

INTERNATIONAL CRIMINAL LAW AND ENFORCEMENT

Expert Analysis

U.S. No Longer Has Monopoly On Antitrust Enforcement

Historically, the United States was virtually alone in the world in treating anti-competitive conduct as a criminal offense. Antitrust enforcement in the U.S. thus often stopped at the border. Increasingly, however, other countries are criminalizing such conduct and aggressively pursuing antitrust enforcement. These overseas efforts have coincided with a greater emphasis in the U.S. on investigating international anticompetitive behavior and seeking cooperation with foreign regulators. Perhaps most significantly, earlier this year, the United States secured the first-ever extradition to this country of an individual to face an antitrust charge.

In addition, the U.S. has obtained the extradition of two other individuals based on alleged anticompetitive conduct, although these extraditions hinged on the fact that the individuals had been indicted for violating fraud and obstruction of justice statutes rather than antitrust statutes *per se*. Nevertheless, these extraditions for anticompetitive conduct, combined with the increase in domestic and overseas antitrust enforcement, indicate that antitrust offenses are on the way to being treated worldwide as seriously as any other international financial crime.



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The Department of Justice's focus on international enforcement and cooperation with overseas regulators is not new. The Justice Department entered into an antitrust cooperation agreement with Germany back in 1976 and Australia in 1982. Currently, the department has antitrust cooperation agreements with 12 countries and the European Union. But many of these agreements were signed or updated in recent years. The year 2011, in particular, also saw a number of public acts by the Justice Department signaling an emphasis on international antitrust cooperation and investigations.

On July 27, 2011, the Justice Department signed a Memorandum of Understanding (MOU) on antitrust cooperation with Chinese antitrust regulators, to go along with existing agreements with other major economies such as Australia, Brazil, Canada, Germany, India, Japan, Mexico and Russia.¹ And in November 2011, the department's Antitrust Division released a white paper describing its emphasis on its

"International Program."²

But perhaps the best proof of the Justice Department's sharpened focus is its own statistics. The top 69 largest fines ever recovered by the department's Antitrust Division were imposed in international rather than domestic prosecutions, with three of the top four coming in the past two years.³ These large fines contributed to the Antitrust Division's recording \$1.1 billion in fines in both 2012 and 2013—the most it has ever recovered.⁴

Foreign Regulators

The Justice Department's antitrust MOU with China takes on added significance because Chinese antitrust regulators are becoming more aggressive. In January 2013, China's National Development and Reform Commission (NDRC) announced a \$56 million criminal penalty against Taiwanese and Korean LCD manufacturers. Not only was this by far the largest criminal penalty ever imposed by the NDRC, it was the first imposed for foreign anticompetitive conduct affecting China.⁵ In August 2014, the NDRC followed up the LCD prosecution by imposing \$200 million in fines on Japanese auto parts makers for price-fixing. These fines included the largest-ever fine imposed on a single corporation in China for antitrust offenses.⁶ Both of these prosecutions closely followed related U.S. and E.U. antitrust prosecutions, signaling that China is prepared to join

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other global authorities in pursuing international cartels.

In the past six months, Microsoft, Qualcomm and German car manufacturer Daimler all had offices in China searched by antitrust regulators in apparently unrelated investigations.⁷ The raid of Microsoft's offices apparently included almost 100 law enforcement personnel. The Daimler raid may be related to an ongoing U.S. antitrust investigation into the auto-parts industry that has resulted in dozens of prosecutions of individuals and corporations and yielded over \$2 billion in fines to date.⁸

The United States, Europe and China are not alone in their increased emphasis on antitrust enforcement. In March 2014, Japanese antitrust regulators imposed over \$200 million in fines on four domestic and foreign companies involved in marine transport.⁹ In May 2014, Brazilian antitrust regulators imposed \$1.4 billion in fines on six domestic and foreign cement companies.¹⁰ In fact, antitrust regulators appear to be unusually active in every major economy in the world.

Antitrust Extraditions to U.S.

The year 2014 saw a unique event in antitrust enforcement: the first-ever extradition of an individual to the United States on an antitrust charge. Historically, the United States was unable to extradite individuals to the U.S. for antitrust offenses. Although the U.S. has extradition treaties with many countries, the treaties include the principle of "dual criminality"—the requirement that the offense conduct be considered a criminal offense in both countries for extradition to occur. The problem for U.S. antitrust regulators has been that many countries simply do not treat anticompetitive conduct as a criminal offense. Additionally, many countries simply refuse to extradite their own citizens for prosecution in other countries.

