

The Antitrust Review of the Americas 2016



Published by Global Competition Review
in association with

Davis Polk & Wardwell LLP

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GLOBAL COMPETITION REVIEW

www.globalcompetitionreview.com

United States: Anti-Cartel Enforcement

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The United States Department of Justice's Antitrust Division had yet another banner year in 2014. The Division's relentless prosecution of cartels at home and abroad has resulted in severe consequences for companies and individuals alike, including unprecedented fines, lengthier sentences, parent-level guilty pleas and extraditions. As Assistant Attorney General Bill Baer recently warned, 'the risk of detection and punishment has never been higher.'¹

We begin our annual update with an overview of Antitrust Division enforcement data. Then we address important recent policy developments related to cartel enforcement, followed by a summary of key case developments from the past year.

Antitrust Division enforcement highlights

For the third year in a row, the total amount of annual criminal fines and penalties collected by the Division topped US\$1 billion.² In fiscal year (FY) 2014, the Division collected almost US\$1.3 billion in criminal fines and penalties, the largest annual yield in the Division's history.³ This record has already been eclipsed, however, as the Division has collected more than US\$2.5 billion in fines in the first half of FY 2015.⁴ These record-breaking fines, along with the Division's recent insistence on parent-level guilty pleas,⁵ underscore the Division's commitment to holding corporate offenders accountable and deterring future violations.

The Division has been equally zealous in its prosecution of individual offenders. As in prior years, individuals are being sentenced to prison more frequently, and for longer terms.⁶ The average prison term is now 25 months, double what it was a decade ago.⁷ The Division charged 44 individuals in FY 2014; 21 of them were sentenced to prison.⁸ Two years ago, we reported on the Division's change in its carve-out policy, limiting carve-outs to people believed to have committed crimes and who were potential targets of the investigation, and declining to publicly identify them. Since then, it appears that fewer people are being carved out of corporate pleas, and that the carved-out individuals are being indicted at a higher rate.⁹ The Division remains committed to bringing foreign offenders to justice; in 2014, it extradited two foreign nationals to face criminal antitrust charges in the United States.¹⁰

Recent developments in antitrust policy

Corporate compliance programmes

In the past, the Division's approach to compliance programmes has been criticised as 'all stick and no carrot'.¹¹ For more than 20 years, the Division has declined to give credit at sentencing for compliance programmes because, in the words of Deputy Assistant Attorney General Brent Snyder, 'a truly effective compliance programme would have prevented the crime in the first place'.¹² Nonetheless, in recent months, the Division has signalled a willingness to recommend reductions in fines and sentencing for companies that implement or improve compliance programmes.¹³ In May 2015, Barclays became the first company to receive such credit; the Division recommended a reduced fine based in part on Barclays' compliance programme.¹⁴

Every company that is convicted of a criminal Sherman Act violation must implement an effective compliance programme.¹⁵ Failure to comply with this requirement carries severe consequences, including additional fines, appointment of a compliance monitor at the company's expense and, in extreme cases, revocation of probation and non-prosecution agreements. In March of 2015, AU Optronics faced the threat of US\$1 billion in fines and five years of probation for failure to implement an effective compliance programme.¹⁶ And in May of 2015, the Division revoked a non-prosecution agreement held by the leniency applicant in the Foreign Currency Exchange (Forex) investigation, UBS AG. UBS's participation in the Forex cartel was found to violate the terms of its 2012 non-prosecution agreement resolving its participation in the manipulation of the London Interbank Offered Rate (Libor) and other benchmark interest rates.¹⁷

Landmark cases in motion

Ongoing criminal investigations in the financial sector *Forex*

In May 2015, the Division obtained parent-level guilty pleas from four major banks for conspiring to manipulate the US dollar-Euro exchange rate on the approximately US\$5 trillion-per-day foreign currency exchange market over a period of six years.¹⁸ Citicorp, JPMorgan Chase & Co, Barclays PLC and The Royal Bank of Scotland plc have agreed to pay criminal fines totalling more than US\$2.5 billion for their involvement in this conspiracy to fix prices and rig bids, and will be placed on probation for three years.¹⁹ The fines paid by Citicorp, Barclays and JPMorgan – US\$925 million, US\$650 million and US\$550 million, respectively – are the three largest criminal antitrust fines levied in the Division's history.²⁰

