The Antitrust Review of the Americas

2014

Published by Global Competition Review
in association with

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US: Anti-Cartel Enforcement

Christopher Hockett, Arthur Burke and Samantha Knox
Davis Polk & Wardwell LLP

2012 was a record-breaking year for anti-cartel enforcement in the United States. Aggressive prosecution of global cartels by the United States Department of Justice's Antitrust Division netted the largest single antitrust fine ever levied, the highest ever annual total for antitrust fines, and the longest US sentences ever imposed against foreign nationals. The Antitrust Division also continued its successful courtroom track record, chalking up convictions in several jury trials. As in past years, the Division worked in close cooperation with other international and domestic enforcers to investigate and prosecute cartel activity around the world, including through the Financial Fraud Enforcement Task Force.

We begin with an overview of Antitrust Division enforcement statistics. Next, we turn to the Antitrust Division's recent policy change regarding carve-outs in corporate plea agreements. Finally, we provide a recap of key case developments over the past year.

Antitrust Division enforcement highlights

The Antitrust Division has maintained a highly aggressive stance against both domestic and international cartel activity. Although the Division filed fewer cases – 67 cases filed in fiscal year (FY) 2012, as compared to 90 in FY 2011 – it obtained a record $1.14 billion in criminal fines, more than twice that of FY 2011.[1] The bulk of this total is accounted for in two massive fines: a $500 million fine imposed after trial against AU Optronics Corporation in the TFT-LCD matter and a $470 million fine against Yazaki Corporation in connection with the Division's auto parts investigation. The Division continues to target a diverse group of industries for investigation, including the automotive, electronics, financial services, real estate and transportation sectors.

In addition, the trend continues that the Division's individual prosecutions more frequently result in jail time, and for increasingly lengthy sentences. Of those individuals sentenced in FY 2012, 78 per cent were sentenced to prison, and the average prison term was just over two years. By comparison, between 1990 and 1999, the Division sent only 37 per cent of sentenced individuals to jail, and the average term prison term was only eight months, less than a third of the sentences imposed today.[2]

The Division again demonstrated its commitment to holding foreign nationals accountable for US antitrust violations. In FY 2012, foreign nationals received average prison terms of 16 months, and two record prison terms were imposed.[3] First, following conviction at trial for their participation in price fixing in the LCD-TFT industry, two Taiwanese executives received 36-month sentences, the longest sentences foreign nationals have ever faced in the US for antitrust violations.[4] Second, two Japanese executives received 24-month terms for their roles in the ongoing automobile parts case. These 24-month terms are the longest a foreign national has received after submitting voluntarily to US antitrust jurisdiction.[5]

Changes in the Division's carve-out practice for corporate plea agreements

Companies accused of cartel activity may negotiate immunity for current and former employees as part of a plea agreement with the Division. The Division often excludes (or 'carves out') certain individual executives from this grant of immunity, and some of them are later prosecuted. However, some are not. Individual executives might be carved out of a company's plea agreement for a variety of reasons, including because they declined to cooperate with the Division's investigation. It had been the Division's practice to list the names of carve-outs in the publicly filed plea agreements. As a result, these individuals suffered reputational damage and were often named in follow-on civil litigation, even when they were never charged with any criminal wrongdoing.

In April 2013, Assistant Attorney General William J Baer announced that the Division will no longer publicly identify employees excluded from corporate antitrust plea agreements. Instead, those individuals will be named in plea agreement appendices, which the Division will ask courts to file under seal.[6] This is a welcome change for corporate executives who previously faced the stigma of being linked publicly to criminal conduct for which they might never be charged. In addition, Assistant Attorney General Baer stated that the Division 'will no longer carve out employees for reasons unrelated to culpability.' However, the Division will continue to carve out employees who are 'potential targets of [the] investigation,' and individuals who do not 'fully and truthfully cooperate with [D]ivision investigations' will continue to forfeit the protections afforded them in plea agreements.[7]

