Annual Report of FY 2012 (Summary)
(Tentative Translation)

Chapter 1:Overview

The Japan Fair Trade Commission (JFTC) actively implemented competition policy during FY 2012 mainly focusing on the following types of measures.

1 Amendments of the Antimonopoly Act and Others

(1) Amendments of the Antimonopoly Act

The bill to amend the Antimonopoly Act (AMA), which is designed largely to abolish the JFTC's hearing procedure for administrative appeals, was submitted to the 174th ordinary Diet session on March 12, 2010. The Diet decided in the 174th session through the 180th session that the bill would be deliberated after the closing of the respective Diet sessions. However, the bill was discarded in the 181st extraordinary Diet session because of unfinished deliberation on November 16, 2012.

On May 24, 2013, a bill to amend the AMA having the same contents as the above-mentioned bill, excepting technical modifications, was submitted to the 183rd ordinary Diet session. The House of Representatives decided on June 26, 2013 that it would deliberate the bill after the closing of the Diet session.

(2) Enactment of the "Act Concerning Special Measures for Pass-on of Consumption Tax"

On March 22, 2013, the "Bill Concerning Special Measures for Correcting Practices Impeding Consumption Tax Pass-on, etc. with the Aim to Ensure Smooth and Proper Pass-on of Consumption Tax," whose main objective is to establish special measures for correcting practices impeding consumption tax pass-on, for price representations, and for concerted practices on determining ways of pass-on and representations of consumption tax, was submitted to the 183rd ordinary Diet session. The bill passed the Diet on June 5, 2013 and was promulgated on June 12, 2013 (law no.41 of 2013; excepting some provisions, the act will be put into force on October 1, 2013).

2 Vigorous and Appropriate Law Enforcement

(1) Active Elimination of Violations of the AMA

A. During FY2012, under a fundamental policy of prompt and effective law enforcement, the JFTC acted swiftly and vigorously against violations of the AMA—especially bid-rigging both in public and private procurements, price-fixing cartels, and unfair trade practices such as abuse of superior bargaining position that places small- and medium-size enterprises at an unfair disadvantage.

The cases in which legal measures were taken in FY2012 were as follows.

Legal Measure Cases during FY2012	
Bid-rigging (in public demand)	Bid-rigging for general engineering works, etc. ordered by the Ministry of Land, Infrastructure, Transport and Tourism and Kochi Prefecture
Bid-rigging (in private demand)	Bid-rigging by EPS block manufacturers Bid-rigging for auto parts ordered by automobile manufacturers Bid-rigging for headlamps and rear combination lamps ordered by automobile manufacturers
Price-fixing cartel	Price-fixing cartel by bearing manufacturers

B. The JFTC actively brings accusations seeking criminal punishment in vicious and serious cases that are considered to have a widespread influence on people's living. In FY2012, the JFTC filed an accusation with the Prosecutor-General against three bearing manufacturers and seven individuals in the price-fixing cartel by bearing manufacturers (June 14, 2012).

C. Regarding so-called "government-assisted bid rigging" in which officials working for central/local government offices, etc. are involved in bid rigging, administrative measures have been provided to prevent the involvement in bid rigging, etc., in the Act Concerning Elimination and Prevention of Involvement in Bid Rigging, etc. In FY2012, the JFTC discovered that officials of the Ministry of Land, Infrastructure, Transport and Tourism were involved in the bid-rigging for general engineering works ordered by the Ministry. Based on the Act, therefore, the JFTC demanded the Minister of Land, Infrastructure, Transport and Tourism to take remedial actions (October 17, 2012).

(2) Promotion of Fair Trade Practices

A. Approach to Abuse of Superior Bargaining Position

(a) The JFTC has long conducted surveillance so that abuse of a superior bargaining position that constitutes an unfair trade practice under the AMA will not occur, and has responded strictly to conducts that violate the AMA.

(b) The JFTC deals vigorously with violations of the AMA. In addition, the JFTC conducted fact-finding surveys in the fields where fair trade practices for small- and medium-size enterprises should be further promoted. In FY2012, the JFTC published the "Fact-Finding Report on Tradings between Hotels/Japanese Inns and Suppliers" (released on May 16, 2012) and the "Fact-Finding Report on Tradings between Large-Scale Retailers, etc. and Suppliers" (released on July 11, 2012). In addition, the JFTC conducted a written survey on the trade between shippers and logistics providers, and an emergency survey on activities including slashing off prices by large-scale retailers against suppliers.

(c) The JFTC has been conducting lecture programs to specific industry fields where abuse of a superior bargaining position has been revealed, or has been suspected through various fact-finding surveys. The aim of the programs is to further improve the legal compliance of enterprises in the fields. In FY2012, the JFTC conducted a total of 30 lecture programs to specific industry fields. In each program, the JFTC explained with specific examples in line

with each actual situation in the industry.

(d) The JFTC has been holding "JFTC Traveling Consultation Sessions for Small- and Medium-size Enterprises" upon request of small- and medium-size enterprises including subcontractors. At such consultation sessions, staff members of the JFTC explain clearly about the contents of the Subcontract Act, etc. and give advice to small- and medium-size enterprises. In FY2012, the JFTC held the consultation sessions at 27 locations throughout Japan, and dispatched lecturers to training sessions, etc. organized by trade associations to raise awareness.

B. Approach to Unjust Low Price Sales

The JFTC takes prompt action against cases of unjust low price sales in the retail sector. In particular, in cases of unjust low price sales by large-scale enterprises and repeated ones that are believed to have a large impact on the business activities of the surrounding retailers, the JFTC conducts individual investigations into the impact on the business activities of the surrounding retailers, and deals strictly with cases by adopting legal measures where problems are discovered.

C. Vigorous Elimination of Violations of the Subcontract Act

(a) The JFTC, considering the state in subcontract transactions that it is hardly expected that subcontractors will provide their information voluntarily, has regularly conducted written surveys of the main subcontracting enterprises and their subcontractors, in cooperation with the Small and Medium-Size Enterprise Agency, to find violations.

(b) The JFTC strives to ensure fairness in subcontract transactions and to protect the interests of subcontractors through prompt and appropriate enforcement of the Subcontract Act, in order for small- and medium-size enterprises not to be hindered in their autonomous business activities.

The main cases in which recommendations were issued in FY2012 are as follows.

Main recommendation cases during FY2012

- ○ Reduction of subcontracting payments, return of goods, and unjust request for financial interest by the Japanese Consumer's Co-operative Union(main subcontracting enterprise)
- ○ Reduction of subcontracting payments and unjust request for financial interest by a wholesaler of wallpaper, floor materials and curtains (main subcontracting enterprise)
- ○ Reduction of subcontracting payments by a manufacturer of brakes, etc. for trucks and buses (main subcontracting enterprise)
- ○ Refusal to receive goods by a retailer of garments and miscellaneous goods (main subcontracting enterprise)

(c) On November 19, 2012, the JFTC made a request to approximately 34,000 main subcontracting enterprises and related trade associations for comprehensive compliance with the Subcontract Act, with a letter signed by both the Acting Chairperson of the JFTC and the Minister of Economy, Trade and Industry in order to prevent illegal conduct against the

Subcontract Act such as delayed payments of subcontract proceeds, reducing the amount of subcontract proceeds, and unjustly setting subcontract proceeds.

(d) The JFTC developed a video explaining the outline of the Subcontract Act, and placed it on its Website.

(3) Appropriate Implementation of Business Combination Regulations

The AMA prohibits acquisition of shares, shareholdings, mergers, and other transactions that could substantially restrain competition in particular business fields. The JFTC is committed to preserving the competitive structure of Japanese markets through the appropriate implementation of regulations on business combinations. During FY2012, the JFTC took appropriate actions on the following proposed business combinations and published the details of these cases.

Main Business Combination Cases during FY2012

○ Integration of Tokyo Stock Exchange Group, Inc. and Osaka Securities Exchange Co., Ltd.

○ Acquisition of shares of BEST DENKI Co., Ltd. by YAMADA DENKI Co., Ltd.

3 Surveys to Develop Competitive Environment

(1) Surveys, Recommendations, etc. on Regulatory Reforms in Public Utility Fields, etc.

Against a backdrop at the progress of regulatory reforms, the JFTC has developed the guidelines that clarify such practices to prevent market access which constitute a problem under the AMA for specific public utility fields ,etc. associated with the regulatory reforms, with a view to ensuring fair and free competition in the fields, and conducted surveys and made recommendations. During FY2012, the JFTC conducted a survey of the current status of the electricity market based on the “Policy of Regulatory and Institutional Reforms in the Energy Sector” (cabinet decision on April 3, 2012), and summarized the points of view after having examined the matters from the viewpoint of competition policy. Then, the JFTC compiled the “Proposals for the Electricity Market from Competition Policy” and published it on September 21, 2012.

(2) Efforts on Competition Assessment

From October 2007 onwards, each Ministry is, in principle, obliged to conduct ex-ante evaluation of the regulations at the time of newly establishment, revision or abolition of its regulations. In such a case, each shall analyze the regulation’s impact on competition (competition assessment). This has been implemented on a trial basis since April 2010. For the competition assessment, each Ministry must complete a checklist (competition assessment checklist) for analysis of impact by regulation on competition, and submit this together with the competition assessment form to the Ministry of Internal Affairs and Communications (MIC). The MIC is required to send the competition assessment checklist to the JFTC. In FY 2012, the JFTC received

42 competition assessment checklists from the MIC and fully examined them.

The JFTC assisted Ministries in making a competition assessment by giving them advices on points of view and examination methods when entering the competition assessment checklist.

(3) Efforts in Prevention of Bid-Rigging

From the viewpoint that efforts by procuring entities are extremely important to secure prevention of bid rigging, the JFTC holds training sessions on the AMA and the Act on Elimination and Prevention of Involvement in Bid Rigging, etc. for those in charge of procurement duties in local governments, etc., and collaborates with central government agencies, local governments and others by dispatching lecturers to training sessions for those in charge of procurement organized by such entities and by providing them with materials. In FY2012, the JFTC held 21 training sessions throughout Japan and dispatched lecturers to central government, local governments and specified enterprises on 214 occasions.

(4) Survey on Corporate Compliance Efforts with the AMA

In the report titled "Corporate Compliance Efforts with the Antimonopoly Act—Measures for Improving the Effectiveness of Compliance—" which was published in June 2010, the JFTC pointed out that ensuring the effectiveness of compliance with the AMA is a real challenge. In view of this, the JFTC conducted: (1) questionnaire surveys for enterprises which are listed on the first section of the Tokyo Stock Exchange; (2) interview surveys of attorneys specialized in corporate legal affairs and of enterprises, against which legal actions were taken in previous antitrust cases; and (3) interview surveys of enterprises which indicated interesting cases, including successful or unsuccessful ones in questionnaire surveys. Based on these, the JFTC formulated measures, etc. which are considered to be effective for ensuring the effectiveness of compliance with the AMA in the report titled "Corporate Compliance Efforts with the Antimonopoly Act" and published it on November 28, 2012.

