

EXPORTING US ANTITRUST LAW

The DOJ's Increasing Focus on Asia

By M. Brinkley Tappan and Stephen M. Byers

Over the last decade, the United States Department of Justice's (DOJ's) Antitrust Division has increased its focus on anticompetitive conduct abroad, out of concern that international cartels cause American consumers a great deal of economic harm. The division has worked to combat anticompetitive conduct abroad by advocating for the adoption of stricter antitrust laws in foreign jurisdictions, as well as by cultivating relationships with foreign governments that can be used to assist the division in investigating and prosecuting foreign conduct that affects US commerce. The Antitrust Division employs both formal and informal methods of cooperation with foreign governments to coordinate competition policy and criminal enforcement against international cartels. As a result of these efforts, the reach of US antitrust law is rapidly expanding.

In 2006, Scott Hammond, deputy assistant attorney general in charge of criminal antitrust prosecutions, stated: "Multinational cooperation has made a 180-degree turn. Now antitrust authorities have a 'pick-up-the-phone' attitude and are searching for ways to cooperate with each other. Antitrust enforcers around the world have taken a page from the cartel handbook by 'harmonizing' their efforts." (Scott D. Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, Address at the Twentieth Annual National Institute on White Collar Crime: Charting New Waters in International Cartel Prosecutions 6 (Mar. 2, 2006), <http://tinyurl.com/lesx3nn>.)

With respect to cartel enforcement, since 2006 the Antitrust Division has taken advantage of tools such as mutual legal assistance treaties (MLATs) and Interpol Red Notices. MLATs are bilateral agreements between nations that provide that each country will use its own criminal investigative powers, including, where appropriate, subpoenas and search warrants, to obtain information for an investigation being conducted by the other party. Interpol Red Notices allow for detention of fugitives pending extradition. (See Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Div., Dep't of Justice, Address Before the Section of International Law and Practice of the American Bar Association: Enhancing Market Access through Trade and Antitrust Law (Aug. 8, 1995), <http://tinyurl.com/l3ajnlf>.)

Increasingly, authorities across the globe coordinate investigations from the very beginning in order to preserve an element of surprise as dawn raids and search warrants are executed simultaneously in multiple jurisdictions. Authorities may also share information throughout the course of parallel investigations. Although the Federal Rules of Criminal Procedure generally prevent US

authorities from sharing documents or specific interview content with foreign authorities, antitrust regulators cooperate in other ways; for example, by sharing general leads.

In addition to its focus on the anticompetitive conduct of foreign companies, the Antitrust Division has also sought increasingly to prosecute foreign individuals for antitrust crimes. From May 1999 to February 2010, the division put more than 40 foreign defendants in jail for antitrust crimes, and, according to Scott Hammond, "Division practice now is to insist on jail sentences for all defendants domestic and foreign." (Scott D. Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, Address at the Twenty-Fourth Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement over the Last Two Decades 7 (Feb. 25, 2010), <http://tinyurl.com/lq3akvy> [hereinafter Evolution of Criminal Antitrust Enforcement].) The division has also pushed foreign governments to impose individual criminal sanctions, including jail time, in order to increase deterrence worldwide.

In the context of these general developments, the division has made particular efforts to further antitrust enforcement in Asia, as evidenced by recent policy work and investigative activity.

Antitrust Enforcement Cooperation in Asia

The Antitrust Division has long collaborated with the Japanese government in developing competition policy. In the past several years, the Antitrust Division has referred to the convergence between the division's own leniency program—which encourages disclosure and cooperation by cartel participants in exchange for amnesty or more lenient treatment—and Japan's, and has touted the success of Japan's program in detecting and dismantling some of the world's largest cartels.

The Antitrust Division and the Japan Fair Trade Commission (JFTC) are cochairs (along with a third member, the German Bundeskartellamt) of the Cartel Working Group of the International Competition Network (ICN), an organization formed for the purpose of facilitating the "adoption of superior standards and procedures in competition policy around the world." (See INT'L COMPETITION NETWORK, <http://tinyurl.com/mlr99bd> (last visited July 5, 2013).) In that context, the US and Japanese governments have collaborated since 2001 on anti-cartel enforcement. For example, the Cartel Working Group has collected its member agencies' "good practices" in its comprehensive *Anti-Cartel Enforcement Manual*, which sets forth a framework for communicating and coordinating with other competition authorities in the early phases of investigations, particularly where the same party has requested leniency across jurisdictions. (See INT'L COMPETITION NETWORK, ANTI-CARTEL ENFORCEMENT MANUAL (2008–12), available at <http://tinyurl.com/kqdgkb6>.) The Cartel Working Group also organizes the annual ICN Cartel Workshop, a continuation of a series of agency-led international cartel conferences initiated by the DOJ in 1999. This annual Cartel Workshop has been described by the Antitrust Division as "a venue for anti-cartel enforcers

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from around the world to come together, learn from each other, and develop close working relationships that serve as the basis for future cooperation.” (Evolution of Criminal Antitrust Enforcement, *supra*, at 14–15.)

