AntitrustConnect Blog

Why did the Chicken Cross the Road? To Visit DOJ and Score a Leniency

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A. The Broiler Chicken Civil Litigation/Criminal Indictment

On June 3, 2020, a grand jury in Colorado returned an indictment charging executives from Pilgrim's Pride Corporation and Claxton Poultry Farms with fixing prices and rigging bids nationwide for broiler chickens [I wonder how the grand jury met? Zoom?] The case was filed in the District of Colorado, where Pilgrim's Pride is headquartered. The individual defendants are Pilgrim's President and CEO, Jayson Penn and former Vice President, Roger Austin. Claxton's President, Mikell Fries, and Vice President, Scott Brady were also named in the indictment.

The DOJ Press Release [which did not use the companies' names] stated: "According to the indictment, from at least as early as 2012 until at least early 2017, Jayson Penn, Roger Austin, Mikell Fries, and Scott Brady conspired to fix prices and rig bids for broiler chickens across the United States. Penn is the President and Chief Executive Officer, and Austin is a former Vice President, of a chicken supplier headquartered in Colorado [~~Claxton Poultry Farms~~. Pilgrim's Pride]. Fries is the President and a member of the board, and Brady is a Vice President, of a broiler chicken producer headquartered in Georgia [~~Pilgrim's Pride~~ Claxton Poultry Farms]." See also, Wall Street Journal, June 3, 2020, *Chicken Industry Executives, Including Pilgrim's Pride CEO, Indicted on Price-Fixing Charges*

The chicken industry is dominated by a handful of companies after decades of consolidation. The five largest companies control 61% of U.S. chicken production, according to Watt Global Media, an industry publication. Pilgrim's Pride, majority owned by Brazilian meat conglomerate JBS SA, is the nation's second-largest chicken producer. Claxton Poultry Farms may have as little as less than 1% of the market. The largest producer, with approximately 21% of the market, is Tyson Foods Inc.

On June 10, 2020, Tyson released a statement saying the company "has been fully cooperating with the DOJ as part of its application for leniency under the DOJ's Corporate Leniency Program." Tyson noted that on April 26, 2019 the company was served with a grand jury subpoena from the Antitrust Division, and "Tyson uncovered information in connection with that investigation, which we *immediately* self-reported to the DOJ." The statement added: ""Our *swift and decisive actions* demonstrate our steadfast commitment to treating suppliers, customers and partners with integrity and to fostering a free and fair competitive environment." (emphasis mine).

A look at the instant replay might draw a flag for the use us the words “immediately” and “swift and decisive action.” A civil price fixing action had been filed in September 2016 accusing chicken producers, including Tyson the ones referred to in the recent indictment, with a cartel spanning at least 8 years that fixed the price of broiler chickens by reducing output. The civil litigation was far along when, on June 21, 2019, the government filed a motion to intervene and stay the discovery in the litigation because it was now conducting a grand jury investigation. The stay motion acknowledged:

> *“The government recognizes the maturity of discovery in this well-publicized case and the court’s substantial investment of resources to keep the case moving forward in a timely fashion. Nevertheless, the investigation has reached a point… where the government’s interests now warrant a temporary and tailored discovery stay.”* In re Broiler Chicken Antitrust Litigation 1:16-cv-08637 (ND Ill.), *The United States’ Motion to Intervene and Stay Discovery*, Dkt. #2268. Filed 6/21/2019.

I have no information about this case other than what is public, but given the fact that Tyson sought leniency in what was a mature investigation, the company likely has Part B conditional leniency under the Antitrust Division’s Corporate Leniency Policy. Part A is available only as long as “*At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source.”* The biggest difference between Part A and Part B is the treatment of individual.

> **Leniency for Corporate Directors, Officers, and Employees**
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> *If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.*
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> *If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.*

B. Some Thoughts on the Leniency Program

The Corporate Leniency Program is the most effective cartel busting tool in the Antitrust Division’s criminal enforcement arsenal. Nonetheless, in recent times there have been a plethora of ABA and other Bar Association programs and articles questioning whether leniency has lost is effectiveness as the number of cases, particularly international cartel cases, has dropped off. There are a number of possible reasons for the drop off in leniency applications (if you agree there has been a drop off). Some attribute the drop off to the success of the program; perhaps, hopefully,

deterrence has had an effect and there are fewer cartels to report. Or, perhaps after years of prosecutions, extraditions, jail sentences etc., price-fixers are far more careful and don't send the damming emails that may cause counsel to go running for leniency when they are discovered. The cost of leniency has also increased significantly with the number of jurisdictions aggressively pursuing cases against cartels and the expansion around the globe of class action damages cases. As a corollary, firms have complained that the ACPERA promise of single damages for a leniency applicant has been too difficult to obtain. Some believe it has been more difficult to secure a leniency from the Antitrust Division. For further reading see, *Some Theories on Why Antitrust Division Case Filings Are Down*, Cartel Capers, October 9, 2018 http://cartelcapers.com/blog/some-theories-on-why-antitrust-division-cartel-case-filings-are-down/; Robert B. Bell and Kristin Millay, *The Antitrust Division's Corporate Leniency Program, Learn from the Past or Be Condemned to Repeat it,* https://files.hugheshubbard.com/files/Antitrust-Division's-Corporate-Leniency-Program.pdf; *Interview with Donald C. Klawiter*, WhosWhoLegal: Thought Leaders, Competition 2020, available at https://whoswholegal.com/donald-c-klawiter.