(5) Survey on the Distribution State of Gasoline

The JFTC conducted questionnaire and interview surveys of business-to-business trading between oil distributors and gasoline retailers, etc. (the report was published on July 23, 2013).

4 Reinforcement of Foundation in Implementing Competition Policy

(1) Response to Globalizing Economy

In recent years, there has been an increase in the number of cases violating the competition laws of multiple countries and regions and of cases requiring competition authorities of multiple countries and regions to conduct concurrent investigations, and consequently the needs of strengthening of cooperation and coordination among competition authorities have been growing. In response to these circumstances, the JFTC is cooperating closely with competition authorities of other jurisdictions, including notifying the competition authorities of jurisdictions relevant to its enforcement activities, in accordance with the bilateral antimonopoly cooperation agreements, the

economic partnership agreements and others.

The JFTC has proactively participated in multilateral frameworks such as the International Competition Network (ICN), the Organization for Economic Co-operation and Development (OECD), Asia-Pacific Economic Cooperation (APEC), the United Nations Conference on Trade and Development (UNCTAD) and so on. In particular, in the ICN's 11th Annual Conference (April 2012), the ICN Framework for Merger Review Cooperation was established. This framework was proposed by the Chairman of the JFTC with the aim of promoting efficient and effective enforcement cooperations among ICN member agencies, and the JFTC is managing its implementation. The JFTC has taken the leading role in the East Asia Conference on Competition Law and Policy and the East Asia Top Level Official's Meetings on Competition Policy.

In response to the recent accelerated trends of strengthening existing competition laws and of introducing competition laws in developing countries, the JFTC provides the competition authorities and competitions related authorities of such countries with technical cooperation such as dispatching its staff as training lecturers and offering training programs to them and through other means.

In addition, to raise its international presence by disseminating Japan's competition policy state globally, JFTC distributes English written brochures, uploads more enriched press releases to its English written web-site and dispatches speakers to seminars organized by overseas bar association, etc.

The major international activities of the JFTC during FY2012 are as follows.

Major international activities during FY2012

- 11th ICN Annual Conference (April 2012)
- Operation of the ICN Framework for Merger Review Cooperation
- East Asia Top Level Official's Meeting on Competition Policy (May 2012)
- Bilateral meetings with foreign competition authorities (the U.S., EU and Hungary)
- Training sessions on competition policy (Vietnam, Indonesia, China, Philippines, Malaysia, etc.)

(2) Public Relations Activities, etc.

The JFTC listened to opinions individually from members of the Antimonopoly Policy Cooperation Committee with the aim of utilizing the opinions and requests concerning competition policy as references of policy implementation and of helping promote understanding on competition policy.

Besides, in its intention to make swift response to the changes of economic society and to promote effective and proper competition policy measures, the JFTC holds the Council on Antimonopoly Policy with the aim of widely exchanging opinions with experts and of seeking further understanding of the competition policy. In FY2012, the JFTC held the Council on Antimonopoly Policy two times.

Furthermore, the JFTC commissioners exchanged opinions with experts in ten cities around the

country, while in each region of the country, staff member of the JFTC such as directors of its regional offices and experts in the regions gathered for discussion.

Other than the above activities, in the cities other than those where the head office and the regional offices are located, the JFTC hosted "One Day JFTC" aiming at further advocacy concerning the Antimonopoly Act and the Subcontract Act and enhancement of consultation service, and held "Consumers Seminar" to introduce to consumers the Antimonopoly Act and the JFTC's activities.

Moreover, at the request of junior high schools, high schools and universities, the JFTC has made efforts to spread awareness on competition policy through school education by dispatching staff to speak on the role of competition in economic activity ("Class Delivery Service").

The major activities of the JFTC during FY2012 are as follows.

Major activities during FY2012

- ○ Opinion gatherings from 150 members of the Antimonopoly Policy Cooperation Committee
- ○ Council on Antimonopoly Policy (2 times)
- ○ Meetings with local experts (Asahikawa, Morioka, Utsunomiya, Saitama, Tsu, Osaka, Hiroshima, Kochi, Fukuoka and Naha)
- ○ Meetings with other experts in local areas (72 occasions)
- ○ "One Day JFTC" (Asahikawa, Morioka, Kofu, Toyama, Himeji, Okayama, Kochi and Kumamoto)
- ○ Consumers Seminars (50 times)
- ○ Class Delivery Services on the Antimonopoly Act (41 times for junior high schools; 14 times for high schools; and 57 times for universities)

Chapter 2: Activities in Each Area

The JFTC's major activities during FY 2012 are summarized by category as follows.

1 Law enforcement into Suspected Violations of the Antimonopoly Act

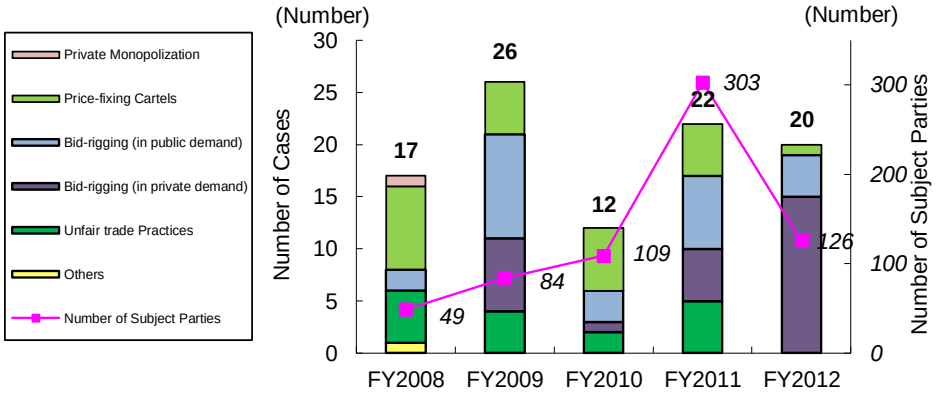
(1) During FY2012, the JFTC investigated 275 suspected violations of the AMA and completed 262 of those investigations.

(2) During FY2012, legal measures were taken in 20 cases. By category, the 20 cases were broken down into one case of price-fixing cartel, 4 cases of bid-rigging in public sectors and 15 cases of bid-rigging (in private sectors) (Figure 1). In addition, the JFTC issued surcharge payment orders for a total of 25,076,440,000 yen (Figure 2).

Furthermore, during FY2012, the JFTC received a total of 102 applications from enterprises reporting their own violations under the leniency program.

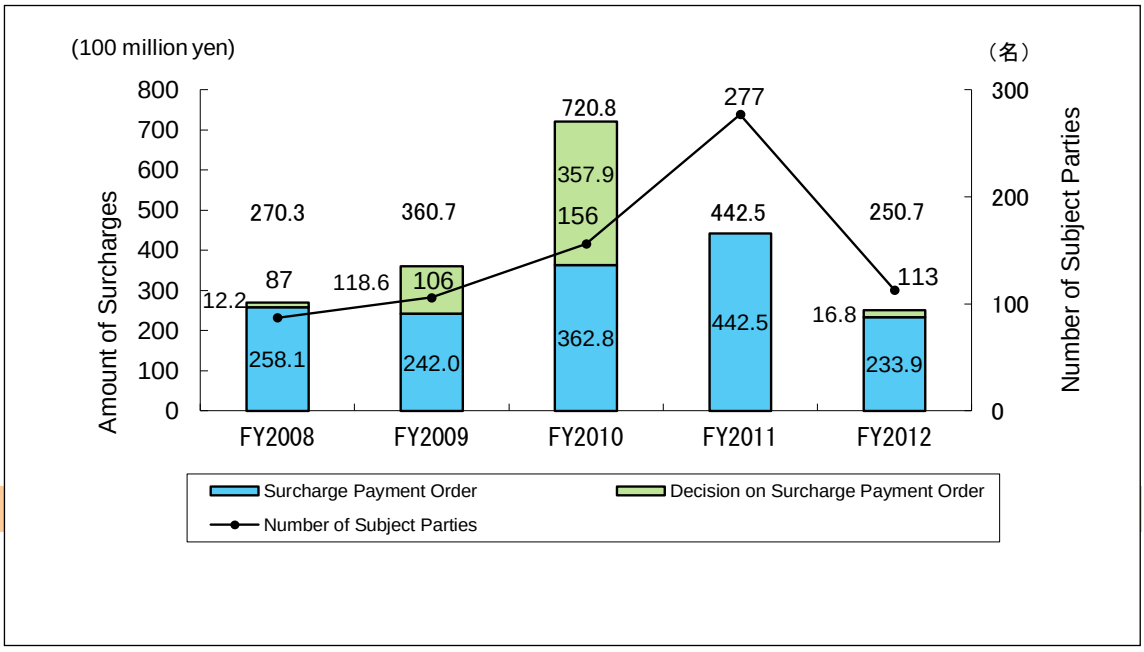
(3) The JFTC also issued 6 warnings on practices that might violate the AMA and 208 cautions on practices that might lead to violations (excluding 1,736 cautions under the expedited investigation process applicable to cases of unjust low price sales) and strived for prompt and appropriate law enforcement.

