

What Price Cooperation? The Ever Increasing Cost of Global Antitrust Cases

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Introduction

The past few months have seen considerable activity in the long-running air cargo price-fixing investigations. More than four and a half years after the worldwide raids of Valentine's Day 2006, the Department of Justice's Antitrust Division (the Division) secured guilty pleas within the past month from its 17th and 18th air carriers, Polar Air and China Air, and an additional \$57.4 million in criminal fines. In total, the guilty pleas have yielded fines to the Division in excess of \$1.6 billion, making the air cargo cartel its most lucrative prosecution to date.

Guilty pleas and enforcement fines have not been limited to the U.S. alone, with competition authorities from Australia to South Korea to the United Kingdom meting out follow-on sanctions to many of the companies that previously agreed to plead guilty. The European Commission is expected to announce substantial fines to a number of companies next month. Civil plaintiffs too have obtained settlement agreements from a number of companies in connection with U.S. class action litigation, while simultaneously pursuing lawsuits in civil courts in Europe and elsewhere.

The events of the air cargo investigation bring into sharp focus one of the underlying premises of the Division's Leniency Program: that a company benefits by confessing wrongdoing, admitting

antitrust liability, and cooperating with the government's investigation. The benefits to the "first-in" company are well-known in that the company escapes criminal prosecution, but the Division also encourages others to confess and cooperate with the promise of more favorable treatment in terms of fines and limits on individual executives targeted for prosecution.¹ The success of the policy – and the financial rewards the U.S. Treasury has reaped from it – has led to an increasing number of global enforcement agencies adopting similar policies. These days, however, a company with worldwide operations must carefully consider whether to embark on the road of cooperation with the Division. Once made, that decision inevitably compels a company to trot around the globe reaching settlements with a multitude of enforcement agencies, each eager to claim its financial penalty. And given the increasing aggressiveness of plaintiffs' lawyers seeking U.S.-style class action redress in overseas jurisdictions, admissions of liability to criminal violations significantly hamper a company's ability to defend against accompanying civil litigation both in the U.S. and overseas. In such a situation, a company may very well ask the question: What price cooperation?

Criminal Enforcement Actions

The Division's Leniency Program

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Since its inception in 1993, the Division's Leniency Program has been based on the simple premise that a company involved in a cartel can escape criminal prosecution if it is the first to confess its wrongdoing to the Division and agrees to cooperate against other cartel members. The advantages of the policy to the Division are obvious in that it obtains evidence of a conspiracy from an applicant undoubtedly eager to provide evidence implicating fellow members of the cartel, often business competitors, in improper conduct. Not all cartel cases, however, involve classic price-fixing activity with competitors reaching agreements in smoke-filled rooms. Some companies may be willing to seek first-in leniency protection when the potential antitrust conduct is troubling, yet nebulous. To incentivize other companies to plead guilty and cooperate with the investigation, the Division has in recent years touted the benefits to companies that come in as the second leniency applicant, or third, or fourth, or beyond. Such companies are promised reductions in fines and limits on the number of executives carved out for individual prosecution.² But these incentives come with one key downside: the terms of the Leniency Policy require the company to plead guilty to at least one criminal violation of the Sherman Antitrust Act. Only the initial leniency applicant avoids a public guilty plea in U.S. federal court.

The Division's policy of encouraging companies to cooperate has coexisted uneasily in recent years with the department's other policy of strengthening sanctions by seeking higher criminal fines paid by companies and longer sentences imposed on individuals. Leadership at the Division has spoken approvingly of the strengthened sanctions that the department has recently obtained.³ The air cargo investigation provides a good example that even companies that cooperate early in the investigation can still face significant sanctions. The Division awarded British Airways and Korean Airlines joint "second-in" leniency behind Lufthansa, the presumed amnesty recipient. Each company pled guilty to a Sherman Act antitrust violation in federal court in August 2007 and each received a \$300 million fine.⁴ Eleven executives of British Airways,

including individuals in senior leadership roles, were carved out of the plea agreement, thus preserving the Division's ability to pursue individual criminal penalties against them, along with seven executives from Korean Airlines. Since the pleas by British Airways and Korean Airlines, 16 other companies have agreed to plead guilty and collectively pay an additional \$1 billion in criminal fines. The combined Air France-KLM, which had operated independently during much of the alleged cartel period, paid a \$350 million fine in 2008, but no other individual company has been fined an amount close to the \$300 million paid by both British Airways and Korean Airlines.

Global Enforcement Agencies

The Division is not alone in imposing sanctions on companies in the air cargo investigation. A multitude of jurisdictions have strengthened their antitrust statutes and implemented policies modeled on the Division's Leniency Program. Whereas 15 years ago, no country outside of the United States had an active antitrust enforcement program, now jurisdictions as far afield as New Zealand, South Africa, and Brazil all have commenced air cargo investigations. Thus, a company with worldwide operations can no longer expect closure after reaching a deal with the Division and pleading guilty. Instead, once it decides to settle a cartel investigation with an enforcement agency in one jurisdiction, it often has little option but to reach agreements in other jurisdictions where its conduct may be implicated. Enforcement agencies cooperate with one another and admissions, testimony, and documents produced to one will be shared across borders.

