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DOJ Is Losing The Battle To Prosecute Foreign Executives

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The U.S. Department of Justice appears to be losing the battle to prosecute foreign executives who refuse to plead guilty. Statistics from the DOJ's ongoing, five-year-long investigation into cartel conduct in the auto parts industry reveal that foreign executives are far less likely to agree to plead guilty than United States-based executives, and that those foreign executives who are indicted almost uniformly refuse to submit to United States jurisdiction.[1] The DOJ has yet to extradite a single executive in the auto parts investigation who refuses to voluntarily enter the United States to face charges. As a result, foreign executives from certain countries — particularly in Asia — who refuse to plead guilty may be beyond the reach of United States prosecutors.

While almost all criminal defendants charged with a crime plead guilty, barely more than half of the individuals charged in the auto parts probe have done so. Of the 52 individuals who have been charged in that investigation, 24 — all foreign nationals — have been indicted because they refused to plead guilty.[2] Only one of these executives has voluntarily submitted to United States jurisdiction and appeared in a United States courtroom.[3]

There is little wonder why: The United States government has limited ability to reach foreign nationals who refuse to plead guilty. The DOJ has secured only one extradition in history exclusively on antitrust charges. It is, therefore, unlikely that the department will succeed in extraditing many — let alone all — of the foreign executives indicted in the auto parts investigation.

The DOJ's inability to reach foreign executives reflects a growing trend across other international corporate criminal investigations. As white collar investigations expand across the globe, the number of individual defendants located abroad has risen. Depending on the country involved, the government may not have the tools necessary to hold those individuals accountable for corporate misconduct. Therefore, the DOJ's goal of prosecuting individuals may not be fully attainable.

DOJ's Track Record Is Not Matching Its Rhetoric

In recent years, the DOJ has focused heavily on prosecuting individuals for corporate wrongdoing. In fact, "[t]he prosecution of individuals — including corporate executives — for white collar crimes is at the very

top of the Criminal Division's priority list."[4] Senior DOJ Criminal Division officials have repeatedly stated that the DOJ intends to pursue, and seek jail time for, individuals who engage in corporate white collar crime. DOJ Criminal Division Chief Leslie Caldwell has lauded "[the division's] record of success in these prosecutions" and touted those successes as a means "to show — rather than just tell — corporate executives that if they participate in [white collar crime], they will personally risk the very real prospect of going to prison."[5]

The DOJ's Antitrust Division has echoed these statements. Criminal Enforcement Section Chief Brent Snyder recently highlighted the division's "vigorous commitment to hold[ing] individuals accountable for engaging in anticompetitive conduct."[6] Antitrust Division Chief Bill Baer has praised the division's "outstanding results in holding ... individuals accountable for their wrongdoing" and underscored its "commit[ment] to continuing these efforts and to build on the division's past successes."[7]

As corporate criminal investigations expand across the globe, the DOJ's focus on prosecuting individuals has likewise extended beyond United States borders. The Antitrust Division, for instance, has reiterated that it "remains committed to ensuring that culpable foreign nationals, just like United States co-conspirators, serve prison sentences for violating the U.S. antitrust laws and to using all appropriate tools to find and arrest or extradite international fugitives."[8]

Despite the department's commitment, however, the DOJ may increasingly struggle to match its rhetoric to results. As the DOJ's auto parts cartel investigation demonstrates, the DOJ's goal of prosecuting foreign nationals is becoming elusive.

Foreign Executives Increasingly Are Refusing to Plead Guilty and Are Choosing to Ignore Charges

In February 2010, a multicountry investigation into price-fixing and bid-rigging in the auto parts industry began with coordinated raids in the United States, European Union and Japan. The investigation has since expanded to at least 10 countries and has covered dozens of auto parts.

There can be little question that the DOJ has succeeded in closing cases against companies: It has secured guilty pleas from 33 companies and netted $2.4 billion in corporate fines. With individuals, however, the results have been decidedly less successful: Of the 52 individuals the DOJ has charged, 24, or more than 45 percent, were indicted because they refused to plead guilty. Of those 24 cases, 22 remain open with no resolution on the horizon because the defendants have not only refused to plead guilty and serve time in a United States prison, but have refused to even come to the United States for an initial appearance in court.[9]

These statistics contrast sharply with the national norm. The vast majority of criminal defendants choose to plead guilty rather than force the government to prove its case at trial. According to the United States Sentencing Commission’s most recent Sourcebook for Federal Sentencing, 97 percent of all cases brought against individual defendants in 2013 resulted in guilty pleas.[10] The statistics from the auto parts investigation paint a much different picture.