Figure 1: Number of Cases with Legal Measures Taken



	FY2008	FY2009	FY2010	FY2011	FY2012
Private Monopolization	1	0	0	0	0
Price-fixing Cartels	8	5	6	5	1
Bid-rigging (in public demand)	2	10	3	7	4
Bid-rigging (in private demand)	0	7	1	5	15
Unfair trade Practices	5	4	2	5	0
Others	1	0	0	0	0

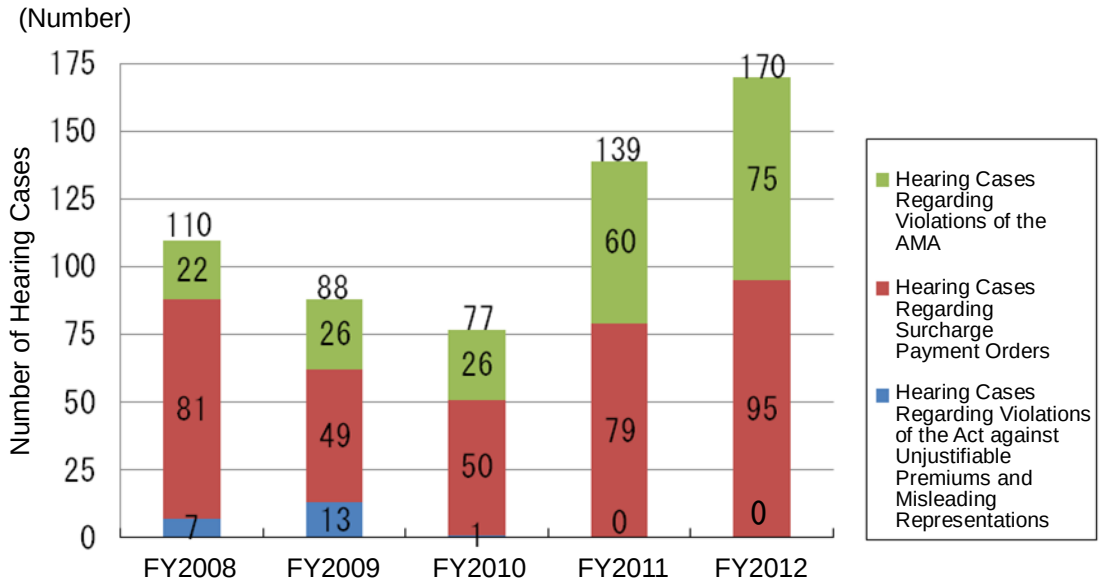
Figure 2: Amount of Surcharges



(Notes) Includes decisions on surcharge payment orders under the former law prior to the implementation of the 2005 amended AMA (meaning the Act for the Partial Amendment of the Antimonopoly Act [Law No.35, 2005]; hereinafter the same will apply), and excludes surcharge payment orders nullified by the initiation of hearing procedures under the former law.

(3) The total number of hearing procedures in progress totaled 170 cases during FY2012 (75 cases regarding violations of the AMA, and 95 cases regarding surcharge payment orders). Of those, 123 cases were continued from the previous fiscal year, while 47 cases were newly initiated during FY2012 (Figure 3). Decisions were rendered in 13 cases during FY2012. Of these 13 cases, decisions were made under the law before the implementation of the 2005 amended AMA in 5 cases (surcharge payment orders) and decisions were made under the law after the implementation of the 2005 amended AMA in 8 cases (cease and desist orders in 4 cases; and surcharge payment orders in 4 cases). As a result, the number of hearing procedures in progress (that will be carried over to FY2013) as of the end of FY2012 amounted to 157 cases.

Figure 3: Number of Hearing Cases by Category



(Note) The number of hearing cases represents the total of the case numbers which are given to requests for hearing against administrative orders.

2 Clarification of Law Enforcement and Prevention of Violations of the Antimonopoly Act

To prevent violations of the AMA, the JFTC provides individual consultations to enterprises and trade associations that seek guidance as to whether specific business activities they are planning could be in violation of the AMA. During FY2012, the JFTC received requests for consultation regarding 1,598 cases of individual company activities and regarding 285 cases of trade association activities.

3 Development of Theoretical and Empirical Bases for Competition Policy

Since its launch in June 2003, the Competition Policy Research Center (CPRC) has developed its activities to strengthen the theoretical and empirical bases required for the enforcement of the AMA and other related laws and the planning and evaluation of competition policies. In FY2012, the CPRC addressed 5 research themes, and held an international symposium (jointly with Nikkei Inc.), 3 open seminars and 10 workshops.

4 Activities Related to Business Combination Regulations

In its activities related to business combinations under the provisions of Articles 9 through 16 of the AMA, the JFTC approved 5 cases of holding of voting rights by banks and insurance companies; received 99 reports regarding holding companies and other matters, one notification regarding the establishment of holding company, etc., and 349 notifications regarding share acquisitions of operating companies, mergers, splits, joint share transfers and business transfers, etc. and conducted

necessary examinations.

5 Approaches to Unfair Trade Practices

(1) Approaches to Abuse of Superior Bargaining Position

While the JFTC established the "Abuse of Superior Bargaining Position Case Task Force" aiming at effectiveness and efficiency in investigations and implementation of necessary remedial measures on cases of abuse of superior bargaining position, the JFTC cautioned against a record number of 57 cases in FY2012.

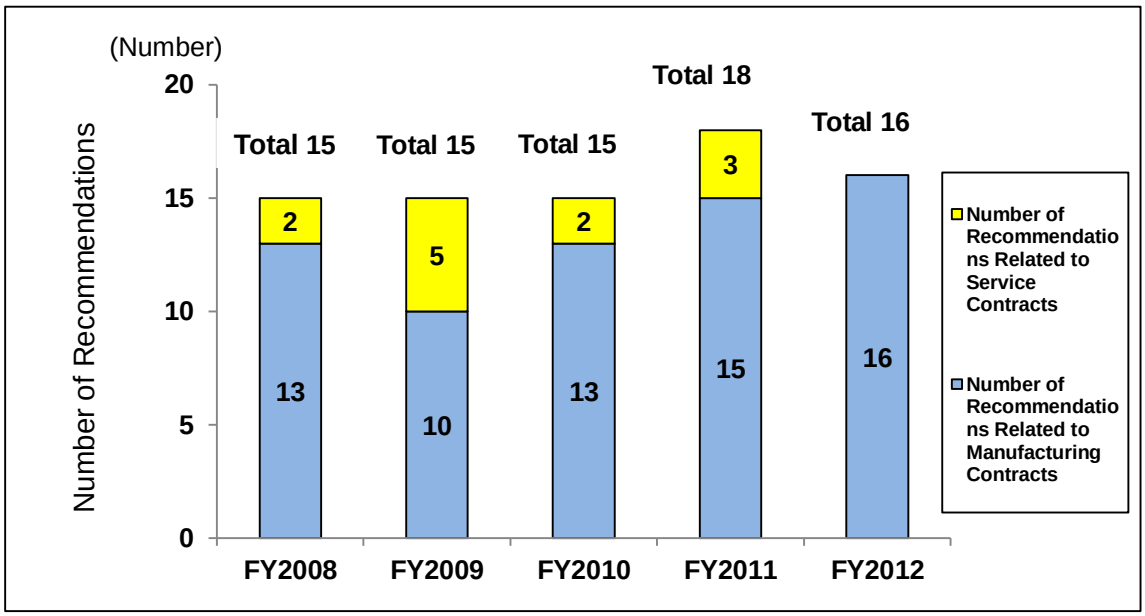
(2) Approaches to Unjust Low Price Sales

In FY2012, the JFTC issued 3 warnings to beer retailers and one warning to a regular gasoline retailer due to suspected unjust low price sales. In addition, the JFTC issued 1,736 cautions to retailers of liquor, petroleum products and household electrical products due to suspected unjust low price sales (breakdown: 1,123 cases for liquor, 426 cases for petroleum products, 121 cases for household electrical products, and 66 cases for others).

6 Activities Related to the Subcontract Act

To ensure fair subcontract transactions and to protect the interests of subcontractors, the JFTC conducted a written survey of 38,781 main subcontracting enterprises and 214,042 subcontractors engaged in transactions with those enterprises. Based on the results of the written survey, the JFTC issued recommendations in 16 cases (these are all manufacturing contracts) (Figure 4), and 4,550 instructions, in accordance with the Subcontract Act.

Figure 4: Disposition of Cases under the Subcontract Act



(Note) In certain recommendation cases, violations were found in multiple types of subcontracting. The above numbers reflect the primary type of subcontracting in such cases.

(Note) "Manufacturing contract" means manufacturing contract and repair contract. "Service contract" means information-based product creation contract and service contract. Hereinafter, the same will apply.

In FY2012, totally amount 5,700,940,000 yen of restitutions (e.g. returns of discounted subcontract proceeds) were made by 233 main contracting enterprises for 9,821 subcontractors in connection with economic disadvantage suffered by subcontractors (Figure 5).

Of those,

(1) in cases related to the reduction of subcontract proceeds, reductions totaling 3,955,480,000 yen were reimbursed by 120 main subcontracting enterprises to 6,540 subcontractors,

(2) in cases related to delay in payment of subcontract proceeds, a total amount of 1,472,960,000 yen was paid by 98 main subcontracting enterprises to 2,887 subcontractors as the interest on the delayed payments,

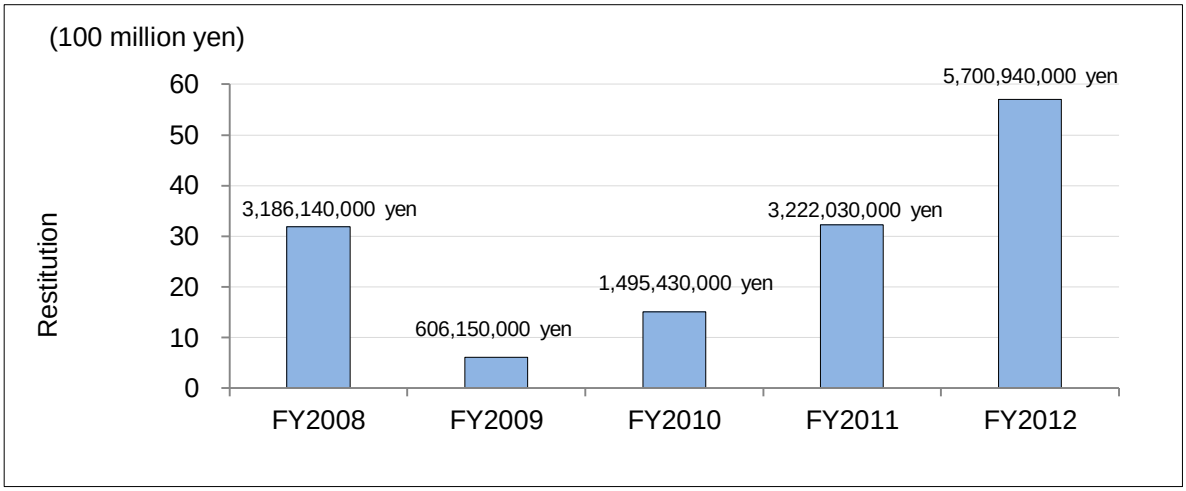
(3) in cases of returned goods, commodities valued at 167,280,000 yen in total were taken back by 6 main subcontracting enterprises from 124 subcontractors,

(4) in cases of refusing to receive commodities, commodities valued at 86,080,000 yen were received by one main subcontracting enterprise from 88 subcontractors, and

(5) in cases of unfair request of economic benefits, provided benefits totaling 19,120,000 yen were reimbursed by 8 main subcontracting enterprises from 182 subcontractors.

(Note) For the above numbers, amounts of less than 10,000 yen are discarded. Therefore, the total amount appearing in Figure 5 doesn't match the total of the above amounts.

