

JAPANESE COMPANIES FACE MORE AND MORE ANTITRUST SCRUTINY IN U.S.

This article was originally published in *Law360* on September 12, 2013.

by Fusae Nara, Jacob R. Sorensen and Lindsay A. Lutz



Fusae Nara

Litigation

+1.212.858.1187

fusae.nara@pillsburylaw.com



Jacob R. Sorensen

Litigation

+1.415.983.1893

jake.sorensen@pillsburylaw.com



Lindsay A. Lutz

Litigation

+1.415.983.1255

lindsay.lutz@pillsburylaw.com

The U.S. Department of Justice's Antitrust Division has been increasingly aggressive in enforcing U.S. antitrust laws against Japanese companies. In 2012, six Japanese companies — the highest number on record — received fines of more than \$10 million each and \$817 million in total.¹ Four Japanese companies have been fined to date in 2013, equaling the previous record numbers in 1999 and 2009. The international probes that have resulted in fines to Japanese companies include the DOJ's antitrust investigations involving automobile parts, graphite electronics, air transportation (cargo and passenger), DRAM computer chips and LCD displays.

Dramatic Increases in Fines and Jail Sentences

In March 1999, the DOJ announced a new era of international anti-cartel enforcement, proclaiming that it had obtained nearly \$440 million in fines in its international cartel prosecutions in the two years prior — an amount roughly equivalent to the total fines imposed in all of the DOJ's prosecutions over the previous 20 years.² In the nearly 15 years since that announcement, the DOJ has sought to increase the criminal fines collected and sentences imposed

through international enforcement, including enforcement efforts against Japanese companies.

Increased enforcement efforts have corresponded to increased collection of criminal antitrust fines. In both 2009 and 2012, the DOJ collected \$1 billion or more in fines against corporations for antitrust violations.³ At least 10 Japanese companies have been fined over \$50 million for antitrust violations, with the highest fine levied against a Japanese company being \$470 million.

Criminal sentences for antitrust violations have also dramatically increased over the past 15 years. The DOJ has stated its belief that the most effective deterrent to cartel offenses is to impose jail sentences on corporate executives,⁴ and it has aggressively pursued increased sentences for executives. From 1990 through 1999, the average prison sentence for Sherman Act offenses was eight months; from 2000 to 2009, the average sentence rose to 20 months; and from 2010 to 2012, the average sentence rose again to 25 months.⁵ In the last several years, more than a dozen Japanese executives have agreed to plead guilty and serve jail time in the United States.

There are no signs that the DOJ plans to decrease enforcement efforts in the future. To the contrary, the DOJ has expanded its resources in combating international cartels by seeking cooperation with foreign agencies, including the Japan Fair Trade Commission. Assistant Attorney General William J. Baer recently emphasized that international cooperation is crucial to the success of the DOJ's criminal enforcement program and specifically highlighted the DOJ's work with its counterparts in Japan on the automobile parts investigation.⁶

As part of its efforts to increase international cooperation, the DOJ has also been involved in the negotiations of the Trans-Pacific Partnership free trade agreement, which will likely include provisions regarding competition policy.⁷ Japan joined the negotiations during the latest round, which took place in July 2013.⁸

Implications and Strategies for Japanese Companies

DOJ antitrust investigations can be extremely costly for a company. Even beyond possible criminal fines and jail time for executives, the simple announcement by the DOJ that a company is being investigated regularly leads to the filing of additional enforcement actions by state attorneys general, civil class actions and civil suits by the company's largest customers.

Given these high costs, companies should be vigilant in trying to prevent antitrust violations from occurring in the first place. Companies should have robust antitrust compliance programs that are required for employees. These programs should explain how conduct that takes place

in Japan can be prosecuted under U.S. antitrust laws, and how the penalties for violations (e.g., treble damages) can be much more severe under U.S. law than under Japanese law. The programs should also address the particular industry in which the company operates, with attention to the types of competitor contacts that could arise within the industry, such as through industry conferences or trade associations.

