

Managing Your Global Antitrust Risk (and Rewards)

Panelists

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Richard Wallis, Microsoft Corporation

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MCCA GLOBAL TEC FORUM

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LATHAM & WATKINS LLP

COTCHETT PITRE & MCCARTHY LLP

Agenda

- 1. Antitrust 101**
2. Practical Tips
3. Managing Your Risks and Rewards

Background

- Section 1 of the Sherman Act
 - Prohibits agreements that unreasonably restrict competition
 - Some agreements are “per se” → always illegal
 - Everything else is “rule of reason” → do benefits to consumers outweigh harm to competition?

Examples Of “Per Se” Illegal Behavior

- Any agreement NOT to compete is “per se” illegal, including:
 - Price fixing (broadly defined)
 - Bid rigging
 - Allocating customers, products, or territories
 - Output restrictions
- No defense to “per se” illegal behavior

What is an “Agreement”?

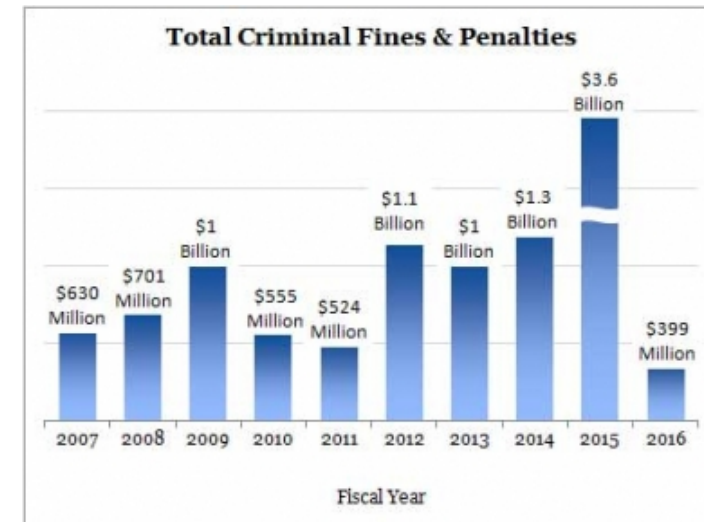
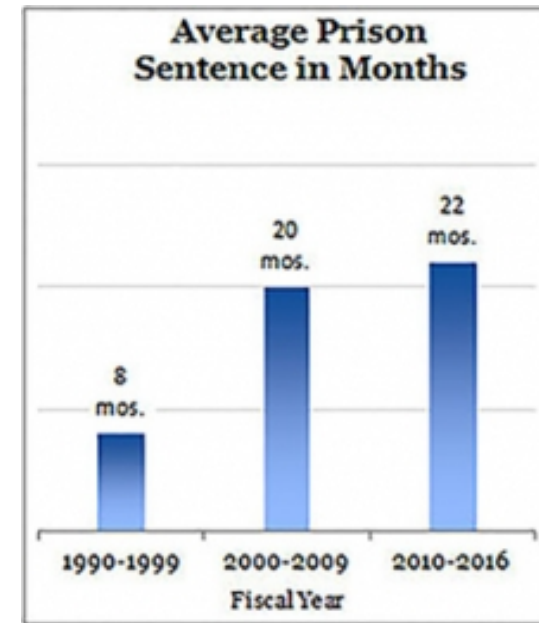
- Does not matter if agreement is only verbal
- Does not matter if agreement is ultimately ineffective or not even carried out
- How do you prove an agreement?

Section 1 Enforcement (Civil)

- Private plaintiffs (class actions, customers, and consumers)
- Also DOJ, FTC, and State Attorneys General
- Joint and several liability for treble (3x) damages
- Attorneys' fees and costs

Section 1 Enforcement (Criminal)

- Individuals
 - Up to 10 years imprisonment, \$1M in fines
 - Exclusion from US for minimum of 15 years
 - Possible arrest and extradition in other countries
- Corporations
 - Up to \$100 million in fines; or
 - “Twice the gain, twice the loss”
- Compliance Programs and Monitors
- Leniency Program = immunity for first to self-report



Conspiracies Come in All Shapes & Sizes

- Increasing government and private enforcement of non-traditional conspiracies
 - Horizontal Conspiracies
 - “Hub and Spoke” Conspiracies
 - Other Conspiracies

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Minimizing Contacts

- Don't talk with competitors about price (even generally) or specific customers
 - Can be legitimate, such as for industry benchmarking studies or merger due diligence; but, it can appear to be a way of monitoring adherence to a cartel
 - Never do it without the law department's involvement
- Don't verify customer claims about competing bids
 - Do not contact competitors to verify that a customer is telling you the truth about a competing bid
 - It could be interpreted as coordinating
- Note, information exchange is “per se” illegal in EU and elsewhere

What If Competitors Contact Me?

- Explicitly reject any offers or invitations to fix prices
 - Even when rejected, this imposes risks on the company, so alert the legal department
 - *e.g.*: You are planning to raise prices, and a competitor suggests you should both raise prices by 10%. Now it looks like price fixing
- Be careful of social interactions with competitors
 - These can lead to anticompetitive business discussions if you are not careful

What If The Job Requires Contact?

- Discuss only what is necessary to do business
 - Don't get into unnecessary discussions about the market, customers, input costs, other products
 - Avoid discussing non-public information
- Keep notes about who attended, what is discussed
 - Make an agenda and create minutes of meetings
- Politely, but firmly stop the conversation if necessary
- Get legal department involved

A Few Rules of Email Practice

The “New York Times” Rule

- How would it look in a newspaper, devoid of context or explanation?

The “Aging Humor” Rule

- It's never as funny later on, even if plainly untrue or sarcastic

The “Full Story” Rule

- If you are collecting or passing along information from a competitor, always include your lawful source of the information

Emails Last Forever

- Assume everything you write will be read by the person you least want to read it

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Managing Risks and Rewards

- How does antitrust litigation differ from managing other types of investigations and cases?
- How should companies evaluate whether to seek leniency?
- How should companies decide whether to become antitrust plaintiffs?
- What are the top mistakes that companies make in an antitrust case? What are the best practices?

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