The DOJ has touted the number of indictments secured from grand juries as evidence of its success in prosecuting individuals. But indicting a foreign executive through a one-sided grand jury process that does not include the defendant, counsel, or the right to cross-examine witnesses, and securing a conviction at trial against that executive are not the same. Nowhere is that distinction more evident than in the auto parts investigation, where indicted foreign executives have almost unanimously chosen to ignore charges and remain abroad, beyond the reach of United States jurisdiction. Rather than plead guilty and serve the

year-and-a-day to 16-month custodial sentence that has become the standard, these executives — all of whom are Japanese — have gambled on the low likelihood of the United States government dragging them into a United States court. And for good reason.

DOJ Has Limited Options to Prosecute Foreign Executives Abroad

As more and more indicted foreign nationals rebuff the United States legal system, the DOJ has limited tools for pursuing them abroad. It is highly unlikely that the DOJ will succeed in hauling many of the foreign executives into the United States for prosecution.

First, the government must overcome the hurdle of successfully serving process upon these individual defendants abroad, which is no easy task. Federal Rule of Criminal Procedure 4 requires the government to personally serve a criminal summons for an individual defendant,[11] but United States prosecutors and law enforcement cannot serve a criminal summons on foreign soil without permission from a foreign country.[12]

One method of requesting assistance is through a mutual legal assistance treaty. Numerous foreign countries, however, have not signed MLATs with the United States. Even if a foreign country, such as Japan, does have an MLAT with the United States, it often contains exceptions under which foreign authorities are not required to act, including when the conduct at issue would not constitute a criminal offense under the laws of the foreign jurisdiction. Furthermore, the process of requesting assistance under an MLAT can be slow and cumbersome.

Successfully serving individual defendants abroad is even more difficult without an MLAT. In the absence of such treaties, requests for assistance must be made through letters rogatory, which are essentially requests from a United States court to a foreign court seeking international judicial assistance. Such requests must comply with numerous procedural requirements, which vary by jurisdiction. In addition, because letters rogatory are not governed by treaty or other negotiated instruments, but are instead based on the international legal principles of comity and reciprocity, compliance with them falls within the discretion of the receiving court. Consequently, obtaining assistance through a letter rogatory is time-consuming and unpredictable.[13]

Second, even if a defendant is successfully served abroad, he may choose not to voluntarily submit to United States jurisdiction. In those cases, the DOJ's ability to successfully prosecute the individuals will hinge on the willingness of foreign officials to extradite them. That willingness is hardly guaranteed. The DOJ has acknowledged that it faces an uphill battle in extraditing foreign nationals on antitrust charges.[14]

In fact, the Antitrust Division has secured only one extradition in the division's history, and the unusual facts of that case provide little precedential value. Romano Pisciotti, an Italian national, was indicted under seal in the DOJ's investigation into price-fixing in the marine hose industry. Pisciotti refused to travel to the United States to face charges. The DOJ was unable to secure Pisciotti's extradition from his home country because Italy did not criminalize cartel conduct at the time. As a result, DOJ was forced to rely on Interpol member countries to respond to a "Red Notice" requiring them to detain Pisciotti if he crossed their borders. It took the DOJ more than three years from Pisciotti's indictment under seal to the time of his arrest in Germany before he was extradited to the United States for prosecution. Before the Pisciotti extradition, the DOJ failed to secure the indictment of British national Ian Norris from the United Kingdom solely on price-fixing charges stemming from the department's air cargo investigation. The U.K. ultimately extradited Norris, but on obstruction of justice, rather than antitrust, charges.