Figure 5: Restitutions Status



7 Other Activities

The JFTC has made policy evaluations based on the Government Policy Evaluations Act (Law No.86, 2001). During FY2012, the JFTC performed 2 ex-ante evaluations for "Ensuring the Smooth and Proper Pass-on of Consumption Tax" and 7 ex-post evaluations for "Prompt and Appropriate Business Combination Reviews", "Vigorous Measures Against Violations of the AMA" and others. Based on these, the JFTC released its policy evaluation report.

Enforcement of the Antimonopoly Act in FY2012 (Summary)

May 29, 2013
Japan Fair Trade Commission

公正取引委員会 Japan Fair Trade Commission

Number of cease and desist orders: 20

Bid-rigging (in private demand)	15	EPS blocks ; auto parts
Bid-rigging (in public demand)	4	General engineering works, etc. ordered by Shikoku Regional Development Bureau, the Ministry of Land, Infrastructure, Transport and Tourism and Kochi prefecture(some part was assisted by government officials)
Price-fixing cartels	1	Bearings

Total surcharge amount: Approx. 25.1 billion yen

- Since FY2008, the total surcharge amount **has been hovering high**, exceeding 25 billion yen every year.

Changes in the Total Surcharge Amount over the Last Decade

FY	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Total (billion yen)	3.86	11.15	18.87	9.26	11.29	27.03	36.07	72.08	44.25	25.07

◻ Criminal Accusation

- The JFTC **filed a criminal accusation** with the Public Prosecutor-General against seven individuals and three companies in connection with price-fixing cartel by bearing manufacturers (June 2012)

(i) The three companies are all large companies operating nationwide.

(ii) The products subject to the cartel (industrial machinery bearings and automotive bearings) are widely used in industrial machineries and automobiles and are closely related to people's lives.

(iii) The size of the market for these products is extremely large (approx. 260 billion yen annually)

⇒ Serious case with wide influence over people's lives

- The JFTC has adopted a policy to actively seek criminal charges against violations of the Antimonopoly Act (AMA), such as cartels and bid-rigging with great influence on people's lives.

Elimination of Price-fixing Cartels and Bid-rigging (ii)

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- The JFTC **protects consumer interests** by eliminating price-fixing cartels and bid-rigging.
  - The aggregated market size for 20 cases in which the JFTC took legal measures is **approximately 480 billion yen a year**.
  - The JFTC focuses on **fields closely relating to people's lives**
  - The JFTC also focuses on **bid-rigging led/assisted by government officials**, where procurer side harms the public interest (e.g., bid-rigging for general engineering works, etc. ordered by the Shikoku Regional Development Bureau, the Ministry of Land, Infrastructure, Transport and Tourism)

Fields closely relating to people's lives (example)	Connection with people's lives (example)
Bearings	Used in rotational axes for wheels, transmissions, engines, etc. of construction machinery, agricultural machinery, and automobiles
Auto parts (generators, wiper systems, headlamps, etc.)	Used in automobiles
EPS blocks	Expanded poly-styrol blocks used in construction works for embankments, such as on soft ground and landslide areas or for road widening
Public construction works	Road repair, river improvement, and port development

Elimination of Price-fixing Cartels and Bid-rigging (iii)

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- The JFTC focuses on bid-rigging led/assisted by government officials, where procurer side **harms the public interest**.
  (e.g., bid-rigging for general engineering works, etc. ordered by the Shikoku Regional Development Bureau, the Ministry of Land, Infrastructure, Transport and Tourism (MLIT))

  - Officials in the Bureau **provided** the presidents of a certain construction firms with **unpublished information** (e.g., names of bidders, their evaluation scores, preset maximum prices, etc.)

    ⇒ In order to eliminate bid-rigging assisted by government officials, it is necessary not only bidders **but procurement agencies** to take prepare preventive measures.

  - The JFTC issued cease and desist orders to **the AMA violators**, and simultaneously **demanded** the MLIT to **take remedial actions**.

    ⇒ The MLIT published the details of its remedial actions.

    (promotion of law compliance, review of the procedures for concluding bidding contracts, tightening of penalties, etc.)

The JFTC will continue to take **strict and proactive** measures against bid-rigging led/assisted by procurement agencies and other violations of the AMA, with the aim of **preventing the recurrence** of such violations.

Elimination of Abuse of Superior Bargaining Position

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- From the perspective of preventing abuse of superior bargaining position, the JFTC conducts investigations **in an efficient and effective manner**.

  - The "Task Force on Abuse of Superior Bargaining Position" was established in November 2009.
  - The JFTC issues cautions to large-scale retailers, hotels and inns, etc. whose conducts may lead to infringements.

FY	2008	2009	2010	2011	2012
Cautions issued	8	22	55	52	57

The **largest number** of cautions **ever** were issued for abuse of superior bargaining position in FY2012.

Elimination of Unjust Low Price Sales (i)

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Japan Fair Trade Commission

- The JFTC takes **strict measures** against unjust low price sales that fall into AMA violations.

> - **Issuance and publication of warnings** against liquor wholesalers (Mitsubishi Shokuhin Co., Ltd., ITOCHU-SHOKUHIN Co., Ltd., and Nihon Shurui Hanbai Co., Ltd.) for suspicion of unjust low price sales of beer, etc. (August 2012)

> - **Issuance and publication of a warning** against Mitani Co., Ltd., a petroleum product retailer, for suspicion of unjust low price sales of regular gasoline (January 2013)

Elimination of Unjust Low Price Sales (ii)

公正取引委員会 Japan Fair Trade Commission

- From the perspective of preventing unjust low price sales, the JFTC **takes measures promptly**.

  - As to alleged unjust low price sales by retailers of liquor, petroleum products, home appliances, etc., the investigation is supposed to be completed within **two months** in principle, and **cautions** are issued to retailers whose conducts may lead to infringements.

FY	2008	2009	2010	2011	2012
Liquor	795	700	1,028	1,138	1,123
Petroleum Products	430	956	714	444	426
Home Appliances	2,364	1,425	856	142	121
Others	65	144	102	48	66
Total	3,654	3,225	2,700	1,772	1,736

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Greetings, One and All

The Korea Fair Trade Commission has set forth its objectives, the realization of a warm market economy which gains respect from small and medium enterprises, large corporations as well as consumers, and has been devoting its efforts to ensuring that all economic players benefit equally from advancements made in the market.

To this end, the KFTC has promoted three major tasks, including fair trade between large corporations and small and medium enterprises and shared growth, expansion of consumer participation and enhancement of their capacity, eradication of unfair trade practices and creation of a competitive market environment.

First of all, the KFTC has actively promoted a policy to establish a fair trade order between large corporations and small or medium companies and to create a culture of shared growth.

In particular, the KFTC has encouraged large corporations to voluntarily improve their unfair trade practices, while strictly enforcing laws in the framework of social communication and agreements. It has demonstrated achievements, such as voluntary declaration for expansion of competitive bidding by ten major conglomerates, a decease in selling commissions of large-scale distribution companies, formulation and dissemination of exemplary trade standard of five franchise businesses, such as bakeries.

In addition, 145 large corporations concluded a fair trade agreement with about 28,000 business partners in 2012, while 38 mid-sized firms concluded their first contract since the introduction of the agreement system in 2007, expanding the base for culture of shared growth.

Second, the KFTC has contributed to increased consumers' opportunities to take part in the market and enhancing their capacity to ensure that consumers can play a more active role as the real owner of the market.
The KFTC launched 'Smart Consumer' service, the comprehensive consumer information portal, in January 2012 and introduced 'Compare and Share(Bigyo Gong-gam in Korea)' Korean consumer report in March 2012. This helped consumers make the right choices by providing comparative information on prices and quality of 11 items, such as hiking boots, baby bottles and strollers.

The KFTC has also installed safety devices for each stage of electronic commerce to promote the sound growth of the online market, while doubling its efforts to protect rights of under-privileged consumers by introducing a dispute mediation system for unfair terms and conditions, amending 76 provisions concerning banking terms and conditions and imposing remedies for correct illegal pyramid selling.

Third, the KFTC has strictly enforced laws and actively promoted improvement of anti-competitive regulations in order to root out unfair trade practices and create a competitive market environment.

The KFTC has imposed remedies for 30 cases of collusion, involving products, such as instant noodles, fertilizers, etc. by strengthening surveillance of bid rigging in the public sector and areas directly related to the lives of citizens and imposed surcharges for negligence of 398.9 billion won thereon. It also imposed strict sanctions on provision of work only to affiliates in areas of system integration and bakeries as well as tolls practice in the courses of selling ATMs.

In addition, the KFTC has endeavored to create a competitive market environment by implementing measures to improve 20 anti-competitive regulations, such as expansion of competition between duty-free shops in Incheon Airport.

On the other hand, the KFTC has strengthened cooperation with foreign competition authorities and enhanced its international status by holding Seoul International Competition Forum, meetings of international organizations, such as International Competition Network (ICN) and Organization for Economic Cooperation and Development (OECD), bilateral council meetings. etc.

Efforts of all employees of the KFTC during 2012 and their achievements are detailed in this White Paper. I hope this White Paper helps people develop a deep understanding of and take more interest in the fair trade system and disseminate a culture of competition. I would like to express my gratitude to employees of the KFTC who have devoted their efforts to publishing this White Paper.

August 2013

Noh Dae-lae

Chairman of the Korea Fair Trade Commission

FAIR TRADE COMMISSION
REPUBLIC OF KOREA

I

2013 Annual Report

Overview in Implementation of 2012 Fair Trade Policy

1. Characteristics in Implementation of 2012 Fair Trade Policy

A. Basic Direction-setting in Policy Implementation

For the last five years, the Korea Fair Trade Commission (KFTC) has enforced law to the letter to realize a type of market economy which gains sympathy from small and medium enterprises, large corporations as well as consumers, and improved the market structure and practices by adopting various unprecedented approaches, thereby playing a significant role in facilitating the new value required by Korean society to take root in Korea, such as fair society or eco-systemic development.

The KFTC has properly enforced the law, focusing on areas directly related to public welfare and areas in which small and medium enterprises have difficulty engaging in their businesses, as well as contributing to the creation of a competitive market environment. It handled a total of 13,000 cases and imposed penalty surcharges amounting to 2.4 trillion won from 2008 until 2012 and endeavored to create a more fair market environment, concentrating on improving anti-competitive regulations. As a result, the market has seen tangible achievements, such as entry of new enterprises into the market and price reductions.

