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United States: Anti-cartel Enforcement

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2013 was another landmark year for the United States Department of Justice's Antitrust Division. Despite severe budgetary restrictions, hiring freezes, and a 16-day government shutdown, the Division's aggressive prosecution of global cartels continued: the Division obtained the longest US prison sentence ever imposed for a Sherman Act violation, the first extradition of a foreign national on an anti-trust charge, and the second-highest annual criminal fine total. As in prior years, the Division continued to work in close cooperation with other international and domestic enforcers to investigate and prosecute cartel activity around the globe.

We begin our annual update with an overview of Antitrust Division enforcement statistics. Next, we provide a quick recap of some recent administrative and legislative policy developments relating to cartel enforcement. Finally, we summarise the key case developments from the last year.

Antitrust Division enforcement highlights

Vigorous prosecution of criminal antitrust violations continues to be a top priority of the Antitrust Division. In fiscal year (FY) 2013, the Division filed fewer criminal cases – 50 in FY 2013 compared with 67 in FY 2012 – but collected US\$1.02 billion in criminal fines, just shy of 2012's record-breaking total of US\$1.14 billion. Since 2009, the Division has levied more than US\$4 billion in criminal fines.¹ Since 1995, the Division has imposed 115 fines of US\$10 million or more on corporations; of which, 99 were levied on foreign corporations.²

Individuals are being sentenced to prison more frequently and for longer periods of time. Since the 1990s, the Division's rate of imprisonment has doubled and the length of the average prison sentence has tripled.³ The maximum prison term for a criminal Sherman Act violation is 10 years; this year, a federal judge sentenced an executive to five years, the longest sentence ever imposed for an antitrust violation.⁴ The Division remains committed to holding foreign offenders accountable: the Division also sentenced 10 foreign executives to prison for an average prison term of 15 months each. And in April, the Division netted its first extradition of a foreign national for a criminal Sherman Act violation.⁵ In the past, foreign nationals indicted for Sherman Act violations have generally been able to avoid arrest by staying away from the United States. This extradition signals that the Division is willing to go beyond the borders of the United States to enforce the US antitrust laws, including by expending the resources necessary to extradite and bring fugitive foreign nationals to justice.

Recent developments in antitrust policy

The Division's leniency programme

The Antitrust Division's leniency programme – described as the 'Division's most effective investigation tool' – offers protection from criminal prosecution to the first company to come forward and report a cartel.⁶ The applicant gets a 'marker' to hold its place in line; the company then has 30 days to offer evidence and witnesses to 'perfect' its marker. The Division has discretion to extend

that 30-day deadline, and in practice, often does. At the American Bar Association's 10th annual International Cartel Workshop in February 2014, Assistant Attorney General William J Baer cautioned that these leniency markers 'are not meant to be indefinite' and that in the months ahead, the Division would focus on making sure that leniency applicants are working hard to perfect their applications in a timely manner.⁷ As the emphasis on cooperation between international antitrust enforcement authorities grows, leniency applicants are often asked to provide a waiver allowing the Division to share confidential information and documents with other enforcers investigating the same conduct. In June 2014, the Division announced that leniency applicants will not face repercussions for declining to grant such a waiver.⁸

Legislative developments

The US Senate unanimously passed the Criminal Antitrust Anti-Retaliation Act (CAARA) on 4 November 2013. The bipartisan bill was co-authored by Senators Patrick Leahy and Chuck Grassley, and would provide whistle-blower protections for employees who provide the Division with information regarding criminal antitrust violations. The law does not cover reports of civil antitrust violations. Unlike the False Claims Act and Dodd-Frank Act, CAARA would not provide whistle-blowers with qui tam and bounty incentives. The bill is awaiting consideration in the House of Representatives.⁹

On 14 November 2013, the Senate Subcommittee on Antitrust, Competition Policy and Consumer Protection held a hearing on cartel enforcement. Assistant Attorney General Baer and FBI Assistant Director Ronald Hosko, of the Criminal Investigative Division, provided testimony regarding the evolution of the Antitrust Division's cartel enforcement, the partnership between the FBI and the Division in cartel investigation and prosecution, and an in-depth discussion of the ongoing *Auto Parts* investigation.¹⁰