In the air cargo investigation, antitrust enforcement agencies in Australia, Canada, and South Korea all have imposed multi-million dollar fines on Air France-KLM, with a fine pending in South Africa. The United Kingdom's Office of Fair Trading fined British Airways approximately \$250 million in 2007 and the company has been fined in Australia and South Korea, with fines pending in South Africa and New Zealand. Other companies such as Martinair,

Qantas, Cathay, Korean Air, Japan Air, Singapore Air, and Cargolux have reached plea deals with both the Division and overseas enforcement agencies.

The European Commission, which has rivaled the U.S. in recent years in the level of monetary sanctions imposed for antitrust violations, is set to announce fines in the air cargo investigation in early November. Commission sources have hinted already that the fines will be “substantial”⁵ and will surely extend into the hundreds of millions of euros across the industry. Joost van Doesburg, the head of European affairs and air cargo for Evo, Europe’s largest transport association, noted last year: “The backbone of the [air cargo] cartel was made up of European carriers. U.S. carriers did not take part. So the fines, and claims by shippers, will probably be higher in Europe.”⁶ Thus, the major European-based carriers, such as Air France-KLM and British Airways, that have admitted liability elsewhere face the prospect of further nine-figure fines.

By admitting liability and cooperating with enforcement investigations, carriers such as British Airways and Air France-KLM may end up paying close to \$1 billion in fines to the Division and other global enforcement agencies. This is a particularly steep amount for a company like British Airways that, after all, was second-in to the Division to confess.

Enforcement agencies would likely argue that the potential sanctions could have been far greater, but it is worth debating whether companies that pled early would have faced more stringent sanctions at a later date. For example, British Airways paid its fine in 2007 during a fiscal year when it earned a net profit well in excess of \$1 billion. Three years and one global recession later, the company ended its most recent fiscal year with a net loss close to \$1 billion. Would the fines imposed on British Airways have been as large had the company settled later? Certainly several airlines apparently have argued to the European Commission that the fines it imposes next month should take into account the economic effects of the last couple of years.⁷

Civil Litigation

One key component of the Division’s Leniency Program bears particular emphasis in connection with follow-on civil litigation against any company that cooperates and settles with the Division. The Leniency Program *requires* second-in and later companies to plead guilty to a felony count. This requirement distinguishes the Antitrust Division from other divisions of DOJ. In fraud and securities cases for example, companies and DOJ have often negotiated stiff financial penalties with deferred and non-prosecution agreements or pleas to less than felony charges. This is a critical distinction because a guilty plea to a felony violation of the Sherman Act renders a substantive defense of follow-on U.S. civil class action cases nearly impossible. No company can risk going to trial when it has admitted to criminal antitrust violations. And the dangers are particularly acute in Sherman Act civil cases when each member of an antitrust conspiracy is potentially jointly and severally liable for three times the damages attributable to the *entire* conspiracy. For example, a company with a 5% market share and tangential role in the conduct might find itself liable for a significant percentage of the trebled damages if it alone proceeds to and loses at trial.

In the air cargo case, the announcement of the raids and the Division’s investigation predictably triggered the U.S. class action lawsuits. These cases have been consolidated as *In re Air Cargo Shipping Services Antitrust Litigation*, 1:06-md-01775, in the Eastern District of New York. Several companies, including Air France-KLM and Martinair have already reached settlements with the civil plaintiffs, agreeing to pay tens of millions of dollars.

On the other hand, companies such as British Airways and other air cargo carriers that have pled guilty, continue to actively defend the case and have spent almost five years fighting over the scope of the claims and the parameters of any certified class. Despite the considerable expense incurred battling class certification – and a class will surely be certified – and other discovery disputes, companies

that have settled with the Division are unlikely to ever face plaintiffs in a trial on the merits. The dangers are simply too great to companies that have already confessed in open court to a criminal violation of the same Sherman Act that forms the basis for the claims in the civil proceeding. At some point, these defendants will surely settle with the civil plaintiffs.

One additional point bears noting with regard to the U.S. civil air cargo lawsuits. The civil plaintiffs attempted to have federal courts in the U.S. adjudicate claims under European Union law in the U.S. civil proceedings. This is part of a recent trend of U.S. antitrust plaintiffs' lawyers seeking to use the established class action practice to obtain redress for a vast set of additional plaintiffs under foreign law. The court dismissed the European Union law claims, as have other U.S. courts to consider these issues, but it presumably will not be the last attempt by antitrust plaintiffs to have a U.S. court, with its more liberal discovery standards, adjudicate foreign antitrust claims.

