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Antitrust Joint Venture Analysis and Criminal Enforcement Update



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Agenda

- I. Antitrust: Joint Venture Pitfalls
- II. Criminal Antitrust Enforcement Trends

COUNSEL TO GREAT COMPANIES

Antitrust: Joint Venture Pitfalls

Key Statutes

- **Sherman Section 1 (15 U.S.C. § 1):**
Coordinated conduct that restrains competition. Three models of analysis.
 - **Illegal *Per Se*:** Horizontal price fixing, bid rigging, horizontal customer, *product line* or geographic market allocation
 - **Significance:** No need to establish anticompetitive effect within a relevant market
 - **Rule of Reason:** traditionally, all other conduct, including joint ventures
 - **Significance:** Plaintiff must prove conduct substantially impairs competition in a relevant market
 - **“Quick Look” or Truncated Rule of Reason:** Conduct that is facially anticompetitive, but falls outside traditional per se categories
 - **Significance:** Burden shifts to defendant to show plausible procompetitive rationale; if defendant fails to do so, court will condemn conduct without undertaking full blown rule of reason analysis of relevant market

Key Statutes

- **Clayton Act Section 7 (15 U.S.C. § 18):**
 - Mergers and acquisitions that:
 - “tend to create a monopoly” or
 - “may substantially lessen competition” in a line of commerce
- **Key Questions:**
 - Will the merger or acquisition enable the post-merger company to exercise market power by increasing price or reducing output, quality, service or innovation? (unilateral effects)
 - Will the smaller number of remaining competitors make it easier to collude to raise prices or reduce services? (coordinated effects)

Challenge To Conduct Other Than *Per Se* Antitrust Violation Requires Evidence Of:

- **RELEVANT MARKET:** Group of products in discrete geographic area to which buyers may turn to perform same function at approximately same price
- **MARKET POWER:** Ability Of a firm or group of firms profitably to charge prices above the competitive level for a sustained period of time
- **ACTUAL OR LIKELY SUBSTANTIAL LESSENING OF COMPETITION:** Reduction in competition not offset by actual or likely benefits to consumers

Challenge To Any Conduct Other Than *Per Se* Antitrust Violation Requires Evidence Of:

➤ RELEVANT MARKET

- **Microelectronics Merger Consent Decrees:**
 - **ON Semiconductor Corp./Fairchild Semiconductor Int., Inc. (FTC 2016) – Insulated-Gate Bipolar Transistors used in automotive systems**
 - **NXP Semiconductors N.V./Freescale Semiconductor Ltd. (FTC 2015) – RF power amplifiers**
 - **Microsemi Corp./Semicoa Corp. (DoJ 2010) – QML Ultrafast Recovery Rectifier Diodes and QML Small Signal Transistors**
 - **Thermo Electron Corp./Fisher Scientific International Corp. (FTC 2007) - High-Performance Centrifugal Vacuum Evaporators**

Challenge To Any Conduct Other Than *Per Se* Antitrust Violation Requires Evidence Of:

➤ MARKET POWER

Market with 10 manufacturers, each of whom has 10% market share:



HHI: 1000 - falls well below HHI 1500 threshold for “unconcentrated” market; no manufacturer likely to have market power

Market with 10 manufacturers, largest has 82%, second largest 10%, remaining eight 1% each:



HHI: 6832 – falls well above HHI 2500 threshold for “highly concentrated” market; Manufacturer A **presumptively** has market power

Challenge To Conduct Other Than *Per Se* Antitrust Violation Requires Evidence Of:

Reduction in competition not offset by actual or likely benefits to consumers

Court or agency will consider

- Customer/competitor complaints about conduct at issue
- Efficiencies attendant to the conduct
- Industry structure and performance
- Barriers to entry
- History of entry and exit
- History (if any) of industry antitrust violations

Joint Ventures And Other Cooperative Actions

- Collaborative activity between independent firms; characterized by some degree of risk sharing and **integration** of resources to achieve an **efficiency-enhancing** common goal. May include capital, technology or other complementary assets.
- Core concern: Will the joint venture increase the parties' market power or facilitate its exercise?
- DoJ/FTC Antitrust Guidelines for Collaborations Among Competitors Section 1.2

Joint Venture Analysis

- Joint venture types:
 - Full integration (de facto merger of existing product lines)
 - Production (efficiency in manufacturing of existing products)
 - Marketing and distribution (efficiency in sell-side operations for existing products)
 - Purchasing (efficiency in buy-side operations for existing products)
 - Network (interoperability and integration among existing products)
 - ***Research and development (efficiency in development of new products)***

Joint Ventures And Other Cooperative Actions

Ask:

Is it really a joint venture?