Previously, the closest the U.S. came to a successful antitrust extra-

dition of an individual was the extradition of Ian Norris from the United Kingdom. His extradition arose out of a U.S. antitrust investigation involving the U.K. corporation The Morgan Crucible Company. In 2004, Norris—Crucible's former CFO and a citizen of the U.K.—was indicted in the United States on antitrust and obstruction of justice charges, and the U.S. sought his extradition from the U.K.¹¹ The U.K.'s House of Lords, however, ultimately rejected the request to extradite him on antitrust charges because antitrust violations were not criminal offenses in the U.K. at the time of the offense conduct. The House of Lords, however, left open the possibility that he could be extradited on related obstruction of justice charges.

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A U.K. court subsequently authorized his extradition on the obstruction charges, and Norris was extradited to the United States in March 2010 and convicted.¹² The Norris extradition thus was a qualified success for antitrust enforcement, in suggesting that creative charging decisions by U.S. prosecutors might overcome the reluctance of many countries to extradite individuals on antitrust charges.

The Justice Department recently scored a far more significant victory when Germany agreed to extradite Italian national Romano Piscioti to the United States on a pure antitrust charge—a violation of the Sherman Act (15 U.S.C. §1). The extradition arose out of an investigation in the U.S. into anticompetitive conduct in the market for marine hoses, which are hoses used to pump oil between tankers and storage facilities. A number of corporations and U.S. individuals pleaded guilty, and the Justice Department indicted and sought the

extradition of Piscioti, who was a former executive with one of the corporate defendants.

Piscioti was arrested in Germany in June 2013 and ultimately extradited in April 2014.¹³ The United States and Germany have an extradition treaty with a "dual criminality" requirement, and Germany is one of the few countries that treat certain anticompetitive conduct by individuals as a criminal offense.

Some commentators, however, have noted that Piscioti's extradition may not be the watershed event hoped for by the Justice Department. Piscioti was an Italian citizen passing through Germany on his way home to Italy when he was arrested. Although Germany extradited him to the U.S., it has specifically declined to extradite a nearly identically situated individual who is a German citizen.¹⁴ The U.S. extradition treaty with Germany—like that of many others—does not require the parties to extradite their own citizens.

In the same month that Piscioti was extradited from Germany, the United States apparently secured the extradition of another individual based on anticompetitive conduct. In 2009, a Canadian citizen named John Bennett was indicted in the District of New Jersey as part of an investigation and prosecution into bid-rigging and kick-backs involving contracts for an environmental cleanup project in New Jersey. Bennett's corporation had pleaded guilty in 2008, and in 2014 another executive at the firm named Gordon McDonald who had been convicted at trial was sentenced to 14 years in prison—the longest sentence ever imposed in the United States for an antitrust offense.¹⁵ Bennett was named in the same indictment as McDonald, and beginning in February 2010 the United States sought his extradition from Canada.

On April 14, 2014, Canada's Court of Appeal for British Columbia upheld a lower court's determination that Bennett should be extradited. Once again,

however, this may not be a significant development for U.S. antitrust regulators. Although all the factual allegations in the indictment against Bennett were clearly anticompetitive in nature, and his co-defendant McDonald was charged with a Sherman Act violation (15 U.S.C. §1), Bennett himself was actually charged only with fraud offenses—18 U.S.C. §§371 and 1031.

The Canadian court concluded in its opinion that the conduct of which Bennett was accused in the United States could result in conviction in Canada for “fraud and conspiracy to commit fraud.”¹⁶ The opinion thus indicates that Bennett was not being extradited based on dual antitrust criminality, but on dual fraud criminality. The significance of the opinion for antitrust enforcement thus is not entirely clear.

Arguably, U.S. prosecutors have missed an opportunity to set a favorable precedent with Bennett. Unlike many countries, Canada has long had criminal antitrust statutes on the books. Indeed, Canada’s original antitrust statute—The Competition Act—was enacted in 1889 and actually pre-dates enactment of the U.S. Sherman Act by one year. Perhaps U.S. prosecutors intentionally charged Bennett with fraud counts thinking it improved their chances of securing his extradition, but given Canada’s relatively strong antitrust enforcement regime, U.S. prosecutors may well have been able to have him extradited on antitrust charges alone.

Regardless, for U.S. regulators this is probably a distinction without a difference. Bennett apparently will be delivered to the United States to face prosecution for anticompetitive conduct, and there may be few antitrust offenses that cannot be recast as frauds. The Bennett opinion, coming in the same month that Germany extradited Piscioti, makes clear that overseas individuals accused of antitrust offenses in the U.S. will no longer have the benefit of the rest of

the world’s historically lax antitrust enforcement policies. For now, U.S. prosecutors may hedge their bets on securing antitrust extraditions by charging anticompetitive conduct under more traditional fraud statutes. But given the dramatic increase in global antitrust enforcement and cooperation, other countries will almost certainly join Germany in extraditing individuals to the United States on antitrust charges alone.