In addition, the KFTC has diversified the functions of supervision by using market pressure through the provision of information and consumer empowerment, instead of exclusively attending to oversight of companies. It has taken greater endeavors to create a market economy led by smart consumers, believing that companies can change when consumers demonstrate abilities. For example, the sale of low-price and high-quality products has significantly increased since information for comparison of products began to be provided via K-Consumer Report (Compare and Share), and import companies reduced their product prices voluntarily after their products were found to be more expensive than those sold

in foreign countries following provision of price information by each distribution channel and stage. The KFTC also endeavored to induce voluntary changes by large companies which are conscious of social reputation, by strengthening social pressure thereon, such as more public announcements of large companies and expansion of information analysis or disclosure.

B. Overview of Major Achievements

(1) Rectification of Collusive Practices

The KFTC has consistently implemented its policies to eradicate collusion, which obstructs the smooth operation of the market economy by blocking the operation of competition principles.

In 2012, the KFTC strictly imposed sanctions on collusion in areas directly related to ordinary citizens, such as home appliances, fertilizers, instant ramen, airlines, LPG and small bonds, as well as the public area, and uncovered 30 cases of collusion and imposed penalty surcharges of 398.9 billion won. It has also reinforced its endeavors to uncover and root out the international cartel which affects the domestic market and consumers. The KFTC imposed sanctions on 4 Braun-tube glass companies which have engaged in collusion regarding prices and restrictions on business counterparts, as well as Korean Air and MIAT Monglian Airlines which have engaged in collusion. The KFTC has also strengthened the reciprocal-assistance system with overseas counterparts, such as U.S, EU. etc. to uncover more international collusion practices and monitored trends in the implementation of foreign laws.

On the other hand, the KFTC expanded the liquidated damages system in an effort to root out bid rigging in the public sector, which wastes public funds and

has negative effects on the private market economy, while 16 major agencies placing an order in the public sector, including the Korea Railroad and the Korea Expressway Corporation, have introduced such system.

The KFTC has also provided tailored education on cartel prevention for companies in Korea and abroad in order to raise awareness of competition laws. It provided stage-by-stage education to each company and group, based on demand of domestic companies and business associations, as well as education on international cartel prevention for executives and employees working in foreign countries (including Japan, EU, Singapore and United States) who require more education on compliance with competition laws, while opening information classes for small and medium enterprises which have rarely received such education and business associations.

(2) Rectifying Abuse of Monopoly Power and Unfair Trade Practices

The KFTC has reinforced its endeavors to rectify unfair trade practices in areas closely related to ordinary citizens and strictly dealt with the abuse of monopoly and oligopoly.

It has monitored companies, focusing on about six businesses closely related to ordinary citizens or businesses, in which monopoly or oligopoly market structure has settled, every year from 2006 and conducted a survey on unfair trade practices in the supply chain, focusing on areas related to outdoor businesses, FTAs (Free Trade Agreement), enterprise server/SW and VAN in 2012.

On the other hand, the KFTC has actively coped with illegal support through which a large company provides work to its affiliates under terms favorable to such company in the areas of MRO (Maintenance Repair and Operation), distribution

and construction. It has imposed sanctions on illegal support by Woongjin, Hanhwa and STX, creating a level playing field for independent small and medium businessmen to seize more opportunities to engage in a business. It also supervised provision of work between affiliates of large companies in the areas of SI and bakery in 2012.

(3) Dissemination of Competition Principles through Regulatory Reforms in the Public Sector

The KFTC has contributed to creation of jobs and enhancement of economic vitality by modifying competition-restricting regulations remaining in economic sectors, such as market-entry regulation. It promoted market competition by improving regulations in a total of 85 projects, including 26 projects in the first stage (2009), 20 projects in the second stage (2010), 19 projects in the third stage (2011) and 20 projects in the fourth stage (2012).

In addition, the KFTC conducted competition assessment through which it checked whether newly established or enhanced regulations in each department unnecessarily limit competition in the relevant market. It conducted competition assessment on 288 cases in 2010, 415 cases in 2011 and 407 cases in 2012 with regard to newly established or enhanced regulations and concluded that such regulations restrict competition in a total of 75 cases.

(4) Establishment of Transparent and Fair Competition System through Policy on Conglomerates

The KFTC has significantly relaxed preliminary regulation on companies following the launch of the new government in 2008 and shifted market rules into rules for ex post market oversight. Accordingly, it reduced the number of companies subject

to regulation in June 2008 by raising a standard for the scale of conglomerates subject to restrictions on mutual investment from two trillion won to five trillion won. It also introduced the disclosure system for large corporate groups in March 2009 for voluntary control of the market, through information disclosure, instead of removing a ceiling on total shareholdings. On the other hand, it has strengthened oversight on illegal support by conglomerates by revising regulations on public announcement of important matters by affiliates to conglomerates subject to restrictions on mutual investment in January 2012.

The KFTC has also reinforced inspections and sanctions on violations committed by conglomerates in 2012 and consistently disclosed information related to conglomerates, such as a fluctuation in the number of companies affiliated to conglomerates and the analysis and disclosure of ownership shares.

(5) Creation of Market Environment for Consumer Sovereignty

The KFTC has actively created the market environment in which a market-savvy consumer can aggressively take part.

Above all, the KFTC has provided abundant information to ensure that consumers are able to make reasonable choices in consumption. It established the integrated information network Smart Consumer to help consumers view information related to consumption in 2012 and expanded connections with other organization sites. In addition, it has actively rectified unfair sement of agencies arranging private study abroad and on-line shopping malls which misled consumers into making a wrong choice. It has also handled electronic commerce and regulation of terms and conditions according to its plans. It has implemented a comprehensive plan for each stage of purchase to enhance consumer confidence in the area of electronic commerce, rectified unfair terms and conditions in areas closely related to citizens,

increased the dissemination of standard terms and conditions, focusing on the introduction and operation of the dispute mediation system regarding terms and conditions, so as to relieve damage suffered by small and medium business operators.

C. Results of Handling Cases

(1) Results of Handling Cases by Measure

The KFTC handled a total of 5,204 cases in 2012, up 34% compared with 3,879 cases in 2011. A total of 2,519 of such cases involved voluntary rectification, warnings or heavier punishment, up 8.9% compared with 2,312 cases in 2011.

Results of Handling Cases by Measure

(Unit : cases)

Type \ Year	'81~'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12
Prosecution (Penalty surcharges)	238 (20)	11 (1)	18 (4)	22 (2)	12 (2)	47 (3)	48 (11)	33 (9)	43 (8)	19 (3)	38 (22)	44 (7)
Corrective order (Penalty surcharges)	4,043 (465)	497 (90)	449 (33)	478 (89)	756 (272)	644 (154)	928 (315)	737 (132)	486 (70)	277 (63)	370 (134)	388 (75)
Recommen-dation of rectification (Requests for rectification)	1,566 (38)	115 (5)	104 (2)	101 (1)	163 (-)	179 (1)	124 (-)	77 (1)	85 (-)	66 (-)	62 (-)	51 (-)
Warning, etc. [1]	8,766	2,013	2,132	2,388	2,419	2,516	2,124	2,336	2.589	1,763	1,842	2,036
Others [2]	4574	711	836	957	949	1,051	1,256	1,373	1,461	1,513	1,567	2,685
Total	**19,187**	**3,347**	**3,539**	**3,946**	**4,299**	**4,437**	**4,480**	**4,556**	**4,664**	**3,638**	**3,879**	**5,204**

1. Cases of voluntary rectification (completion of deliberative procedures in cases of violations on terms and conditions, warnings for other cases), mediation and imposition of fines for negligence are included. However, records since 2008 are classified in cases of voluntary rectifications.
2. Drop charges, completion of deliberative procedures, re-calculation of penalty surcharges, etc.

The KFTC imposed penalty surcharges of 510.5 billion won in 2012, down 15.1% compared with 601.7 billion won in 2011. Large penalty surcharges were imposed on four business operators manufacturing and selling instant ramen who engaged in collusion (124.1 billion won), 20 building contractors related to bidding for first turn-key construction in the Four Major Rivers Restoration Project who engaged in collusion (111.5 billion won) and 13 business operators manufacturing and selling fertilizers who engaged in collusion (40.7 billion won).

(2) Trend in Handling Cases by Type of Acts

When it comes to cases of voluntary correction, or warnings or heavier punishment, violations of regulations limiting business consolidation, unfair subcontract transactions and violations of electronic commerce law increased from 21 cases to 37 cases (76.2%), 802 cases to 1,100 cases (37.2%) and 326 cases to 412 cases (26.4%), respectively, compared with the previous year. On the other hand, violations of regulations limiting economic concentration, collusion and unfair terms and conditions decreased from 77 cases to 31 cases (59.7%), 71 cases to 41 cases (42.3%) and 194 cases to 120 cases (38.1%), respectively, compared with the previous year.

Results of Rectification by Type of Acts

(Warnings[1] or heavier punishment, cases)

Type \ Year	'81~'99	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12
Abuse of monopoly power	13	0	4	0	1	0	0	2	38	5	2	7	0	1
Violating regulations limiting business combination	154	48	45	46	43	36	17	60	53	27	23	21	21	37
Violating regulations limiting economic concentration	56	19	16	80	29	149	108	24	44	116	41	36	77	31
Collusion	155	47	43	47	23	35	46	45	44	65	63	62	71	41
Offences committed by business associations	353	117	88	100	91	62	57	58	58	98	107	62	85	66
Unfair transactions	1,796	121	169	210	123	298	481	370	715	565	446	360	279	248
Total	**2,527**	**352**	**365**	**483**	**310**	**580**	**709**	**559**	**952**	**876**	**682**	**548**	**533**	**424**
False labeling and advertisements [2]	342(644)	310	328	339	558	436	513	425	304	327	300	246	327	249
Unfair terms and conditions	626	56	100	175	114	79	144	119	93	77	43	165	194	120
Unfair subcontract [3]	2,313	295	3,130	1,632	1,583	1,649	1,741	1,947	1,527	1,438	1,386	669	802	1,100
Violation of electronic commerce law [4]		-	-	-	98	96	125	170	207	189	197	262	326	412
Violation of Door-to-Door Sales Act [4]		-	-	-	24	116	63	84	65	44	84	67	15	11
Violation of Franchise Business Act [4]		-	-	-	1	20	43	47	46	95	366	165	111	102
Violation of Installment Transactions Act [5]		-	-	-	-	-	-	-	-	-	-	-	0	100
Others [6]	2	5	11	7	13	13	12	34	30	0	26	3	4	1
Total	**5,826**	**1,018**	**3,933**	**2,636**	**2,704**	**2,989**	**3,350**	**3,385**	**3,224**	**3,070**	**3,084**	**2,125**	**2,312**	

1. Cases of voluntary rectification (completion of deliberative procedures in cases of violations on terms and conditions, warnings for other cases), mediation and imposition of fines for negligence are included. However, records since 2008 are classified in cases of voluntary rectifications.
2. ( ) refers to the number of cases involving unfair transactions under the Fair Trade Act before the Labeling and Advertising Act is enacted.
3. Unfair international contracts and resale price maintenance are included.
4. Violations of laws which have entered into force since 2002.
5. Violations of the Installment Transactions Act since it is completely revised in 2010.
6. Failure to submit data, refusal of investigations, failure to comply with remedies

D. Organization and Budget Operation of Fair Trade Commission

(1)Organization

Monopoly and oligopoly have consistently intensified in domestic distribution market, led by department stores, large shopping malls and TV home shopping stations since the distribution market has been widely opened in 1996. Against this backdrop, suppliers were compelled to accept unfair transactions offered by large

distribution companies with massive purchasing power, as they were afraid of trade suspension.