“The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without **integration** are not a basis for avoiding per se condemnation.” Competitor Collaboration Guidelines section 3.2.

If so, will the parties have a continuing ability and incentive to compete?

Six factors:

Joint Ventures And Other Cooperative Actions

1. **Is it exclusive?**
 - Can the parties continue to compete against each other and the joint venture, either independently or through other collaborations?
 - If it is exclusive, is the goal something each party could not achieve on its own?
2. **Control over assets**
 - Have the parties surrendered control over significant assets that cannot be replaced and are essential for continuing competition against each other or the joint venture?
3. **Financial interests**
 - Are the parties' financial interests in the joint venture likely to impact adversely their incentives to compete with the joint venture?
4. **Control of competitively significant decision making**
 - Do the organization and governance of the joint venture impair the parties' ability and incentive to compete independently?
 - Does the joint venture function as an independent decision maker, or are its competitively significant decisions (price, output, level and scope of R&D efforts) controlled by the parties?
5. **Likelihood of anticompetitive information sharing**
 - Are there safeguards against collusion by the parties through the joint venture?
 - Is competitively sensitive information about each parties' internal operations protected from disclosure to the other party (for example, through firewalls or disclosure to third parties)?
6. **Duration**
 - Is the joint venture time limited or project specific, or is it intended to be continuing?

Joint Ventures And Other Cooperative Actions

Ancillary restraints:

Permissible if “reasonably necessary” to “efficiency enhancing integration of economic activity” even if they would otherwise be per se unlawful.

DoJ /FTC Antitrust Guidelines for Collaborations Among Competitors (2000) Section 1.2

Compare:

- price fixing and customer allocation for new product developed by joint venture
- overbroad prohibition on competition between joint venture partners’ existing products

ANTITRUST SAFETY ZONES (DoJ/FTC Competitor Collaborations Guidelines Section 4)

- **General Safety Zone**

Collaborations in which participants collectively account for no more than 20% of relevant market

but no protection for per se unlawful conduct

- **R&D Innovation Safety Zone**

Where there exist three or more “independently controlled research efforts” comparable to those of the participants

Hypothetical

- Semiconductor makers A and B compete in sales of RF power amplifiers. These chips employ “GenX” technology.
- In response to customer demands, all chip makers serving this niche will have to develop higher end “GenXX” technology within the next three years.
- A and B propose a joint venture to develop, manufacture and sell a new chip employing GenXX technology. The joint venture agreement:
 - Commits A and B to devote all of their GenXX technology efforts to the joint venture
 - No side deals with other chip makers or independent development
 - Requires A and B to commit to produce GenXX chips at their existing respective foundries
 - No new production facilities
 - Provides the joint venture exclusive control over the marketing and sale of GenXX chips at prices and under terms agreed to by A and B.
 - No competition between A and B for sales of GenXX chips.
- Although A and B will continue to make and sell GenX chips, the GenXX chip, if successful, will render those earlier products obsolete.

HSR Premerger Notification Requirements

- Apply to joint ventures (16 C.F.R. §801.40)

One joint venture participant has annual sales or total assets of \$100 million or more, another participant has annual sales or total assets of \$10 million or more, and the joint venture will have total assets of \$10 million or more, or

The joint venture will have total assets of \$100 million or more, and at least two participants each have sales or total assets of \$10 million or more.

Note: a joint venture's "assets" include cash, IP, hard assets and any amount of credit or other obligations that a participant has agreed to provide at any time.

