

The role of individuals in antitrust enforcement actions: it's personal!

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Over the years, an increasing number of jurisdictions have decided to follow the U.S. example by making it possible to go not only after companies but also after individuals who were involved in violating competition rules, creating an important additional personal incentive to comply with these rules. The theory is that 'making it personal' by sanctioning individuals in some way may be a more effective deterrent to cartels than imposing high fines on companies.

In many jurisdictions, investigations by competition law authorities have become personally relevant for current or former employees of companies that violate or have violated competition rules. An investigation can lead to severe sanctions such as prison time, substantial criminal or administrative fines and other restrictive measures for individuals (for instance disqualification from directorship). As the work of companies is done by natural persons, competition law authorities consider individuals as a 'key' source of information. For instance, individuals can play an important role within the context of an application for amnesty (or leniency) or a whistle-blower 'hotline'.

With increased exposure of individuals the relationship between companies and their employees has become more complicated and difficult questions have arisen with regard to various topics such as legal representation, possible conflicts of interest and financial compensation (for legal representation and/or possible fines).

In an effort to highlight the complicated situation of individuals in antitrust enforcement actions and identify recurring complications, we have invited experts from both sides of the Atlantic to give an overview of their relevant experience in their jurisdiction.

Competition law practitioner **Silke Heinz** looks at the way individuals are subject of investigation, procedure and fining in Germany. British criminal practitioners **Jasvinder Nakhwal** and **Nicholas Queree** reflect on the last 15 years and discuss the current state of the UK criminal cartel offences.

Dutch criminal practitioner **Marleen Velthuis** and competition law attorney **Joe Mathis** focus on the way in which the Dutch Authority Markets and Consumers has applied the concept of "factual leadership" over the years.

Experienced practitioner **Vincent Power** addresses the question of possible conflicts of interest and in particular whether the company and individuals under investigation can be represented by one and the same outside counsel. U.S. Practitioners **Bill Baer** (former Assistant Attorney General for the United States Department of Justice), **James W. Cooper** and **Philip A. Giordano** examine the vigorous cartel enforcement in the U.S. which is achieved by imposing significant sanctions on both companies and individuals who violate the law. And finally, **Ana Paula Martinez** gives the Brazilian perspective which clearly illustrates the various ways in which individuals can end up in serious trouble when participating in a violation of the competition rules.

These contributions highlight the recent developments in the area of personal liability and clearly show that competition authorities are more willing than ever to use this to enforce competition rules.

An investigation, whether it leads to proceedings and enforcement action or not, can have far-reaching consequences for individuals, professionally and personally. In view of the

interests at stake, authorities should respect the presumption of innocence and refrain from making public announcements before the individual concerned is proven guilty by a final judgment. Unfortunately, with growing media interest around the violation of competition rules, authorities do not always resist the temptation to seek publicity and engage in 'naming and shaming' before guilt has been established.