Antitrust's new big brother

Feds now can wiretap suspected offenders

By Mark D. Alexander and Peter A. Barile III

How do you think your clients would feel if the federal government listened in on their business calls? It's no longer very far-fetched.

Business executives in industries of interest to federal antitrust authorities have recently been added to the ever-growing ranks of those who may have cause for concern that the government is eavesdropping on their conversations — whether they be on the phone, in the boardroom, or elsewhere.

In addition to better-known provisions, the amendments to the Patriot Act signed into law by President Bush on March 9, 2006, expand the scope of the federal surveillance authority that has been the subject of much recent controversy further into the corporate realm with the extension of federal wiretapping authority to cover suspected corporate price-fixers. With these new amendments, a criminal violation of the Sherman Act is now a "predicate offense" for an order by a federal district court to authorize a wiretap, bug or other electronic surveillance.

The new antitrust surveillance power may have unsettling implications for executives in industries where companies closely watch their competitors' marketplace activity in making competitive decisions. Parallel pricing activity by competitors can raise inferences of collusion — and thus trigger antitrust investigations — even where the decisions in question are ultimately shown to have been made completely independently.

Because the range of conduct that may be sufficiently suspicious to attract investigatory attention in the antitrust realm is broad enough to encompass independent competitive decisions as well as unlawful conspiracies, the upshot of the new law may be that corporations and their employees in concentrated industries would be prudent to act as though government enforcers are silent listeners of their commercial communications as a matter of course.

The new surveillance power was created to reduce the historical reliance placed by the Justice Department's Antitrust Division on informants to infiltrate antitrust cartels. Up to now, the government's primary source for obtaining direct evidence of a conspiracy has been to enlist the participation of an informant, such as a coconspirator who has taken advantage of the Antitrust Division's leniency program and reported the conspiracy to the government to obtain amnesty.

Conspiratorial meetings may be recorded by such cooperating witnesses wearing a wire or by resort to other electronic surveillance undertaken with the "consent" of the cooperating witness. While not an uncommon occurrence, wiring or otherwise enlisting the participation of a cooperating witness presents a number of logistical challenges and may provide a limited view of the conspiracy and thus a limited amount of evidence.

The ability to conduct electronic surveillance without resort to a cooperating witness will likely lead to more robust and compelling evidence of conspiratorial communications. As Sen. Herb Kohl, D-Wisc., one of the new law's sponsors, explained regarding a predecessor bill he co-sponsored in 2005: "Because of their secret nature, antitrust conspiracies are extremely hard to uncover unless prosecutors can penetrate the inner workings of the conspiracies . . . By giving prosecutors the necessary

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authority to obtain a wiretap in these cases, we will greatly enhance their ability to aggressively bust up these criminal enterprises."

To use the new surveillance powers, prosecutors will have to demonstrate to a judge probable cause that communications about an antitrust violation will be obtained through the sought-after electronic surveillance and establish that the use of the electronic surveillance is necessary in light of the potential difficulties of more traditional methods. Based on experience in other areas of the law, these requirements may establish only a very modest bar for, according to an April 2005 report by the Administrative Office of the U.S. Courts, over the past decade, federal judges have granted 99.97 percent of the more than 14,000 applications for wiretaps, turning down only four.

Antitrust crimes can differ from other substantive offenses giving rise to wiretapping powers (drug trafficking, say) because the line between lawful and unlawful conduct can be murkier in antitrust than in many other areas of criminal law.

A lawful case of a company acting as a "price follower" of its competitors, for example, may closely resemble unlawful price fixing to an external observer monitoring marketplace behavior. In both cases, the companies in an industry may make changes in pricing (or discounts or other terms) in parallel with one another, particularly in oligopolistic industries dominated by a small number of major firms. When multiple firms in an industry raise their prices in lockstep, there is no easy way to know whether the firms are acting independently or through a conspiracy.

A critical question presented by the new law is thus whether federal investigators will seek to engage in electronic surveillance of potential offenders based solely on observed market information, such as parallel price increases, in the absence of tips from an insider to the suspected conspiracy.