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Antitrust: Criminal Enforcement Trends

Criminal Antitrust Enforcement Authorities

- Criminal versus civil enforcement
 - Sanctions
 - Types of charges (antitrust specific and general white-collar)
 - Legal process and investigatory powers
 - Reputational damage
- Who brings criminal antitrust cases?
 - USDOJ-main (Antitrust Division, Criminal Sections I and II)
 - UDOJ Antitrust Division Field Offices: New York, San Francisco
 - Chicago
 - USDOJ Criminal Division (in conjunction with Antitrust Division)

When does DOJ seek criminal charges?

- Principles of Federal Prosecution (generally)
 - Sufficiency of the evidence
 - Likelihood of success at trial
 - Probable deterrent, rehabilitative, and other consequences of conviction
 - Adequacy of non-criminal approaches

When are corporations charged?

- Principles of Federal Prosecution (corporations)
 - *Nature and seriousness of the offense (primary factor)*
 - Pervasiveness of wrongdoing within the corporation
 - History of misconduct
 - Willingness to cooperate in investigation of agents
 - Pre-existing compliance program
 - Timely and voluntary disclosure of wrongdoing
 - Remedial actions
 - Collateral consequences
 - Adequacy of remedies
 - Adequacy of prosecution of individuals
- Cooperation credit applies uniquely in antitrust context

Antitrust Division's Corporate Leniency Program

- In addition to standard Fed. R. Crim. P. 35 and § 5K1.1 USSG
- Type A (first in the door, no leadership role)
 - DOJ has not already received information
 - Corporation took prompt and effective action
 - 4 C's: Candor, completeness, and continuing cooperation
 - Corporate confession (not isolated individuals)
 - Restitution where possible
 - No coercion of other party; neither leader nor originator
- Benefits
 - Total criminal immunity
 - Avoiding civil liability of treble damages and joint and several liability
- Challenge: Grand jury secrecy and whether you are "first"

Corporate Leniency Program (continued)

- Type B (once DOJ investigation has begun)
 - Corporation is first to come forward
 - DOJ does not yet have evidence against the company likely to result in a conviction
 - Prompt and effective action to end its part in illegality
 - 4 C's: Candor, completeness, and continuing cooperation
 - Corporate confession (not isolated individuals)
 - Restitution where possible
 - Granting leniency would not be unfair to others considering nature of illegality, corporation's role, and when corporation steps forward