Landmark cases in motion

Criminal trials

TFT-LCD Panels

In March 2012, a federal jury convicted AU Optronics Corporation (AUO), AU Optronics Corporation America (AUOA) and two former executives of participating in a worldwide conspiracy to fix the prices of thin-film transistor liquid crystal display panels. In September 2012, AUO was sentenced to pay a $500 million fine, the largest antitrust fine ever imposed, but half of the $1 billion fine sought by the government. The two executives were also fined and received three-year prison sentences, the longest ever imposed on foreign nationals for antitrust violations, but less than the 10-year maximum terms requested by the Division and permitted under the Sherman Act.[8] Two other executives were acquitted at trial, and the jury was unable to reach a verdict as to a third executive. Following a December 2012 retrial, the third executive was convicted of participating in the conspiracy. Another individual defendant, who was a fugitive at the time of trial, recently appeared and pleaded not guilty. That case is set for trial in September 2013.

AUO, AUOA and two of the individual defendants have appealed their convictions to the Ninth Circuit, and the defendants and the Division have both appealed the sentences.[9] Though price

fixing is typically treated as 'per se illegal,' defendants claim that this standard does not apply to foreign conduct, and that the district court erred in failing to apply the more lenient 'rule of reason' test. The Ninth Circuit denied the individual defendants' request for bail pending appeal, finding that they 'have not shown that the appeals raise a "substantial question" of law or fact that is likely to result in reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a reduced sentence.'[10]

To date, the Division's TFT-LCD investigation has netted $1.39 billion in criminal fines, 10 company convictions, 13 executive convictions, and charges against an additional seven individuals.[11] Related civil litigation pending in the Northern District of California, including class actions brought by direct and indirect purchasers, has so far resulted in more than $1.4 billion in settlements against these companies.

Coastal Freight

The Antitrust Division has been investigating allegations that coastal water freight transportation companies have conspired to fix freight transport fees between Puerto Rico and the continental US. In January 2013, a jury in Puerto Rico convicted the former president of Sea Star Line LLC, a water freight transportation company, of participating in the price-fixing conspiracy from late 2005 through mid-2008. In total, three companies and six individuals have been convicted in connection with these activities, resulting in more than $46 million in fines. Five individuals received sentences from seven months to four years.[12]

The coastal water freight probe is continuing, and the Division is working on it in collaboration with the Department of Defense, the Department of Transportation and the Federal Bureau of Investigation.

Municipal Bonds

The Antitrust Division is also working with other federal agencies and state partners through the Financial Fraud Enforcement Task Force to aggressively prosecute financial crimes. As part of this effort, the Division has been investigating bid rigging in municipal bonds. The Division and state attorneys general began investigating the municipal bonds industry after an Internal Revenue Service (IRS) examination of bond issuer fees raised suspicions of bid rigging.

The investigation has resulted in one company and 19 individual convictions. The Division won jury convictions of three former General Electric Co (GE) executives in May 2012 and three former UBS AG executives in August 2012. The GE executives received three to four-year sentences and $50,000–90,000 in criminal fines.[13] The UBS AG executives will be sentenced 23–24 July 2013, with the Division recommending 11–19 year sentences and almost $675,000 in restitution.[14] In January 2013, a Tradition NA financial services broker received 18 months in prison and a $12,500 criminal fine for his role in the conspiracy.

The Division has also worked with the IRS, the SEC, the Office of the Comptroller of the Currency, the Federal Reserve Board and state attorneys general to settle with some entities. Through these efforts, these companies have agreed to pay almost $745 million in restitution, penalties, and disgorgement.

