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## Planes, Trains, and Ships: Criminal Antitrust Enforcement Speeding Up for Transportation Sector

The Biden administration recently issued a sweeping Executive Order<sup>1</sup> aimed at protecting and enhancing competition, and the transportation sector—including air, ocean, and rail—is among the industries specifically identified and likely to see heightened antitrust scrutiny under the new directives. This executive action was soon followed by the long-awaited announcement of Biden’s pick to lead the U.S. Department of Justice’s Antitrust Division (“Division”), Jonathan Kanter, who, assuming he is confirmed, is widely anticipated to oversee an era of vigorous antitrust enforcement under a Democratic administration and Congress.

That goal was clear in recent remarks by current Acting Assistant Attorney General Richard Powers. In discussing the Division’s criminal enforcement trends, Powers noted that last fiscal year saw the most corporate fines and penalties of the past five years and the most open grand jury investigations in the last decade, and that the Division’s current number of indicted cases (17) across 14 different investigations is the most in modern history, and reaffirmed the Division’s ongoing objective to hold individual executives accountable for antitrust crimes.<sup>2</sup>

Now more than ever, companies must be vigilant in ensuring compliance with competition laws. While the new Executive Order focuses on industry consolidation

amongst the largest carriers and alliances that may hinder competition and increase prices, historically, the Division has repeatedly pursued conduct cases against firms suspected of cartel activity such as price fixing, market allocation, and bid rigging conspiracies, and clients should expect that enforcement focus to continue.

The Division has an array of tools at its disposal for uncovering anticompetitive conduct. It relies heavily on its leniency program to encourage self-reporting of antitrust violations by providing strong incentives to cooperators,<sup>3</sup> but also employs traditional investigative resources such as the grand jury, search warrants and subpoenas, consensual monitoring such as audio or video tape recordings, wiretaps, and the like. The Division also coordinates with other federal agencies and its international counterparts in monitoring, investigating, and prosecuting cartel activity. Cooperation with international antitrust enforcers—most of which have leniency programs of their own—includes tactics such as coordinated searches or “dawn raids,” information and evidence sharing, and extradition agreements, as well as broader coordination of international enforcement strategy through organizations like the International Competition Network. As such, firms with

global operations must ensure compliance with the anti-trust regimes of multiple jurisdictions.

In the United States, antitrust violations carry the threat of substantial corporate criminal fines—sometimes running into the hundreds of millions of dollars—as well as prison sentences for individual executives and employees, and this extends to foreign corporations and foreign nationals.<sup>4</sup> Firms also can face enormous private civil class action litigation exposure, as such cases typically follow announcement of criminal anti-trust investigations within days, even without guilty pleas or convictions. Mere allegations of a possible anti-trust violation can be enough to spur costly litigation. Thus, implementation of a robust, effective corporate antitrust compliance program is *critical* to educate employees and avoid problems *before* they arise.<sup>5</sup>

This article provides a brief overview of recent criminal antitrust enforcement in the transportation sector, focusing on international air and ocean shipping, to exemplify likely areas of scrutiny and potential consequences of misconduct.

## AIR TRANSPORTATION

President Biden’s recent Executive Order directs the Department of Justice (“DOJ”) and the Department of Transportation to coordinate on competition issues in air transportation, with particular attention to anti-competitive practices impacting passenger travel, but also more broadly to ensure improved competition with respect to market entry and improved service and capacity. Historically, the industry has been monitored closely by global antitrust enforcers and has been the subject of numerous investigations, and that level of attention is expected to continue.

In 2006, the Division commenced an international investigation of the air carrier industry in coordination with European authorities.<sup>6</sup> Leniency was granted to Lufthansa and Virgin Atlantic in exchange for their cooperation, revealing far-reaching conspiracies to fix fuel surcharges for cargo shipments and for passenger tickets.<sup>7</sup> The conspiracy was carried out through meetings and other communications in which the participants discussed and agreed to fix certain rates and surcharges, as well as to monitor and enforce them after implementation. British Airways and

Korean Air Lines soon pleaded guilty to price fixing of the surcharges on both cargo and passenger flights, each paying \$300 million USD in criminal fines, and also agreed to cooperate in the investigation. In all, 22 airlines and 21 executives have been charged in the DOJ investigation, more than \$1.8 billion USD in criminal fines have been imposed, and eight executives have been sentenced to prison. Just last year, the DOJ obtained extradition of an air cargo executive, a Dutch national, who had been apprehended in Italy after nearly 10 years as a fugitive. She pleaded guilty and was sentenced to 14 months in prison (with credit for time held by the Italian government pending extradition) and ordered to pay a \$20,000 USD criminal fine.

