


SAA Update:

- Mergers and Acquisitions
- Price Fixing and Collusion

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Update 2: Price Fixing/Collusion



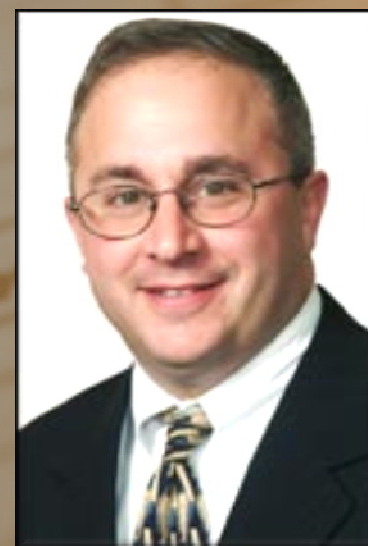
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Recent DOJ Antitrust Investigations in the Automotive Industry and How to Respond When the Government Comes Knocking

Overview

- Current Investigation
- Illegal Conduct
- Penalties
- Leniency and Amnesty
- What's Next?

Timeline

- February 2010: Enforcers in the U.S., Japan and Europe coordinate raids on the targeted companies.
- September 29, 2011: The DOJ announced a plea deal with Furukawa Electric.
- October 2011: Two follow-on class action lawsuits are filed.

Enforcers

- United States
 - Department of Justice, Antitrust Division
- Japan
 - Fair Trade Commission
- Europe
 - European Competition Commission

Conduct

- The Information filed in the Furukawa case identifies two type of illegal conduct:
 - Price-fixing
 - Bid-rigging

Price-fixing

- An agreement among competitors to set prices or price levels, or terms and conditions for commodities or services.
- Per se illegal.
- Examples:
 - Setting prices.
 - Uniform discounts or eliminating discounts.
 - Price formula.

Bid-rigging

- An agreement among competitors to determine the successful bidder at a bid-letting.
- Per se illegal.
- Examples:
 - Predetermined winner with “courtesy” bids.
 - Agreements not to bid.
 - Rotating “winners.”
 - Allocating geographic areas.

Market Allocation

- An agreement among competitors that each competitor will service certain customers and will not compete for another competitor's customers.
- Per se illegal.

Penalties under the Sherman Act

- Corporate penalty:
 - Fine of up to \$100 million.
- Individual penalty:
 - Fine up to \$1 million.
 - Prison term up to 10 years.

Alternative Fine Provisions

- Potential for higher fines:
 - Twice the conspirators' gain.
 - Twice the victims' loss.

Penalties

- Furukawa agreed to pay a \$200 million fine.
- Three of its executives will serve jail time.
 - Mgr. of Honda Sales Division – 12 months
 - CFO – 15 months
 - Gen. Mgr. of Honda Sales Division – 18 months

Leniency

- The Antitrust Division's leniency program helps corporations avoid criminal convictions and fines, and individuals avoid criminal convictions, prison terms and fines.
- You must be the ***first*** to confess participation and must fully cooperate in the investigation.

Type A Leniency

- Type A Leniency is available only before the Division has received any information about the activity being reported from any source.

Type A Leniency

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

Type A Leniency

- Benefit for corporation
 - Corporation is not charged criminally for the activity being reported
- Benefit for directors, officers, and employees of the corporation
 - Will not be charged criminally if they admit their wrongdoing and continue to assist the DOJ in the investigation

Type B Leniency

- Type B Leniency is available even after the Division has information about the illegal antitrust activity, though the applicant must still be first in line.
- But the applicant must now show that granting leniency to it would not be unfair to others, in addition to the Type A factors.

Type B Leniency

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;
3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
6. Where possible, the corporation makes restitution to injured parties; and
7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

Type B Leniency

- In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

Type B Leniency

- Benefit for corporation
 - Same as Type A Leniency – not charged criminally
- Benefit for directors, officers and employees of the corporation
 - Technically: treated as if they'd approached the DOJ individually – possibility of immunity on a case-by-case basis
 - Practically: generally same as Type A Leniency – not charged criminally

Marker System

- A “marker” will hold a leniency applicant’s place in line while the applicant gathers additional information to perfect the leniency application.

Amnesty Plus

- If a company is not the first to apply for leniency, it may still be able to obtain “amnesty plus” if it reports its involvement in a separate antitrust conspiracy.

Amnesty Plus

- Company XYZ is under investigation for its participation in an international cartel in the widgets market. As part of XYZ's internal investigation, it uncovers XYZ executives' involvement in a separate conspiracy in the sprocket market. There is no current investigation of the sprocket market.

Amnesty Plus

- If XYZ admits to participation in the sprockets conspiracy and cooperates in the investigation, it may qualify for amnesty plus.
- Benefit in the sprocket investigation:
 - Leniency (no fines and no jail time)
- Benefit in the widget investigation:
 - “substantial additional discount” in its fine

Amnesty Plus

- Amnesty plus discount is calculated based on (1) the strength of the evidence provided by the cooperating company in the leniency product; (2) the potential significance of the violation reported in the leniency application, measured in such terms as the volume of commerce involved, the geographic scope, and the number of co-conspirator companies and individuals; and (3) the likelihood the Division would have uncovered the additional violation absent the self-reporting.

Penalty Plus

- XYZ discovers the sprocket conspiracy and does nothing. The Antitrust Division later learns of the sprocket conspiracy, learns that XYZ had knowledge of the conspiracy, and prosecutes XYZ.

Penalty Plus

- The DOJ will urge the sentencing court to consider XYZ's and any culpable executive's failure to report the conduct voluntarily as an aggravating sentencing factor.
- Additional penalty to company:
 - Ask court to impose term and condition of probation
- Additional penalty to individuals:
 - Fine or jail sentence at or above the upper end of the Sentencing Guidelines.

