Cartel Enforcement Updates

JUNE 8, 2023

The *GCR Live – Cartels* 2023 conference took place on June 7, 2023, in Washington, D.C. The agenda included a keynote address by Manish Kumar, Deputy Assistant Attorney General (DAAG) for Criminal Enforcement at the Antitrust Division of the U.S. Department of Justice, who discussed the Division's current approach to criminal antitrust enforcement, as well as panels examining cartel enforcement in labor markets, criminal monopolization, and antitrust compliance in a shifting economy. In addition, Winston's own Eva Cole spoke on a panel regarding building (and defending against) cartel cases.

In addition to DAAG Kumar, other Antitrust Division speakers included James Fredericks, Chief of the Washington Criminal II Section; Andrew Schupanitz, Special Counsel for Section 2 Criminal Enforcement; and Carolyn Sweeney Olson, Acting Chief of the Washington Criminal I Section. International enforcers included Juliette Enser, the Senior Director for Cartels at the UK's Competition and Markets Authority, and Maria João Melícias, former Commissioner of Portugal's Competition Authority. The remaining speakers were economists and lawyers from companies and private practice.

In a welcome shift from the Division's seeming reticence of late to engage in meaningful dialogue with private practitioners from both sides of the antitrust bar, Kumar, in his keynote address, embraced open conversation and invited input from a diverse range of perspectives so that the Division could incorporate feedback and ideas into its practices and policies. Kumar emphasized the Division's commitment to transparency and predictability, recognizing that these principles increase detection of antitrust violations and incentivize antitrust compliance. To ensure transparency and predictability, he underscored the Division's desire to ensure that its policies and practices are accessible and up to date.

Kumar indicated that the Division is focused on a coordinated global approach to cartel enforcement, recognizing the importance of a dynamic and vibrant global economy. He underscored the Division's commitment to international collaboration through its involvement with the Organization for Economic Cooperation and Development and the International Competition Network. He emphasized a holistic and comprehensive approach to enforcement, with the Division engaging more law enforcement partners and regulators, both within the United States and internationally.

Kumar also spoke about the Division's increasingly proactive approach to uncovering illegal cartel conduct, maintaining that the Division's Leniency Program continues to rely on the risk of detection as one of its

cornerstones. To enhance its reach, the Division is working with partners it deems force multipliers, exemplified by initiatives like the Procurement Collusion Strike Force. The Division is also continuing to expand its toolset, investing in cutting-edge collusion-detection methods—such as data analytics software to recognize suspicious bid patterns and other red flags of collusion—and hiring data scientists to work alongside its economists and attorneys. Kumar noted the Division's vigorous response to complaints and tips from industry participants, as well as referrals from other agencies, emphasizing its proactive engagement in investigations at a pace not seen in decades.

Key takeaways from the panels include the following:

- The Division is taking lessons from its spate of losses in recent labor market cases but continues to emphasize that collusion by employers does not require a unique set of legal rules.

- Criminal enforcement of monopolization continues to be a risk area for companies, particularly where monopolization conduct occurred alongside other criminal behavior.

- As the Division continues to push the envelope on the boundaries of criminal enforcement, new compliance challenges emerge, and companies should be diligent in ensuring antitrust compliance programs are keeping up with new risks and that employees are being appropriately trained.

- Companies must proactively consider the role of algorithms and artificial intelligence as they build and update their antitrust compliance programs. An effective compliance program will account for the risks associated with AI, pricing algorithms, and similar tools.

- To build successful cartel cases, the Division must focus on properly structuring cases and creating compelling narratives through sufficient documentary and testimonial evidence.

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