A fifth bank, UBS AG, sought leniency from the Division and was not charged.²¹ However, certain of UBS's practices on the foreign exchange market were found to have breached the non-prosecution agreement it reached with the Division in 2012 to resolve its involvement in the *Libor* investigation.²² As a result, UBS agreed to plead guilty to manipulating Libor and other benchmark interest rates, and will be subject to a three-year probation and US\$203 million in penalties.²³ Similarly, Barclays was charged an additional US\$60 million criminal penalty because its foreign exchange trading practices violated a key term in its Libor non-prosecution agreement.²⁴

In addition to the fines imposed by the Antitrust Division, the five banks have faced fines from other regulators, both in the United States and abroad, including over US\$1.6 billion in fines levied by the Federal Reserve. In total, the fines imposed on the five banks to resolve their illegal activity in the foreign exchange market, both domestically and abroad, amount to nearly US\$9 billion.²⁵ JPMorgan Chase, UBS, Bank of America Corp, and Citigroup Inc have also agreed to pay a total of US\$808.5 million to settle claims in a civil class action suit brought on behalf of thousands of investors by a combination of investment funds and retirement plans.²⁶

Libor

The Division continued its investigation of an alleged conspiracy to manipulate Libor, a benchmark for short-term interest rates that forms the basis of many loans and contracts globally. The rate is determined by asking panel banks the rate at which they can borrow funds in a given currency each day. In July 2014, Lloyds pleaded guilty to manipulating Libor submissions and agreed to pay a US\$86 million fine.²⁷ More recently, in April 2015, Deutsche Bank AG also entered into a deferred prosecution agreement (DPA), admitting it engaged in both manipulation of Libor and Euro Interbank Offered Rates as well as the rigging of yen Libor submissions in violation of the Sherman Act.²⁸ The terms of the DPA require Deutsche Bank and its subsidiary to pay a US\$775 million fine and retain a corporate monitor for three years.²⁹ In addition to Deutsche Bank and Lloyds, the Department of Justice has also charged four other banks – Barclays Bank PLC, UBS AG, The Royal Bank of Scotland Plc and Coöperatieve Centrale Raiffeisen-Boerenleenbank BA (Rabobank) – and 12 individuals. The Libor investigations are part of the broader Financial Fraud Enforcement Task Force efforts to prosecute financial crimes, and have benefited from cooperation between the Department of Justice, FBI, CFTC, SEC, European Central Bank and the UK Serious Fraud Office.

Precious metals

The Division is investigating at least 10 banks, including HSBC and Barclays, for possible conspiracy and bid rigging in various precious metals markets.³⁰ Until recently, the prices for gold, silver, platinum and palladium were set via daily conference calls among a small number of banks.³¹ The UK's Financial Conduct Authority previously fined Barclays over US\$40 million for its management of the gold-fixing auction, while Switzerland's Financial Market Supervisory Authority fined UBS nearly US\$150 million last November for its practices in the precious metals market.³²

Other ongoing criminal investigations

Airlines

In July 2015, the Division stated that it was investigating possible collusion among major US airlines concerning capacity and expansion plans. American Airlines, Delta, Southwest and United all confirmed that they had been contacted by the Division in connection with this probe.³³

Airline charter services

The Division has brought charges involving fraudulent and anti-competitive conduct in the airline charter services industry against several individuals. Aviation Fuel International, Inc (AFI), an airline fuel supply services company, was charged with making kickback payments to an officer of Ryan International Airlines, a charter airline company, for awarding business to AFI. AFI's owner and operator pleaded guilty and was sentenced to 50 months in prison and ordered to pay US\$202,856 in restitution. Four other individuals have also pleaded guilty and have been ordered to serve prison sentences ranging from 16 to 87 months.³⁴