Although unsuccessful in asserting claims under European Union law in U.S. court, this has not stopped plaintiffs' lawyers from seeking to bring U.S.-style class action litigation to European courts. Claims Funding International ("CFI"), in conjunction with plaintiffs' lawyers from the U.S. and Europe, is coordinating class action lawsuits in Europe with the intention of recovering hundreds of millions (possibly billions) of euros from air carriers.⁸ After settling with Air France-KLM in the U.S. class action lawsuit this summer, lead U.S. plaintiffs' lawyer Michael Hausfeld and CFI sent a letter to Air France-KLM demanding compensation for European consumers affected by the air cargo cartel.⁹ Peter Koutsoukis, Managing Director of CFI, stated that "[t]he claim that will eventually be before the courts could be in excess of €500 million."¹⁰ Hausfeld and his firm already had initiated a lawsuit in the U.K.'s High Court of Justice against British Airways claiming hundreds of millions of dollars for fixing fuel surcharges on cargo flights.¹¹ That lawsuit is still pending and British Airways recently joined 32 airlines for contribution, including Air France-

KLM, Qantas and Cathay.¹² Class action lawsuits have also been filed in Australia against a number of companies previously fined by the Australian Competition Commission and the Division. The scope of pending collective actions in certain jurisdictions outside the United States remains unsettled, but it presents a considerable concern to companies that have admitted wrongdoing.

Conclusion

The Division's Leniency Policy program undoubtedly has had a significant impact on cartel enforcement in the past two decades. The Division has obtained huge fines and prison sentences for senior executives, both U.S. and foreign nationals, from companies involved in cartel activity. The public nature of the investigations and enforcement activity surely has had an impact on the behavior of companies and led to increased vigilance and training against anticompetitive conduct. And to be sure, there are instances when it may be advisable for a company to cooperate with the Division and reach a negotiated resolution via the Leniency Program. For example, if irrefutable evidence of conspiracy exists, through wire-tapped conversations or confidential documents outlining cartel conduct, then a company may consider it wise to reach a negotiated resolution with the Division that provides some benefits in terms of financial sanctions and carve-outs of senior executives.

But not all cases are marked by clear-cut evidence of conspiratorial conduct. Companies need to consider very carefully the consequences before deciding on the path of cooperation with the Division. No longer is it the case that a company can simply negotiate a plea with the Division and seek to resolve accompanying U.S. class action lawsuits. The proliferation of jurisdictions in the past decade that have adopted forms of the Leniency Policy means that a company with worldwide operations must be prepared to negotiate agreements with multiple enforcement agencies. Each will seek its own monetary sanction adding to the overall cost of cooperation.

Guilty pleas to criminal charges and settlements with enforcement agencies also undermine a company's ability to defend against accompanying civil litigation. In the U.S., it is highly unlikely that any company that negotiates a plea agreement with the Division requiring admission of a felony in federal court can risk a trial against civil plaintiffs. The potential financial impact from being found jointly and severally liable for three times the damages of the entire conspiracy is simply too great. And the efforts by plaintiffs' counsel to use courts in Europe and elsewhere to pursue civil litigation will almost certainly increase in the years to come.

In all, a company that thinks it will achieve swift finality by cooperating and settling an antitrust investigation may instead face years and years of protracted dealings with enforcement agencies and civil plaintiffs around the globe. In these circumstances, a company may very well ask itself whether cooperating is too steep a price to pay.

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⁴ The British Airways fine covered \$200 million for its participation in the air cargo price-fixing conspiracy, and \$100 million for its participation in the passenger surcharge price-fixing conspiracy.

⁵ *BA, Air France face cargo cartel fines in Nov-sources*, REUTERS, Oct. 21, 2010, <http://www.reuters.com/article/idUSBRU01109120101021>.

⁶ Will Waters, *See you in court*, Nov. 16, 2009, <http://www.ifw-net.com/freightpubs/ifw/article.htm;jsessionid=D9BFB93FA74639E1A0C033D56C-6FDF80.5fa4e8cc80be35e2653c9f87d8b8be45bf6ba69a?artid=1257955569964&print-able=true>.

⁷ *See, supra*, note 5.

⁸ *See, supra*, note 6.

⁹ Ron Knox, *Hausfeld and CFI to take air cargo fight to Europe*, GLOBAL COMPETITION REV., July 13, 2010.

¹⁰ *See, supra*, note 6.

¹¹ Christine Caulfeld, *US Firm Hits British Airways With Antitrust Suit in UK*, LAW360, Sep. 22, 2008, <http://www.law360.com/articles/70067>; Caroline Byrne, *British Airways Sued in U.K. Over Alleged Air Freight Cartel*, Bloomberg News, Sep. 19, 2008.

¹² Faez Samadi, *BA drags rivals into air cargo lawsuit*, GLOBAL COMPETITION REV., July 26, 2010.

¹ Address given by Scott D. Hammond, Deputy Assistant Attorney General, DOJ Antitrust Division, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations*, at 1–2 (Mar. 29, 2006).

² *Id.*

³ Presentation given by Scott D. Hammond, Deputy Assistant Attorney General, DOJ Antitrust Division, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, at 1 (Feb. 25, 2010).