In an effort to fundamentally improve unfair trade practices of large distribution companies, the Act on Fair Transactions in Large Franchise and Retail Business (enacted on January 1, 2012) was enacted and entered into force on November 14, 2011, leading to new or strengthened investigations into unfair practices. The KFTC employed five persons for conducting investigations into unfair practices of large distribution companies and concluding an agreement on shared growth between large distribution companies and suppliers, and employed two persons for formulating and operating standards for exemplary transactions to create a fair franchise business market. The KFTC also changed its Franchise and Retail Division into the Franchise and Transactions Division and established the Retail and Transactions Division to perform duties in areas of large distribution business and franchise business in a more professional manner.

As the Electronic Commerce Transactions Act (enacted on August 18, 2012) including an obligation to provide product information, introduction of an online completion service system and reinforced responsibilities of brokers of mail-order sale, was revised on February 17, 2012, the KFTC employed two persons for reinforcing supervision over and investigations into unfair practices in the electronic commerce market to handle new and strengthened duties, as well as preventing consumer injury following rapid market growth and the emergence of new type transactions.

(2) Outlines of budget

Estimated revenues of the KFTC in the fiscal year 2012 stood at 405.1 billion won, down 0.8% compared with the previous year. Estimated revenues were organized

at the same level as the budget of the previous year, but revenues received are on the increase as violations, such as collusion and abuse of monopoly power, increase in the fiscal year 2012.

Details of Estimated Revenues in 2012

(Unit: one hundred million, %)

Classification Classification	Estimated revenues (A) Estimated revenues (A)	Estimated amount collected		Amount received (D) Amount received (D)	Amount unpaid		Deficiencies due to default Deficiencies due to default	Receipt rates		
		Settlement of accounts (B)	Substantial [1] (C)		Settlement of accounts	Net [2]		(D/A)	(D/B)	(D/C)
2012	4,051	10,856*	9,552	9,162	1,694	390	-	226	84.4	96
2011	4,082	8,856*	3,833	3,491	5,365	342	-	85.5	39.4	91.1
Fluctuation Fluctuation	348	27	△1,523	△1,593	1,620	70	-	-		-
	9.3	0.3	△28.4	△31.3	43.3	25.7	-	△50.7	△19.3	△3.8

* Amounts unpaid as at the previous year carried forward (536.5 billion won) + this year's newly imposed fines (562.1 billion won) - refunds and reduction (13 billion won)

1. Estimated substantial amount to be collected, excluding amount for which payment deadline has not yet arrived and amount subject to deferment of collection.
2. Net amount unpaid (arbitrary amount in arrears), excluding amount for which payment deadline has not yet arrived and amount subject to deferment of collection.

FAIR TRADE COMMISSION
REPUBLIC OF KOREA

II

2013 Annual Report

Promotion of Market Competition

1. Concentrated Surveillance and Tightened Sanctions on Chrtels

A. Records of Cartels detected

The Korea Fair Trade Commission (KFTC) exposed and corrected a total of 41 cases of collusion in 2012, by issuing 30 corrective orders and 11 warnings. Among 30 cases where a remedial order was issued, two cases are subject to corrective orders, prosecutions and fines for negligence concurrently and 24 cases are subject to corrective orders and fines for negligence concurrently and 4 cases are subject to remedial orders.

In terms of the types of violations, 17 cases of price cartels ranked highest, and 16 cases of bid rigging ranked second highest. This results from KFTC's efforts to focus on exposing and regulating a cartel which significantly restricts competition. Bid rigging is included in a new category of cartel prescribed under the Fair Trade Act amended in August 2007 and it has been dealt with as a separate category thereafter, although it was included in a category to which agreements on price, restrictions on business counterparts, etc. belong in the past.

B. Major Sanction Cases

(1) Chemical Fertilizer Price Cartel

(A) Details of Cartels

Thirteen chemical fertilizer companies, such as Nam Hae Chemical Corporation, Dongbu HiTeck and Dongbu Hannong, agreed to fix a quantity and bidding price for each company in advance in bidding for chemical fertilizers ordered by the National Agricultural Cooperative Federation or the Korea Tobacco Growers

Organization and acted on such agreement, thereby avoiding competition from 1995 to 2010.

The market share of 13 chemical fertilizer companies which participate in agreement stood at 100% for a total of 8 items and the price-fixing led to a successful bid rate of at least 99% during the relevant period.

(B) Details of Sanctions

The KFTC issued corrective orders to, and imposed fines for negligence of 82,823 million won on, 13 chemical fertilizer companies for violating Article 19 (1) 1 of the Fair Trade Act (for determining, maintaining or changing prices) and Article 19 (1) 3 of the Fair Trade Act (for restricting production, delivery or transport of products, or restricting transactions or services).

(C) Significance of Sanctions

The sanctions taken by the KFTC are significant that they have eradicated price-fixing practices and structure which have taken deep root in the market for a long time. According to data submitted by the National Agricultural Cooperative Federation, the prices of custom-made chemical fertilizers in a competitive bid fell by 21% in 2011, compared with in 2010 after the KFTC conducted an on-site investigation on June 8, 2010 and costs of chemical fertilizers to be borne by farmers decreased 102.2 billion won. As price competition becomes fierce in the chemical fertilizer market in the future, it is expected to contribute to enhancing the competitiveness in the industry and reducing costs of fertilizers to be borne by farmers.

(2) Instant Noodle Price Cartel

(A)Details of Cartels

Four companies manufacturing and selling instant noodles (Nongshim, Samyang Food, Ottogi, and Korea Yakult) jointly increased prices of instant noodles through information exchanges on six occasions from the time when the prices rose during May to July 2001 until the prices decreased in February 2010. In particular, they fixed the wholesale prices and suggested retail prices of main products (Shinramen of Nongshim, Samyang amen of Samyang, Jinramen of Ottogi, and Kingramen of Korea Yakult) at the same level.

Nongshim, who played a leading role in raising the prices of instant noodle, formulated a plan to increase prices and then informed other companies of the price increase. Other companies also raised the prices of instant noodle at the same or similar level according to the plan. The largest company in the market encouraged other companies to raise prices by providing information on the price increase, becoming aware that other companies would follow its price increase. Companies which entered the market late provided information on the price increase each other, checking price increases of other companies. They exchanged sales records and targets, support plans for business partners, PR and sale promotion plans and sensitive business information including plans to launch new products, as well as information on the price increase on a regular basis to keep a watch on those who refuse to engage in collusion and ensured internal stability. In particular, they held regular general meetings and management meetings of the Instant Noodle Manufacturer Association in late March each year to facilitate continued exchanges and cooperation between rival companies.

(b) Details of Sanctions

The KFTC issued a corrective order to, and imposed penalty surcharges of 135.4 billion won on, four companies manufacturing and selling instant noodle under Article 19 (1) 1 of the Fair Trade Act (for determining, maintaining or changing prices).

(C) Significance of Sanctions

This case is significant that the KFTC has expressed its intention to enforce laws strictly against collusion in which products closely related to the life of citizens are involved. The sanctions taken by the KFTC eradicated collusion practices which have taken deep root in the market for a long time by business operators whose market share is close to 100%, thereby encouraging competition in the instant noodle market. As a result, four companies has determined instant noodle prices at different levels since the instant noodle industry decreased instant noodle prices in 2010.

C. Activities to Prevent International Cartels

As regulation on international cartels in each country is strengthened, Korean companies are subject to growing sanctions imposed by foreign competitors, following an increase in market share of Korean companies in the world market. Fines imposed by the USA, the EU, Japan, Canada on Korean companies amount to 3.3 trillion won to date and three Korean companies are included in the list of top ten companies on which the USA imposed fines for cartel activity.

As our global companies are subject to growing number of sanctions imposed by foreign countries due to international cartels, the KFTC is focusing on

implementing a project aimed at preventing violations of foreign competition laws.

The KFTC has systematized projects to prevent international cartels since 2010 and held briefing sessions to prevent international cartels at home and abroad. First of all, it held cartel briefing sessions to explain improvement of related systems or details of recent law enforcement for all companies at home and provided education tailored to each industry or company by considering the characteristics of businesses and situation of each company, in response to demand for education from each business or company. It also held overseas briefing sessions for executives and employees of local subsidiaries and branches of Korean companies in the USA and the EU where Korean companies suffer much damage from cartels as well as in China where regulation on cartels has been tightened, following the enforcement of anti-trust laws. In particular, it maximized effects of preventive education in overseas briefing sessions by utilizing local public officials working for foreign authorities and lawyers as instructors. These education provided at home and abroad is expected to arouse companies' attention to danger of international cartels and help Korean companies become fully aware of competition laws at home and abroad.

2. Restrictions on Violations by Business Associations

A. Records of Corrective Actions

The KFTC corrected 68 cases of violations committed by business associations in 2012, by issuing 18 corrective orders (including six penalty surcharges) and 49 warnings.

The KFTC has taken corrective actions by exposing violations of law committed

in various areas. It took strict measures against price-fixing or restrictions on business activities of various groups, such as the Korean Dental Association, Ski Board Rental Association, Hyundai Car Dealers Association, Busan Auto Mechanic Business Association, Seoul Metropolitan Government Association belonging to the Federation of Specialized Driver Training Schools, Uiryeong-gun branch of the Korean Cosmetologists' Association, Mokpo Ready Mix Truck Presidents' Organization, Construction Works Supervisory Association in Daegu and Kyeongsangbuk-do. Given that these businesses are closely related to the life of citizens, KFTC's corrective actions contributed to improving the public convenience.