Antitrust authorities’ attention to the air transport industry extends beyond large carriers alone. The market for air freight forwarding services also has been the subject of international enforcement activity. Between 2010 and 2013, the Division charged 16 freight forwarders with multiple conspiracies to fix and to impose on shippers certain freight forwarding service fees, including fuel surcharges and various security fees, for services provided in connection with international air freight forwarding during 2002–2007. The companies either pleaded or agreed to plead guilty and paid criminal fines totaling more than \$120 million USD.<sup>8</sup>

## OCEAN SHIPPING

With respect to the market for maritime transport, the Division shares enforcement duties with the Federal Maritime Commission (“FMC”). The FMC monitors the effects of ocean carrier alliances on competition and can bring civil actions in court to enjoin agreements if they are likely, by a reduction in competition, to result in unreasonable price increases or service reductions, or to substantially lessen competition in purchasing covered services.<sup>9</sup> The FMC Bureau of Enforcement investigates potential violations and can negotiate settlements and informal compromises of civil penalties, or may engage in formal FMC proceedings. The Biden Executive Order encourages the FMC to cooperate with DOJ on enforcement efforts—focusing on the significant fees imposed on U.S. exporters by increasingly consolidated foreign shipping conglomerates—pursuant to which the agencies signed a Memorandum of Understanding in July 2021 to enable regular collaboration and review of shipping industry competition issues.

It thus seems likely that market participants can expect increased attention to the pricing practices of alliances of large ocean carriers.

Most recently, ocean carriers engaged in transportation of “roll-on/roll-off”<sup>10</sup> cargo to and from the U.S. and elsewhere have been the target of a major international criminal investigation into a worldwide conspiracy from as early as 2006 through 2012, affecting hundreds of millions of dollars (USD) in commerce. Beginning in 2014, DOJ has brought charges in Maryland federal court—the most recent filed in 2018—against five carriers based in Japan, Norway, and Chile, plus 13 individual employees, for price fixing, bid rigging, and allocation of customers and routes. The court has ordered the carriers to pay a total of more than \$255 million USD in criminal fines. To date, four individuals of those charged have pleaded guilty and been sentenced to prison terms ranging from 14 to 18 months plus a \$20,000 USD fine. Others remain fugitives.<sup>11</sup>

The deep-sea container shipping industry has been the subject of investigation as well. As a recent example, the Division raided the biannual “Box Club” meeting in 2017, serving subpoenas on CEOs of the major lines concerning potential price fixing. According to several carriers, the investigation concluded in 2019 without any charges or fines. This followed an earlier investigation by the European Commission’s Directorate-General for Competition (“DG Comp”), which opened formal proceedings in 2013 against several container shipping companies, concerned that their practice of publicly announcing intended price increases allowed them to exchange information on future pricing intentions. In 2016 the Commission accepted, and made legally binding, commitments by the companies to alter their pricing announcements to ensure transparency to customers and avoid competition concerns.

As was the case in the air cargo industry, freight forwarding services for ocean shipping have been the subject of investigation as well. The Division recently investigated and charged a nationwide conspiracy to fix prices for international ocean freight forwarding services during 2010–2015, resulting in guilty pleas in 2018 and 2019.

The Division also pursued a domestic shipping conspiracy to allocate customers, rig bids, and fix rates and surcharges levied on purchasers of coastal water

transportation of freight (*e.g.*, heavy equipment, perishable food items, medicine, and consumer goods) between the continental United States and Puerto Rico during the period 2002–2008, leading to charges against three companies and seven individuals. Between 2008 and 2013, the companies received fines ranging from \$14–17 million USD each, and executives received prison sentences ranging from 7–60 months plus fines of \$20,000 USD each.

Importantly, on top of the criminal fines and prison sentences, each of the antitrust investigations in the air and ocean transportation markets that resulted in criminal penalties quickly spawned private plaintiff class action lawsuits seeking treble damages, costing the companies involved millions of dollars in defense and settlement costs.

The best defense, as noted above, is for companies to educate their executives and employees about common antitrust traps and competitor interactions to avoid through implementation of a well-crafted, comprehensive, and effective antitrust compliance program. In the current antitrust enforcement climate, transportation industry clients can expect increased scrutiny of shipping rates, fees, and surcharges, as well as any action or conduct that may result in reduced competition among carriers. Companies are strongly encouraged to consult with experienced antitrust counsel before pursuing any strategy or course of action that could raise a red flag.