According to the Antitrust Division:

The ICN has assisted cartel enforcers in developing cross-border relationships that have resulted in real-time coordination among enforcers conducting parallel investigations of the same cartel. In addition, the proliferation of effective leniency programs has resulted in an increasing number of applicants seeking leniency simultaneously in multiple jurisdictions. Enforcers can then coordinate investigative steps, share—with the applicant’s consent—information provided by a mutual leniency applicant, and coordinate searches. (*Id.* at 15.)

are investigating related matters, it may be in those agencies’ common interest to cooperate in appropriate cases, consistent with those agencies’ enforcement interests, legal constraints, and available resources.” (Memorandum of Understanding on Antitrust and Antimonopoly Cooperation, U.S.-China, July 27, 2011, available at <http://tinyurl.com/ns9gqzo>.) The MOU also contains a pledge to explore how the countries can facilitate the coordination of law enforcement activities, through the development of “detailed work plans.” The agencies have agreed to conduct high-level annual meetings to further the goals set forth in the MOU and to encourage regular dialogue among staff-level employees regarding day-to-day investigative issues.

In September 2012, the US and Chinese competition agencies held the first joint dialogue meetings on competition policy in Washington, D.C., where they discussed, among other things, “various aspects of civil and criminal enforcement.” (See *Division Update Spring 2013, supra.*) In

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In addition to the long-standing ICN collaboration, the Antitrust Division has held bilateral discussions with the JFTC throughout recent years, and also hosted a JFTC official in Washington, D.C., in July 2012 as part of the division’s Visiting International Enforcers Program (VIEP), which was created for the purpose of increasing mutual understanding and enhancing relationships with enforcement partners around the world. (See *Division Update Spring 2013: International Program*, DEP’T OF JUSTICE, <http://tinyurl.com/lrpkyt> (last visited July 5, 2013).) The division also collaborated closely with the JFTC on several investigations, described in more detail below.

For the last several years, the Antitrust Division has also worked closely with the Korea Fair Trade Commission (KFTC), another founding member of the ICN. During 2012, the two agencies participated in several conferences and workshops. (*See id.*)

Very recently, the division has made strides to increase collaboration with the People’s Republic of China (PRC). In July 2011, the assistant attorney general in charge of the Antitrust Division and the chairman of the US Federal Trade Commission traveled to Beijing to sign a Memorandum of Understanding on Antitrust and Antimonopoly Cooperation (MOU) between the two US competition agencies on the one hand, and China’s three competition agencies—the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM), and the State Administration for Industry and Commerce (SAIC)—on the other. The MOU expresses the countries’ interests in collaborating on policy and enforcement. Specifically, each agency recognized that, “when a U.S. antitrust and a PRC antimonopoly agency

addition to the joint dialogue, the MOU signatory agencies also participated in two workshops in China, and various other “formal and informal exchanges.”

In April 2013, Scott Hammond, speaking at the ABA’s Antitrust Spring Meeting, described the Antitrust Division’s efforts regarding international cartel enforcement. Hammond mentioned the division’s efforts in China as a significant feature of international enforcement. Specifically, he expressed a keen interest in working with China and other Asian countries to develop effective leniency programs to encourage reporting in those jurisdictions, as well as to expand the basis for collaboration across jurisdictions.

Recent Enforcement Efforts

The Antitrust Division’s increasing focus on Asia is also demonstrated by several recent investigations arising out of conduct that occurred in Asia. The division has extracted many of its largest fines—and most significant prison terms—from companies and individuals based in Asia.

