

# Here Comes Tougher International Antitrust Enforcement

Philip Giordano

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The Justice Department's program to prosecute international price-fixing and bid-rigging cartels has shifted into overdrive. After dramatically expanding the scope of criminal antitrust enforcement over the past decade, federal prosecutors at the department's Antitrust Division obtained a record-breaking \$1.1 billion in criminal fines in 2013. That was when the Division was saddled with severe budget cuts, a lengthy hiring freeze, multiple office closings, and a 16-day government shutdown. Now, with these impediments largely behind it, the Division has raised its sights.

The latest international cartel investigation acknowledged by the Division is a probe of alleged anticompetitive conduct among capacitor manufacturers, potentially worldwide. Capacitors are ubiquitous electronic components found in a vast array of electronic devices, from consumer electronics to heavy machinery. Manufacturers produce trillions of them a year.

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Published reports indicate that US prosecutors may be coordinating their investigation with counterparts across Asia and Europe. After Chinese competition authorities raided Japanese capacitor manufacturers in China in March, two Japanese companies, NEC Tokin and Taiyo Yuden, acknowledged that they were cooperating with investigators. Korean competition authorities followed up the first week in May with a visit to the Korean facilities of Japan's Panasonic Corporation. Japanese and European Union competition authorities have initiated their own investigations.

Press reports indicate that a Japanese corporation has applied to the Justice Department's leniency program, which grants amnesty to the first conspirator to report collusive conduct.

This broadside against the electronic components industry signals that the Justice Department is not resting on its laurels when it comes to Asian cartelists and their American subsidiaries. Over the past decade, the Antitrust Division has prosecuted more than a dozen Asian companies for fixing prices on high technology products, including dynamic random access memory chips, liquid crystal displays, cathode ray tubes, optical disk drives, and lithium-ion batteries. Corporate criminal penalties have skyrocketed—in 2012 prosecutors obtained a \$500 million criminal fine from Taiwan-based AU Optronics for fixing the prices of LCDs.

Any fines imposed on the capacitor companies now under investigation could very well eclipse that sum, given the sheer volume of capacitor production and the very real possibility that prosecutors may uncover collusion on related electronic components.

It would not be the first time that the focus of a Justice Department cartel investigation shifted from a singled product to multiple conspiracies across a supply chain. This is in fact increasingly the norm. In early 2010 the Antitrust Division went public with an investigation into automotive wire harnesses. Plea agreements for fixing wire harness prices were quickly followed by pleas on a range of other automotive products, including electronic control units, sensors, switches, high intensity discharge ballasts, and ignition coils—nearly 40 products in all.

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The auto parts investigation, which is ongoing, has set three new Division records for a single investigation:- an eye-watering \$2.2 billion in criminal antitrust fines, guilty pleas from 27 companies, and charges filed against 30 executives, nearly all of whom have served or are expected to serve jail terms. Among them is an American citizen who received a sentence of 14 months.

Now all indications point to an even more aggressive US enforcement effort, with high technology imports front and center.

William J. Baer, the assistant attorney general for antitrust, has installed new leadership at the helm of the criminal program, notably Brent Snyder, a prosecutor known in particular for his high-profile prosecutions of cartels in high technology industries. Baer has brought Antitrust Division staffing levels back up from last year's low. He has opened a second criminal enforcement office in Washington, DC. Under his leadership, the Antitrust Division's Chicago

office has joined the fight against international auto parts cartels and obtained a \$425 million criminal antitrust fine against a Japanese producer of anti-vibration rubber. And in April, in a long-sought first, the Justice Department extradited a foreign national on a criminal antitrust charge. These important recent developments set the stage for the direction of future enforcement.

With the Antitrust Division running full tilt, domestic and foreign firms alike should reevaluate their interactions with their competitors and strengthen their antitrust compliance programs. Upper management must lead the charge to reinforce employee codes of conduct and reinvigorate internal oversight. Collaboration with competitors on technical specifications, while often desirable, can evolve into pricing or bidding discussions. Management should also review employee participation in trade associations, especially the informal interactions that may follow official association meetings. Salespeople who have robust relationships with counterparts at competing firms may represent significant antitrust vulnerabilities.

If a company uncovers questionable conduct, it should consider reporting it to the Justice Department and applying for its leniency program. Despite its gravity, such a decision must be made without delay, because only the first qualified applicant to report the conduct will receive immunity from criminal antitrust charges and fines. By design, the winner-take-all nature of the program pits competitors against one another to be the first to report potential antitrust violations.

Even so, often a company that is beaten to the punch later discovers that its employees may also be fixing prices on other products through a second cartel. If the company reports that conduct, it can not only receive immunity for the second cartel offense but reduce any fine that may be imposed for the first cartel offense. This inducement can help prosecutors broaden an investigation dramatically.

The Justice Department's leniency program has been instrumental in exposing international cartels to the ordeal of a government inquiry. A reprovisioned Antitrust Division is primed to intensify the scrutiny it applies. With capacitor manufacturers incentivized to report potential price fixing of other passive electronic components, the Justice Department is on a trajectory it will not lightly abandon.

## About the Author

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