STEPTOE & JOHNSON LLP

# AMNESTY, COOPERATION, AND CONFIDENTIALITY:

# PRACTICAL THOUGHTS ON

# INTERNATIONAL ANTICARTEL ENFORCEMENT

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## INCREASED ANTICARTEL ENFORCEMENT

- The Antitrust Division has increased its international anticartel enforcement since the mid-1990s.
  - 25% of all criminal antitrust cases filed by DOJ since 1990 had some international aspect.
  - The magnitude of fines levied against international cartels has increased dramatically. In FY 1999, the total fines in criminal antitrust cases exceeded $1.1 billion.
- Foreign enforcement is also on the rise.
  - Increasingly active authorities in Canada, EU, and even Japan.

## REASONS FOR INCREASED ENFORCEMENT

- Antitrust Division's Leniency Policy (1993)
- Changes in legislation have increased penalties for cartel behavior.
- International cooperative agreements have facilitated multijurisdictional prosecutions of cartels.
  - Bilateral antitrust-specific enforcement and cooperation agreements (Canada, EU, Israel, Japan, etc.)
  - Agreements under the International Antitrust Enforcement Assistance Act (IAEAA), 15 U.S.C. §§ 6200-12.
  - Mutual legal assistance treaties (MLATs) (30 in place)

## AMNESTY ISSUES—U.S.

- It is critical to render an early assessment of the client's eligibility for amnesty.
  - Is the client the "ringleader"?
  - Are client's officers, directors, and employees ready and willing to seek amnesty and cooperate fully with the Division during the course of the investigation?
  - Is the client the first to seek amnesty? How likely is it that the Division already has evidence on the client that would sustain a conviction?
- Making such an assessment will require a prompt but thorough internal factual investigation.

## AMNESTY ISSUES—CANADA AND EU

- KEY POINT: Obtaining amnesty in the U.S. does not guarantee amnesty in other jurisdictions!
- Canada's draft amnesty provision has much in common with the U.S., such as the "first in" requirement and provisions protecting the confidentiality of evidence. However, significant differences exist, such as the requirement that disclosure be made for "any and all offenses."
- Unlike the U.S. and Canada, the EU determines whether leniency is appropriate only at the conclusion of the investigation. Leniency means only a reduction in fines.
- Local counsel is required to maximize strategic coordination.

## PROTECTING CONFIDENTIAL BUSINESS INFORMATION

- U.S. anticartel enforcement policy is at tension with itself on protecting confidential evidence acquired by the Division from disclosure to foreign enforcers or the general public.
  - Confidentiality protections are a necessary and critical element of the Division's Leniency Policy.
  - Yet confidentiality is hard to reconcile with the spirit of the international cooperation agreements that encourage agencies to exchange information.
  - States with agreements under IAEAA may demonstrate a "particularized need" to obtain disclosure of matters occurring before a grand jury, which are otherwise protected from public disclosure by Fed. R. Crim. P. 6(e).

## OTHER CONFIDENTIALITY ISSUES

- How strong are confidentiality protections in other jurisdictions?
  - Lack of accountability for violations of policy.
  - Some “leaky” enforcement authorities are known by reputation to offer uncertain confidentiality protection.
  - If the investigation is targeting an industry in which a prominent, politically-powerful national corporation (or the state itself) participates, the integrity of enforcement agency may be tested.
- Counseling clients with these concerns is made difficult by the lack of transparency in the application of other states’ confidentiality policies, and the failure of agencies to provide notice (either before or after the fact) that confidential information is being turned over to another enforcer.

## ICPAC MERGER ENFORCEMENT ISSUES

- How realistic are ICPAC's merger enforcement recommendations?
  - Neutral application of competition laws is not realistic.
  - Reforming merger vetting process is more realistic.
  - Revising notification thresholds is also realistic, and long overdue in the U.S.
  - Changing the second-stage review process is already underway in the U.S., as the U.S. enforcement authorities have taken steps permitting additional administrative review of burdensome second requests.

## <u>ICPAC MERGER ENFORCEMENT ISSUES</u> (continued)

- Identifying obstacles to development of seamless international merger review systems:
  - Need for harmonization of filing forms and requirements.
  - Greater transparency in application of foreign competition law, to recognize substantive differences between jurisdictions.
  - An improvement would be a two-step process that permits a “universal short form” to be filed in all jurisdictions, and then allows states having a legitimate interest in the transaction to “opt-in” and require a complete filing.

## ICPAC MERGER ENFORCEMENT ISSUES (continued)

- Should HSR filing fees be "delinked" from agencies' funding?
  - Complete delinking is currently unwise and impractical.
  - Any increases in filing fees should be done on a sliding scale and in conjunction with an increase in the filing thresholds.
- Regulatory authorities and the merger review process
  - Agencies (FCC, FERC) will not cede their "public interest" review of mergers without legislative action removing such matters from their jurisdiction.
  - A more realistic goal is to continue to push agencies to interpret their "public interest" standard in accordance with U.S. antitrust law and economics.