

C L I F F O R D
C H A N C E



TUNA TALES
THE ANTITRUST TSUNAMI

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Most everyone ensures their house is clean before inviting others in. That concept applies equally to a party contemplating a strategic transaction, the prospect of which will invite the government of one or more jurisdictions to visit each party's corporate "house." As the below-described events portray, an unclean house—one beset with compliance failures such as cartel conduct that violate the antitrust laws—can quickly turn the tide on a pending transaction and instead leave parties to the would-be deal faced with exposure to criminal penalties, prison time for executives, the inability to sell unwanted assets, diminution of corporate value (indeed, including bankruptcy), and significant business disruption.

What follows is the story of a merger gone awry—so far awry that even industry participants *not* parties to the planned deal faced criminal antitrust prosecution and the end of their careers. One was convicted of criminal price-fixing in December 2019, and now faces a prison sentence and a significant monetary penalty. Meanwhile, the companies were left with massive criminal penalties, tarnished reputations, and oppressive legal bills. And of course, the potential merger never came to fruition; instead one of the companies has filed for bankruptcy, and will soon be forced to liquidate its assets.

We end our tuna tale with some key take-aways for parties contemplating strategic transactions.

Part I: The Cascading Implications Of Collusion

Prologue: Conglomerates Take Hold Of Tuna

Canned tuna is an undifferentiated, commodity product. Three producers of canned tuna and other packaged seafood products—Bumble Bee, StarKist, and Chicken of the Sea—dominate their marketplace, together holding 73% of the market, with the remainder fragmented between smaller companies and private-label products.¹

During their rise to a triopoly, each of the three market leaders was acquired by large conglomerates and/or private equity firms.

- **Bumble Bee** was founded in 1910, when a group of seafood canners came together to create the Columbia River Packer Association.² Over the next century, Bumble Bee went through a series of transactions and ownership changes



before landing as a portfolio company of United Kingdom-based private equity firm Lion Capital.³ In late 2010, Lion Capital acquired a majority stake in Bumble Bee from Centre Partners Management for USD 980 million.⁴ When that deal was announced, Lion Capital was “excited about the opportunity to acquire one of North America’s best-known consumer packaged goods companies and a portfolio of brands that enjoy unrivalled positions with US and Canadian consumers.”⁵ Over the next several years, Lion Capital sought new opportunities for Bumble Bee, including the acquisition of Anova Food LLC, and a partnership with Sapmer SA to deliver sashimi-quality frozen tuna to North American restaurants and food retailers.⁶ Lion Capital also explored the possibility of merging Bumble Bee with one of its competitors in order to take advantage of economies of scale and improve its competitiveness in the market.

- **StarKist** began as the French Sardine Company, established in 1918.⁷ StarKist’s later owners included the H.J. Heinz Company and Del Monte Company.⁸ Dongwon Industries of Korea acquired StarKist in 2008 for USD 363 million.⁹ At least for some part of the time period at issue here, StarKist was the largest seller of canned tuna in the United States.¹⁰
- **Tri-Union Seafoods LLC**, operating under the brand name “Chicken of the Sea,” started in 1914, when the company was created as the Van Camp Seafood Company.¹¹ In 2000, Thai Union Group, a conglomerate based in Thailand, acquired Tri-Union.¹² Thai Union Group became the world’s largest canned tuna producer, capturing approximately 18% of global canned tuna production.¹³

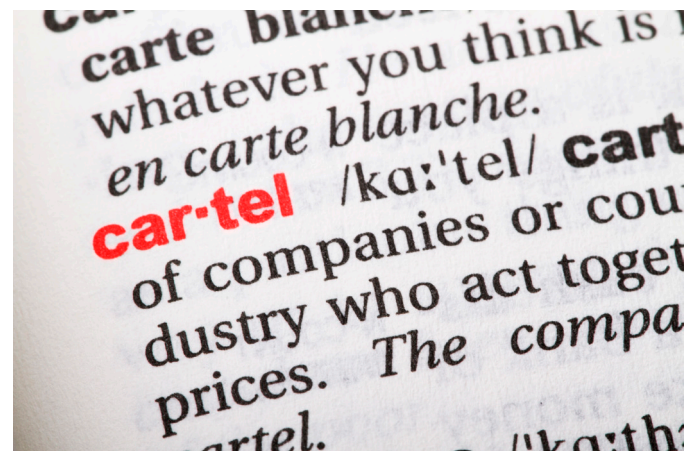
Ownership by conglomerate parents and private equity funds can put significant pressure on a business to perform. Such pressures can be exacerbated when the parent is seeking to

sell the business in the short term. Indeed, under such pressures, management can become focused solely on short term numbers.