While the United States does have a bilateral extradition treaty with Japan, Japan has never before extradited an individual to the United States solely on criminal antitrust charges. It is unlikely that Japan would do so now. Japanese officials have publicly criticized United States efforts to target cartel conduct abroad,[15] and have urged United States courts to limit the reach of United States antitrust laws and instead defer to Japan's own internal enforcement mechanism.[16] Furthermore, Japan may not view the underlying conduct as serious enough to warrant extradition. The Japan Fair Trade Commission, Japan's antitrust authority, will only prosecute individuals criminally for "[v]icious and serious cases which are considered to have wide spread [sic] influence on people's livings."[17] In light of this policy, the JFTC generally has pursued individuals for antitrust violations through administrative, rather than criminal, charges.

Absent Japan's agreement to extradite, the DOJ has little control over whether the nearly two dozen Japanese executives currently under indictment will face prosecution in the United States. The Pisciotti case is a cautionary tale that the DOJ's only option may be to cross its fingers that these individuals travel outside of Japan and are swept up by Interpol. Otherwise, their outstanding indictments may, on the whole, be toothless.

DOJ's Prosecutorial Limitations Reflect a Growing Trend in Other International Corporate Criminal Investigations

The DOJ's inability to reach Japanese executives indicted in connection with the auto parts cartel investigation appears to reflect a growing trend in corporate criminal investigations. In the modern, globalized world, criminal activity increasingly crosses international boundaries. The DOJ has consequently sought to expand the extraterritorial reach of United States criminal laws. In Foreign Corrupt Practices Act, fraud and other white collar cases, the department has increasingly focused its attention on foreign actors whose criminal activity affects the United States.

The same obstacles that have frustrated the DOJ's prosecution of nearly two dozen Japanese nationals in the auto parts cartel investigation appear to hamper the department's efforts to prosecute foreign citizens in other international corporate criminal investigations. In FCPA cases, for example, more and more foreign nationals are refusing to submit to United States jurisdiction and are instead forcing the DOJ to extradite them. The department currently has indictments outstanding against 26 foreign nationals who have refused to plead guilty.[18] The vast majority of those defendants have chosen to remain abroad, outside United States jurisdictional reach. And of those defendants who have refused to consent to United States jurisdiction, not one has been extradited. In fact, at least five are known to have successfully avoided extradition.[19] Clearly, prosecuting foreign nationals in FCPA cases remains fraught with difficulty and is far from guaranteed.

Given the importance of extradition to the DOJ's stated policy of prosecuting foreign nationals for cartel conduct, the department may be looking for a test case that can help reverse its current track record. Some commentators suggest that the DOJ's next attempt will come as part of the department's ongoing auto parts cartel probe and will involve a Japanese executive charged with both antitrust violations and obstruction of justice.[20] But to guarantee extradition, the DOJ may need a case that garners more international support.

We project that the government may seek extradition in connection with the Libor interest-setting investigation, an investigation spearheaded by both the Antitrust and Criminal Divisions in connection with authorities in Europe and Asia. The Libor investigation touches all countries because, at its core, it symbolizes the collapse of the global economy that occurred in 2008. Therefore, it may represent the best

next case for the DOJ to seek extradition so that it can reaffirm its commitment to prosecuting individuals abroad.

Until then, the DOJ's success in prosecuting foreign nationals abroad remains uncertain.

—By Kirby D. Behre, Lauren E. Briggerman, and Michael Anderson, Miller & Chevalier Chtd.

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[1] This article tracks the number of public indictments and does not account for indictments under seal, which are not publicly available.

[2] For a complete list of individuals charged in DOJ's ongoing auto parts investigation, please visit: http://www.millerchevalier.com/portalresource/Charged_in_DOJs_Criminal_Cartel_Auto_Parts_Investigation.

[3] According to a motion to dismiss an arrest warrant filed by the United States in January 2015, a second executive is willing to travel to the United States to plead guilty. See United States v. Toyokuni, No. 2:14-cr-20559-GCS-PJK, D.E. 7 (E.D. Mich. Jan. 14, 2015). However, the docket sheet for Mr. Toyokuni's case does not indicate that he has travelled to the United States or appeared in a United States courtroom.

[4] Department of Justice, Remarks by Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller at the Global Investigation Review Program (Sept. 17, 2014), available at http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-1409171.html (last visited Feb. 13, 2015).

