

Cartel Watch

US Department of Justice Enforcement Update

Welcome

to the inaugural issue of the *Cartel Watch*! With cartel enforcement remaining aggressive in the US and on the rise globally, it is more important than ever to keep current on this area of the law. This publication will cover the latest key developments in cartel enforcement and follow-on civil damage antitrust class action lawsuits in the US and internationally. The *Cartel Watch* will be published six times a year so we can keep you updated on the most important events on a regular basis.

In 2012, cartel enforcement remained a top priority at the US Department of Justice Antitrust Division (DOJ) across a range of industries:

- **LCD** – In the long-running liquid crystal display (LCD) cartel investigation, AU Optronics was fined USD 500 million. This was the first time the DOJ proved illegal gains of at least USD 500 million at trial in order to obtain fines in excess of the USD 100 million statutory limit of the Sherman Act.
- **Auto Parts** – The DOJ has said the auto parts investigations are the largest it has ever pursued, both in terms of scope of products and potential volume of affected commerce. A federal judge sentenced Hong-Ming Hsu, a former executive of Eagle Eyes Traffic Industrial Co. Ltd. and a Taiwanese national, to 14 months in prison for his role in the auto lights conspiracy, less than the 27 months sought by the DOJ. Follow-on class action litigations have begun and cases involving the alleged price-fixing of heating control panels, fuel senders, instrument panel clusters, and wire harnesses have already been combined into a multidistrict litigation in Michigan federal court.
- **LIBOR/EURIBOR** – The DOJ's enforcement efforts extended to the financial services industry, with the investigation of banks for manipulation of the London InterBank Offered Rate (LIBOR) and the Euro Interbank Offered Rate (EURIBOR). Both Barclays and UBS entered into non-prosecution agreements, although one UBS subsidiary pled guilty, and have agreed to pay fines of USD 160 million and USD 400 million respectively, admit and accept responsibility, and cooperate with the government. The DOJ has cooperated with various domestic and international agencies in this investigation, including the Securities and Exchange Commission, the Japanese Ministry of Justice, and the Swiss Financial Market Supervisory Authority. The banks currently face follow-on civil litigation from private and government plaintiffs.
- Looking ahead to 2013, William J. Baer is the new Assistant Attorney General. Mr. Baer has previously worked in both the private sector and in government, including serving as Director of the Federal Trade Commission Competition Bureau from 1995 to 1999. Cartel enforcement is expected to remain a central focus in President Barack Obama's second term, as it has remained a priority for the DOJ regardless of which political party is in the White House. A potential challenge for the DOJ will be to maintain or increase the level of enforcement with four field offices closing (Atlanta, Cleveland, Dallas, and Philadelphia), some of which were active in cartel prosecutions.

Cartel Fine Tracker

Jurisdictions with well-established competition laws and aggressive regulators continued to prosecute cartels. The table below shows total fines in certain select jurisdictions in 2012.

Jurisdiction	Fines in 2012
United States	USD 1.1 Billion
EU	EUR 1.8 Billion (approx. USD 2.4 Billion)
Japan	JPY 1.9 Billion (approx. USD 215 Million)

The number of active cartel enforcers is increasing as well. For the first time, China's National Development and Reform Commission sanctioned six LCD manufacturers RMB 353 million (approximately USD 56.8 million) for colluding to manipulate prices in China from 2001 – 2006.

Follow-On US Civil Class Action Update

In 2012, there were several notable developments in antitrust class actions following from or relevant to cartel investigations.

- **Class Certification and Expert Evidence** – The US Supreme Court will decide this term whether judges must determine the admissibility of expert evidence supporting class certification, in particular, proof of common impact or injury, before certifying a class in *Comcast v. Behrend*. The Third Circuit affirmed class certification, declining to consider the admissibility of the proffered expert testimony on the ground that they raised merit-based issues that were premature at the class certification stage. The outcome may raise the hurdle to private antitrust plaintiffs.
- **Withdrawing from a Conspiracy** – In *Smith v. United States*, a case involving a drug conspiracy,

the US Supreme Court held that the defendant, not the government, bears the burden of proving a defense of withdrawal from a conspiracy. The decision has significant implications for companies seeking to defend against or minimize potential exposure from conspiracy charges on the ground that they withdrew from the cartel.

- **FTAIA** – Canadian producers of potash sought review by the US Supreme Court in *Agrium Inc., et al. v. Minn-Chem, Inc., et al.*, a case involving alleged price-fixing of potash, in which all the alleged conduct occurred outside of the United States. The Seventh Circuit held that the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) did not bar the price fixing claims of US consumers of potash because the foreign conduct involved import commerce and had a direct effect on US commerce. It remains to be seen whether the US Supreme Court will grant certiorari and further clarify the extraterritorial scope of US antitrust law, which it last addressed in its ruling in the *Empagran* vitamins cartel case in 2004.
- **Proof of Conspiracy** – The Supreme Court declined to review the Second Circuit's decision in *Stora Enso North America Corp. v. Parliament Paper, Inc., et al.*, where a civil price fixing case was sent to the jury even though the defendant had been acquitted of criminal charges brought by the DOJ involving the same conspiracy. The case illustrates the different evidentiary standards that apply to proof of a conspiracy in the civil and criminal contexts.

Cartel Watch is published by the Antitrust/Competition practice group of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, <http://www.weil.com>.

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