Ongoing criminal investigations

Auto Parts

The European Commission – and subsequently the Antitrust Division – began investigations into bid rigging and price fixing of auto parts in early 2010. So far, 11 companies and 15 executives have pleaded guilty. Twelve executives have received one to two-year prison sentences, and the remaining three have not yet been sentenced. More than $874 million in criminal fines has been assessed, $470 million of which comprises a single fine against Yazaki Corporation. Other companies involved include DENSO Corporation, Fujikura Ltd, GS Electech and Autoliv.[15]

In July 2013, Panasonic Corporation pleaded guilty for its role in separate price-fixing conspiracies involving switches, steering angle sensors and automotive high intensity discharge ballasts. The alleged conspiracies spanned at least seven years, from 2003 to 2010. The company agreed to pay $45.8 million in criminal fines.[16]

Japan has also investigated auto parts cartel activity, assessing $49.1 million in fines to three companies for bid rigging in the headlights and taillights market and $41.3 million for similar activity with generators, starters, windshield wiper systems and radiators.[17]

Libor

In addition to the municipal bonds investigation, the Antitrust Division is also investigating an alleged conspiracy to manipulate the London Interbank Offered Rate (Libor). Libor is 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. When the financial crisis hit, commentators voiced concerns that banks were suppressing Libor reports to maintain the appearance of good financial health. The Fraud Section of the Criminal Division of the US Department of Justice, the Antitrust Division, the US Commodity Futures Trading Commission, the European Commission and the UK Financial Services Authority have all launched investigations into whether Libor panel banks conspired to manipulate USD Libor rates and other similar benchmark rates.

In June 2012, Barclays settled with these agencies for around $456 million, and the Division has granted the bank conditional leniency for potential violations regarding EURIBOR financial instruments. In December 2012, the Fraud Section, the Commodity Futures Trading Commission, the UK Financial Services Authority and the Swiss Financial Market Supervisory also settled with UBS AG regarding Yen Libor, Pound Sterling Libor, Swiss Franc Libor, Euro Libor, USD Libor, EURIBOR, and the Tokyo Interbank Offered Rate for Yen traded in markets external to Japan. UBS paid around $1.5 billion, and the UK Financial Services Authority noted that UBS's much steeper payment (as compared to Barclay's $456 million settlement) was because UBS's wrongdoing was more widespread. UBS Securities Japan also pleaded guilty to wire fraud, paying $50 million in fines, and the Antitrust Division filed criminal charges against two former UBS Yen derivatives traders. Finally, the Royal Bank of Scotland settled with the UK Financial Services Authority, the Commodity Futures Trading Commission, the Fraud Section and the Antitrust Division for $615 million.[18]

The many civil suits filed against banks allegedly involved in the conspiracy have not met with as much success. In April 2013, Judge Naomi Buchwald, who is overseeing the consolidated suits in the Southern District of New York, dismissed the plaintiffs' federal antitrust claims for lack of antitrust injury. She reasoned that Libor setting was an inherently collaborative, not competitive, activity, such that bank manipulations could constitute misrepresentations but could not harm competition. The court noted that its dismissal of the antitrust claims was 'not as incongruous' as might seem in light of the large government settlements with certain defendants because 'private actions which seek damages and attorney's fees must be examined closely to ensure that the plaintiffs who are suing

are the ones properly entitled to recover and that the suit is, in fact, serving the public purposes of the laws being invoked.'[19]

The Libor investigations are also part of the broader Financial Fraud Enforcement Task Force efforts to prosecute financial crimes.

Real estate foreclosure and tax liens auctions

The Division and the FBI continue to investigate and prosecute bid rigging and fraud at real estate auctions and public tax lien auctions. So far, 53 individuals and two companies have been charged in connection with the real estate auction investigation,[20] and nine individuals and three companies have pleaded guilty for similar activity in municipal tax lien auctions in New Jersey.[21] These activities also form part of the Financial Fraud Enforcement Task Force efforts.

Chocolate

The Division, the Canadian Competition Bureau and the German Federal Cartel Office have been investigating an alleged chocolate price-fixing conspiracy involving Hershey, Nestlé, Mars and Cadbury, which is alleged to have run from 2002 to 2007. In January 2013, the German Federal Cartel Office fined 11 chocolate companies $81.4 million, granting Mars leniency in exchange for its help in the probe.[22] In June 2013, the Canadian Competition Bureau formally charged Nestlé Canada, Mars Canada, ITWAL Ltd (a network of independent food distributors) and three executives (ITWAL's CEO and two former Nestlé Canada executives). Hershey Canada pleaded guilty for its role in the plot on 21 June 2013 and was fined $4 million. To date, the US authorities have not brought any charges, although civil class actions brought by US consumers and retailers against Cadbury, Hershey, Mars, Nestlé and other chocolate manufacturers and distributors are currently pending in the Middle District of Pennsylvania.