Act I: A Conspiracy Develops

Despite few competitors, the prepackaged tuna industry was not particularly booming around 2010. Prices of canned tuna were steadily decreasing.¹⁴ The industry faced a supply glut as the supply of skipjack tuna—the primary tuna used for canned tuna—increased.¹⁵ The over-supply problems were compounded by a simultaneous decline in canned tuna demand.¹⁶ Indeed, packaged tuna consumption had been on the decline since 2004.¹⁷ Contamination fears contributed to the decline.¹⁸

Faced with decreasing prices and continued pressure to remain profitable, the three major tuna manufacturers decided to work together. The three competitors agreed with one another to (1) decrease the size of the cans in which they sold tuna, (2) list price increases for canned tuna, (3) limit promotional activity so



as not to upset agreed-upon market prices, and (4) not offer tuna products labeled as “FAD free,” which the competitors believed would decrease profits by cannibalizing sales of the products they sold that were subject to the price-fixing conspiracy.¹⁹ According to court filings, the agreements between Bumble Bee, StarKist and Chicken of the Sea occurred through a mix of bilateral conversations, emails, phone calls, and in-person meetings between senior executives and sales personnel at each company.²⁰

Like most cartels, the canned tuna conspiracy included a means to monitor and punish those that did not abide by the illegal agreement. The conspiracy was enforced through so-called “jabs” — calls between company executives to address circumstances where one of the competitors failed to abide by the terms of the parties’ agreement.²¹

Multiple factors may have led to the ill-fated decision by the parties to conspire. Profit pressure, as described above, may have been one. Another may have been the incestuous nature of



employment in the industry. According to private plaintiffs, of the 58 executives eventually implicated in the conspiracy, approximately one-third had held executive positions at a competitor at some point in their careers.²² Also facilitating collusive behavior were the companies’ joint operations and packing agreements, which plaintiffs claimed afforded opportunities for information sharing and avenues through which parties could communicate to monitor adherence to the conspiracy.²³ Such frequent interaction between competitors can often lead to coordination and information sharing, and form the basis of cartel conduct.

In addition to their joint agreements, the competitors also met frequently at trade association meetings. In 2008, members of Bumble Bee, StarKist and Chicken of the Sea gathered at the Infofish Conference in Thailand. Shortly thereafter, each reduced the size of their tuna product from six ounces to five ounces.²⁴ In 2009, Bumble Bee, StarKist and Chicken of the Sea formed the National Fisheries Institute and the International Seafood Sustainability Foundation, an organization chaired by Bumble Bee’s CEO Christopher Lischewski.²⁵ Prosecutors later argued that the companies used such trade associations to further their conspiracy.

The collusive conduct described here, surprisingly, was not well-hidden from public view. Beginning in 2008 (the year the alleged conspiracy began), Bumble Bee’s CEO Lischewski made several public statements regarding pricing that private plaintiffs later argued could be considered “signaling” to competitors.²⁶ Then, the companies in 2011 began a practice of using announced list prices, and followed each other in increasing the price of canned tuna on those list prices.²⁷ For each list price, the competitors “agreed on whether to take a list price increase, the amount of the list price increase, the announcement date of the list price increase, and the rationale the conspirators would give



their customers for the list price increase.”²⁸ Rarely can there be clearer evidence of price fixing than list prices agreed to by competitors in the same marketplace.

The conspiracy appears to have been vast and far-reaching within each of the three participating companies. To date, the individuals implicated in the legal proceedings surrounding the conspiracy have included senior-level managers with titles like CEO, CFO, COO, Chairman, Controller, Regional Sales Manager, Vice President of Operations, Senior Vice President of Sales, CEO of US Operations, Head of Human Resources, Vice President of Retail Sales, and more.²⁹ The implicated individuals included employees of the three companies as well as of their respective parent companies.³⁰

Act II: The Merger

While Lion Capital was building Bumble Bee’s profits, it was also looking to sell the business.

Lion Capital found a buyer. On December 19, 2014, Thai Union, the parent company of competitor Chicken of the Sea, announced it had reached an agreement to acquire Bumble Bee from Lion Capital for USD 1.5 billion.³¹ In press releases, Thai Union announced that it planned to raise USD 400 million through the issuance of new shares in order to finance the transaction. Together, the combination of Chicken of the Sea and Bumble Bee would have captured approximately 40% of the market and have only one remaining significant competitor: StarKist.³² But, before the deal could be consummated, the two companies needed to convince competition authorities around the world to approve the transaction, which would be especially difficult given the size of the transaction and the two brands’ respective shares of the market.³³ Indeed, it was not long before the deal raised antitrust eyebrows.

As part of its investigation of the proposed transaction, the Antitrust Division (the “Division”) of the United States Department of Justice (the “DOJ”) issued a Second Request (see below definition), seeking various documents relating to, among other topics, competition in the marketplace. Those documents became the eventual downfall of the deal and led to much more.

Act III: The Conspiracy Is Uncovered

It was not long before the authorities’ review of the proposed transaction took a back seat to more pressing antitrust issues. As the Division reviewed the documents supplied by the merging parties, it uncovered evidence of anticompetitive practices between Chicken of the Sea and its competitors. On July 23, 2015, while the merger was still pending—and just before Thai Union was expected to publish a stock offering to fund the transaction—news broke that the Division had issued subpoenas focused on more than the competitive implications of the transaction: an investigation of potential criminal collusion in the packaged seafood industry, including by the parties to the

proposed deal.³⁴ In response to the news, Thai Union announced that it was postponing the planned share offering intended to raise money to finance the deal, pending further details on the Division's investigation. The writing was on the wall, and in December Thai Union announced that it had formally abandoned its acquisition of Bumble Bee.³⁵

Unfortunately, the break-up of the deal was just the beginning of the tuna saga. Soon after the Division's investigation into Chicken of the Sea came to light, media reports revealed that Bumble Bee and StarKist had also received subpoenas relating to the Division's antitrust investigation.³⁶