Landmark cases in motion

Criminal trials

Real estate foreclosure auctions

The Division and the FBI continue to investigate and prosecute bid rigging and fraud at real estate auctions and public tax lien auctions. In March 2014, following a four-week trial, the Division obtained convictions against two real estate investors for conspiring to rig bids at public foreclosure auctions in California. The third defendant, an auctioneer, was acquitted. The jury could not reach a verdict on the mail fraud charges brought against the real estate investors. To date, the Division's real estate bid-rigging investigation has yielded more than 40 guilty pleas in Northern California alone; in all, more than 90 individuals have pleaded guilty to real estate foreclosure and tax lien conspiracies.¹¹ Most recently, in February and April 2014, the Division's ongoing investigation of anti-competitive conduct at public real estate foreclosure auctions in Georgia yielded two guilty pleas for conspiracies to rig bids and commit mail fraud.¹² In March 2014, a real estate investor was also indicted for conspiracy to commit mail

fraud as part of a scheme involving public real estate foreclosure auctions in Alabama.¹³ These indictments were brought in conjunction with President Obama's Financial Fraud Enforcement Task Force, as part of a coordinated effort to investigate and prosecute financial crimes.¹⁴

Superfund kickback scheme

In September 2013, following a two-week jury trial, a former project manager for a prime contractor was found guilty for his role in bid-rigging conspiracies that involved over US\$1.5 million of kickbacks at two Environmental Protection Agency Superfund sites. The defendant accepted kickbacks from subcontractors in exchange for the award of subcontracts and provided co-conspirators with competitors' bid prices so that the co-conspirators could submit better bids. The conspiracies spanned seven years and involved three subcontractors at two New Jersey Superfund sites. In March 2014, the court sentenced the defendant to 14 years in prison and a US\$50,000 fine, not including future restitution payments. Six people have been sentenced to prison and over US\$6 million in restitution and criminal fines have been imposed over the course of the investigation.¹⁵

TFT-LCD panels

In early 2012, a federal jury convicted AU Optronics Corporation (AUO), its US subsidiary AU Optronics Corporation America (AUOA) and two former executives of participating in a conspiracy to fix the prices of thin-film transistor LCD panels. AUO was sentenced to pay a US\$500 million fine, which accounted for roughly half of the penalties collected by the Division in 2012.¹⁶

In October 2013, a jury acquitted an AUO employee who headed the company's notebook sales division of charges that he had participated in the same alleged conspiracy, after the Division conceded that he did not attend the majority of the meetings where price-fixing allegedly occurred. He is the third AUO executive to be acquitted.¹⁷ In December, the Ninth Circuit granted two of the individual defendants' requests for bail pending appeal.¹⁸

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.¹⁹ 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. Additionally, defendants argue that the indictment was deficient because it failed to plead the requirements of the Foreign Trade Antitrust Improvement Act (FTAIA) as an element of the Sherman Act violation, citing a recent Second Circuit decision.²⁰ The FTAIA establishes a general rule that the Sherman Act does not apply to overseas commerce, unless the claim involves import commerce or applies to foreign conduct that 'has a direct, substantial and reasonably foreseeable effect' on US domestic commerce.²¹ Defendants argue that the FTAIA bars the government's claims, because the conspiracy took place entirely in Asia, and the LCD panels only came into the US as part of finished products made overseas.

The Ninth Circuit rejected all of AUO's arguments, concluding that the indictment had sufficiently pleaded the elements of the offence, that the 'per se' standard applied to the foreign conduct alleged in this case, and that 'transactions between the foreign defendant producers of TFT-LCDs and purchasers located in the United States' constituted 'import commerce' and thus the FTAIA did not apply.²²

In another recent decision in civil litigation also relating to LCD panels, the Seventh Circuit held that the claims of a US-based

finished product manufacturer were barred by the FTAIA, because '[t]he effect of component price fixing on the price of the product of which it is a component is indirect' and too 'remote' to constitute a 'direct effect' on US commerce.²³ Several months after the panel issued this decision, it was vacated, and the Seventh Circuit granted the plaintiff's petition for rehearing en banc.²⁴

To date, the Division's investigations of cartels in the LCD industry have resulted in more than US\$1.39 billion in fines, as well as convictions of 10 companies and 13 executives.²⁵

Coastal freight

The Antitrust Division continued its pursuit of coastal water freight transportation companies that allegedly conspired to fix freight transport fees between Puerto Rico and the continental US. In December 2013, after being convicted by a jury in Puerto Rico of participating in the price-fixing conspiracy from late 2005 through mid-2008, the former president of Sea Star Line LLC was convicted of participating in a conspiracy to fix the freight transport fees between Puerto Rico and the continental US. He was sentenced to five years' imprisonment and ordered to pay a US\$25,000 criminal fine.²⁶ The five-year sentence is the longest prison sentence ever imposed for a Sherman Act violation (though it is less than the 87 months sought by federal prosecutors in the case).²⁷ The former vice president of price and yield management of Crowley Liner Services Inc was indicted in March 2013 for his role in the conspiracy and is scheduled to go to trial in the autumn of 2014. As a result of the ongoing investigation, Sea Star, Crowley Liner Services and Horizon Lines LLC, the three largest water-freight carriers between Puerto Rico and the US, have been ordered to pay more than US\$46 million in criminal fines for price fixing.

