Hispanic Latino Team Blog

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What Every Company Should Know about Multi-Jurisdictional Cartel Investigations: Compliance Training

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This article is the first in a three-part series on multi-jurisdictional cartel investigations.

In a break from traditional enforcement trends, two recent events underscore the importance of antitrust compliance training for companies located or doing business in Mexico and Latin America. First, in November 2008, the European Commission announced that several cement companies, including Cemex, a global building materials company headquartered in Mexico, were under investigation for violating Article 81 of the EC Treaty, which prohibits cartel behavior. In May 2009, Mexico's Federal Competition Commission joined the probe, wreaking further havoc on Cemex's precarious financial position. Second, in February 2009, the Brazilian Ministry of Justice, in conjunction with the U.S. Department of Justice and the European Commission, took the lead in an antitrust investigation of compressor makers, including Empresa Brasileria de Compressores S.A.-Embraco and Tecumseh do Brasil Ltda. The scope of the Brazilian inquiry was unprecedented, with nearly 60 federal police agents, Justice ministry officials and state prosecutors working to serve six search warrants in Sao Paolo and Santa Catarina and gather evidence of wrongdoing.

The penalty for cartel violations across jurisdictions is steep. In the United States, the maximum fine under the Sherman Act for a corporation found guilty of cartel conduct is $100 million. Alternatively, fines in excess of the statutory maximum are twice the gain derived by or twice the loss caused by cartel. Individuals are also subject to criminal prosecution and face a maximum individual fine of $1 million and jail term of 10 years. Although the Division has previously imposed lesser sentences on non-US citiznes, this trend is changing—particularly if the individual engages in collusive activity on U.S. soil. Brazil imposes an administrative fine ranging from 1% to 30% of the gross domestic revenue of the company in the last financial year and culpable individuals must pay a fine equal to 10% to 50% of the corporate penalty. In Mexico, the Federal Competition Commission can collect fines up to 375,000 minimum daily wages for Mexico City ("MDW") (approximately $1,740,000 USD) or 10% of annual sales from

corporations and 7,500 MDW (approximately $34,800 USD) or 10% of assets from individuals. These staggering penalties far outweigh the cost of a successful compliance program, which may stop cartel activity before it takes root. Set forth below are principles of effective training gleaned from our vast experience in dealing with corporations and individuals.

1. Focus Intensively on Senior Management

The primary actors in international cartels typically are the top executives at the corporations—the CEOs and heads of sales—who have responsibility for global operations. Accordingly, the nature of compliance training should shift from general and more basic training of the sales organization to a more sophisticated and nuanced training "seminar" for senior executives. Most compliance programs simply announce that hard-core violations such as cartel activity will not be tolerated, but effective training must candidly examine the "gray areas" of antitrust law—*i.e.*, discussions with competitors and other conduct that appears to be less blatant than price-fixing—that are likely to crop up in commercial dealings. Ideally this dialogue should occur in an atmosphere that encourages reflection and openness, free from the judgment of their immediate superiors.

2. Explain the Language of Antitrust Law

In cartel cases, victory or defeat often hinges on the words that an executive uses to communicate with competitors, customers and colleagues—as interpreted by the enforcers. Because a few words or even the absence of words can be characterized as an agreement, and thus a violation of law, executives need specific training on how someone can spin their words or their silence to launch an antitrust investigation. While boastful comments about aggressive business practices or hostility to customers are obviously verboten, references to "following prices," "cooperating," "harmonizing" or "organizing" also may suggest collusion, even where none exists. This sensitivity to language applies especially to electronic media such as email and texts, which seem harmless and ephemeral until the enforcers demand their production.

3. Confront the Complexities of International Enforcement

The truly comprehensive seminar must also teach executives about the reality of concurrent, cross-border enforcement today, emphasizing the differences across competition law regimes and their leniency programs—and what to do if the worst happens and an investigation is initiated. Simulating dawn raids as well as drop-by interviews by enforcers—*e.g.*, questioning at their home or as they travel—is a must. Because the prison sentences and fines for obstructing justice often exceed those imposed for antitrust violations, training should also impart that the destruction or alteration of any document relevant to an investigation is absolutely prohibited. Finally, senior executives should be educated that their suppliers could well be fixing prices or manipulating the market on products sold to their company. A state-of-the-art compliance seminar will teach the executives how to protect the company and its shareholders—and recover appropriate damages if the company is a victim of an antitrust conspiracy.

4. Tie the Executive's Conduct to Consequences

Despite the company's best efforts, some executives will deny the seriousness of cartel activity unless their own self-interest is at stake. Accordingly, the company must leave no doubt that serious penalties, including but not limited to immediate termination and forfeiture of corporate benefits such as stock options and retirement, will befall those employees who engage in cartel activity. These consequences must be set forth in corporate handbooks, added to the employment contracts of senior executives and stated forcefully in compliance training so that the repercussions are clear and immediate to those at risk.

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