The news of the Division's investigation led almost immediately to a panoply of civil class action lawsuits against the three companies by consumers seeking damages under state and federal antitrust and consumer protection laws. Olean Wholesale Grocery was the first to file its class action against the tuna companies, submitting a complaint on August 3, 2015 on behalf of a purported class of consumers who had purchased packaged seafood directly from at least one of the defendants.³⁷

Other wholesalers of tuna soon followed with class suits of their own, including PITCO Foods³⁸ and Affiliated Foods³⁹ (both of which sought to represent the same purported class as Olean). Certain major wholesalers "opted out" of these class actions and filed their own individual lawsuits, the most notable of which was Wal-mart, which according to its complaint bought and resold at least a quarter of all prepackaged tuna purchased in the United States during the period of the conspiracy.⁴⁰ The wholesaler actions were followed by class actions asserted on behalf of individual plaintiffs who claimed to have indirectly purchased packaged seafood products (e.g. from a grocery store).⁴¹ All told, over 70 class and individual actions have been filed against the tuna producers, seeking hundreds of millions of dollars in damages.

In the meantime, the Division's criminal cartel investigation continued. In order to protect the confidentiality of its investigation, the Division sought and obtained judicial stays of discovery in the civil litigation (a measure intended to shield potential grand jury witnesses from a company under investigation from evidence relevant to a potential indictment



against them). The agency has continued to gather facts since then, eventually pursuing criminal cases not only against the companies, but also against certain executives allegedly responsible for the companies' participation in the conspiracy.

Act IV: The Aftermath

The United States District Court for the Northern District of California ultimately found executives from Bumble Bee, StarKist and Chicken of the Sea engaged in a conspiracy to fix shelf-stable canned tuna prices, in violation of the Sherman Act.⁴² Bumble Bee agreed to plead guilty to the conspiracy in May 2017, agreeing to pay a fine of USD 25 million.⁴³ Starkist agreed to plead guilty a year and a half later, in October 2018.⁴⁴ It initially sought to challenge the size of the penalty it faced, but the judge presiding over the case was unconvinced and ultimately ordered the tuna company to pay a criminal fine of USD 100 million.⁴⁵

Meanwhile, executives alleged to have been involved in the conspiracy have also faced consequences. In December 2016, the DOJ filed several criminal information statements against Bumble Bee executives.⁴⁶ The first domino fell in January 2017 when the Senior Vice President of Sales for Bumble Bee pleaded guilty to conspiring to fix prices for packaged seafood in the United States.⁴⁷ Soon after, additional executives at both Bumble Bee and StarKist pleaded guilty to their roles in their conspiracy.

As for Chicken of the Sea, in October 2015, press reports suggested that Chicken of the Sea had sought leniency from criminal prosecution by the Division for the tuna company's role in cartel conduct.⁴⁸ Pursuant to the Division's Corporate Leniency Policy, immunity from prosecution is available to the first-reporting company to confess its role in the conspiracy and cooperate in the Division's investigation into the cartel participants (here, between Chicken of the Sea, Bumble Bee, and StarKist). As a result, Chicken of the Sea and its executives have thus far

avoided prosecution as a result of that company's leniency application, but that shield has been conditioned upon the continued and indefinite—and costly—cooperation of the company (and its employees) in the Division's investigation and prosecution of other participants.

All three companies continue to be embroiled in civil litigation.

The foregoing saga aptly illustrates all of the challenges that a company can face as it navigates the labyrinth of U.S. laws regulating competition, as the companies—and in some cases their corporate parents—have found themselves mired in criminal and civil enforcement actions as well as class action lawsuits.

Part II: Perspectives For Transacting Parties

Competition Regulation in the US: An Overview⁴⁹

In the United States, competition is primarily overseen by the Division and the Federal Trade Commission ("FTC"), two agencies that have significantly-overlapping authority to preserve





competition, including through the review of planned mergers. By inter-agency agreement, planned business combinations in certain industries are subject to review by a single agency: for example, the Division reviews deals in industries such as telecommunications, banks, railroads, and airlines, while the FTC typically reviews others industries, such as pharmaceuticals. For industries not covered by this inter-agency agreement, whether the Division or the FTC has oversight depends on the clearance process. On paper, the two agencies aim to complement each other and work together to analyze the deals. But in practice, the negotiated division of oversight responsibilities between the agencies has led to some high-profile turf wars, especially for industries that are perceived as being “hot” in the market or that are priorities for the U.S. government.⁵⁰ One important difference between the two agencies, however, is that while both agencies can challenge a planned merger, only the Division can pursue criminal penalties for anticompetitive conduct. If the FTC uncovers evidence of anticompetitive practices that are potentially criminal in nature, they refer the matter to the Division for prosecution.

The Division and the FTC oversee competition primarily under the authority of three federal statutes: the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act (the “FTC Act”). Both agencies enforce the Sherman Act, which forbids “every contract, combination, or conspiracy in restraint of trade” as well as any actual or attempted monopolization. The FTC enforces the FTC Act, which prohibits “unfair methods of competition” and “unfair or deceptive acts or practices.” U.S. courts have interpreted the FTC Act to include all violations of the Sherman Act, so although the two agencies derive their authority from different laws, in practice they oversee similar types of conduct. Both agencies also have authority under the Clayton Act, which prohibits more nuanced forms of anticompetitive conduct such as price discrimination, as well as mergers or acquisitions that substantially lessen competition or that could create a monopoly.