Auto parts

The Division's investigation into market allocation, price-fixing and bid rigging in the automobile industry – the largest criminal investigation in the Division's history – continues. The alleged conspiracies spanned several continents and a vast variety of automobile parts, including lighting fixtures, lamp ballasts, ignition coils, electronic throttle bodies, anti-vibration rubber parts, heater control panels, seatbelts, airbags

and steering wheels. The price-fixed parts have been incorporated in automobiles manufactured by many different companies, including Toyota Motor Corp and Honda in Japan, as well as Ford in the US. The Division's efforts have resulted in guilty pleas from both implicated companies as well as many of their executives. As of publication, 55 individuals have been charged for their participation in the alleged conspiracies,³⁵ while 35 companies and 29 executives have pleaded, or agreed to plead, guilty to similar charges.³⁶ In total, the Division has collected more than US\$2.5 billion in fines.³⁷ In addition, five of the implicated companies have paid US\$210.5 million in settlements to resolve claims against them in connection with a massive MDL civil suit arising from the same misconduct.

The Division's investigation remains open, with six companies and four former executives agreeing to guilty pleas since September 2014. These most recent guilty pleas have resulted in over \$100 million in additional criminal fines and penalties. The Division also continues to cooperate with fellow enforcement agencies in the US and abroad, including the Japan Fair Trade Commission, the Canadian Competition Bureau and the FBI.

Capacitors

The Division is investigating alleged anti-competitive conduct by the manufacturers of capacitors used in mobile devices and other consumer electronics. In 2014, plaintiffs filed a civil class action against Panasonic Corporation, Samsung Electro-Mechanics America, Inc, and others alleging price-fixing in the capacitor industry. Later in 2014, the Division intervened and successfully sought a stay of discovery in the private civil action pending federal grand jury proceedings against an as-yet unidentified target or targets.³⁸

Marine hose

Since 2006, antitrust authorities around the globe have been investigating cartel activity in the market for marine hose, a flexible hose used for onshore and offshore transfers of oil, petrochemicals, and gas. The investigation began after Yokohama Rubber applied to the Division for amnesty. Since then, five more companies have pleaded guilty to participating in a conspiracy to fix prices, allocate customers and rig bids.³⁹ In April 2014, Romano Piscioti, a former executive of Parker ITR SRL, was extradited to the United States after his arrest in Germany – the first successful extradition on an antitrust charge.⁴⁰ Piscioti has since been sentenced to two years in jail and a US\$50,000 criminal fine.⁴¹ In addition, eight other individuals have also entered guilty pleas and have received sentences ranging from 12 to 30 months in prison.⁴²

Maritime transportation

The Division, the Federal Maritime Commission and Canadian, European and Japanese antitrust authorities are investigating alleged cartel activity in the maritime transportation industry. In September 2012, the investigation became public following raids by the European and Japanese antitrust authorities. After a Chilean shipping company, Compania Sud Americana de Vapores, pleaded guilty to a conspiracy to fix prices in the ocean shipping of roll-on, roll-off cargo in February 2014,⁴³ two Japanese companies and three executives have also entered guilty pleas. These guilty pleas have resulted in over US\$136 million in criminal fines, and jail sentences ranging from 14 to 18 months for the three executives.⁴⁴

Movie theatres

The Division is investigating the use of 'clearances' – exclusive exhibition rights granted by film distributors to movie theatres – in

the film industry. Several smaller theatre owners have complained that major theatre chains are using clearances to block the smaller theatres' access to new releases in an effort to drive them out of business.⁴⁵ The Division has contacted three of the four largest theatre owners – Cinemark, Regal and AMC Entertainment – in connection with this investigation.⁴⁶ Cinemark and AMC have also reported that they have received civil investigative demands for information from the Division and the Ohio Attorney General as part of this ongoing investigation.⁴⁷