B. Major Sanction Cases

(1) Sanctions on Korean Dental Association

(A) Outlines

The Korean Dental Association decided to ban Seminar Review publisher, who placed help-wanted advertisements of network dental clinics, from entering its office and refuse any interview at a regular board meeting in March 2011. It also passed a resolution for member hospitals of the Korean Dental Association to stop subscribing to the Seminar Review at a special board meeting in April, 2011, forcing network dental clinics not to place their help-wanted advertisements in the Seminar Review. In addition, the Korean Dental Association restricted the use of the Dental Job website by member hospitals engaged in network dental clinics in March 2011. It also requested dental equipment and materials businesses to stop providing equipment and materials to network dental clinics in July and August 2011, while asking the Korean Dental Technologist Association to stop providing dental lab products to network dental clinics.

(B) Rulings on Illegality and Sanctions

Member hospitals of the Korean Dental Association are entitled to freely determine regarding placement of advertisements, use of the Dental Job website and purchase of dental lab products as well as dental equipment and materials on favorable terms, which can promote competition in the dental medical service market by improving business conditions of member hospitals. Nevertheless, the Korean Dental Association made it impracticable for its member hospitals to place help-wanted advertisements against their intention and restricted the use of the Dental Job website, as well as making it difficult for them to purchase dental lab products and dental equipment and materials. This hindered the fair and free competition between member hospitals by significantly restricting business and activities, which is the violation of Article 26 (1) 3 of the Act.

The KFTC issued a corrective order to, and imposed penalty surcharges of 500 million won on, the Korean Dental Association, as well as informing its member hospitals of such corrective order.

(2) Sanctions on Daegu Construction Works Supervisory Association

(A) Outlines

Daegu Construction Works Supervisory Association (hereinafter referred to as the "Association") determined the lowest price of supervision costs and detailed standards for supervision costs for each type or size of building from March 2011 and forced member architects of the Association to comply with such determination, which led the increase of 75% in design or supervision costs. In addition, the Association didn't allow member architects to supervise construction works of buildings, the design of which is ordered to them, while allowing only

architects selected through the 'Supervisor Selection Program' to supervise construction works when a client orders supervision, and imposed penalties on any person who violates its rules.

(B) Rules on Illegality and Sanctions

Supervision costs should be determined, based on free negotiations between clients and supervisors, therefore the conduct performed by a business association to determine a standard price and enforce the compliance therewith unfairly restricts price competition between member architects. Accordingly, the conduct amounts to violation of Article 26 (1) 1 of the Act. In addition, allowing only supervisors selected by the business association to perform their duties unfairly restricts business and activities of member architects.

The KFTC issued a corrective order to, and imposed penalty surcharges of 83 million won on, the Association as well as informing business operators of such corrective order.

3. Strengthened Surveillance on Unfair Trade Practices

A. Records of Corrective Measures

The KFTC handled a total of 996 unfair trade practices in 2012, accounting for 76% of 1,307 cases related to the Fair Trade Act. When it comes to the types of unfair trade practices, coercing customers (539 cases, 54%) ranked highest, and abuse of position in transactions (308 cases, 31%) ranked second highest.

Corrective measures against unfair trade practices in 2012 included corrective

orders (76 cases), warnings (168 cases) and voluntary rectification (3 cases).

B. Major Sanction Cases

(1) Coercing Customers by Telecom Carriers and Mobile Phone Makers and Conditional Transactions Conducted by SKT

(A) Details of Violations

Three telecom carriers and three mobile phone makers set high prices for mobile phones, considering the provision of incentives by using the fact that mobile phones with high incentives can induce many customers, and then provided such incentives to customers through a franchise. The types of inflated mobile phone prices are classified into factory prices inflated by telecom carriers and wholesale prices inflated by mobile phone makers.

Where a factory price was inflated, three telecom carriers set a factory price significantly higher than the wholesale price (an average difference between the wholesale price and factory price for 44 mobile phone models stands at 225,000 won), considering the amount of incentives to be provided for a total of 44 mobile phone models from 2008 to 2010 by holding consultations with mobile phone makers, and used the price difference for paying incentives to customers. Three mobile phone makers suggested a factory price significantly higher than the wholesale price to telecom carriers by considering that a high factory price can help consumers have a high-end mobile phone image.

Where a wholesale price was inflated, three mobile phone makers set a wholesale price high (an average of incentives for 209 mobile phone models stood at 234,000 won) in consideration of the amount of incentives to be provided for a total

of 209 mobile phone models from 2008 to 2010 by holding consultations with telecom carriers and paid such incentives to customers through a franchise. On the other hand, three telecom carriers actively requested mobile phone makers to share the burden of paying incentives, approving inflation of wholesale prices.

SK Telecom Co. Ltd. restricted the ratio of mobile phones directly supplied by Samsung Electronics Co. Ltd. to distribution channels, such as franchises and mass merchandisers, without going through SK Telecom Co. Ltd., by up to 20%, thereby restricting price competition among distribution channels.

In detail, when a quantity directly supplied by Samsung Co. Ltd. exceeds 20%, SK Telecom Co. Ltd. refused the registration of the relevant items by using the system of registering the past mobile identification number in telecom carriers in advance.

(B) Details of Sanctions

As the acts committed by telecom carriers and mobile phone makers correspond to the acts of coercing customers under Article 23 (1) 3 of the Fair Trade Act, the KFTC issued a corrective order to, and imposed penalty surcharges of 45,330 million won on, them.

In addition, as any act committed by SK Telecom Co. Ltd. to hinder business activities corresponds to conditional transactions under Article 23 (1) 5 the Fair Trade Act, the KFTC issued a corrective order to, and imposed penalty surcharges of 440 million won on, SK Telecom Co. Ltd.

(2) Rectification of Resale Price Maintenance Policy for 'North Face' Products

(A) Details of Violations

Goldwin Korea Co. Ltd. sold products made by its outdoor brand 'North Face' to chain stores nationwide by fixing retail prices thereof and prevented such stores from selling products at a price lower than the retail price from November 1997 to January 2012.

Goldwin Korea Co. Ltd. has specified an obligation to comply with retail prices in sales agency agreements since it launched North Face in 1997 and directly imposed sanctions on chain stores which provide product discounts, based on such agreements.

In addition, the headquarters of Goldwin Korea determined retail prices, informed chain stores of such prices, and monitored the stores to see if they comply with such prices by means of visiting stores and mystery shoppers (checking prices by disguising himself/herself as a customer).

The KFTC found many cases in which the Goldwin Korea imposed sanctions, such as termination of a contract, suspension of delivery, collection of deposits and warnings, on chain stores which refused to comply with a pricing policy formulated by the headquarters and sold products at a discounted price.

Goldwin Korea has also included in contracts provisions prohibiting online sales of its products to raise efficiency of resale price maintenance since 2002, thereby blocking fierce online sales competition.

(B) Details of Sanctions

The KFTC issued a corrective order to, and imposed penalty surcharges of 5,248 million won on, Goldwin Korea under Article 29 (1) of the Fair Trade Act (resale price maintenance) and Article 23 (1) 5 (conditional transactions).

(3) Sanctions on Resale Price Maintenance Policy of Philips Electronics

(A) Details of Sanctions

Philips Electronics Co. Ltd. formulated a pricing policy saying that all Philips' small domestic appliances should be sold at a price of at least 50% of a suggested retail price in the Internet open market at a TF meeting formed to restrict price competition in the online market in May 2011. Shortly after the meeting, it informed business operators of disadvantages, such as suspension of delivery and an increase in a supply price, when its pricing policy was not observed, while putting retail stores which failed to comply with its pricing policy at a disadvantage, such as suspension of delivery, an increase in a supply price and requests for purchase of entire quantity.

On the other hand, Philips Electronics formulated a policy to ban sales of four products, including Senso Touch, in the Internet open market at an online TF meeting on March 18, 2011, while putting retail stores which violated its policy at a disadvantage, such as suspension of delivery and an increase in a supply price.

(B) Details and Significance of Sanctions

The violations by Philips Electronics corresponded to resale price maintenance under Article 29 (1) of the Fair Trade Act and conditional transactions under Article 23 (1) 5 of the Act. The KFTC issued a corrective order to, and imposed penalty surcharges of 1,513 million won on, Philips Electronics to prohibit resale price maintenance and acts of restricting business counterparts.

4. Endeavors to Improve Regulation Restricting Competition

A. Amendment to Regulations Restricting Competition

Despite efforts to improve regulatory provisions in laws and regulations, established rules and notices of the Central Government, many point out that when the same as or similar to such regulatory provisions are included in local governments' ordinances and rules, the effects of amending regulatory provisions are reduced. Therefore, the KFTC has endeavored to improve regulations restricting competition found in ordinances and rules of local governments since 2007.

In an effort to improve regulations restricting competition in metropolitan councils' ordinances and rules, the KFTC requested the Korean Local Government Law Association to conduct a study on measures to improve regulations restricting competition in metropolitan councils' ordinances and rules from June to November, 2007 and found 74 regulations restricting competition in metropolitan council's ordinances and rules.

The KFTC decided to improve 68 regulations restricting competition in ordinances and rules and agreed with each metropolitan council to improve 40 regulations restricting competition by 2012.

Among 40 regulations restricting competition, a total of 37 (36 until 2011 and 1 in 2012) were improved, showing that 92.5% were improved.

In addition, the KFTC requested the Korean Local Government Law Association to conduct a study on measures to improve regulations restricting competition in ordinances and rules of primary local governments from June to November in

2008, in an effort to improve regulations restricting competition in ordinances and rules of primary local governments.

The KFTC agreed with primary local governments to improve 1,209 regulations restricting competition and a total of 939 regulations were improved, including 773 regulations by 2011 and 166 regulations in 2012.

The KFTC would continuously encourage local governments to improve regulations restricting competition in their ordinances and rules, endeavoring to improve all regulations restricting competition with regards to which it agreed with local governments.

In addition, the KFTC would check ordinances and rules newly enacted by local governments on a regular basis, and, when they are deemed competition-restrictive, it would improve such ordinances and rules by holding consultations with the relevant local governments.

B. Competition Assessment

(1) Significance

Since the OECD announced the Competition Assessment Toolkit in 2007, the Republic of Korea has formulated measures of competition assessment tailored for Korean situation, by referring to the Toolkit model. On the other hand, as the Guidelines for Regulatory Impact Analysis is amended by the Office for Government Policy Coordination, it became institutionalized for the KFTC to conduct competition assessment on newly established or strengthened regulations in government authorities. Accordingly, as competition assessment processes were introduced as preliminary procedures for regulatory examinations of the

Regulatory Reform Committee belonging to the Office for Government Policy Coordination, the KFTC with abundant experiences in reviewing regulations restricting competition and special knowledge about such regulations has conducted competition assessment.