Conclusion

All signs point to an era of dramatically increased global antitrust enforcement. Overseas regulators that typically lagged the U.S. in antitrust enforcement are now aggressively pursuing it. And now that regulators worldwide are recognizing the massive financial penalties that can result from antitrust enforcement, expect them (to paraphrase Willie Sutton) to go where the money is. Although large financial penalties are not new to multinational corporations, the rising level of cooperation among antitrust regulators is cause for concern for any corporation engaged in international commerce. Moreover, the extraditions to the United States of Norris, Piscioti and presumably Bennett give individual employees of corporations engaged in international commerce plenty to think about.

Ironically, however, overseas antitrust regulators may eventually pose greater risks to individuals and corporations than U.S. antitrust regulators ever did. Many other countries simply do not have the same procedural restraints and protections of individual rights found in U.S. law. As a result, the day may come when individuals actually prefer to be extradited to the United States to face antitrust prosecutions.



1. See Department of Justice Antitrust Division, “Antitrust Cooperation Agreements,” available at <http://www.justice.gov/atr/public/international/int-arrangements.html>.

2. Department of Justice Antitrust Division, “The Antitrust Division’s International Program,” Nov. 2011, available at

<http://www.justice.gov/atr/public/international/program.pdf>.

3. See Department of Justice Antitrust Division, “Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More,” July 9, 2014, available at <http://www.justice.gov/atr/public/criminal/sherman10.html>.

4. See Department of Justice, “Criminal Enforcement Fine and Jail Charts,” available at <http://www.justice.gov/atr/public/criminal/264101.html>.

5. See Congressional-Executive Comm. on China, “Chinese Authorities Fine LCD Cartel in First Case Concerning Conduct Outside China,” Feb. 12, 2013, available at <http://www.cecc.gov/publications/commission-analysis/chinese-authorities-fine-lcd-cartel-in-first-case-concerning>.

6. See “China Levies Record Antitrust Fine on Japanese Firms,” Bloomberg News, Aug. 20, 2014, available at <http://www.bloomberg.com/news/2014-08-20/china-levies-record-antitrust-fine-on-japanese-firms.html>.

7. See Neil Gough, Chris Buckley and Nick Wingfield, “China’s Energetic Enforcement of Antitrust Rules Alarms Foreign Firms,” N.Y. Times, Aug. 10, 2014, available at <http://www.nytimes.com/2014/08/11/business/international/china8217s-energetic-enforcement-of-antitrust-rules-alarms-foreign-firms.html>.

8. See Department of Justice, “Antitrust Division Update 2014, Auto Parts Investigation,” available at <http://www.justice.gov/atr/public/division-update/2014/auto-parts.html>.

9. See Japan Fair Trade Commission, “The JFTC Issued Cease and Desist Orders and Surcharge Payment Orders against International Ocean Shipping Companies,” Mar. 18, 2014, available at <http://www.jftc.go.jp/en/pressreleases/yearly-2014/March/140318.html>.

10. See Mario Sergio Lima, “Holcim Among Six Fined \$1.4 Billion in Brazil Cartel Case,” Bloomberg News, May 29, 2014, available at <http://www.bloomberg.com/news/2014-05-29/holcim-among-six-fined-1-4-billion-in-brazil-cartel-case.html>.

11. *U.S. v. Norris*, No. 03 CR 632 (E.D. Pa. Dec. 13, 2010).

12. Department of Justice, “Former CEO of The Morgan Crucible Company Sentenced,” Dec. 10, 2010, available at http://www.justice.gov/atr/public/press_releases/2010/265028.htm.

13. *U.S. v. Piscioti*, No. 10-60232 (S.D. Fla. Aug., 26, 2010).

14. See, e.g., Shepard Goldfein & James A. Keyte, “Justice Department’s First-Ever Antitrust Extradition,” N.Y.L.J. June 10, 2014, available at <http://www.newyorklawjournal.com/id=1202658655244/Justice-Departments-First-Ever-Antitrust-Extradition?slreturn=20140914174521>; see also Nicholas M. De Feis and Philip C. Patterson, “Citizenship a Good Defense Against Extradition—But Not in U.S.,” N.Y.L.J., Dec. 14, 2012 (noting that unlike the United States, many foreign countries will not extradite their own citizens).

15. See Department of Justice, “Former Project Manager Sentenced to Serve Time in Prison,” March 3, 2014, available at http://www.justice.gov/atr/public/press_releases/2014/304133.htm.

16. *United States v. Bennett*, 2014 BCCA 145 (B.C. Court of Appeal Apr. 14, 2014), available at <http://www.courts.gov.bc.ca/jdb-txt/CA/14/01/2014BCCA0145.htm>.