What's next?

- More pleas?
- Grand jury?
- Follow-on class action litigation.
 - Treble damages.
- Opt-out litigation?

The Civil Class Action Lawsuits

- “Indirect purchaser” suits – plaintiffs are dealers or car purchasers that did not purchase directly from the defendants.
- Indirect purchasers cannot recover damages under Federal antitrust law.
- Damages under state antitrust statutes in approximately 30 states
- All the private lawsuits are principally brought under these state laws

Criminal v. Civil Cases

- In criminal cases, the issue is “did they conspire?”
- In private indirect purchaser class action, “did they” is not only, or necessarily most important, issue.

Key battles over:

- Class certification -
 - e.g., is every consumer claim the same when car price is based on individual negotiations with dealer?
- Damages – how much more (\$0?) did consumer pay for car?
- Antitrust standing – Are there too many people / steps between conspiracy and car buyers?

Class Actions Already Filed

- *Lacava v Delphi* 11-cv-14399 (EDMI; 10/5)
- *Bott v. Delphi* 11-cv-4949 (ND Cal; 10/6)
- *Nicoud v Furukawa* 11 cv 5057 (CD Cal; 10/17)
- *Ballek v Delphi* 11-cv-14555 (EDMI; 10/17)
- *Junkins v. Delphi* 11-cv-14556 (EDMI; 10/17)
- *Landers v. Delphi* 11-cv-757 (ED Arkansas; 10/18)
- *Superstore Auto. v Delphi* 11-cv-3092 (D. Minn; 10/19)

Quick Summary – How We Got Here?

- DOJ Antitrust Division Program –
 - The “Early Bird” Catches the Worm:
 - Amnesty, Leniency, Amnesty Plus, Penalty Plus
 - Creates HUGE incentive for companies to investigate themselves and race in to tell the government what they did wrong
 - Not only with respect to criminal investigation but with respect to follow on class action litigation that is certain to follow
 - The “Plus” programs are designed to ferret out full and complete information because if first in, don’t want 2nd (or 3rd . . .) to come in and tell the government something that you did not

Search Warrants v. Subpoenas

- Level of evidence of wrongdoing required to seize documents is higher than evidence required to issue a subpoena
- Execution of search warrants against companies used to be rare
- An increasing number of both public and private companies will find themselves on the receiving end of a grand jury subpoena or a search warrant – the two primary tools in the government's toolbox.
- It is essential for companies to know how to respond to these investigative methods swiftly, effectively, and appropriately

Preparing for and Responding to Subpoenas

- Identify a Subpoena Response Coordinator
- Identify Outside Counsel
- Develop a Response Plan
- Identify Key Personnel
- Create and Update a Record Retention Protocol
- Create a Preservation Memo to All Employees
- Responding to Subpoenas After They Arrive

Preparing for and Responding to Search Warrants

- Search Warrants are issued by judges
- Law Enforcement must establish (through Affidavit) that there is:
 - Probable cause that crime committed;
 - Evidence of that crime located in place to be searched; and
 - Identify what specifically that evidence is
- Search warrants (and affidavit) are usually placed under seal
 - In antitrust context, one can assume that at least part of the basis used for the Affidavit comes from amnesty applicant (if any)

Search Warrants – Be Prepared!

- Don't be like far too many other companies and get caught off guard
- Instead, BE PREPARED:
 - Create a Warrant Response Team –
 - Should include in-house counsel, outside counsel, and security personnel
 - Trained to object to any request to search an area outside the scope of the warrant
 - Be courteous to the agents, and certainly do not attempt to obstruct or interfere
 - Get Inventory of items seized

Search Warrants – Interviews

- Importantly, a search warrant does not require anyone to be interviewed by the agents.
- Employees should be informed that they are not required to speak with the agents
 - But no one should instruct an employee that they cannot speak to an agent – that could constitute obstruction of justice
- Separate counsel will be provided to employees if they so desire

Search Warrants – ESI






- Be prepared
 - Develop a Data map
 - Understand and document your employees authorized access to documents
 - Work with your IT Department on any potential preservation concerns

Search Warrants – ESI

ESI Data Map

(Sample Data Map)

File Types	Local drive	Network directory access	Public drive or directory	Doc. Mgmt.	Linux/Unix	E-Mail, e.g., Lotus Notes or MS Outlook & Databases	Relational database	Content security for e-mail	Laptop or home computer	Remov-able Media CD, DVD, Diskette, Thumb Drive, etc.	Other mo-bile devices PDA, phone, etc.
Personal productivity (i.e. MS Office, OpenOffice)											
E-Mail											
PDF-Text only											
PDF-non-text content											
Relation database records											
Graphic image files											
Audio files											
Video files											
XML											
TXT											
Password protected or encrypted film											
Custom flat file format											

Easily searched 
 Query possible 
 Limited search 
 Access difficult 
 No automation 

Search Warrants – ESI

- Preservation memo
 - Educate employees
 - Develop a “Response team”
 - Identify key employees and the ESI related to the response.
 - Tiered preservation memo
 - Broad and tailored
 - Required signatures/ email reply?

Search Warrants – ESI

- Preservation memo – (Continued)
 - Response team to coordinate efforts with IT dept.
 - Servers – Auto delete function disabled
 - Backup tapes
 - Employee termination process
 - Outside vendors with access to or hosting ESI
 - Update and resubmit frequently
 - Interview custodians to identify where ESI is stored

Search Warrants – ESI

■ Collection

- Understand the type of collection the government requires
 - Forensic or live collection effort
- Know the security and encryption your company uses on data before collection.

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Q&A

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