Municipal bonds

To date, the Division's investigation into bid rigging in the US\$3.7 trillion municipal bond market has resulted in more than a dozen convictions and guilty pleas, and US\$743 million in penalties against five financial institutions, including UBS AG and Bank of America Corp. According to prosecutors, the scheme involved hand-picking the winning bidders for investment deals and municipal finance contracts brokered by CDR Financial Products, a California company.²⁸ In November 2013, the Second Circuit reversed the convictions of three former General Electric Co finance executives after finding that prosecutors had improperly characterised the alleged scheme as a continuing conspiracy in order to bypass the statute of limitations. Three former UBS executives were convicted in August 2012 by a federal jury of conspiracy and wire fraud for favoring large investors over the municipalities for which they were supposed to be working.²⁹ The trio received prison sentences ranging from 16 to 27 months, and were ordered to pay criminal fines ranging from US\$300,000 to US\$1 million. The former UBS executives sought new trials on the ground that the government allegedly failed to disclose evidence. In May 2014, a New York federal judge denied the motions, ruling that evidence the government had allegedly failed to disclose until after the original trial was immaterial.³⁰ Several other defendants were spared prison time or received time served in exchange for their cooperation with the government's investigation.³¹

Ongoing criminal investigations

Auto Parts

The Division's ongoing investigation into bid rigging and price fixing in the automobile parts industry is the 'largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope

and the potential volume of commerce affected by the alleged illegal conduct.³² The Division's investigation has uncovered a number of alleged conspiracies among auto parts suppliers targeting a variety of auto parts, including seat belts, air bags, power steering systems, antilock brake systems, anti-vibration rubber, instrument panel clusters, starter motors and wire harnesses. In September 2013, nine Japanese companies agreed to plead guilty to conspiracy charges related to rigging bids, setting prices, and allocating supply for over 30 different products sold to car manufacturers. According to the Division, these conspiracies affected more than US\$5 billion in auto parts sold to US car manufacturers, including Chrysler, Ford and GM. Ultimately, more than 25 million cars purchased by American consumers were affected. Since September, seven more companies have entered into plea agreements, including Bridgestone Corp. The Division imposed a US\$425 million fine on Bridgestone for participating in an eight-year conspiracy to rig bids and set prices on anti-vibration rubber parts. Bridgestone's fine was significantly increased because it was a repeat offender. In October 2011, Bridgestone pleaded guilty to participating in the separate *Marine Hose* cartel; however, Bridgestone failed to disclose to the Division its role in the auto parts cartel when it entered into a plea agreement in connection with the *Marine Hose* matter.³³

To date, the Division has charged 35 individuals for participation in conspiracies to fix prices of and rig bids on automobile parts, and 27 companies have pled guilty or agreed to plead guilty. The Division's investigation has netted US\$2.3 billion in criminal fines.³⁴ The Division is continuing its investigation in connection with, among others, the Japan Fair Trade Commission, the European Commission, the Canadian Competition Bureau, the Korean Fair Trade Commission, the Mexican Federal Economic Competition Commission, and the Australian Competition and Consumer Commission.

Marine Hose

Since 2006, international 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 companies – Parker ITR SRL of Italy, Bridgestone Corporation of Japan, Manuli SpA of Italy, Trelleborg of France, and Dunlop Oil & Marine Ltd of the United Kingdom – have pleaded guilty to participating in a conspiracy to fix prices, allocate customers and rig bids.³⁵ The Division alleges that the conspiracy lasted for more than two decades, from 1986 to 2007. The Division has also charged 13 executives, including Parker executive Romano Piscioti. Piscioti was indicted in 2010, and remained at large until April 2014, when Germany extradited him to the United States.³⁶ Piscioti, an Italian citizen, was arrested by German authorities during a stopover at the Frankfurt airport. Two weeks after his extradition, Piscioti pleaded guilty and was sentenced to two years of imprisonment (with credit for the time he served in Germany prior to extradition) and a US\$50,000 fine.³⁷

Maritime Transportation

The Division, along with 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. In February 2014, Chilean shipping company Compania Sud Americana de Vapores became the first to plead guilty in the United States and

agreed to pay US\$8.9 million in fines. According to the indictment filed by the Division, CSAV participated in a decade-long conspiracy to rig bids, allocate customers and routes, and fix the prices of international shipping services for roll-on, roll-off cargo (such as cars, trucks and heavy machinery).³⁸

Airline Charter Services

Six people have pleaded guilty to charges involving fraudulent and anti-competitive conduct in the airline charter services industry. Aviation Fuel International, Inc (AFI), an airline fuel supply services company, defrauded Ryan International Airlines, a charter airline company, by making kickback payments to an officer of Ryan for awarding business to AFI. In March 2014, AFI's owner and operator pleaded guilty. Four of the six were ordered to serve prison sentences ranging from 16 to 87 months; together, the four will pay more than US\$580,000 in restitution.³⁹

Libor

The Antitrust Division continued its investigation of 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 manipulating Libor reports to maintain the appearance of their own sound financial health. The Fraud Section of the Criminal Division of the US Department of Justice, the Antitrust Division, the US Commodity Futures Trading Commission (CFTC), the European Commission, the UK Financial Services Authority, the UK Financial Conduct Authority (FCA), and the UK Serious Fraud Office, all launched investigations into whether Libor panel banks conspired to manipulate US dollar Libor rates and other similar benchmark rates. Notably, these investigations primarily involved manipulation of non-US Libor rates by foreign banks through activities occurring mostly outside the US.

