.

36 See ABA Section of Antitrust Law, International Antitrust Cooperation Handbook (2004) at 57 (internal quotation marks & footnote omitted).

37 See U.S. Dep't of State, Preparation of Letters Rogatory, available at http://travel.state.gov/law/info/judicial/judicial_683.html;see also ABA Section of Antitrust Law, In'tl Antitrust Cooperation Handbook, at 57.

38 See Bert Swart, Cooperation Challenges for the Special Tribunal For Lebanon, 5 J. Int'l Crim. Justice 1153, 1157 (Nov. 2007) ("A general threshold in national laws that may determine the ability of states to cooperate is the dual criminality requirement. Dual criminality is often a precondition to extradition."); see, e.g., U.S.-U.K. Extradition Treaty, Treaty Doc. 108-23 (2004).

39 For more information about the Antitrust Division's leniency policies, see the Antitrust Division's Leniency Program website at http://www.justice.gov/atr/public/criminal/leniency.htm.

40 See Hammond, Charting New Waters, at 16.

41 See Fed. R. Crim. P. 5.

42 See 18 U.S.C. § 3142(c).

43 Weatherford v. Bursey, 429 U.S. 545, 559 (1977)

44 See Fed. R. Crim. P. 16.

45 See 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2.

46 See 18 U.S.C. § 3553(a)

47 The authors and other attorneys at Gibson Dunn LLP represent officers and directors of multi-national corporations who are under investigation by the Antitrust Division of the United States Department of Justice and other law-enforcement authorities. The views and positions expressed in this article are those of the authors only and do not reflect those of the firm, its lawyers or its clients.