This is not an note about disincentives to leniency, but a reminder that leniency can still be the best deal in town. Do disincentives exists? Sure, but do not forget what made leniency a great cartel busting tool in the first place. The first firm to successfully apply and receive conditional leniency will receive a pass from criminal prosecution and its cooperating executives are also eligible for immunity from prosecution. Moreover, while ACPERA has its critics, in theory it grants the winner of the "leniency race to the courthouse" the additional benefit [if conditions are met] of limiting liability in civil follow on cases to only single damages and damages caused by that company's own conduct (rather than joint and several liability).

Unless you are Tyson Foods and any of its executives who might obtain leniency, you might think it is not a great result that the largest member of the alleged cartel will receive immunity from criminal prosecution. And it is possible the plaintiffs in the civil case, which led to the criminal investigation, are not pleased that a deep pockets defendant has the ability to limit its civil exposure to single actual damages attributable to the applicant's commerce in the affected market. Co-conspirators remain liable for treble damages on a joint and several basis for all damages caused by the cartel. The hallmark of the Corporate Leniency program, however, and the policy that has made it so successful, is the transparency of the conditions and the certainty of obtaining leniency if these conditions are met. The Corporate Leniency Policy has some conditions related to culpability an applicant must clear: "The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity. [Part A, Condition 6]" or "The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward. [Part B, Condition 7]. Given the fact that the civil litigation had been ongoing for years with extensive discovery already in the books, every defendant had the opportunity to seek leniency. This equal opportunity likely contributed to the Division concluding that granting leniency to Tyson's was not unfair.

Leniency in this case may have been attractive to Tyson despite the potential downsides of leniency for some/all of these reasons:

- Most importantly, conditional leniency provides Tyson executives with the opportunity to obtain immunity from prosecution. This should be the dominant consideration of any company in a position to seek leniency as noted in a Division speech: *When Calculating the Costs and Benefits*

of Applying for Amnesty, How Do You Put a Price Tag on An individual's Freedom, Scott Hammond, March 8, 2001, Former Deputy Assistant Attorney General, Antitrust Division. This calculus has only increased in favor of seeking leniency with the massive volume of commerce that could easily push convicted defendants into a sentencing guidelines range reaching the Sherman Act maximum of 10 years in prison. See *Upcoming Sentencing of Former Bumble Bee CEO Christopher Lischewski*, Cartel Capers, June 4, 2020,

- As noted, Tyson's has the opportunity under ACPERA to limit its civil damage to single damages–not joint and several liability (trebled) for the entire cartel.
- Another factor in play here is that the alleged cartel seems to be domestic in geographic scope. A deterrent to seeking leniency is the fact that for international cartels, leniency may have to be sought in numerous jurisdictions. Moreover, civil class action damages are now possible in many foreign jurisdictions–not just the United States. *If* this is a purely domestic cartel, that removed one major downside to seeking leniency.

It would only be speculation as to why other companies did not apply for leniency, or did, but lost the race to Tyson's.But one condition of leniency is that the applicant "confess" a per se violation of the Sherman Act. It may be that no other company (and its executives) was willing or able to confess a violation. As the DOJ press release states: "An indictment alleges that crimes have been committed, and all defendants are presumed innocent until proven guilty beyond a reasonable doubt." As a side note: One tool in the Division's leniency arsenal is known as "affirmative leniency." Under certain conditions, the Division may approach an attractive leniency candidate, make a reverse proffer and offer a limited time to apply for the one leniency available in the investigation. An attractive leniency candidate is generally a company that is involved enough in the cartel to provide indictable evidence, but reasonably far down the culpability scale to limit the credibility cross-examination concerns should immunized executives have to testify at trial.

Another aspect of DOJ's leniency policy that may come into play as this investigation moves forward is "Leniency Plus." As described in the Antitrust Division's Frequently Asked Questions About the Antitrust Division Leniency Program and Model Leniency Letter, revised, January 26, 2017:

> *"Leniency Plus"*
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> 8. *If a company is under investigation for one antitrust conspiracy but is too late to obtain leniency for that conspiracy, can it receive additional credit for substantial assistance in its plea agreement for that conspiracy by reporting its involvement in a separate antitrust conspiracy?*
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> *Yes. Many of the Division's investigations result from evidence developed during an investigation of a completely separate conspiracy. This pattern has led the Division to take a proactive approach to attracting leniency applications by encouraging subjects and targets of investigations to consider whether they may qualify for leniency in other markets where they compete.*

The auto parts investigation is an example of how leniency plus allowed the investigation/prosecutions to roll along over many years to cover virtually every part of an automobile. Some of the defendants in the chicken case are diversified in the food industry and the

Division’s investigation may expand. It may have already if Tyson’s expanded the investigation and received conditional leniency for more products than just chickens.

C. Conclusion

Clearly, leniency is not dead. The decision to seek leniency is a very fact specific pro/con decision. And while there are perhaps increasing negatives, the “race to the courthouse” which Tyson seems to have won in this case, will only go to one company per investigation.

Thanks for reading.

This post originally appeared on the CartelCapers blog.

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