The Antitrust Division monitors many industries for suspicious market activity through a program it calls "cartel profiling." The division examines publicly available information as to pricing trends and the like, and also monitors markets and firms previously involved in antitrust conspiracies. If the division takes an expansive view of probable cause, the new law could be construed to empower federal cartel profilers to electronically monitor competitors, or perhaps even trade-association meetings, in any industry in which the investigators observe what they deem to be suspicious price activity.

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Market forces may open boardroom doors to feds.

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Whether market information alone will provide the probable cause necessary to warrant such surveillance is not altogether clear. It is noteworthy that in the civil litigation context, however, the Second Circuit's recent decision in *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114-16 (2d Cir. 2005), suggests that merely alleging parallel conduct among competitors suffices to state an antitrust conspiracy claim, prompting defendants' counsel in *Twombly* to argue that now "any claim asserting parallel conduct will survive a motion to dismiss."

Given the historical reluctance of federal judges to reject wiretap applications, observed parallel conduct may well now provide the basis for intrusive electronic surveillance. Thus, it is possible that natural market forces may open the doors of the boardroom to the federal government. Firms in concentrated markets — where parallel pricing often is the norm — beware.

How the new surveillance powers will influence the longer-established aspects of federal criminal antitrust enforcement, such as the federal criminal leniency program, antitrust plea negotiation and sentencing practice, as well as related follow-on civil antitrust litigation, remains to be seen. Nevertheless, it is reasonably certain that the new powers will increase government leverage and downside risks to antitrust defendants to at least some degree.

The federal leniency program has proven to be a boon to criminal antitrust enforcement by creating compelling incentives for conspirators to police their own misconduct by affording potential criminal amnesty to the first — but only the first — conspirator to cooperate with DOJ enforcers.

Companies will now have even greater incentive to move with alacrity toward seeking leniency, since conspirators will not only need to race their counterparts to the Justice Department in order to be first-in to avail themselves of amnesty, but also the federal investigators who may be able to develop incriminating evidence without the assistance of an amnesty applicant at all.

In plea negotiations, more robust evidence of antitrust crimes that may be developed from the new surveillance powers are likely to lead to bigger fines and more jail time for executives. In the same vein, the fruits of government electronic surveillance will bolster the efforts of private plaintiffs pursuing follow-on litigation that takes advantage of federal criminal enforcement actions, likely leading to quicker and more lucrative settlements of such suits.

These new surveillance powers are also noteworthy because they apply not only to suspected price-fixers but also to suspected monopolists. Over the objections of the ABA's Antitrust Section, the new law also includes Sec-

tion 2 of the Sherman Act, which concerns monopolization, as a predicate offense. For many years, criminal prosecutions have been confined, as a matter of prosecutorial discretion by the Antitrust Division, to horizontal price fixing in violation of Section 1 of the Sherman Act, while monopolization under Section 2 has been the subject of civil enforcement only.

The lack of recent historical criminal prosecution of monopolization suggests that the government, at least in the current administration, may be circumspect in exercising its power to electronically monitor the corporate offices of dominant firms suspected of exclusionary practices. As antitrust enforcers gain experience with their new surveillance powers, however, and as the pendulum inevitably swings back to a more pro-enforcement posture, it may be only a matter of time before this eavesdropping power is used in circumstances outside the paradigm of the suspected price-fixing conspiracy.

For this reason, some commentators have urged that Congress clarify that only suspected members of hard-core cartels are subject to criminal prosecution and thus to wiretapping. Absent such clarification, the prospect of the electronic surveillance of dominant firms should give such firms — and their counsel — a great deal of pause.

The new antitrust surveillance rules provide another compelling reminder to lawyers advising corporate clients of the importance of antitrust compliance programs. In addition to being an ameliorative factor in antitrust sentencing, these compliance programs serve the primary role of educating clients in areas likely to give rise to antitrust concern, the government's arsenal of tools for ferreting out antitrust violations, and the dire consequences that can follow from failure to abide by antitrust laws.

The need for such programs is particularly acute in industries dominated by a relatively small number of firms where circumstances may make collusion both tempting and relatively easy to achieve when compared with less concentrated industries. With the increased ability of antitrust enforcers to discover violations, this type of prevention becomes an even more important counseling tool.