Lithium Ion Batteries

The DoJ is investigating an alleged price-fixing conspiracy in the cylindrical lithium ion battery cell industry, used in notebook computers. In July 2013, the DoJ announced that SANYO and LG Chem Ltd agreed to plead guilty for their roles in this conspiracy. SANYO will pay $10.731 million in criminal fines and LG Chem Ltd will pay $1.056 million.

The conspiracy is alleged to have run from April 2007 to September 2008. The Antitrust Division's San Francisco Office and the FBI in San Francisco are cooperating in this investigation.[23]

Civil trials

e-books

In addition to the criminal trials discussed above, this year the Antitrust Division tried and won a civil price-fixing case against Apple for allegedly conspiring with five of the six largest US publishers to raise the prices for e-books.

When Amazon.com began selling e-books, it employed the standard publishing 'wholesale model,' whereby publishers sell their rights to booksellers and booksellers then have free rein to set retail prices. Amazon.com set its bestseller e-book price at $9.99, allegedly prompting publisher concerns that e-books would cannibalise the hardcopy book market.

Apple and five major publishers – Hachette, HarperCollins, Simon & Schuster, Penguin and Macmillan (previously Holtzbrinck) – changed the e-book pricing model. Under a new 'agency' pricing system, Apple acted as an agent for the publisher rather than a retailer, enabling the publisher to set the e-book prices to consumers. Second, publishers agreed to a most-favoured-nation (MFN) clause that guaranteed that Apple iBookstore prices would not exceed the lowest price of the publishers' e-books offered elsewhere, even if the publishers did not control those other prices.

In spring 2011, both the European Commission and the Antitrust Division began investigating these practices as potential violations of Section 1 of the Sherman Act. Class action suits on behalf of e-book purchasers soon followed.

The publisher defendants quickly settled with the Division; HarperCollins, Hachette, and Simon & Schuster settled the day the Division filed its complaint in April 2012. Penguin followed in December 2012, and Macmillan in February 2013. These settlements generally dictated the boundaries of acceptable publisher e-book pricing actions going forward. Publishers agreed to cancel agency model MFN contracts in place and agreed to hold off for two years signing new contracts that would preclude retailers from setting e-book prices. In addition, these publishers are subject to an antitrust compliance programme, under which they must report all communications with other publishers and give advance notice to the Division on planned e-book projects involving other publishers. No fines were issued. The five publishers have also settled a 49-state and consumer class action suit (all states except Minnesota participated). To settle this state and consumer suit, Hachette, Simon & Schuster and HarperCollins – the first to settle – paid $69 million, Macmillan paid $26.5 million and Penguin – the last to settle – paid $90 million.[24] All five publishers and Apple have also settled with the European Union. Apple was the only defendant that did not settle with the Division.

The Division's case against Apple came to trial in June 2013 in the Southern District of New York. After a three-week bench trial, Judge Denise Cote ruled in favour of the Division, finding that Apple 'played a central role in facilitating and executing' the publishers' horizontal price-fixing conspiracy.[25] Specifically, Judge Cote found that Apple and the publishers 'agreed to work together to eliminate retail price competition in the e-book market and raise the price of e-books above $9.99.'[26] Apple had argued that per se treatment was not appropriate, since it was 'a vertical player vis-à-vis the Publisher Defendants' and a new, non-dominant entrant.[27] The court rejected these arguments, holding that the per se standard applies to any vertical participant in a horizontal conspiracy, and that dominance by such a vertical player is not necessary for per se treatment.[28]

The Division's prosecution of this case has highlighted questions about the legality of MFN clauses, which historically have been regarded as pro-competitive because of their potential to reduce buyers' input and transaction costs – efficiencies that can be passed on to retail customers. However, both the Division and the Federal Trade Commission have expressed concerns about the potential anti-competitive effects of MFNs, which could be used as a tool to monitor and enforce an alleged horizontal price-fixing conspiracy (as the Division alleged in its case against Apple).[29] The agencies have also suggested that MFNs may be anti-competitive when the MFN clauses for large buyers discourage discounts to smaller buyers (because these discounts would require suppliers to match discounts on the larger contracts).

