

In this March edition, we are delighted to present legal and industry updates from the firm’s global network of offices. The selection is based upon our experience of the wide variety of issues faced by our clients in their business operations and investments around the world.

We hope that you enjoy the edition, and would welcome the opportunity to discuss further any matters which impact your business today.



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Our Antitrust Practice Group has been recognized by Chambers USA as a “*sharp, practical, business-oriented group*” that provides “*a great mix of theory and practicality.*” The Antitrust Group’s Cartel practice also received a national Chambers ranking.

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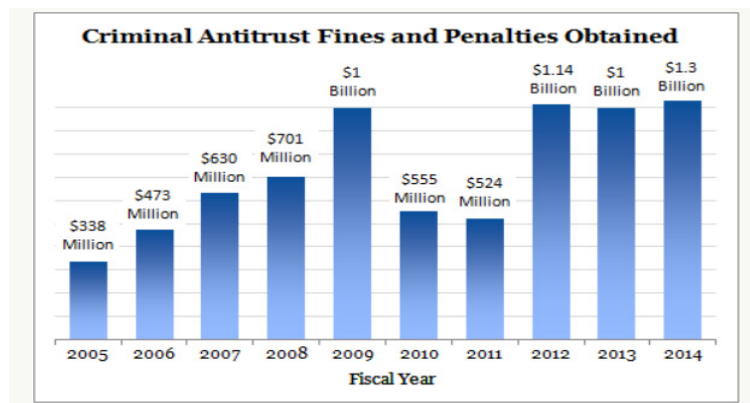
Global Cartel Enforcement Update

Guidance on Managing International Investigations

The U.S. Department of Justice’s Antitrust Division has continued to successfully prosecute corporations and individuals for criminal violations of the U.S. antitrust laws, *i.e.*, cartel violations. Both companies and individuals located in Japan and other jurisdictions may be subject to U.S. investigations and prosecution, if their conduct overseas impacts U.S. consumers. For the third year in a row, total cartel fines paid by companies and individuals to the U.S. Department of Justice exceeded \$1 billion.

Since 2011, more than \$2.5 billion in fines have come from the Antitrust Division’s Auto Parts investigation, in which 36 companies and 30 individual executives have pleaded guilty or agreed to plead guilty to criminal antitrust violations. More than half of the companies and individuals charged in this investigation were from Japan. The significant level of U.S. criminal fines, the broad reach of U.S. antitrust laws, and the coordination among global enforcement agencies have made cartel issues a significant compliance issue in recent years.

Companies now understand that cartel investigations can present significant exposure and risk to their businesses, just as other major government investigations do (*e.g.*, corruption, money laundering, and other allegations of business crime).



Source: U.S. DoJ, Antitrust Division, Criminal Enforcement Update

Although U.S. enforcers have been at the forefront in criminal prosecutions of companies and individuals in global cartel investigations, there are numerous other competition agencies around the world with antitrust/cartel enforcement authority. Major jurisdictions include the European Commission (EC), individual EC member states, Canada, Japan, Korea, China, Brazil, and Australia. There are more than 300 global competition agencies worldwide. Japanese companies have been investigated not only by U.S. authorities, but by other competition agencies as well.

Why have so many Japanese companies and individuals been prosecuted in recent years? What are the best ways to prepare and respond to these investigations? We provide below an overview of U.S. enforcement and some practical tips for responding to search warrants.

Cartel Conduct – Price-Fixing, Bid Rigging or Market Allocation

There are several common aspects to the recent cases involving Japanese companies. Government investigations concluded that there was a business culture among competitors in which communication about pricing and customers was common.

In fact, many of these cases involved allegations of a long history of dealings and agreements reached between the competitors not to engage in price wars. These agreements were evidenced by phone calls, e-mails, and in-person meetings. In addition, government enforcers viewed there to be little to no attention to compliance with antitrust laws, even though most major jurisdictions in North America, Europe, and Asia actively enforce these laws, and the United States prosecutes companies and individuals criminally.

Most U.S. criminal antitrust prosecutions involve price fixing, bid rigging, or market division or allocation schemes. Each of these forms of collusion

may be prosecuted criminally if they occurred, at least in part, within the past five years.

- **Price fixing:** Agreeing with competitors to raise, fix, or otherwise maintain prices or discounts.
- **Bid rigging:** Agreeing with competitors to at certain levels, refrain from bidding, or withdraw a bid so that a competitor's bid will be accepted.
- **Market allocation:** Agreeing with competitors to divide up markets or regions, or allocate specific customers.