U.S. Merger Control

Under the Clayton Act, companies planning a merger or acquisition may find themselves under an obligation to file a notification with the federal antitrust agencies pursuant to the Hart-Scott-Rodino Act (“HSR Act”), depending on the size of the transaction as well as the parties participating in the deal.⁵¹ The formation of a joint venture or a licensing agreement might also trigger an HSR filing obligation. Most transactions involving domestic companies and meeting the filing threshold are caught by the HSR Act’s requirements. Generally, a filing is required if the target in an acquisition is a non-U.S. company, assets or sales in or into the United States meet the HSR filing threshold,⁵² or other filing thresholds are met. Although an HSR notification filing obligation is triggered by the value of the transaction, there are numerous legislative exemptions, including for foreign companies. While acquisitions of U.S. companies are obviously under the jurisdiction of U.S. antitrust regulators, foreign companies looking to acquire a non-U.S.

company might be surprised to find that the acquisition does not qualify for a foreign company exemption and could be subject to an HSR notification obligation.

HSR notifications are submitted to both the FTC and the Division, and are reviewed by one of the agencies depending on the industry of the acquired company (as set forth above). Along with the HSR notification form, companies need to submit documents prepared in connection with the transaction that discuss the market, competition, or similar topics. If there are no substantive issues with a transaction, then it is cleared by one of the agencies within a statutory 30-day waiting period or once the waiting period expires.

If, however, a transaction raises the appearance of substantive antitrust issues, the agency reviewing the filing may issue a voluntary request letter and/or a Request for Additional Information (“Second Request”). Both the FTC and the Division will consider a deal to be problematic if they believe it creates, enhances, or facilitates the exercise of market power in a defined market (*i.e.*, a company’s ability to raise and maintain prices above competitive levels).⁵³

Typically, the agencies’ voluntary request letters will seek information about topics such as strategic or marketing plans over a recent period (*e.g.*, for the past three years), lists of products manufactured and sold or in development, lists of competitors and top ten customers for overlap products, and market share information for overlap products. As the name implies, a voluntary request letter is voluntary and there are no statutory penalties for not responding to a request. In practice, however, a voluntary request letter is a signal to the company that receives it that the reviewing agency has concerns about the deal, and responding will be in the company’s best interest in order to try to address the agency’s concerns before the

deal is blocked. Responding may also help the company avoid a Second Request.

A Second Request, on the other hand, is a compulsory demand for information. It requires companies to engage in collecting, reviewing, and producing significant amounts of the companies’ internal documents and relevant market data, including market shares, competitors, customers, strategic plans, and similar documents—a process that often takes months. In the course of a Second Request investigation, the reviewing agency may take depositions of key management as well as third parties, such as customers, suppliers, and even competitors. A Second Request is a formal process that pauses the HSR waiting period until both parties have certified “substantial compliance” with the request, at which point a new 30-day waiting period begins (although in practice the waiting period is often further extended through negotiation with the U.S. agencies).



The Bumble Bee transaction met the HSR thresholds, and thus required a filing. The deal was valued at approximately USD 1.5 billion, and even though Chicken of the Sea's parent, Thai Union, was a foreign company, its acquisition target, Bumble Bee Foods, was a U.S. company with substantial sales in the U.S. Accordingly, the parties submitted an HSR filing in anticipation of the acquisition. Some industry experts were skeptical that the deal would be approved without significant concessions.⁵⁴ Indeed, the track record was not good: in 1996, the Division had blocked StarKist from acquiring Bumble Bee, citing competitive concerns.⁵⁵ Indeed, Thai Union stock prices actually closed 3.5% *down* after the deal was announced, potentially reflecting investor concern over the prospect of approval.⁵⁶ And while HSR reviews are not public, it is clear that the skeptics' concerns were well-founded, based on the fact that nearly a year passed between the announcement of the deal and the Division's announcement that the parties had agreed to abandon their plans to merge after the Division informed them it had "serious concerns" the transaction would harm competition.⁵⁷

Division Criminal Antitrust Enforcement

As noted above, the Division is the only U.S. agency that has the authority to pursue criminal penalties for antitrust violations. This authority is derived from Section 1 of the Sherman Act, which provides for criminal penalties of up to USD 1 million and/or 10 years in jail for individuals, and up to USD 100 million in fines for corporations (or up to twice the amount gained by conspirators or lost by victims of the criminal conduct, if either amounts exceed USD 100 million).⁵⁸

Individual Liability

One somewhat unique, but well-publicized, aspect of U.S. criminal enforcement against corporate misconduct is the focus on executive responsibility. Casual observers may be

surprised to learn, however, that the focus on individuals is a comparatively recent development, contrary to the impression given off by the scores of high-profile prosecutions that have dominated headlines in recent years. U.S. law has long allowed prosecutors to target culpable executives of companies charged with criminal misconduct. In practice, however, such prosecutions were comparatively rare, as companies sought to protect their executives from liability, blaming lone rogue employees or agreeing to higher penalties in return for non-prosecution of individuals.

That dynamic changed in September 2015 with the issuance of the DOJ's so-called "Yates memo," which instructed DOJ prosecutors to prioritize the prosecution of culpable individuals.⁵⁹ The memo explained that moving forward, any company seeking cooperation credit in a DOJ investigation would be required to identify all individual employees responsible for misconduct. As for the Division itself, the memo instructed prosecutors to focus on individuals from the very beginning of any corporate investigation, encouraging them to



resolve cases against individuals even before cases are resolved against their employers. The memo also discontinued the practice of allowing companies to agree to larger corporate fines or other concessions in order to immunize individual officers or employees.

