

Cartel Watch

Third Edition

This third edition of ***Cartel Watch*** continues our coverage of the latest key developments in cartel enforcement and follow-on civil class action lawsuits in the US and internationally.

Both criminal enforcement and civil litigation have been very active in Spring 2013:

Criminal Enforcement Update

New Changes to DOJ Policy Regarding Employees “Carved Out” from Corporate Plea Agreements – On April 12, the new head of the DOJ Antitrust Division, Assistant Attorney General William Baer, announced two significant changes to the agency’s practice of “carving out” certain employees from the non-prosecution protections contained in corporate plea agreements. First, the DOJ will no longer list the names of such persons in the publicly accessible portions of plea agreements. Second, the DOJ will carve out only those persons it “ha[s] reason to believe were involved in criminal wrongdoing and who are potential targets of [DOJ’s] investigation.” The new policy eliminates a practice that had received some criticism for harming the reputation of an individual who may never be (and, in fact, in most cases was not) prosecuted. Another effect of the new policy is that plaintiffs’ attorneys will have less information when it comes to alleging the individuals involved in a cartel when bringing a lawsuit. Similarly, defense counsel will have less insight into the focus of a cartel investigation. The DOJ’s official statement adopting this change in cartel enforcement policy can be found at: http://www.justice.gov/atr/public/press_releases/2013/295747.pdf.

Third AU Optronics Executive Sentenced to Prison for LCD Cartel – On April 29, a federal trial court in California sentenced an AU Optronics executive to serve two years in prison and pay a \$50,000 fine for his role in a conspiracy to fix the prices of LCD panels used in televisions and computer monitors. On May 2, that court also rejected the executive’s request for an acquittal or retrial based on, among other arguments, that alleged foreign price-fixing must be analyzed under the “rule of reason” standard (which generally requires a showing of an adverse effect on competition in a properly defined relevant market) rather than under the “per se” rule (which unquestionably applies to domestic price-fixing cases and requires only a showing of an agreement). This important legal issue and the scope of the US antitrust laws under the Foreign Trade Antitrust Improvements Act of 1982 have also been raised for further judicial review before the Ninth Circuit in appeals of the convictions of AU Optronics (which was fined \$500 million) and two other executives. *U.S. v. Lin et al.*, No. 09-cr-00110 (N.D. Cal.); *U.S. v. Hsiung*, No. 12-10492, *U.S. v. Chen*, No. 12-10493 (9th Cir.).

Third and Fourth Denso Executives Plead Guilty in Auto Parts Cartel – On May 21, two more Japanese Denso executives agreed to plead guilty to bid-rigging and fixing prices of electronic control units and heater control panels – two auto parts subject to the DOJ's ongoing cartel investigation. Those executives agreed to serve 15- and 16-month prison sentences and pay \$20,000 in fines each. In 2012, Denso and two other Japanese executives agreed to plead guilty to participating in the same conspiracies, with the company agreeing to pay a \$78 million fine and the individuals agreeing to serve 12- and 14-month prison sentences and pay \$20,000 in fines each.

Follow-on US Civil Class Action Update

Standing Lacking in Indirect Purchaser State Claims – A federal trial court in Michigan dismissed certain state antitrust and consumer protection claims brought by indirect purchasers of compressors. Under the US Supreme Court decision in *Associated General Contractors v. Carpenters*, 459 U.S. 519 (1983), a private plaintiff's injury must result from its participation in the market where trade has allegedly been restrained in order to bring a lawsuit under the federal antitrust laws. The plaintiffs in the compressors suit alleged that they had purchased appliances containing compressors (for which no conspiracy was alleged), but not the allegedly price-fixed compressors themselves. As a result, the federal trial court dismissed those plaintiffs' antitrust and consumer protection claims brought under state statutes that, it concluded, apply *Associated General Contractors*. *In re Refrigerant Compressors Antitrust Litigation*, No. 2:09-md-02042-SFC (E.D. Mich., April 9, 2013).