In the *Apple* case, the Division alleged that the MFN clauses in Apple's agency agreements were 'the enforcement mechanism' for the horizontal conspiracy.[30] In the MFNs, the publishers promised Apple that they would not set the retail prices for e-books sold by Apple any higher than the lowest retail price in the market.[31] The DOJ characterised this provision as an 'unusual retail price MFN.'[32] The court ultimately agreed that these MFNs (which it called 'unique') had anti-competitive effects – finding that that Apple

created the MFN clause as a means 'to achieve an industry-wide shift to the agency model.'[33]

It found that the MFN incentivised the publishers to demand agency models with Amazon.com and other e-book retailers so that publishers could control – and thus increase – retail prices.[34] If Amazon.com refused, then Amazon.com's $9.99 price point would drop Apple's price to $9.99. But the court also noted that MFNs – and, relatedly, agency models – are not inherently illegal, but rather are only illegal when used to create unreasonable restraints of trade. Indeed, the court suggested that Amazon.com's and Google's own MFN clauses posed no issues because nothing suggested that these two companies desired to eliminate retail price competition or raise prices.[35] Nonetheless, under the terms of their settlements with the Division, the five publishers are prohibited for five years from entering into any new MFN contracts that might undermine the settlements.

Conclusion

The Antitrust Division continues its collaborative efforts with other international, federal and state agencies to prosecute cartel activity. As the vast majority of significant cartel activity now is global in scope, defendants face an ever-increasing risk of overlapping enforcement actions from competition authorities in multiple jurisdictions. Companies also face a growing risk of exposure to duplicative damage awards in civil cases in the US and abroad, particularly as more foreign jurisdictions adopt civil redress mechanisms for injured parties. The Division's recent dramatic successes in the TFT-LCD and Auto Parts investigations, and in criminal jury trials, signal that it will continue to aggressively target foreign companies and individuals involved in global price-fixing activity.

Notes

1 US Dep't of Justice, Antitrust Division Update 2013, Criminal Program, available at www.justice.gov/atr/public/division-update/2013/criminal-program.html. This figure does not include additional assessments of more than $220 million in restitution, penalties and disgorgement.
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5 Id.
6 Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Div.'s Carve-Out Practice Regarding Corporate Plea Agreements (12 April 2013), available at www.justice.gov/opa/pr/2013/April/13-at-422.html.
7 Id.
8 *United States v Lin et al*, Case No. 3:09-cr-00110, Sentencing Order 19-20 (N.D. Cal. 29 April 2013).
9 *United States v AU Optronics Corporation et al*, Case Nos. 12-10500, 12-10514, 12-10558 (consolidated with Nos. 12-10492, 12-10493, 12-10559, and 12-10560).
10 *United States v AU Optronics Corporation et al*, No. 12-10492 (9th Cir. 22 January 2013).
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19 *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 1:11-md-02262-NRB, Memorandum and Order 159-60 (S.D.N.Y. 29 March 2013).
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24 These figures include attorney fees and other costs in addition to restitution to consumers.
25 *United States v Apple Inc*, No. 1:12-cv-02826-DLC, Opinion & Order 9 (S.D.N.Y. 10 July 2013).
26 Id at 11.
27 Id at 152-53.
28 Id at 153.
29 Federal Trade Commission, FTC and Department of Justice to Hold Workshop on 'Most-Favored Nation' Clauses (17 August 2012), available at www.ftc.gov/opa/2012/08/mfn.shtm.
30 *United States v Apple, Inc*, No. 1:12-cv-02826-DLC, Plaintiffs' Proposed Findings of Fact paragraph 171 (S.D.N.Y. 14 May 2013).
31 As proposed by Apple, the MFN read:

> *If, for any particular New Release in hardcover format, the then-current Customer Price [designated by the publisher for Apple's e-book store] at any time is or becomes higher than a customer price offered by any other reseller ('Other Customer Price'), then Publisher shall designate a new,*

lower Customer Price to meet such lower Other Customer Price.