Parking heaters

In March 2015, the Division obtained its first plea in its investigation into a price-fixing conspiracy involving parking heaters for commercial vehicles from 2007 through 2012. Espar Inc has pleaded guilty to conspiring with others to set a price floor for aftermarket parking heater kits and for coordinating the timing and amount of price increases for these kits, and has been sentenced to pay a US\$14.9 million fine.⁴⁸

Wall decor

As part of an ongoing investigation with the FBI, in April 2015, the Division brought its first charges in connection with a price-fixing conspiracy targeting e-commerce. According to the felony charge filed in federal court in San Francisco, a former executive of an e-commerce merchant of posters and prints was involved in a conspiracy to fix prices of wall decor; the conspirators used algorithm-based software to set prices of posters sold on Amazon Marketplace. The defendant has agreed to pay US\$20,000 in fines and to assist the Division's continuing investigation.⁴⁹

Criminal trials

Environmental services

In connection with both the IRS and FBI, the Division continues to pursue those involved in a conspiracy that resulted in over US\$1.5 million of kickbacks being paid by subcontractors for the award of contracts at two Environmental Protection Agency Superfund sites in New Jersey. In March 2014, a former project manager for one of the prime contractors was convicted and sentenced to 14 years in prison for his crimes – the longest prison sentence ever imposed in connection with an antitrust offence – and ordered to pay US\$50,000 in fines.⁵⁰ In April 2014, another defendant pleaded guilty to making a materially false statement to the EPA at a debarment hearing after having already pleaded guilty to his involvement in the conspiracy.⁵¹ A Canadian national charged with providing kickbacks to the project manager of one of the Superfund sites was also extradited in November 2014 and is currently awaiting prosecution.⁵² In total, the investigation has resulted in guilty pleas from eight individuals and three different companies.⁵³

Municipal bonds

As part of President Obama's Financial Fraud Enforcement Task Force, the Division, the FBI and the IRS continue to investigate bid-rigging in the US\$3.7 trillion municipal bond market. As of publication, the investigation had led to the conviction or guilty plea of 17 individuals and one corporation and has yielded over US\$740 million in fines. Most recently, a federal district judge in North Carolina sentenced the former managing director of Bank of America's municipal derivatives group to 26 months in prison for fraud and involvement in a conspiracy to win lucrative investment agreements and other municipal finance contracts.⁵⁴

Real estate foreclosure auctions

The Division is also working with other members of the Financial Fraud Enforcement Task Force to investigate and bring cases against companies and individuals involved in bid rigging and fraud at public real estate foreclosure auctions in four different states. Since the beginning of the investigation, more than 80 individuals have pleaded guilty or been convicted; 21 more are awaiting trial. In the past year, 30 individuals have been charged.⁵⁵

Tax liens

The Division and the FBI's investigation into bid rigging at tax lien auctions continues. To date, five companies and 16 individuals have been charged and US\$2 million in fines have been imposed. This investigation is also part of the Financial Fraud Enforcement Task Force's broader efforts to investigate and prosecute financial crimes.⁵⁶

TFT-LCD panels

The Ninth Circuit affirmed the convictions of AU Optronics Corporation (AUO), AU Optronics Corporation America and two former executives, holding that the foreign price-fixing conduct at issue was subject to the per se rule (not the rule of reason, as appellants had argued).⁵⁷ The court also held that the Foreign Trade Antitrust Improvements Act (FTAIA) did not bar the charges because the defendants' conduct constituted import trade, and thus fell 'outside the scope of the FTAIA'.⁵⁸ In the alternative, the court held the conduct alleged fell within the statute's domestic effects exception because 'the impact [of the conspiracy] on the United States market was direct and followed as an immediate consequence of the price fixing'.⁵⁹ The AUO defendants unsuccessfully petitioned the Supreme Court for review of the Ninth Circuit's decision.