DOJ's New Corporate Cooperation Policy

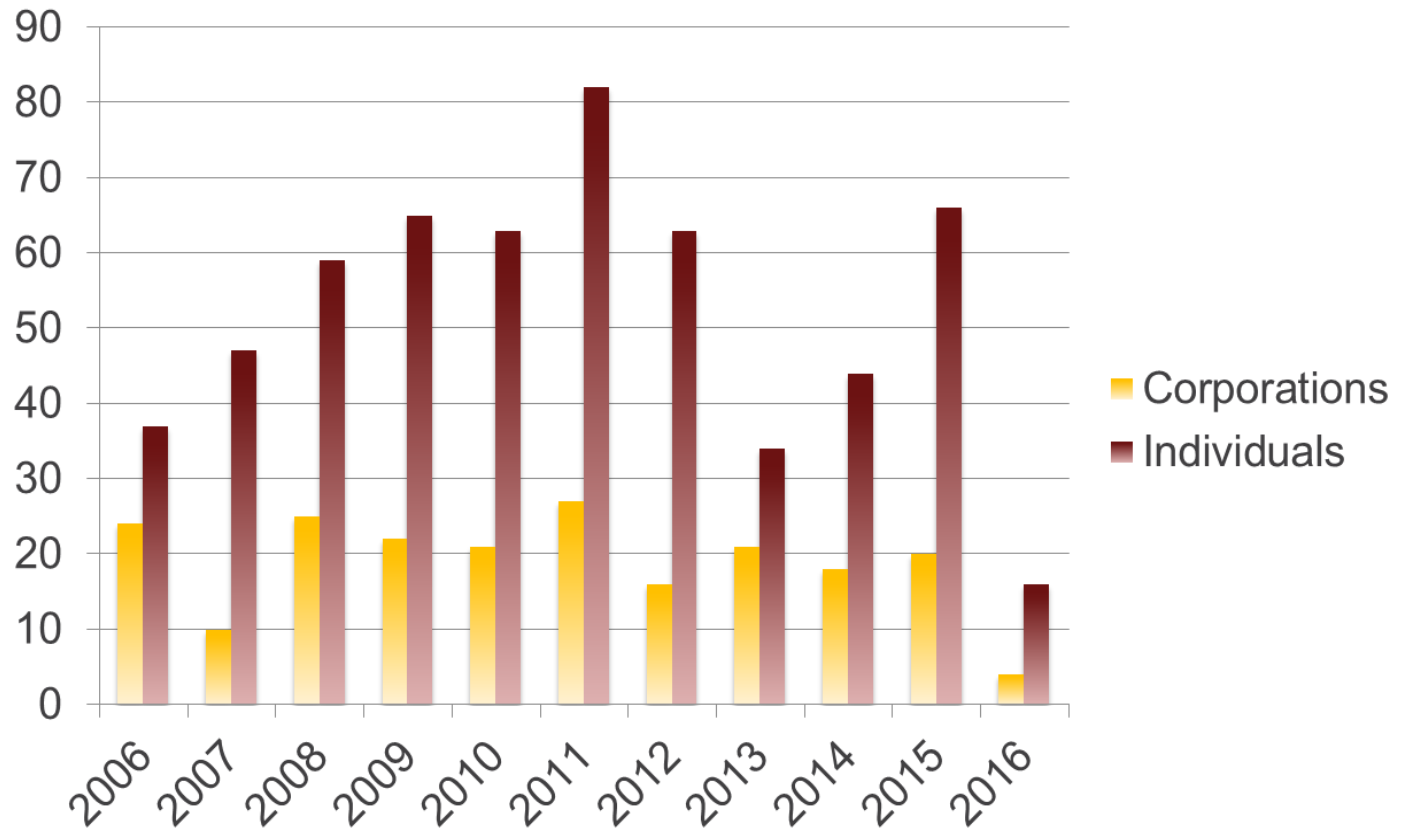
- The Yates Memo
 - Revised Principles of Federal Prosecution of Business Organizations
 - Instructs prosecutors to focus on individual wrongdoing
 - For cooperation credit, the corporation must identify “all relevant facts relating to the individuals responsible”
 - Old policy, new consequences: Cooperation credit is now “all or nothing”
 - Risk of unfairly labelling employees: *See Shell Oil v. Witt* (Texas Supreme Court)

The Yates Memo and Criminal Antitrust Enforcement

- According to Deputy Assistant Attorney General Brent Snyder:
 - The Antitrust Division has created “new internal procedures” crafted to “ensure that [the Division] is identifying and investigating all senior executives who potentially condoned, directed, or participated” in criminal conduct.”
 - “[A]fter the Yates memo . . . [the Antitrust Division is] even more inclined to charge and try even the toughest cases .”
- Are these empty words?

Yates Memo's Impact

- Lower number of charged individuals, but more relative to corporations charged



Enhanced scrutiny of the financial sector

- Plea deals relating to antitrust offenses from:
 - Citicorp, JPMorgan Chase & Co., Barclays PLC, Royal Bank of Scotland PLC pleaded guilty to manipulating the price of US dollars and euros exchanged in the foreign exchange spot market, and further agreed to fines of more than \$2.5 billion
 - UBS AG agreed to plead guilty to manipulating LIBOR and other benchmark interest rates and to pay a \$203 million criminal penalty