United States v Apple, Inc, No. 1:12-cv-02826-DLC, Opinion & Order 53 (S.D.N.Y. 10 July 2013). There were variations among the final MFNs adopted into the five agency agreements at issue, but 'the core principal of the MFN remained intact.' Id at 57.

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33 Id at 47-48.

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Christopher Hockett
Davis Polk & Wardwell LLP

Christopher Hockett is a partner in Davis Polk's Menlo Park office and global head of its antitrust and competition group. He is also chair of the ABA Section of Antitrust Law for 2013–14. Mr Hockett has practised in the antitrust area for over 25 years, and has served as lead counsel in dozens of antitrust cases in industries such as microprocessors, optical disk drives, telecommunications, liquid crystal displays, flash memory devices, newspapers, software, aviation, medical equipment and chemical manufacturing. He has also represented clients in connection with state and federal antitrust investigations and counselled clients concerning mergers and acquisitions, joint ventures, and distribution and pricing practices. Mr Hockett's experience also includes representing leading firms in a wide range of other types of complex commercial litigation, including patent and copyright litigation, securities litigation, professional malpractice matters, contract cases and consumer class actions. He is a frequent speaker at antitrust and trial practice programs around the country. He is a graduate of the College of William & Mary and the University of Virginia School of Law.

Arthur Burke
Davis Polk & Wardwell LLP

Arthur Burke is a partner in Davis Polk's New York and Menlo Park offices. He has represented clients in a variety of antitrust, securities, corporate governance and general litigation matters. In his antitrust practice, he advises clients on the competition law aspects of mergers and acquisitions and represents clients in investigations of mergers undertaken by federal antitrust authorities pursuant to the Hart-Scott-Rodino Act. Mr Burke is routinely sought out by some of the largest technology companies and financial institutions in the world to advise them on the antitrust aspects of transactions and other litigation and regulatory matters. His clients have included such companies as Comcast, Oracle, McData Corporation, Citigroup, Equinix, Oracle, SLM Corp (Sallie Mae) and Tyco Electronics. He regularly represents Comcast on its most meaningful antitrust matters, including the corporate and antitrust aspects of its agreement with General Electric to form the NBCUniversal joint venture. Mr Burke has long been active in the ABA Section of Antitrust Law, and is currently chair of the Section's Media & Technology Committee as well as the former co-chair of the Section's Intellectual Property Committee. He is a graduate of the University of Pennsylvania and the University of Michigan Law School.

Davis Polk & Wardwell

Davis Polk & Wardwell LLP
1600 El Camino Real
Menlo Park, California 94025
United States
Tel: +1 650 752 2000
Fax: +1 650 752 2111

Christopher Hockett
chris.hockett@davispolk.com

Samantha Knox
samantha.knox@davispolk.com

Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, New York 10017
United States
Tel: +1 212 450 4000
Fax: +1 212 450 3800

Arthur Burke
arthur.burke@davispolk.com

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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 high-stakes 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 at the appellate level before the US Court of Appeals for the Ninth Circuit, and in connection with Supreme Court petitions for writs of certiorari. She also provides transactional counselling on antitrust and FCPA-related risks, and has represented clients in connection with recent DOJ, FTC and FCC investigations and shareholder actions relating to mergers in the telecommunications and technology sectors. Ms Knox is an active member of the ABA Section of Antitrust Law, and is currently serving as the assistant to the Section chair. She is a graduate of the University of California at Berkeley and Columbia Law School.

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