The impact of the Yates memo appears to have been felt strongly in the tuna investigation. The first individual executive to plead guilty was Bumble Bee's Senior Vice President of Sales, in January 2017—months before Bumble Bee itself pleaded guilty to price-fixing charges in August of that year. That plea was shortly followed by the pleas of four more executives at Bumble Bee and StarKist. Each individual guilty plea has included an acknowledgements that the pleading executive participated in criminal price-fixing, and required the pleading executive to cooperate with the government in its ongoing investigation, in return for more lenient sentences.

Not all of the executives under scrutiny chose to cooperate with the Division's investigation. In May 2018, a federal grand jury indicted Lischewski, then the sitting CEO of Bumble Bee, for his alleged role in the price-fixing.⁶⁰ It was a rare move for the Division to criminally indict a sitting CEO, even after the Yates memo and accompanying Division policy shift. Lischewski temporarily stepped down as CEO after charges were announced and spent the next year and a half fighting criminal charges against him.

The trial was delayed for over a year, but on December 3, 2019, a California jury found Lischewski guilty of conspiring to fix prices of canned tuna, in a verdict delivered after just five hours of deliberation.⁶¹ That verdict followed a month of trial that included the testimony of two of Lischewski's former lieutenants, both of whom had pleaded guilty to criminal price-fixing, and who testified against Lischewski in hopes of receiving a more

lenient sentence.⁶² The testifying executives described their former boss as the mastermind of a "truce" among the three canned tuna producers in order to manufacture profits.⁶³ According to the government's witnesses, immediately following Bumble Bee's acquisition by Lion Capital, the industry encountered a spike in fish prices amidst an aggressive price war among the three canned tuna producers.⁶⁴ The cooperators testified that Lischewski ordered them to fix prices with their counterparts at Chicken of the Sea and Starkist, in response to pressure he was facing to increase profits to facilitate a future sale.⁶⁵ The former CEO of Chicken of the Sea also testified at trial, a requirement of his former company's leniency agreement. Somewhat unusually for a criminal trial of this nature, Lischewski himself took the stand in his own defense, a risky move that opened him up to hours of questioning by government attorneys on cross-examination.⁶⁶ Ultimately, the jurors reported to the press that emails Lischewski sent to his competitors complaining of low prices had convinced the jury he was guilty of criminal price-fixing.⁶⁷

Lischewski's sentencing is scheduled for April 2020.⁶⁸ When he is sentenced, the former executive will face the prospect of up to 10 years in prison and a USD 1 million fine, in addition to individual civil liability. As for his former deputies, they face more lenient sentences, including potentially no jail time at all as a result of their cooperation.⁶⁹ This leniency comes at a cost, however, as they spent months cooperating with government attorneys and had to endure withering cross-examination in open court, where they were forced to testify under oath and acknowledge their complicity in the crimes.⁷⁰

Corporate Criminal Consequences

Even though the Division recently shifted its focus towards executives (in line with the rest of the DOJ), it continues to vigorously pursue criminal (and civil) antitrust charges against

corporations accused of anticompetitive conduct. Indeed, the Division has been one of the world's most active antitrust enforcers for decades, imposing significant criminal penalties on companies in a diverse array of industries including air transportation, vitamins, and LCD panels. The Division made perhaps its biggest splash when it levied billions of dollars in fines against a number of major banks for their participation in the global LIBOR and FX price-fixing conspiracies.

In recent years, the Division has increasingly turned its attention towards international anticompetitive activity, reflective of the fact that the Sherman Act is not limited to U.S. companies, but rather reaches anticompetitive conduct—including foreign conduct—that has a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce. The extraterritorial scope of the Sherman Act means that not only are foreign companies subject to U.S. antitrust laws and enforcement, but foreign activities of U.S. companies are also subject to antitrust scrutiny (if those activities impact US commerce). This scope can significantly impact the calculation of criminal penalties, since the Sherman Act provides for fines of up to USD 100 million or twice the amount gained by conspirators or lost by victims, an amount that may be significantly increased by sales not in the U.S. that nevertheless have an effect on US markets.

The expansive reach—and severity—of U.S. criminal antitrust laws is evident in the tuna companies’ guilty pleas. Indeed, Bumble Bee’s USD 25 million penalty was actually far *lower* than it might have been: according to the Division’s charging documents, Bumble Bee’s involvement in the conspiracy affected USD 567 million in commerce, and the company faced a fine as high as USD 272.4 million.⁷¹ But the Division agreed to several reductions of that amount. First, prosecutors agreed to use the low end of the amounts provided under US sentencing

guidelines (USD 136.2 million) as the starting point for the fine, due to the liability that Bumble Bee also faced in civil suits and because Bumble Bee’s conduct had not resulted in any *non-economic* harm. Second, the Division also credited the company’s cooperation in the agency’s ongoing investigation, meriting a downward departure from the low end of the guidelines range, and further reducing the fine to USD 81.5 million.⁷² Third, the Division further lowered Bumble Bee’s penalty to USD 25 million because the Division recognized that payment of a higher amount might lead the company to suffer “adverse consequences” (e.g., bankruptcy).⁷³ This penalty ultimately contributed to Bumble Bee’s bankruptcy in November 2019: in documents supporting its filing, the company cited the fine as well as civil litigation and “tens of millions of dollars in defense costs” as one of the reasons the company was forced into bankruptcy.⁷⁴