From 2005 to 2011, the division investigated a global price-fixing cartel involving air cargo services. Although carriers based in Europe were also subjects of the investigation, a large number of Asian carriers were implicated and paid substantial fines. For example, Korean Airlines pleaded guilty in 2007 and paid a fine of \$300 million, which remains one of the largest single fines in the history of the Antitrust Division. The following year, Japan Airlines pleaded guilty and paid a criminal fine of \$110 million. In 2011, All Nippon Airways, based in Japan, entered a guilty plea and paid a \$73 million fine. Cathay Pacific (Hong Kong), Asiana Airlines (Korea), Singapore

Airlines (Singapore), Nippon Cargo Airlines (Japan), China Airlines (Taiwan), and Nippon Express (Japan) all pleaded guilty as well, and paid fines ranging from \$40 to \$60 million for participation in the same cartel. (See *Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More*, DEP'T OF JUSTICE (Dec. 21, 2012), <http://tinyurl.com/kxqccl> [hereinafter *Corporate Fine*].) The Antitrust Division also indicted several Japanese executives—two from Nippon Cargo Airlines and one from Japan Airlines—although none has yet come to the United States to face the charges. (Press Release, Dep't of Justice, Former Executives from Two Japanese Airlines Indicted in Conspiracy to Fix Rates on Air Cargo Shipments (Nov. 16, 2010), <http://tinyurl.com/lzq6of2>.)

The JFTC investigated the same conduct, and levied its own fines against many of the same carriers, which suggests coordination between the US and Japanese antitrust authorities with respect to this investigation. (See Hisane Masaki, *Japan Forwarders Fined for Price Cartel*, J. COM. (Mar. 19, 2009), <http://tinyurl.com/lpceevr>.) The KFTC also conducted an investigation, and imposed liability on 26 carriers. It imposed aggregate fines of KRW 119.5 billion, and attributed the success of the investigation to “collaboration with foreign competition authorities, such [as] the US and the EU.” (See KOREA FAIR TRADE COMMISSION, 2011 ANNUAL REPORT, at 94, <http://eng.ftc.go.kr>, “publications,” “annual reports,” “Annual Report 2011”.)

From 2009 to 2012, the division investigated a price-fixing cartel regarding liquid crystal display (LCD) screens manufactured by various competitors based in Asia. The conspirators in that cartel are headquartered throughout Asia, including in Taiwan, Japan, and Korea, and are said to have participated in “monthly meetings . . . secretly held in hotel conference rooms, karaoke bars and tea rooms around Taiwan.” (Press Release, Dep't of Justice, AU Optronics Corporation Executive Sentenced for Role in LCD Price-Fixing Conspiracy (Apr. 29, 2013), <http://tinyurl.com/c2t4lya>.) This investigation yielded some of the largest corporate antitrust fines ever imposed. Sharp Corporation, based in Japan, pleaded guilty and paid a fine of \$120 million. Chi Mei Optoelectronics Corporation of Taiwan pleaded guilty and paid a fine of \$220 million, and LG Display Company of Korea paid a staggering \$400 million following a guilty plea. (See *Corporate Fine*, supra.) Several of the same companies were also penalized in Japan, which suggests at least some level of cooperation between the US and Japanese authorities. (See Press Release, Japan Fair Trade Comm'n, Cease and Desist Order and Surcharge Payment Order against Manufacturers of TFT Liquid Crystal Display Module for “Nintendo DS” and “Nintendo DS Lite” (Dec. 18, 2008), <http://tinyurl.com/kkchcnum>.)

AU Optronics Corporation (AUO), based in Taiwan, was another target of the division's LCD investigation. The company refused to accept a plea agreement, and instead took the case to trial. In September 2012, following an eight-week trial in the Northern District of California, AUO was found guilty and sentenced to pay \$500 million,

the largest fine ever imposed against a company for violating US antitrust laws. In addition to the corporate fine, two AUO executives were prosecuted individually and convicted. Hsuan Bin Chen, former president of AUO, and Hui Hsiung, former vice president, were each sentenced to serve three years in prison and to pay \$200,000 in criminal fines. (Press Release, Dep't of Justice, Taiwan-Based AU Optronics Corporation Sentenced to Pay \$500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy (Sept. 20, 2012), <http://tinyurl.com/9ujmd53>.) These verdicts are now on appeal to the Ninth Circuit, where AUO and the executives have argued that the DOJ exceeded its jurisdiction under the Sherman Act by prosecuting conduct that involved “foreign defendants who allegedly met in a foreign country to fix prices for foreign-made components sold to foreign-based entities and shipped from one foreign jurisdiction to another.” (Brief for Defendants-Appellants Hui Hsiung and Hsuan Bin Chen, United States v. AU Optronics Corp., Nos. 12-10492, 12-10493, 12-10500, 12-10514 (9th Cir. May 13, 2013).) The DOJ, on the other hand, has argued that a single overt act in the United States is sufficient to confer jurisdiction over a conspiracy that is otherwise foreign in all respects, particularly where the conduct was intended to produce, and did in fact produce, effects in the United States.

