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Dawn Raid, Antitrust Charges, Decade of Litigation

By David Gustman

Shortly before the close of business on an otherwise average day, the Royal Canadian Mounted Police arrive at your client's Canadian offices. Based on claims made by a disgruntled competitor, the Mounties have a warrant to seize broad swaths of your client's files. At the same time, FBI agents in the United States are arriving unannounced at the homes of your top sales and marketing personnel, asking for the opportunity to "ask just a few questions."

The so-called "dawn raid" – jointly coordinated by the Antitrust Division of the U.S. Department of Justice and the Canadian Competition Bureau - has begun.

This is not a hypothetical. The Canadian and U.S. agencies in charge of enforcement of antitrust laws in both countries in fact did launch a raid against several large mining and chemical companies, seizing documents in Canada and interviewing potential witnesses in the United States. The DOJ conducted its criminal investigation for more than five years before closing it without bringing any charges. Of course, this did not protect the companies from the pain and expense of defending against a follow-on multi-district antitrust class action in the United States. After nearly 10 years of litigation, the Seventh Circuit Court of Appeals recently affirmed a judgment for the defendants in the consolidated nationwide class action, *In Re Sulfuric Acid Antitrust Litigation*.

You too could be faced with this scenario. In recent years there has been an increased focus on international enforcement of antitrust and competition laws, and greater coordination among international agencies. A mutual legal assistance treaty between Canada and the United States (known as MLAT) allows coordination and sharing of information obtained in investigations with international implications.

This phenomenon is not confined to the United States and Canada. Many other countries are now coordinating their investigations. As of January, 2012, the United States had MLATs with about 70 other countries for the provision of mutual assistance in criminal enforcement matters.

Although the treaties vary in their specifics, they generally provide for assistance such as in the conduct of searches, taking of witness testimony and service of documents. The United States also has less formal agreements with other countries. This cooperation has been described by the DOJ's Deputy Assistant to Attorney General for Criminal Antitrust Enforcement as a "pick-up-the phone" attitude toward cooperation with his foreign counterparts. Although in some instances it is restricted by confidentiality rules, cooperation includes the sharing of leads and background information about the relevant industry and actors, notification of the initial investigative actions, and coordination of inspections and interviews.

If you find yourself on the receiving end of a dawn raid, how do you handle the immediate aftermath and what is sure to be years to follow of criminal investigation and possible civil class action litigation?

Several lessons can be learned from the Acid Antitrust Litigation saga. First, successful results begin with implementing and maintaining a rigorous antitrust and competition law compliance program. These programs can help avoid antitrust violations in the first instance. And if a rogue employee does nevertheless commit an antitrust violation, a robust compliance program can promote early detection of that violation. This may allow the company to take advantage of leniency programs now in place in over 50 countries, many of which allow companies and their officers to avoid criminal prosecution. In the United States, participation in the DOJ's leniency program dramatically reduces the potential damages in a follow-on civil case.

But even the best compliance programs may not protect your company from a dawn raid. As with any other crisis, the best strategy is a planned response. In addition to its compliance program, any company with cross-border dealings should work with experienced counsel to develop a dawn raid contingency plan. It should be clear who will direct the planning process for the company. Among other things, this plan should include a primer for key employees on how to handle the unexpected appearance of government agents at their front door, or at their office seeking to seal off records and conduct interviews, as well as how to respond to telephone calls from government investigators. The anxiety and, in many cases, panic that naturally accompanies encounters like these is not conducive to thoughtful responses, and the result can be confusion and the communication of misinformation.

Any company with cross-border dealings should work with experienced counsel to develop a dawn raid contingency plan.

Your key executives should not have to grapple with these issues for the first time when staring through the peephole at an FBI agent. Counseling should include education on the potential dangers of these encounters, including the natural inclination to prove on the spot that they have done nothing wrong.

It is also critical when faced with a cross-border antitrust investigation to have experienced antitrust litigation counsel lined up in each jurisdiction. Counsel should have in place a plan to obtain copies of any seized documents or data and to deal with the inevitable privilege issues. They must coordinate their efforts as carefully as the investigative agencies are coordinating theirs.

With respect to obtaining counsel, keep in mind that the interests of the company and employees involved in the investigated conduct may diverge. Separate counsel to advise on any potential individual criminal liability may be necessary.

In the aftermath of the dawn raid, after your inside and outside counsel have completed their own investigation, the company must decide whether

and how to approach the government authorities to discuss the company's position. If the challenged conduct is defensible, the company should consider presenting the company position to the investigating agencies.

Even if the company avoids criminal prosecution, the risk of civil litigation remains. The criminal investigation into the sulfuric acid industry did not become public for several years, which allowed the companies to deal with the government authorities without interference of civil litigation. But once the investigation became public, civil class actions were filed in the United States almost immediately. Ultimately, the cases were consolidated into a multi-district nationwide class action, now pending in federal district court.

Civil class action litigation in antitrust cases is often protracted, time consuming and expensive. Expert economic testimony is often necessary to address the question of antitrust impact or "fact of damage." Most cases involve challenges to the expert testimony under Daubert and its progeny. In many circuits, including the Seventh Circuit, Daubert issues must be resolved before the court can render a decision on class certification.

In the Sulfuric Acid case, after costly and extensive discovery, the principal issue was whether the challenged conduct – the sale of low-cost acid produced in Canada to U.S. producers who decided to buy the Canadian acid rather than continue to produce their own acid – was per se illegal, or should be evaluated for its competitive effects under the Rule of Reason. The plaintiffs had prepared the case from the outset as though the conduct was per se illegal, but the defendants argued the conduct had plausible pro-competitive justifications that should be presented to a jury.

The determination of which test applies is critical in an antitrust case. If conduct is per se illegal, the defendants are generally limited to denying that the conduct occurred and defending against damage claims. If the conduct is not per se illegal, the question is whether the anti-competitive effects of the conduct outweigh its pro-competitive benefits.

Prior to trial, the Sulfuric Acid defendants requested that the court determine which standard applied. Rejecting the plaintiffs' argument, the trial court selected the Rule of Reason. The plaintiffs, unprepared for a trial under the Rule of Reason, allowed judgment to be entered against them so they could appeal. The Seventh Circuit, however, affirmed, agreeing with the district court that the conduct should have been evaluated under the Rule of Reason.

Notably, the conduct at issue in the civil litigation, which the Seventh Circuit concluded had plausible pro-competitive justifications, was the same conduct that the DOJ had targeted before closing its investigation without bringing charges. Beginning with the dawn raid, this plausibly pro-competitive conduct had been the subject of criminal and civil proceedings that lasted more than a decade.

International antitrust investigations and follow-on civil actions like this one present daunting challenges to those managing them. But in the current enforcement environment, it is a great advantage if your company has a contingency plan in place to deal with the initial dawn raid and an experienced cross-border defense team available on short notice. ■

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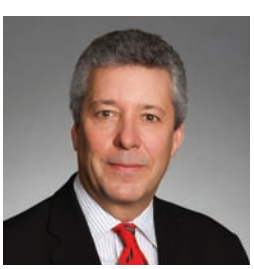

David Gustman, a senior partner at Freeborn & Peters, LLP, heads the firm's Litigation Practice Group. He is an experienced trial lawyer who has handled class actions, antitrust, finance, insurance, real estate and securities cases in the United States.
dgustman@freeborn.com