Antitrust and the Automotive Supply Chain: Why are OEM Terms Now Addressing Antitrust Violations?

5.24.2021

Ford's new purchasing terms (effective 7/1/21) have a long and dense provision addressing antitrust violations. In shortened form, under §38.09 if a Supplier pleads guilty to or has been found to have violated a "Competition Law" (which in the US is labelled "antitrust law") with respect to commodity purchased by Ford, it must:

> *(a) produce [] all [] information produced to all Government authorities globally [] within 4 weeks of a finding or guilty plea; and (b) participate in binding arbitration to resolve any Buyer claims related to the violation. If, during arbitration, Supplier is found to have violated competition laws with respect to the Buyer, the Supplier agrees to pay Buyer 15% of the purchase price of all Goods impacted by the anticompetitive conduct []. If the Supplier is found to have violated the Sherman Act in the United States, the Buyer shall be entitled to treble the amount paid under Section 38.09(c) for all purchases governed by the Sherman Act. []*

Likewise, FCA's current terms now require that:

> *30. ASSIGNMENT OF ANTITRUST CLAIMS. Upon FCA US's request [], Seller will execute a written assignment of all [] causes of actions under any applicable antitrust laws arising out of or relating to Seller's purchase of raw materials or ingredients used in goods sold or resold to FCA US. If FCA US recovers damages [], and a portion [] is reasonably allocable to Seller, FCA US will, net of its attorneys' fees, return such allocable amount to Seller.*

This Alert addresses three questions: (1) Why now? (2) What is the purpose of these provisions? and (3) How can these new risks being mitigated?

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1. Why now?

These new provisions are a response to *In re Automotive Parts Antitrust Litigation*, a massive series of lawsuits, and the related criminal proceedings. (Note 1 — Butzel Long represents several parties in the proceedings, but this Alert contains only public information. Note 2 — The following data focuses only on US proceedings. There was also extensive enforcement activities in no less than 18 other countries.) In over-simplified form, the civil and criminal proceedings allege widespread bid-rigging among suppliers for no less than 34 different types of parts. To date, approximately 32 individuals and more than 30 companies have plead guilty to criminal antitrust violation. Many of those individuals have served prison sentences. The companies have collectively paid almost $3 billion in fines to the U.S. government and approximately $2 billion to affected purchasers of parts and vehicles. (The actual total is likely significantly higher, as some buyers have reached private, undisclosed, settlements with their suppliers.)

2. What is the purpose of these provisions?

a) Ford

The new Ford provision is aimed at making it much quicker and easier for Ford to prove the scope of the conspiracy and mere arithmetic to prove the resulting damages. In litigation, by contrast, it is extraordinarily hard, slow and expensive to prove the conspiracy's full extent and the resulting damages, even with the many criminal guilty pleas.

As to the scope of the conspiracy (i.e., which Ford parts were affected), it does this by requiring the conspiring Supplier to promptly turn over all of the information that was provided to governmental authorities. For a variety of reasons, a company pleading guilty to a criminal antitrust violation is likely to be extremely forthcoming with the government. For a different variety of reasons, the conspiring supplier may be less forthcoming in civil litigation. Under the new provision, Ford is likely to receive the information it needs to assess and prove the scope of the conspiracy (i.e., which parts were affected by the conspiracy) within weeks, not years.

As to the resulting damages, antitrust damages are generally the difference in price between what was paid and what would have been paid absent the conspiracy (which amount, in the US, is then trebled). In most cases, it is hard to know what the price would have been in the but-for world, so damages usually become a battle between highly specialized expert economists. Ford's new terms eliminate the battle of the experts by automatically setting the overcharge at 15%, a very high overcharge. That amount is then trebled to 45% for Sherman Act (the principal US antitrust law applicable to competitor conspiracies) violations. So, a Supplier with annual sales to Ford for the affected part of $100 million, will pay Ford $45 million per year for each year of the conspiracy.

b) FCA

The sole, but important, function of FCA's provision is to get around an antitrust rule known as the "direct purchaser rule," which says that in a federal antitrust claim, only the person purchasing directly from the conspiring seller may recover damages. In the automotive supply chain, that means that if a Tier 2 conspires to raise the price of its parts, only the Tier 1 may recover, even if some or all of the price increase was passed on to the OEM. (31 states allow indirect purchasers to recover under their state antitrust laws, but those state laws are often less favorable to victims than the Sherman Act.) The FCA term avoids the direct purchaser rule by requiring the victimized Tier 1 supplier to assign to FCA its right to recover the overcharge from the Tier 2 conspirator. The final sentence addresses the possibility that not all (or even none) of the overcharge was passed on to FCA. If that happens, FCA will return amounts that are "reasonably allocable" to the Supplier, net of attorney fees. It is not clear how that reasonable allocation would be determined or whether the Tier 1 would be able to challenge FCA's allocation. And if challenge is possible, proving the extent of pass-on is usually at least as difficult as proving the amount of the overcharge.

3. How to mitigate risk

The obvious way of mitigating antitrust risks is to not violate the antitrust laws in the first place. And the only way of minimizing that risk is to establish an effective antitrust compliance program. The elements of an effective compliance program are beyond the scope of this Alert, but were the subject of a Client Alert in 2020. In general, an effective compliance program, whether for antitrust or other compliance areas, requires much more than placing a boilerplate written policy in a compliance manual. Experienced counsel should be consulted both as to the content of the policy and its implementations and enforcement.

Sheldon Klein
248.258.1414
klein@butzel.com

Theodore Eppel
248.258.2905
eppel@butzel.com