Apart from the convictions on appeal, a third AUO executive, Shiu Lung Leung, former manager of AUO's desktop display business, was recently sentenced to two years in prison and a fine of \$50,000. Leung initially avoided a conviction after a mistrial was declared. In November 2012, however, Leung was retried and found guilty. Regarding the outcome of the second trial, the new assistant attorney general for the Antitrust Division, Bill Baer, who is said to be keenly interested in international cooperation regarding antitrust enforcement, stated: “These international price-fixers caused consumers to pay inflated prices for their computer monitors, notebook computers, and televisions. . . . Prison sentences for culpable executives, combined with substantial fines against corporate wrongdoers, are the most effective deterrents for protecting consumers from this kind of illegal cartel behavior.” (See Press Release, Dep't of Justice, AU Optronics Corporation Executive Sentenced for Role in LCD Price-Fixing Conspiracy (Apr. 29, 2013), <http://tinyurl.com/c2t4lya>.)

Although the final outcome of the AUO investigation is not yet certain, the case demonstrates that the Antitrust Division is prepared to be aggressive with respect to the prosecution of international cartels, even where most of the conduct occurred outside of the United States.

Also during 2012, the Antitrust Division began an investigation of price-fixing in the auto parts industry. The investigation initially centered on an Asia-based cartel to fix the price of wire harness, and expanded to include other automobile parts. To date, the majority of the corporations that have pleaded guilty and paid fines have been based in Asia. In 2012, Yazaki, a Japanese manufacturer of various auto parts, agreed to plead guilty and pay a fine of \$470 million, the second largest fine ever

imposed for an antitrust violation. In conjunction with Yazaki's corporate plea, four of its executives also agreed to plead guilty, and to serve prison sentences ranging from 15 months to two years. Two of these executives—Japanese nationals—were sentenced to two years in prison, which is the longest term of imprisonment ever imposed on foreign nationals voluntarily submitting to US jurisdiction for antitrust violations. (See Press Release, Dep't of Justice, Acting Assistant Attorney General Sharris A. Pozen Speaks at the Briefing on Department's Enforcement Action in Auto Parts Industry (Jan. 30, 2012), <http://tinyurl.com/6lt6e2u>.)

Around the same time, Furukawa Electric Company Ltd., a Japanese producer of wire harness and other related automotive products, agreed to pay a \$200 million criminal fine, and three of its executives received individual prison sentences. (*Id.*) In addition, Denso, a Japanese manufacturer of various auto parts, agreed to pay a \$73 million fine. (See *Corporate Fine*, *supra*.) Several other Asian companies, including Fujikura Ltd., Tokai Rika Co., G.S. Electech, and Nippon Seiki Co., have also pleaded guilty to anticompetitive conduct in the auto parts industry, and have paid fines ranging from \$1 million to \$20 million. (See *Division Update Spring 2013*, *supra*.)

In recent months, the JFTC has announced its own fines against various companies for fixing auto parts prices, as a result of its parallel investigation. (See Press Release, Japan Fair Trade Commission, The JFTC Issued Cease and Desist Order and Surcharge Payment Orders to Participants in Bid-Rigging Conspiracies for Automotive Parts (Nov. 22, 2012), <http://tinyurl.com/l4yo66z>.) Although neither government has divulged publicly the details of their collaboration, in a recent

update, the Antitrust Division noted that it “continues to cooperate with its counterparts” in Japan and Korea, among other countries, on the auto parts investigation. (*Division Update Spring 2013: Criminal Program*, DEP'T OF JUSTICE, <http://tinyurl.com/lqyvl66> (last visited July 5, 2013).)

Conclusion

It is clear that the DOJ views anticompetitive conduct as a worldwide problem, particularly in today's global economy, where illegal agreements in foreign jurisdictions have the power to harm American consumers. To date, the Antitrust Division has addressed foreign anticompetitive conduct on two fronts: First, it has sought to advance antitrust policy in jurisdictions where enforcement regimes are still developing and to foster cooperation with its foreign counterparts. Second, it has been aggressive in its prosecution of foreign conduct—both corporate and individual—that affects US commerce. The two goals are intertwined. As antitrust policy in the United States and foreign jurisdictions converges, formal and informal cooperation increases, and enforcement becomes more effective.

The Antitrust Division's recent enforcement efforts with respect to Asia are illustrative. The long history of cooperation with Japan and Korea, and the more recent overtures with China's antitrust authorities, have led to increased harmonization of antitrust policy with respect to cartel conduct, and can be expected to provide the Division with additional tools to prosecute Asia-based conduct that affects US consumers. That in turn will allow the DOJ to maintain its aggressive stance toward combating anticompetitive conduct overseas. ■