Proving such a crime does not require that conspirators entered into a formal written agreement. Agreements can be proven by witnesses (often employees of competing companies), suspicious bid patterns, travel and expense reports, telephone records, and business diary entries. Collusion among competitors is a “per se” violation: once established, it cannot be justified under the law by arguments that the agreed-upon prices were reasonable, the agreement was necessary to prevent price cutting, or other business justifications.

One of the most unique aspects of U.S. cartel enforcement is the Antitrust Division's Corporate Leniency Program. Under this program, the first company to report its participation in a cartel and meet cooperation requirements may avoid criminal prosecution and fines completely. There is only one company that can earn this status and, if successful, current employees who cooperate will also avoid criminal prosecution. This “first in the door” policy makes effective antitrust compliance programs more critical for companies that operate in industries in which collusion could occur.

Cooperation with the Japanese and Other Global Competition Authorities

Beyond specific prosecutions of Japanese companies and executives, there are other connections between

U.S. authorities and Japan. U.S. antitrust prosecutors continue to coordinate their investigations with Japanese authorities, as well as other major enforcers worldwide. Policy and case-level coordination are quite common in U.S. cartel investigations.

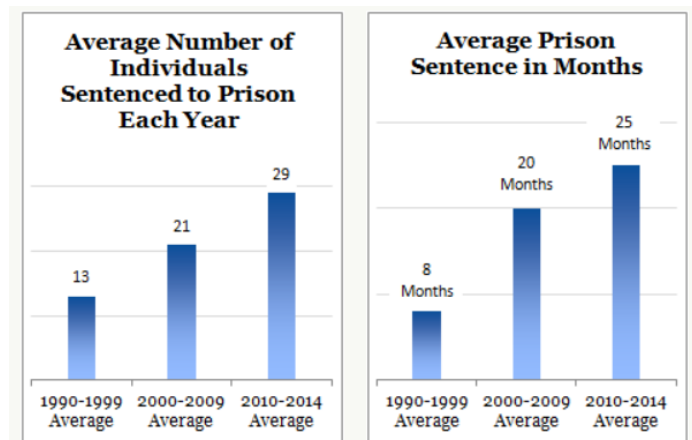
In the past two years, the Department of Justice has conducted formal bilateral meetings with the Japan Fair Trade Commission (JFTC), the Korea Fair Trade Commission (KFTC), and hosted the Chinese Ministry of Commerce with the U.S. Federal Trade Commission.

In addition, to promote greater agency-to-agency coordination, the Department of Justice has sponsored a Visiting International Enforcers Program. As a part of this program, the Division hosted three visiting enforcers, including an enforcer from the JFTC. In return, Division managers have served as visiting enforcers with the JFTC and other worldwide enforcers. On a case-team level, the United States, Japan, and other authorities are able to coordinate certain aspects of their investigations, including the timing of raids and interview of witnesses.

Prosecution and Extradition of Foreign Nationals

In the Auto Parts investigation and other U.S. cartel investigations, the Antitrust Division has criminally charged executives who reside in Japan and other jurisdictions outside of the U.S. The Division continues to utilize Interpol red notices to arrest indicted foreign nationals who fail to submit to U.S. jurisdiction while they are traveling abroad. As a result of this reach of U.S. enforcement and the burden of defending criminal charges, a significant number of individuals have submitted to U.S. authorities to plead guilty. Their business and personal lives are impaired when they are not able to travel to the United States or Europe while charges are pending and, in accepting responsibility, they may seek a reduction of jail times and criminal fines.

Prosecution of individuals is a priority in the United States. It is common for the Antitrust Division to prosecute individual executives even after the guilty plea of the company. Under U.S. laws, the maximum jail time for a cartel offense is 10 years, but the average jail sentence in past years has been approximately 25 months. The highest jail sentence in this time period has been approximately 5 years.



Source: U.S. DoJ, Antitrust Division, Criminal Enforcement Update

The Antitrust Division has the ability to extradite individuals from certain countries. Since 2014, the Antitrust Division secured its first ever extraditions of individual defendants from other countries on antitrust charges. The Antitrust Division has not yet extradited a Japanese national in a cartel case, and such an effort would require Japanese authorities to cooperate and concur with the request.

“Follow On” Civil Class Actions in the U.S., Canada, and Europe

In the United States, once it becomes public that the Antitrust Division is investigating a cartel, it is common for private civil class actions to be filed alleging damage claims against the companies under investigation.