StarKist pleaded guilty to price-fixing in November 2018, though it took almost a year afterward for its penalty amount to be set. According to the Division, StarKist’s conduct affected at least USD 600 million in sales. Unlike Bumble Bee’s plea agreement, Starkist’s plea agreement specified only a range for the penalty the company was to pay, to be determined by a U.S. district judge. This determination resulted in months of heated litigation. The Division requested the judge impose the top end of the range provided for by US sentencing guidelines: USD 100 million. In response, StarKist argued that such a fine would devastate the company, and claimed it could afford to pay only USD 50 million—the low end of the penalty range recommended by the US sentencing guidelines.⁷⁵ The amount of Starkist’s fine hinged on whether the company would be able to sell its subsidiary, TechPack Solutions, which is valued at approximately USD 155 million. In September 2019, the federal district court judge presiding over

Starkist's guilty plea ordered Starkist to pay the full USD 100 million penalty amount, finding that StarKist did not prove its financial circumstances justified the lower fine as the company had argued.⁷⁶

Both companies have been subjected to criminal penalties at levels they assert they cannot pay, along with penalty provisions that seem almost specifically designed to impact the companies' foreign parents. For Bumble Bee, its guilty plea specified that in the event of a "qualifying transaction" (e.g., if the company was acquired), Bumble Bee's fine would revert to the USD 81.5 million figure. In essence, this provision added USD 56.5 million to the cost to any buyer of acquiring Bumble Bee from Lion Capital, to be paid to the Division in the form of a criminal penalty. As for Starkist, its parent, Dongwon Industries of South Korea, has vigorously opposed any resolution that requires Starkist to dispose of assets to pay the criminal penalty. Both outcomes perhaps indicate that the Division holds the corporate parents of the conspiring companies at least partially responsible for the misconduct.

Leniency⁷⁷

The Division's leniency program allows individuals and corporations to self-report their role in antitrust crimes and thereby avoid criminal convictions and penalties. The Division's aggressive pursuit of criminal convictions for companies and executives implicated in cartel conduct has had the effect of encouraging companies to self-report such antitrust conduct to pursue leniency. To be eligible for leniency, an individual or a corporation must meet all of the conditions set forth in the Division's corporate or individual leniency policies, including confessing to the antitrust violation and fully cooperating with the agency's investigation and prosecution of co-conspirators. The Division will award leniency only to the first company to come forward and successfully self-report its role in a conspiracy and satisfactorily cooperate with the Division's investigation however, so prompt action is important if conduct is uncovered during a merger review.⁷⁸

There are two types of leniency available under the Division's Corporate Leniency Policy: "Type A" leniency and "Type B"



leniency. Type A leniency is available where a company approaches the Division for leniency *before* the agency has opened any investigation into the cartel conduct at issue. Type B leniency is available to the first company that agrees to cooperate with the Division *after* the Division has already launched an investigation into the conduct at issue, but before the Division has sufficient detail to convict any conspirator. There are two significant disadvantages to Type B leniency. First, the Division has more discretion over whether to grant leniency to a Type B applicant. Under the policy, the Division will only grant Type B leniency if it determines that doing so would “not be unfair” to other conspirators. Second (and more significant), the Division has greater discretion over whether to grant immunity to officers, directors, and employees of a Type B leniency applicant. Personnel of Type A leniency applicants who satisfy the requirements for cooperation and admission of guilt automatically receive immunity when their employer receives immunity. Employees of Type B applicants, on the other hand, must separately earn their immunity in return for cooperation. The protections afforded to a Type A leniency applicant are intended to encourage companies to promptly self-report their role in a criminal antitrust conspiracy, rather than waiting to do so once they have received an inquiry from the Division.

When news broke in July 2015 that the Division was investigating potential antitrust violations in the packaged seafood industry, the immediate speculation was that the agency had uncovered evidence of cartel conduct between the parties in the course of its review of the Chicken of the Sea-Bumble Bee deal. As a result, press reports speculated that Thai Union had sought Type B leniency, given that the Division had already begun investigating the industry.⁷⁹ Normally, leniency applications are closely-guarded secrets; in fact, Division policy is to treat leniency applications as strictly



confidential. Indeed, Chicken of the Sea’s leniency application was not confirmed until September 2017 when its parent, Thai Union, filed a notice with the Stock Exchange of Thailand stating that the company had received conditional leniency from the Division.⁸⁰ Such corporate disclosures to shareholders are typical means by which a company discloses its status as a leniency recipient.

Chicken of the Sea’s leniency application illustrates the lengthy and substantial cooperation requirements of leniency applicants. The Division had launched its investigation at least by July 2015, when news of the investigation broke. Chicken of the Sea likely pursued leniency for over two years before the Division finally awarded leniency in 2017. And notably, in Thai Union’s Stock Exchange notice, the company was careful to specify that the leniency was *conditional*, which means that the company’s cooperation obligations continue indefinitely. This is part of Division policy, pursuant to which the receipt of leniency becomes final only after the Division closes its investigation and prosecution of all co-conspirators related to the conduct that is the subject of

the application. As a result, Chicken of the Sea is required to continue to provide significant—and costly—cooperation in the Division’s ongoing investigation. Chicken of the Sea’s leniency protections will not be final until the Division concludes its investigation of Chicken of the Sea’s co-conspirators and their executives, which may take years. In the meantime, Chicken of the Sea is at the mercy of the Division—as the agency has made clear, conditional leniency can and will be revoked if the Division determines that the company’s cooperation has not been satisfactory. As long as the company continues to cooperate, however, Chicken of the Sea and its employees will avoid prosecution and its resultant fines and jailtime.