In September, a federal judge in Connecticut approved a US\$100 million fine as part of a plea agreement between the US government and UBS Securities Japan, which pleaded guilty to manipulating Libor interest rates. The fine, combined with more than US\$1 billion in regulatory penalties and disgorgement, brings the total price paid by UBS to more than US\$1.5 billion.⁴⁰ Also in September, London-based ICAP PLC reached a US\$87.4 million civil settlement with the US CFTC and UK FCA over its role in the Libor matter.⁴¹ In October, Dutch lender Coöperatieve Centrale Raiffeisen-Boerenleenbank BA (Rabobank) entered into a deferred prosecution agreement with the Division and agreed to pay a US\$325 million penalty to resolve alleged violations relating to Libor and the Euro Interbank Offered Rate (Euribor), and announced that its CEO had resigned. Rabobank also reached agreements with the US CFTC, the UK FCA and the Dutch Public Prosecution service, with total civil and criminal fines reaching more than US\$1 billion.⁴² Also in January, a Connecticut federal judge sentenced the Japanese subsidiary of Royal Bank of Scotland PLC for its role in rigging the Japanese yen Libor, approving a plea agreement including a US\$50 million fine. The sentence comes one year after RBS had reached a deal to pay US\$612 million to US and UK regulators over claims that it manipulated Libor.⁴³ In May, the US CFTC and UK FCA fined London interbank brokerage firm RP Martin Holdings Ltd over US\$2.2 million for misconduct over manipulation of the yen Libor, making RP Martin the sixth financial institution to be fined by US and UK regulators for Libor rate misconduct.⁴⁴ In all, the Division

has obtained more than US\$475 million in criminal fines and penalties; the total global criminal and regulatory fines, penalties, and disgorgement collected to date exceeds US\$3.7 billion.

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

Forex

The Antitrust Division, in cooperation with the CFTC, along with regulators in other jurisdictions, including the Swiss Financial Market Supervisory Authority, the Swiss Competition Commission, and the UK's FCA, have been investigating whether various banks manipulated the foreign-exchange market (Forex). With daily transactions of between US\$4.7T and US\$5.3T, Forex is the largest and most actively traded market in the world.⁴⁵ In October 2013, UBS AG and Deutsche Bank AG revealed that various authorities were investigating their Forex activities and that they had launched their own internal reviews.⁴⁶

Conclusion

Prosecution of alleged domestic and international cartels continues to be a top enforcement priority for the Antitrust Division. Offenders face increasingly high stakes: over the last decade, corporate fines have increased, while courts are sentencing individual defendants to prison for longer periods. These stakes are magnified by the increasing 'internationalisation' of cartel enforcement: penalties imposed on the same behaviour by multiple authorities may result in 'double counting' or excessive fines, especially in light of follow-on civil damages actions. And as more jurisdictions adopt enhanced cartel penalties and criminal enforcement regimes, there is an increased risk that US businesses operating abroad could face severe sanctions without the benefit of due process protections that are well-established under US law.

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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 programmes 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.

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Davis Polk is one of the world's premier law firms. Known for skilful work in highly complex matters that are critical to our clients, we offer substantial breadth and depth across all of our practices. Our clients, many of them industry and global leaders, rely on the exceptional, collaborative services that we deliver through our 10 offices worldwide.

Our market-leading antitrust and competition practice combines broad experience in complex corporate transactions with a sophisticated litigation practice. Working closely with our M&A group, our antitrust lawyers advise and represent clients in a wide variety of US and cross-border transactions in many industries. We also provide representation in the full range of antitrust litigation, including private class actions, criminal and administrative investigations, and government civil enforcement actions.

Our lawyers have unparalleled experience in defending corporations and individuals in cases alleging predatory or exclusionary behaviour, such as tying, monopolisation and patent misuse. We have frequently acted as coordinating counsel for large defence groups, where we have taken the lead developing and advancing arguments not only on behalf of our own clients, but also on behalf of large groups of firms in various industries, including pharmaceuticals, telecommunications, cable television and investment banking.



Neal Potischman
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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 Abbot 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
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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.



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