If a company does come under investigation by the DOJ, it should take immediate action. A company often finds out that it is the subject of an investigation when it receives a DOJ subpoena, at which time it may also be raided by the FBI. A company that receives such a subpoena should immediately contact counsel and take the following steps:

- Issue a preservation notice instructing employees not to destroy documents. Several recent antitrust investigations have involved employees who panic and make rash decisions to destroy relevant documents. Such actions suggest a consciousness of guilt, and U.S. courts may infer that a document destroyed in this way was incriminating.
- Initiate an internal investigation, focusing on the divisions within the company most likely to have contacts with competitors. If such employees also have authority to set prices, the internal investigation must be conducted particularly carefully. Conducting a swift internal investigation will allow the company to have a solid grasp on the facts before making a decision regarding how to respond to the DOJ.
- If the internal investigation uncovers anti-competitive conduct, consider whether to approach the DOJ and offer to cooperate. The DOJ has a leniency program through which a corporation can avoid criminal convictions and fines by being the first to confess participation in a criminal antitrust violation and fully cooperating with the division. The amnesty applicant also gets the benefit of important limitations on civil liability; for example, it is not subject to treble damages and is not jointly and severally liable for damages caused by its co-conspirators. By the time of a raid, it is likely that the first leniency applicant has already walked through the DOJ's doors. However, cooperating may still have benefits, such as reduced fines and charges.
- If the internal investigation confirms that the company has engaged in no anti-competitive conduct, the company's lawyers should present that position to the DOJ in an effort to convince the government not to press charges.
- If the DOJ is unconvinced, the company may need to dig in for battle and prepare to litigate. There are specific defenses and strategies that Japanese companies — in particular — should consider. These may include challenging the extraterritorial application of the U.S. antitrust laws and resisting the production of documents located in Japan.

Conclusion

With the increasing prevalence of cross-border antitrust enforcement, led by an active DOJ, companies around the world should invest

more time and effort in preventive measures. From compliance training programs to strong messages from management to refrain from certain kinds of contacts with competitors, there are a number of steps

companies can take to lessen the risk of facing these problems in the first place. Once an investigation begins or problematic conduct comes to light, there are strategies available to minimize the repercussions.

Fusae Nara is a partner in Pillsbury's New York office. Jacob Sorensen is a partner and Lindsay Lutz is a senior associate in the firm's San Francisco office.

Endnotes

- ¹ Antitrust Division Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More, available at <http://www.justice.gov/atr/public/criminal/sherman10.pdf>.
- ² "Negotiating The Waters of International Cartel Prosecutions," Gary R. Spratling, Department of Justice, Mar. 4, 1999, at 1, available at <http://www.justice.gov/atr/public/speeches/2275.pdf>.
- ³ Criminal Enforcement Fine and Jail Charts Through Fiscal Year 2012, available at <http://www.justice.gov/atr/public/criminal/264101.html>.
- ⁴ See "Charting New Waters in International Cartel Prosecutions," Scott Hammond, Department of Justice, Mar. 2, 2006, at 13, available at <http://www.justice.gov/atr/public/speeches/214861.pdf>.
- ⁵ Criminal Enforcement Fine and Jail Charts Through Fiscal Year 2012, *supra* note 2.
- ⁶ "Oversight of the Enforcement of the Antitrust Laws," Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary, Apr. 16, 2013 (statement of William J. Baer, Department of Justice), at 8, available at <http://www.justice.gov/atr/public/testimony/295840.pdf>.
- ⁷ "Intensification of International Cooperation: The Antitrust Division's Recent Efforts," Remarks for the American Chamber of Commerce, Feb. 17, 2012, Rachel Brandenburger, Department of Justice, at 18, available at <http://www.justice.gov/atr/public/speeches/281609.pdf>.
- ⁸ See Office of the United States Trade Representative Report on Round 18 Trans-Pacific Partnership Negotiations, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/round-18-malaysia>. The other negotiating parties are the U.S., Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam. See Brandenburger report, *supra* note 7, at 18.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Pillsbury Winthrop Shaw Pittman LLP | 1540 Broadway | New York, NY 10036 | 1.877.323.4171

ATTORNEY ADVERTISING. Results depend on a number of factors unique to each matter. Prior results do not guarantee a similar outcome.

© 2013 Pillsbury Winthrop Shaw Pittman LLP. All rights reserved.

