

ANTITRUST VIOLATION RESULTS IN FOUR YEAR JAIL SENTENCE

In January 2009, a former shipping executive was sentenced to 48 months in prison for his role in a conspiracy to suppress competition for the provision of coastal shipping services.¹ The sentence is the longest imposed in the United States for a single antitrust violation, and represents a continuing effort by the Department of Justice Antitrust Division (“Antitrust Division”) to obtain significant penalties against antitrust violators.

Peter Baci pleaded guilty in October 2008 for his role in a six-year conspiracy to allocate customers, rig bids, and fix prices for water freight shipping between the coastal United States and Puerto Rico. The companies involved in the conspiracy ship hundreds of millions of dollars worth of cargo each year, including heavy equipment, medicine, food, and consumer goods. Three other shipping executives still face charges for their alleged role in the conspiracy, and a fourth executive faces an obstruction of justice charge. All of the cases are pending before the U.S. District Court in Jacksonville, Florida.

Criminal antitrust violations are subject to stiff penalties. The maximum fine was raised by Congress in 2004 to \$1 million for individuals and \$100 million for corporations.² However, these fines can increase significantly under the alternative penalty provisions of 18 U.S.C. § 3571(d), which provide for a fine of twice the gain derived by (or twice the loss caused by) the violation. The maximum prison sentence is ten years per offense. In addition, civil claims under the Sherman Act and some state laws can expose violators to treble damage judgments totaling millions, or even billions, of dollars.

The detection, prosecution, and deterrence of cartel activities continue to be a high priority for the Antitrust Division.³ The Baci case highlights the trend of increasing penalties for antitrust violations, which has resulted in record punishments over the past several years.⁴ For example, in 2007 defendants were sentenced to serve 31,291 days in prison, nearly double the number from the next highest year, 2005. Fines have also increased, netting over \$2 billion since 1997 -- the largest single fine being \$500 million from Hoffman-LaRoche for its role in a vitamins

¹ Press Release, Antitrust Division, Department of Justice, *Former Shipping Executive Sentenced to 48 Months in Jail for His Role in Antitrust Conspiracy* (Jan. 30, 2009), available at http://www.usdoj.gov/atr/public/press_releases/2009/242473.htm.

² 15 U.S.C. § 1, amended by Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 665.

³ See Scott D. Hammond, *Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program 1*, presented to the ABA Section of Antitrust Law (Mar. 26, 2008), available at <http://www.usdoj.gov/atr/public/speeches/232716.htm>.

⁴ Antitrust Division, Department of Justice, *Workload Statistics: FY1998-2007* (2008), available at <http://www.usdoj.gov/atr/public/criminal.htm>.

conspiracy. The increase in jail time has affected not only U.S. participants in cartel cases, but foreign nationals as well, as the Antitrust Division steps up efforts to prosecute violators around the world for activities that affect competition in the United States. In the past two years, nationals of France, Korea, and the United Kingdom have been sentenced to U.S. jail terms that have ranged from 14 to 30 months for alleged violations of federal antitrust law.

The Antitrust Division credits a number of factors for the stiffer sentences, including the increased maximum statutory penalties enacted by Congress in 2004; the increased willingness of courts to impose longer sentences; and the increased cooperation of foreign enforcement agencies. Each factor has bolstered the Antitrust Division's ability to insist on more punitive plea agreements. In addition, the Antitrust Division has increased efforts to prosecute offenses outside of the Sherman Act that affect the competitive process -- often in fraud and corruption cases involving government contracting -- as well as pursuing obstruction of justice charges against those who seek to conceal cartel conduct in connection with a government investigation.

The Antitrust Division's leniency program provides incentives for cartel participants to race to be the first participant to notify the Antitrust Division about cartel activity. In particular, the first participant whose notification is recognized by the Antitrust Division obtains reduced potential exposure and effectively increases the potential exposure for other participants. The leniency program has aided the Antitrust Division significantly in its criminal enforcement of the antitrust laws.

While President Obama's nominee to head the Antitrust Division, Christine Varney, has yet to be confirmed, the pursuit of criminal antitrust violations is expected to remain a high priority for the administration. Both U.S. and foreign executives should remain sensitive to potential antitrust issues, especially in an economic environment in which there is increased pressure to defend profits and market share. Indeed, some studies show that antitrust violations and enforcement increase in times of economic turmoil.⁵ An effective and active compliance program is thus critical to protecting a company and its executives against the risk of substantial fines, civil damages, and incarceration.

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⁵ See, e.g., Vivek Ghosal and Joseph Gallo, *The Cyclical Behavior of the Department of Justice's Antitrust Enforcement Activity*, 19 Int'l J. Indus. Org. 27 (2001).

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