The Seventh Circuit recently ruled on a civil case relating to LCD panels presenting similar questions under the FTAIA. In late November 2014, the court held that the claims of a US-based finished products manufacturer, Motorola Mobility LLC, were barred by the FTAIA because the price-fixed purchases occurred 'entirely in foreign commerce': the purchases were made abroad by the plaintiff's foreign subsidiaries, not by the plaintiff itself.⁶⁰ As foreign companies, these subsidiaries were limited to seeking redress under the laws of their home country and were barred by the FTAIA from obtaining redress under US antitrust laws.⁶¹ Motorola's petition for a writ of certiorari was denied in June 2015.

As noted above, in March 2015, AUO faced US\$1 billion in additional fines and five years of probation for allegedly violating the terms of its probation, including by failing to hire a full-time compliance officer to meaningfully develop or oversee its compliance programme.⁶² AUO resolved the probation revocation proceedings by agreeing to a 15-month extension of its probationary period as well as additional reporting requirements.⁶³

Conclusion

Prosecution of cartels at home and abroad continues to be a top enforcement priority for the Division. There are many new and ongoing investigations, and corporate fines and prison sentences have never been higher. In addition, the Division continues to partner with domestic and foreign enforcers to investigate and prosecute criminal conduct, and to bring offenders to justice. As a result, companies and individuals face greater risks of detection and punishment for antitrust crimes than ever before.

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Neal Potischman is a partner in Davis Polk's Menlo Park office. He has extensive experience litigating class action and other high-stakes civil disputes, with a focus on litigation relating to mergers and acquisitions, international cartels and other complex antitrust matters. Mr Potischman has represented individuals and institutions in a variety of civil, regulatory and criminal matters, including in connection with alleged price fixing in the markets for liquid crystal displays, optical disc drives and also in the fine art auction market, and in connection with alleged monopolisation of the market for services by heavy-duty helicopters. He has also provided antitrust advice in connection with a number of mergers. His current and former clients include Abbott Laboratories, AMI Semiconductor, Bank of America Merrill Lynch, Innolux Corporation, Equinix, Erickson Air-Crane, KPMG, LG Electronics, Morgan Stanley, Palm, Pfizer, Roche AG, SMART Modular and T-Mobile USA. He is a graduate of Swarthmore College and Harvard Law School.



Samantha Knox
Davis Polk & Wardwell LLP

Samantha Knox is an associate in Davis Polk's antitrust and competition practice group in Menlo Park, California. She represents clients in the technology, telecommunications, and financial services industries in a diverse range of multi-district and other complex civil litigation matters and government investigations. Ms Knox has experience litigating a wide range of antitrust issues in federal and state courts, including cases involving international cartels, patent licensing, patent misuse, price fixing, standard-setting organisations, and tying and bundling discounts. A former Ninth Circuit clerk, Ms Knox has also represented clients before the US Court of Appeals for the Ninth Circuit, and in connection with Supreme Court petitions for writs of certiorari. Ms Knox is an active member of the ABA Section of Antitrust Law, and is vice chair of the Section's joint conduct committee. She is a graduate of the University of California at Berkeley and Columbia Law School.



Greg Andres
Davis Polk & Wardwell LLP

Greg Andres is a partner in Davis Polk's New York office, concentrating on white-collar criminal defence and representing clients in both civil and criminal trials. He has represented individuals, financial institutions and other entities in a wide range of regulatory and criminal investigations involving market manipulation, insider trading, securities, procurement and tax fraud, and money laundering. He also has extensive experience in anti-corruption matters, both in private practice and at the Department of Justice; his current practice involves investigations that span the globe from China to Europe, India and Mexico. Mr Andres is an experienced trial lawyer who has conducted more than a dozen jury trials and supervised dozens of others involving financial fraud, FCPA, terrorism, and organised crime. He served as the lead trial lawyer in the first criminal trial stemming from the recent financial crisis. In private practice, he has served as trial counsel on a variety of matters involving antitrust claims, securities fraud, legal malpractice and FCPA issues. He is a graduate of the University of Notre Dame and the University of Chicago Law School.



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