Plaintiffs in these actions (often individual U.S. consumers or companies) can seek trebled damages based on an alleged market overcharge or loss. The damages in these cases are in addition to any

criminal fine that is levied in a government investigation. For example, Japanese companies that pleaded guilty to cartel violations paid fines in the Auto Parts investigation, but still face ongoing civil litigation seeking damages. In the past, the U.S. was the primary jurisdiction in which private civil antitrust litigation would be filed, but actions are now often filed in Canada and in EC member states. New class action legislation in the UK has also made “U.S.-style” litigation possible. It is common for these damage actions to last several years.

Practical Tips for Responding to a Search Warrant in Cartel Investigations

The Department of Justice and other competition authorities may investigate cartel conduct without notice by issuing search warrants to search companies or conducting dawn raids. These “dawn raids” often include searching the U.S. offices of foreign companies or their domestic subsidiaries.

A prompt and effective response to a search warrant may make a significant difference in the company’s defense in the cartel investigation. We recommend the following:

- Notify counsel immediately.
- Do not resist the search. Forcible resistance or interference with a search is a criminal offense.
- Establish a respectful and constructive relationship with the lead agent. It should be clear, however, that the company is not giving consent or waiving the ability to contest scope or execution of the warrant later.
- Obtain a copy of the search warrant and a list of all materials seized pursuant to the search.
- Request that counsel and relevant company representatives are present during the search.

Agents may seek to interview employees. It is an employee’s right to consent to an interview (and have

counsel present) or refuse to be interviewed. If employees are interviewed, they should provide truthful statements.

Should you be interested in further discussion of any of these topics, we are available to consult.

About the Authors

Wendy Huang Waszmer (Partner) and Emily Chen (Associate) are members of the firm’s Litigation and Antitrust Practice Group.

King & Spalding’s antitrust lawyers have been involved in virtually all the significant cartel cases over the past decade, including most of the major criminal cartel cases brought by the U.S. Department of Justice. In Europe, the team has been involved in cases in the EU Commission, European Court of Justice and the Competition Commission.

The Cartel Practice includes numerous former U.S. Department of Justice officials, including Jim Griffin, who served as Deputy Assistant Attorney General for Criminal Enforcement in the Antitrust Division; Chris Wray, the former Assistant Attorney General of the Criminal Division; Drew Hruska, the former Chief Assistant U.S. Attorney, Eastern District of New York; Wendy Huang Waszmer, the former Assistant Chief at the Antitrust Division; and Alan Dial, current Vice Chair of the ABA Cartel and Criminal Practice Committee. King & Spalding also has a number of practitioners with competition experience in Europe and Asia, in particular Stuart Isaacs QC and Angela Hayes in our London office.

While these are highly confidential matters, our antitrust lawyers currently represent multinational corporations and individuals involved in cartel investigations and related civil proceedings, including representing senior executives of several Japanese auto parts manufacturers in an international cartel investigation concerning auto parts.

Resources & Links

The following is a selection, with links, of recent King & Spalding publications in the Dispute Resolution and Crisis Management space.

Legal Updates

US Litigation: New Rules for Litigators: 2016 Brings Significant Changes to the California Code of Civil Procedure

Data: Five Tips For Insuring Big Data Does Not Become Your Company's Big Problem

Construction Litigation: Financial Information and Set-Off Requirements Under the FIDIC Red Book

Data: EU-U.S. Privacy Shield Agreement Released

Maritime Litigation: Recent Judgment on Vessel Owner Liability in Marine Casualties

Infrastructure: Middle East PPP Policy Developments: Kuwait and Dubai

Investigations: The DOJ's New Focus On Individual Liability

Energy: Uncovering Hidden Value – Unconventional Resources

Investigations: Impact of the 2016 Elections on Government Investigations

Energy: LNG in Europe: An Overview of European Import Terminals in 2015

King & Spalding News

Recognition: Global Arbitration Review Ranks King & Spalding Among Top Five Global Firms For International Arbitration Expertise

Recognition: King & Spalding Maintains Multiple Top-Tier Rankings in Chambers Asia-Pacific 2016

Upcoming Event: Quarterly Energy Forum - Executive Roundtable: Lessons Learned From Previous Oil & Gas Downturns

Recognition: King & Spalding on GCs' Short List for Most Complex Matters, According to BTI Report

New York: Construction Disputes Lawyer Joins King & Spalding's New York Office

Deal News: King & Spalding Advises on Landmark \$550 million Tema LNG Project in Ghana

Washington, D.C.: King & Spalding Adds Former EPA International Trade Negotiator to Washington, D.C., Office

Case News: King & Spalding Wins Federal Jury Trial in Key Off-Label Marketing Case on Behalf of Vascular Solutions Inc.

Global Contacts (with links to curricula vitae)

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