[5] Department of Justice, Assistant Attorney General Leslie R. Caldwell Speaks at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), available at http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st (last visited Feb. 10, 2015).

[6] Department of Justice, Bridgestone Corp. Executive Agrees to Plead Guilty for Fixing Prices and Rigging Bids on Auto Parts Installed in U.S. Cars, available at http://www.justice.gov/opa/pr/bridgestone-corp-executive-agrees-plead-guilty-fixing-prices-and-rigging-bids-auto-parts (last visited Feb. 20, 2015) (quoting Snyder).

[7] Department of Justice, Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division's Carve-Out Practice Regarding Corporate Plea Agreements (Apr. 12, 2013), available at http://www.justice.gov/opa/pr/statement-assistant-attorney-general-bill-baer-changes-antitrust-division-s-carve-out (last visited Feb. 10, 2015).

[8] Department of Justice, Antitrust Division, Division Update Spring 2014, Criminal Program, available at http://www.justice.gov/atr/public/division-update/2014/criminal-program.html (last visited Feb. 10, 2015).

[9] As explained above, one individual pled guilty after being indicted, and another is willing to travel to the United States to plead guilty to an indictment.

[10] U.S. Sentencing Commission, 2013 Sourcebook of Federal Sentencing Statistics at Fig. C, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/FigureC.pdf (last visited Feb. 10, 2015).

[11] Fed. R. Crim. P. 4(c)(3)(B).

[12] See Restatement (Third) of Foreign Relations Law § 432(2) & cmt. b (1987); Charles Doyle, Extraterritorial Application of American Criminal Law, Congressional Research Service, at 2, 22 (Feb. 15, 2012), available at https://www.fas.org/sgp/crs/misc/94-166.pdf (last visited Feb. 11, 2015).

[13] See Doyle, supra note 12, at 24.

[14] Memorandum of Understanding between the Antitrust Division, United Sates Department of Justice and the Immigration and Naturalization Service, United States Department of Justice (Mar. 15, 1996), available at http://www.justice.gov/atr/public/criminal/9951.pdf (last visited Feb. 13, 2015).

[15] See Yoshiya Usami, Why Did They Cross the Pacific? Extradition: A Real Threat to Cartelists? at 3 (The American Antitrust Institute Working Paper No. 14-01, Mar. 20, 2014) (citing comments from a former commissioner of the Japan Fair Trade Commission), available at http://www.antitrustinstitute.org/sites/default/files/AAIWP1401.pdf (last visited Feb. 10, 2015).

[16] See Tiffany Robertson, Antitrust Enforcement Set for Record Year of Fines in WeComply Compliance Blog (Aug. 25, 2014), available at http://www.wecomply.com/blog/post/2345877-antitrust-enforcement-set-for-record-year (last visited Feb. 10, 2015).

[17] Usami, supra note 15, at 9 (citing Japan Fair Trade Commission press release).

[18] The 28 exclude foreign nationals who are also United States residents.

[19] See Ashby Jones, "Extradition Is Hurdle in FCPA Prosecutions," Wall Street Journal (Oct. 2, 2012), available at http://www.wsj.com/articles/SB10000872396390444004704578028430536186670 (last visited Feb. 11, 2015); Samuel Rubenfeld, "UK Privy Council Quashes Kozeny Extradition to US," Wall Street Journal (Mar. 29, 2012) (discussing DOJ's inability to secure the extradition of Viktor Kozeny), available at http://blogs.wsj.com/corruption-currents/2012/03/29/uk-privy-council-quashes-kozeny-extradition-to-us/ (last visited Feb. 11, 2015). DOJ is known to have successfully extradited at least seven foreign nationals charged with FCPA-related violations. At least two others initially fought extradition before voluntarily submitting to United States jurisdiction.

[20] See, e.g., Jennifer Driscoll-Chippendale, What Does the First-Ever Extradition on an Antitrust Charge Mean for the Auto Parts Investigation? in Antitrust Law Blog (Apr. 8, 2014), available at http://www.antitrustlawblog.com/2014/04/articles/articles/what-does-the-first-ever-extradition-on-an-antitrust-charge-mean-for-the-auto-parts-investigation (last visited Feb. 11, 2015).