Leniency provides some protections for civil penalties as well, although that protection is not complete, as evident from Chicken of the Sea’s involvement in the multitude of civil lawsuits that have been brought by consumers in the past few years. Those protections are discussed further below.

Civil Liability

In addition to empowering the Division to police antitrust violations, federal antitrust law also permits damages suits by private parties who claim to have been injured by such violations. To compensate for the fact that not all violations are capable of being uncovered or remediated by the agencies themselves, and to increase deterrence, federal law permits plaintiffs to proceed on an “opt out” class basis (as described below), and provides for treble damages for successful plaintiffs. Indeed, civil liability can sometimes be even more costly than criminal liability for a company embroiled in an antitrust scandal, especially given the length of time such proceedings take to conclude, as well as the multitude of different classes of plaintiffs that alleged violators can face in court. This heightened risk of civil liability derives from the prevalence of class actions in antitrust litigation.

Class Actions

US law permits plaintiffs to proceed as a “class action,” aggregating individual claims into a single suit that can (a) encourage parties to aggregate individually small claims that would otherwise not be asserted; and (b) facilitate the pursuit of these claims more efficiently. To proceed, a purported class of plaintiffs must meet certain criteria to be “certified” as a class by the court: there must be so many class members that litigating individual suits would be impractical; the underlying claims must share common facts and laws; and the class representative must accurately reflect the rest of the class and be capable of fairly protecting and pursuing the entire class’s interests.

Would-be plaintiffs are incentivized to lead a purported class. The class representative often gets to control certain aspects of the case, such as litigation strategy and whether to consider a proposed settlement. In addition, lead plaintiffs and their counsel receive an increased amount of any award or settlement. These benefits, coupled with comparatively



permissive threshold pleading standards in U.S. courts, often result in a race to the courthouse by numerous would-be plaintiffs suing in parallel on behalf of similarly-defined classes relying on barebone allegations that largely parrot news reports and allegations of Division investigations. As a result, a corporation that is the target of a Division antitrust investigation can expect to promptly face a multitude of civil lawsuits if news of the Division's investigation leaks to the press.

The Division's packaged seafood investigation is instructive of this. The first civil plaintiff, Olean Wholesale Grocery, stormed into court with an antitrust class action complaint less than two weeks after news broke of the Division's prepackaged tuna investigation.⁸¹ Olean sought to sue on behalf of itself and all similarly situated wholesale purchasers. Olean's complaint was followed quickly afterwards with class actions filed by other wholesalers, such as PITCO Foods⁸² and Affiliated Foods,⁸³ both of whom sought to represent the same class as Olean. These wholesaler class actions were followed shortly thereafter by individual consumers of prepackaged tuna suing on behalf of purported classes of plaintiffs claiming to have purchased tuna indirectly from the conspirators, leaving the tuna companies facing liability on many different fronts.⁸⁴

Opt-out Individual Suits

A judicial decision resolving a class action, or a class resolution approved by the court, is binding on all similarly-situated class members unless a would-be class member opts out and reserves their right to pursue an individual suit. There are many reasons why individual plaintiffs may choose to opt out of a class action. Some may do so because they believe they have suffered damages in excess of (or different from) those suffered by the class. Others may simply disagree with the strategy of the lawsuit itself.

The tuna civil antitrust litigation features several large opt-out plaintiffs. Perhaps the most noteworthy opt-out plaintiff was Wal-mart, which likely decided to opt out of the class action due to the size of the impact it believed it felt as a result of the price-fixing conspiracy. According to its complaint, Wal-mart purchased approximately USD 400 million of packaged tuna products per year during the price-fixing conspiracy, constituting approximately a quarter of all packaged tuna products sold in the United States. Chicken of the Sea was the first to settle with Wal-mart for an undisclosed amount in May 2018,⁸⁵ followed by StarKist, which settled with the retailer in January 2019 for a combination of cash and favorable commercial terms valued at approximately USD 20.5 million.⁸⁶ Bumble Bee settled Wal-Mart's civil suit in June 2019.⁸⁷

Several other opt-out suits continue, involving claims by large grocery store chains. These cases will continue in parallel to the class actions until the tuna companies resolve those claims in court or settle them.



Indirect Purchasers⁸⁸

While direct purchasers are able to sue under federal law, the so-called *Illinois Brick* rule disallows indirect purchasers from doing the same. Named after the Supreme Court case setting forth the principle, the rule limits federal antitrust claims to those who purchase price-fixed goods directly from alleged co-conspirators. The rule aims to protect defendants from duplicative damage awards claimed by purchasers at different levels of the market, and to spare courts from the complicated task of apportioning settlements and awards among participants at different levels of a purchasing chain, in which direct purchasers may have “passed on” some or all of an anticompetitive overcharge to downstream consumers.