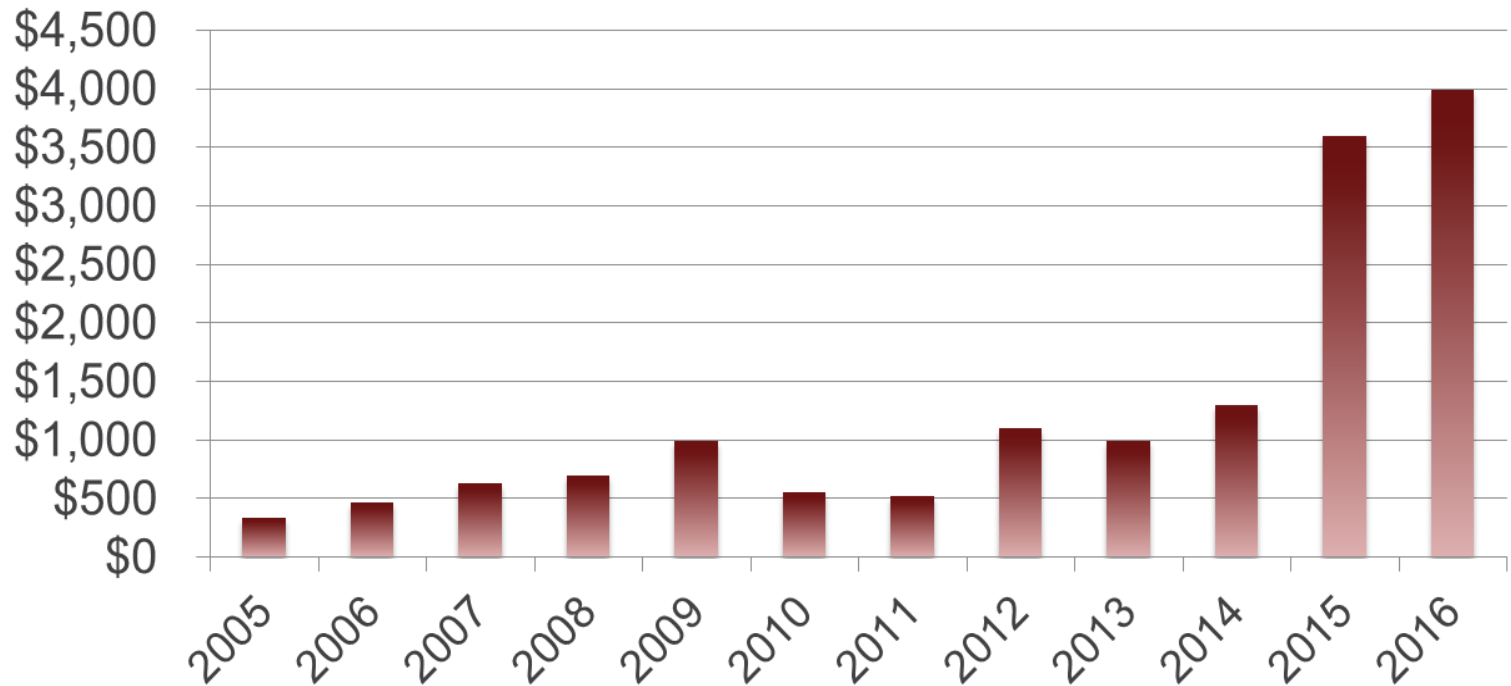
- Jail sentences of two years and one year, respectively, were imposed on two former Rabobank traders convicted last November of manipulating US dollar and Japanese Yen LIBOR
 - Prosecuting two Deutsche Bank traders, one located in the US, and one in London, for allegedly manipulating US dollar LIBOR

International Versus Domestic Criminal Enforcement

- Expanding international enforcement
 - Antitrust prosecutions of major global banks (more on this later)
 - Increasing cross-border cooperation
 - DOJ continues to take an expansive view of its jurisdiction
- US enforcement is also on the rise
 - FY2015 ended with record-breaking fines and penalties of \$3.89 billion; criminal antitrust fines and assessments for 2016 will be higher
 - Domestic investigations predominate (although several long-standing global enforcement efforts have continued, such as DOJ's auto parts investigation)

Increasing US Enforcement

Total Criminal Fines & Penalties from Antitrust Division Investigations (FY2005-2016)



Global Enforcement

- Worldwide, antitrust enforcement has increased
 - China: Release of draft guidelines regarding leniency and fine-setting
 - Brazil: Competition authority collected about \$24 million in fines from 19 companies and 22 individuals and has opened 7 new investigations
 - Chile: Increasing targeting of cartels
 - Mexico: Fines of nearly \$4.8 million against 17 corporations and individuals relating to sugar price-fixing; initiated several “Statement of Probable Responsibility” covering diverse industries; and opened several new significant investigations
 - Europe: “Brexit” creates uncertainty

Questions?

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