**Blank Rome can assist with development and/or fine-tuning of your corporate compliance program and training for key staff.**

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## ENDNOTES

1. See Briefing Room, The White House, Executive Order on Promoting Competition in the American Economy (July 9, 2021), [whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/).
2. See U.S. Dep't of Just., Antitrust Div., Remarks by Richard A. Powers, Criminal Antitrust Enforcement: Individualized Justice in Theory and Practice (July 21, 2021), [justice.gov/opa/speech/acting-assistant-attorney-general-richard-powers-delivers-remarks-symposium-corporate](https://www.justice.gov/opa/speech/acting-assistant-attorney-general-richard-powers-delivers-remarks-symposium-corporate).
3. Among these incentives are that the first company to come forward and admit involvement in an antitrust conspiracy, if granted amnesty, is given full immunity from criminal prosecution in exchange for its cooperation in the investigation (and this immunity extends to covered cooperating executives and employees), and will be individually liable for only actual, not treble, damages in any related civil litigation in which it cooperates. See Leniency Program Page, U.S. Dep't of Just., Antitrust Div., [justice.gov/atr/leniency-program](https://www.justice.gov/atr/leniency-program). Even if a company is not the first in the door, it may still benefit in other ways from admitting involvement and providing cooperation, such as through a deferred prosecution agreement.
4. To date, non-U.S. corporations have accounted for more than 80% of criminal fines of \$10 million or more obtained by the Antitrust Division. See U.S. Dep't of Just., Antitrust Div., Sherman Act Violations Resulting in Criminal Fines & Penalties of \$10 Million or More, [justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more](https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more) (updated July 16, 2021).
5. Indeed, the Antitrust Division now evaluates and may credit well-designed, comprehensive, and effective compliance programs carried out in good faith at both the charging and sentencing stages of an investigation. See Press Release, U.S. Dep't of Just., Antitrust Division Announces New Policy to Incentivize Corporate Compliance (July 11, 2019), [justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance](https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance); U.S. Dep't of Just., Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), [justice.gov/atr/page/file/1182001/download](https://www.justice.gov/atr/page/file/1182001/download).
6. The European Commission's Directorate-General for Competition ("DG Comp") opened its air cargo investigation following Lufthansa's application for leniency in December 2005. It found that the carriers coordinated pricing for airfreight services from, to, and in some cases within, the European Economic Area, with respect to fuel and security surcharges, and refused to pay commission to freight forwarders on surcharges, between 1999–2006. The Commission imposed fines totaling nearly 800 million Euro on 12 carriers in 2010 (Lufthansa received full immunity, and most other carriers received reduced fines for cooperation). Related enforcement actions by competition authorities around the world, including Japan, Korea, Canada, and Australia, have led to imposition of additional fines.
7. Other ancillary air passenger fees, such as those for baggage, changes, or cancellations, are a focus of attention in the recent Biden Executive Order.
8. The Japan Fair Trade Commission ("JFTC") had in 2009 imposed cease and desist orders and surcharge payment orders totaling over nine billion yen on 12 freight forwarders, and found two additional companies to have committed violations. DG Comp also investigated after Deutsche Post first reported the cartel, and in 2012 fined 14 corporate groups a total of 169 million Euro for their participation (Deutsche Post, including subsidiaries DHL and Exel, were granted full immunity).
9. Large international ocean carriers generally belong to alliances, of which three major ones currently exist and together account for more than 80% of the global container shipping trade. These alliances—themselves cooperative agreements among competitors—historically have enjoyed a limited antitrust exemption for certain maritime shipping agreements filed with the FMC, but that limited exemption does not preclude enforcement actions against unreasonable competitive restraints or criminal cartel conduct. Moreover, the Antitrust Division has repeatedly taken the position that the exemption is no longer justified. See, e.g., U.S. Dep't of Just., Antitrust Div., Comments on The Alliance Agreement, FMC Agreement No. 012439 (Nov. 22, 2016), [justice.gov/atr/page/file/913521/download](https://www.justice.gov/atr/page/file/913521/download); U.S. Dep't of Just., Antitrust Div., Comments on the OCEAN Alliance Agreement, FMC Agreement No. 012426 (Sept. 19, 2016), [justice.gov/atr/file/909131/download](https://www.justice.gov/atr/file/909131/download). The similar maritime exemption from EU competition law was repealed in 2008, except for shipping consortia falling below a designated market share threshold.
10. "Roll-on/roll-off" refers to non-containerized cargo that literally rolls off on wheels onto or off of the shipping vessel—generally, cars, trucks, and construction or agricultural equipment.
11. DG Comp concluded its ocean vehicle carriage inquiry in 2018 with a decision imposing fines totaling nearly 400 million Euro on four carriers, with a fifth receiving immunity for its initial report of the conspiracy in 2012. The Commission found that, during 2006–2012, the carriers engaged in meetings and/or other communications through which they agreed to coordinate pricing, allocate customers, and/or reduce capacity through coordinated scrapping of vessels, and followed a "rule of respect" whereby carriers would refuse to bid or bid high such that certain business would remain with an incumbent carrier. Numerous other international enforcers investigated the market as well, including the competition authorities of Japan, China, South Korea, Australia, Canada, and Mexico. Accus.

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