Most U.S. states have enacted so-called “*Illinois Brick* repealer statutes” that seek to undo the Supreme Court’s decision, by allowing indirect purchasers to sue under *state* antitrust and consumer protection laws. These state rules can result in defendants’ being forced to defend lawsuits under the laws of multiple jurisdictions, each with different standards, precedents, and remedies, and potentially resulting in some of the inefficiencies in litigation that *Illinois Brick* was intended to foreclose.⁸⁹

In the tuna case, at least two sets of indirect purchaser class actions have been filed by plaintiffs who claim to have been downstream purchasers of price-fixed goods from defendants: a class of individual consumers and another class of commercial food preparation businesses (e.g., restaurants). These would-be classes included plaintiffs from at least 32 states and two U.S. territories (Washington, D.C. and Guam) and involved claims under local antitrust and unfair competition laws for each of these states and territories, demonstrative of the headaches that antitrust litigation can present to defendants.⁹⁰



ACPERA⁹¹

Even though Chicken of the Sea has been protected from criminal penalties as a result of its cooperation with the Division’s investigation, the company remains subject to claims from private litigants. However, a leniency recipient is not completely out of luck when it comes to civil suits: a leniency recipient that satisfactorily cooperates with the plaintiff’s suit may be able to avoid treble damages under the Antitrust Criminal Penalty Enhancement & Reform Act (“ACPERA”). However, the courts have not spoken clearly on what level of cooperation is sufficiently “satisfactory” to merit ACPERA credit. In addition, a leniency applicant is not eligible for ACPERA credit until civil litigation reaches the damages phase. In the tuna case, it remains an open question whether Chicken of the Sea will ultimately receive ACPERA credit.

Tuna Tales: What’s Next?

As of publication, the saga of the tuna cartel continues. StarKist faces a USD 100 million criminal penalty, the size of which may cause the company’s bankruptcy. Chicken of the Sea was able to avoid criminal prosecution for itself and its executives as a result of its leniency application, but its costly cooperation obligations remain ongoing and may continue for years. It also faces the threat of hundreds of millions of dollars in civil liability along with its co-conspirators.

For private equity firm Lion Capital, what started as a promising acquisition when it purchased a majority stake in Bumble Bee has instead turned into years of litigation and reputational harm. On November 21, 2019, Bumble Bee filed for bankruptcy, blaming among other reasons, the USD 25 million criminal penalty imposed by the Division in connection with the tuna cartel, as well as the threat of civil litigation damages and “tens of millions of dollars in defense costs” that the company has reportedly been forced to pay to defend itself.⁹² Lion Capital now indicates it has no choice but to liquidate Bumble Bee’s assets in bankruptcy—certainly not the result it envisioned when it purchased the company in 2010 for almost USD 1 billion. And this is to say nothing about the liability the parent company faces itself—in early 2018, certain of the private civil plaintiffs added Lion Capital as a co-defendant in the ongoing litigation.⁹³

Epilogue

The saga of the tuna cartel illustrates how a planned private equity transaction can morph into a full-blown criminal antitrust investigation when a private equity firm is unaware of conduct at the portfolio company level. Companies need to exercise care starting with due diligence during a merger or acquisition. Although time is often of the essence in acquisitions, parties need to be on the lookout for questionable conduct by their own employees or those of the target company, that could be

caught by competition authorities reviewing the proposed transaction. When a planned transaction would take place in a concentrated market, it is all the more important to ask the right questions, both internally and of the counterparty. In such deals, it is important to determine whether there are areas of potential antitrust risk, such as communications between competitors, and whether the parties participate in industry organizations (including trade associations or standard setting organizations). If the deal is in a concentrated market—especially if there is any history of antitrust violations in the industry—companies might consider asking antitrust counsel to engage in a more thorough investigation to look for issues such as these. Private equity companies are not immune from scrutiny involving the conduct of their portfolio companies: for example, private litigants have made much of accusations that before buying Bumble Bee, Lion Capital executives met with executives of a Bumble Bee competitor.



When there could be a potential antitrust issue in a new portfolio company, it is important for the company to conduct adequate diligence prior to acquisition. It is also important that after the acquisition, the acquirer properly integrate the new portfolio company, including implementing compliance policies and procedures. Pursuant to newly-released guidance from the Division, it is important that the company's compliance policy and procedures are tailored to the risks facing the company.⁹⁴ Key components of an effective antitrust compliance program include regular antitrust audits and employee trainings.

If a party to a planned transaction *does* find itself the recipient of a Second Request from antitrust authorities, there are steps it can take to reduce the burden and handle potential issues. Due

to the incredibly broad nature of a standard Second Request, a company should often work with antitrust agencies to narrow the request's scope, even though doing so takes time. Further, though a company may be tempted to produce documents in response to the Second Request as quickly as possible, it is generally important to conduct a thorough review of the documents prior to production. A party that is aware of what is in its documents can address issues proactively. If antitrust issues are found at the company, whether during an antitrust audit or during a Second Request, a company should consider what remediation measures are available.



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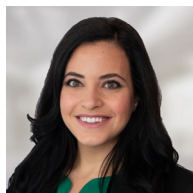
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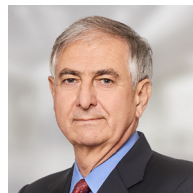
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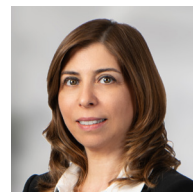
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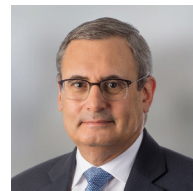
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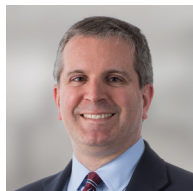
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