Auto Parts Class Action Update – Indirect and direct purchaser plaintiffs filed two separate class action lawsuits against several auto parts manufacturers and suppliers. The complaints allege federal and state antitrust claims resulting from alleged bid-rigging and price-fixing of anti-vibration rubber parts. These lawsuits are the latest in a string of follow-on class actions from what the DOJ has stated is its largest cartel investigation ever. Other auto parts at issue in these follow-on lawsuits include: wire harnesses,

instrument panel clusters, fuel senders, heater control panels, bearings, occupant safety systems, alternators, windshield wipers, radiators, and starters. *Martens Cars et al. v. Yamashita Rubber Co. et al.* No. 13-cv-11593 (E.D. Mich.); *Barron et al., v. Yamashita Rubber et al.*, No. 13-cv-10801 (E.D. Mich.).

Class Decertification Request Cannot Nullify a \$400 Million Jury Verdict – A federal trial court in Kansas refused to decertify a class of direct purchasers that had won a \$400 million jury verdict (trebled under US antitrust law to \$1.2 billion) against Dow Chemical in a price-fixing case involving urethane chemicals. Dow had argued that the US Supreme Court's recent decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), rendered the previously certified class invalid because the plaintiffs' theory of alleged harm was disconnected from their economic expert's model of classwide impact. The Kansas court largely rejected this argument on procedural grounds because Dow made this challenge well beyond the class certification stage. Thus, the impact of the *Comcast* ruling remains to be determined. *In re Urethane Antitrust Litigation*, No. 04-md-01616 (D. Kan.).

Developments Outside the US

Canada Establishes Cartel Whistleblowing Initiative – On May 29, the Canadian Competition Bureau announced a program to encourage whistleblowers to come forward with information about possible violations of the criminal cartel provisions of the Competition Act. A whistleblower with reasonable grounds to believe that a company has committed, or intends to commit, a criminal offense under the Act may confidentially notify the Bureau of the particulars of the matter. The program promises that confidentiality will extend to other Canadian law enforcement agencies to which the whistleblower provides information or with which the Bureau shares the information. In addition, the initiative clarifies the rights available to a whistleblower under Canadian law, including protection from retaliation by employers. For more about the Bureau's initiative, go to: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02819.html>.

EU Court Reduced Marine Hose Fines – On May 17, the General Court of the EU reduced by 75% a 2009 European Commission fine imposed on a company for its role in the marine hose cartel. The General Court reduced the €25.6 million fine imposed on Parker ITR to €6.4 million because it concluded that the Commission had failed to show that there was a structural link between Parker ITR (the successor entity) and Parker-Hannifin (the entity that preceded it and actually took part in the cartel).

Dawn Raids By Regulators – European cartel enforcers have had an active couple of months. On May 14, the European Commission and the Norwegian Competition Authority raided the offices of Shell, BP, and Statoil in an investigation into alleged collusion in benchmark prices for oil and biofuel. A follow-on proposed class action lawsuit has already been brought in a federal court in New York by purchasers of oil futures contracts. Also on May 14, the Commission announced that it had conducted raids in April of unnamed sugar producers in several EU Member States for alleged cartel behavior. On May 7, in a price-fixing investigation, the German Federal Cartel Office raided one individual's home

and the facilities of nine companies that produce and distribute potatoes. Finally, Brazil's Administrative Council for Economic Defense announced that on March 17 it had conducted dawn raids on wheat flour millers and distributors in an investigation into alleged information exchanges and allocation of markets.

International Competition Enforcers Announce Continued Vigorous Cartel Enforcement – On April 24, the Korean Fair Trade Commission announced that it will focus enforcement efforts on price-fixing and bid-rigging. The KFTC intends to push for higher fines and expand the size of its investigative teams (including the use of other agencies). In addition, the incoming head of the UK Competition Commission announced his intention to reinvigorate cartel enforcement. In particular, he aims to have the newly formed Competition and Markets Authority – which will replace the Commission in 2014 – successfully prosecute a criminal cartel case that establishes a legal precedent for the new agency's authority to bring such cases.

Cartel Fine Tracker – Be sure to read the next issue of *Cartel Watch* for an update on cartel fine activity in jurisdictions with aggressive enforcement through the end of Q2 2013.

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