(2) Major Achievements

First, the KFTC received a request to conduct competition assessment on 407 Bills to be enacted or amended from the Prime Minister's Office in 2012 and deemed that 26 Bills were likely to restrict competition. In response to this, it conducted an in-depth assessment and suggested market-friendly alternatives, preventing enactment or enforcement of regulations affecting competition. To this end, it enhanced the accuracy of assessment and analysis by visiting the relevant organizations.

Second, the KFTC has played a leading role in operating the competition assessment system in the global arena. It showed how the system is operated in Korea to public officials in Asian competitors, such as Philippines, Indonesia and Singapore at OECD Korean Center Economic Policy Workshop (August 2012, Philippines) and received a lot of attention from them.

Third, the KFTC has reinforced PR activities to raise awareness of competition assessment. In an effort to help people fully understand the competition assessment system introduced in 2009, it amended the Competition Assessment Manuals, which had been formulated by reflecting characteristics of the Republic of Korea based on the OECD Competition Assessment Toolkit, by reflecting amendments to the OECD Competition Assessment Toolkit and then disseminated the manuals to each Government authority and the Regulatory Reform Committee belonging to the Office for Government Policy Coordination.

Fourth, with regard to laws and subordinate statues newly enacted or enforced by Government authorities, the KFTC has actively voiced its opinions on competition-restrictive laws and subordinate statues, such as opinions on barriers to entry into the market when proposed Bills were examined in 2012, as a government panel of the Regulatory Reform Committee belonging to the Office for Government Policy Coordination, thereby blocking regulations not beneficial to competition in advance.

(3) Major Competition Assessment

After the KFTC reviewed a total of 407 Bills in 2012, it presented its opinion that 26 Bills restrict competition. Among 26 Bills, 15 were withdrawn or improved during the processes of examination by the Regulatory Reform Committee or re-examination by the competent authority, showing that 62.5% of opinions were reflected.

Examples of major competition assessment are:

① It deemed that regulations (amendments to the Act on the Improvement of Water Quality and Support for Residents of the Han River Basin, amendments to the Act on Water Management and Resident Support in the Geum River Basin, amendments to the Act on Water Management and Resident Support in the Nakdong River Basin, and amendments to the Act on Water Management and Resident Support in the Yeongsan and Seomjin River Basins), which restrict new construction of buildings where the water quality in four rivers falls short of the target water quality or emissions of pollutants exceed the assigned pollutant loads for each year, are competition-restrictive, unduly restrict business freedom and lead to entry restriction of a new enterprise by forcing business operators to observe standards of similar characteristics twice over.

② It deemed that regulations (amendments to the Enforcement Rules of the Ship Management Industry Development Act), which grant qualifications for application for certification of exemplary ship management business operators to business operators, whose ships entrusted account for at least 30% of all ships or who have at least ten ships, restrict market entry of small business operators by limiting qualifications for application. Therefore, it removed qualifications for application and suggested alternatives to ensure that capacity of a company is evaluated in certification examination processes.

③ It deemed that regulations (amendments to the Enforcement Decree of the Building Act), which allow architects designated by the head of a Si/Gun/Gu to conduct an inspection, while having owners or managers of publicly used buildings, etc. assume an obligation to conduct regular inspections, are likely to raise prices, such as inspection costs, as competition is defeated for an architect who received a right to exclusive inspection and a building owner loses a bargaining power in the course of concluding an inspection contract.

C. Review of and Consultations on Competition-Restrictive Laws

Operation of the advance consultation system concerning competition-restrictive laws by the KFTC is a competition advocacy activity in the Government sector and its smooth operation is urgently needed in that, once laws or systems are established, it is difficult to improve them thereafter. This is directly based on the provisions of Article 63 of the Fair Trade Act, and consultations with relevant authorities and the system of hearing opinions are stipulated in Article 11 of the Regulations on Legal Affairs (Presidential Decree).

At the stage of holding consultations on laws, the KFTC checks whether provisions of each law violate the Fair Trade Act, and whether laws include regulations restricting competition, such as a decision on a price or transaction

conditions, restrictions on market entry or business activities, or joint violations, and then present its opinions to the competent authority.

The KFTC has also endeavored to reflect its opinions in the whole legislative processes, including review of regulations, review by the Ministry of Government Legislation, meetings of vice ministers and Cabinet meetings, while checking whether administrative rules, including instructions and established rules, restrict competition in the market and taking corrective measures.

The KFTC had consultations on a total of 1,593 pieces of legislation enacted by the Government in 2012 and the number of consultations on legislation has grown for the recent five years.

Number of Consultations on Legislation Enacted by Government Authority

(Unit: cases)

	2008	2009	2010	2011	2012
Number of consultations	827	1,097	1,178	1,624	1,593

The KFTC voiced its opinions in 22 pieces, 1.4% of a total of 1,539 pieces of legislation enacted by the Government in 2012, and its opinions were reflected in 20 pieces, 90.9% of its presented opinions. Given that two pieces in which its opinions are not reflected include laws, to which amendment is underway, the rates of reflecting opinions of the KFTC is high.

5. Strengthened Economic Analysis

A. Outlines

The trend in enforcement of international competition laws shifts from the form-based approach[1] to the effects-based approach.[2] The KFTC should consider effects of the relevant conduct on competitors, market, consumers, etc. in deciding on whether the relevant conduct violates laws. As enforcement of competition laws requires specialized and sophisticated work, making a comprehensive and multilateral economic analysis is deemed necessary for promoting the fair and free competition in the market.

Reflecting this trend, the KFTC has expanded the scale of the Economic Analysis Division since the Economic Analysis Team (the current Economic Analysis Division) was established in December 2005, and employed more experts, continuously endeavoring to reinforce its capacity to conduct economic analysis.

B. Outcomes of Promoting Economic Analysis

The KFTC has actively responded to written opinions presented by respondents, by utilizing various economic analysis techniques, focusing on business consolidation, abuse of market dominant power and cartels.

(1) Cases of Joint Violations by 20 Securities Companies

This case involves 20 securities companies which decided on bond yields submitted to the Korea Exchange by holding mutual consultations by means of Internet

1) Methodology of mechanically judging that ducts is illegal when the relevant conduct amounts to a violation prescribed in legal provisions.

2) Methodology of judging illegality of conduct by comprehensively considering effects of conduct on competition and consumer benefits, instead of judging that the relevant conduct is illegal even when the conduct amounts to a violation stipulated in legal provisions.

messenger, etc., so as to determine selling prices of small bonds, such as housing bond. In this case, 'securities company A' who is a respondent asserted that it independently determined bond yields of housing bonds by referring to the bond yields of a private bond assessment company after November 2008, unlike other 19 securities companies.

However, the KFTC conducted Johansen integration test[3] with regard to opinions of 'securities company A' and proved no long-term equilibrium exists between bond yields of housing bonds submitted to the Korea Exchange by 'securities company A' after November in 2008 and bond yields of a private bond assessment company.

(2) Cases of Business Consolidation between Lotte Shopping and CS Distribution

This case involves Lotte Shopping Co. Ltd. operating Lotte Supermarket (SSM) which concluded a contract on acquisition of shares of CS Distribution which operates Good Morning Mart (SSM) and Harmony Mart (voluntary retailer).

This case involves a company operating SSMs which acquires business of a company operating both SSMs and individual supermarkets, making re-definition of the relevant market a controversial issue.

The KFTC conducted an economic analysis, such as a critical loss analysis[4] and aggregate diversion ratio analysis,[5] based on a consumer questionnaire for definition of the relevant market. As a result, SSM and an individual supermarket were defined as separate markets, while large-scale supermarkets were defined as the same market as SSM.

3) The integration test means testing whether two economic time series systematically move together over the long term, in other words whether a long-term equilibrium exists.
4) Defines a market by comparing actual loss (AL) following a certain price increase, with critical loss (CL)
5) Defines a market by comparing aggregate diversion ratio (ADR) following a certain price increase, with critical diversion (CD)

This case is significant that types of supermarkets were divided into an individual market and SSM, and expansion of SSM by a large-scale distribution business in the form of acquiring a franchise as a direct management store may be examined to see if it corresponds to competition-restrictive business consolidation.

C. Continued Strengthening of Economic Analysis Capacity

The KFTC has dealt with most economic analysis required in the courses of handling cases on its own after economic analysis experts (a doctor of economics, 2011) were employed. It also has shown significant development in terms of economic analysis capacity by formulating and implementing various educational measures to enhance economic analysis capacity of its employees.

Above all, it gave two lectures on statistics theory, regression analysis methods and actual cases by inviting Ryu Geun-kwan, economic analysis expert related to competition laws, and made lectures available in a video to all employees.

On the other hand, it publicized 'Well-Defined Fair Trade Economic Analysis' to introduce various economic analysis methodology applied to handling actual cases, as well as economic theory necessary for economic analysis, laying a foundation for enhancing its employees' understanding of economic analysis.

6. Creation of Fair Trade Compliance Culture

A. Outlines

As a growing number of people are aware that companies' efforts to voluntarily comply with laws are important as well as enforcement of laws for establishment

of fair market order, the KFTC introduced Compliance Program (hereinafter referred to as "CP") in 2011. It has actively encouraged companies to utilize the Program as a basic guideline for proactively observing fair market order.

CP means an internal compliance system implemented and operated by companies, with regard to education and supervision, etc., for companies to proactively observe laws related to fair trade. In cases of exemplary in operating the CP, they can prevent violations through continued education of executives and employees on laws related to fair trade and monitoring system, and reduce damage from violations even if competition laws are violated. In addition, they can improve their image as companies which practice transparent management and ethical management. From the standpoint of the Government, it can save human resources and material resources necessary for preventing violations and taking measures when exemplary companies in operating the CP increase, therefore it is a win-win system for companies and the Government.

Accordingly, the KFTC engages in various activities for dissemination of the CP system, such as holding forums and local explanatory meetings, to ensure that more companies can proactively introduce and operate the CP system, and operates an incentive system where exemplary companies in operating the CP receive benefits, such as reduced fines for negligence and exemption from ex officio investigation.

B. Dissemination and Expansion of CP

As CP is a voluntary compliance program, it can be operated, based on characteristics of companies and business types. However, when a company intends to be recognized as introduced the CP system in grade evaluation, it shall satisfy seven requirements, the minimum elements suggested by 'CP Operation

Notice', including: 1) clarification of the willingness to voluntarily comply with fair trade and measures therefor by CEO; 2) appointment of CP managers in charge of CP operation; 3) manufacture and dissemination of a manual for CP; 4) provision of continued and systematic education on CP; 5) establishment of an internal supervision system; 6) sanctions on executives and employees violating laws related to fair trade; and 7) establishment of a document management system. However, in cases of small or medium companies, point 4) may be recommended, not compulsory.

The number of companies which have introduced CP has grown yearly, since 14 companies introduced the system in 2011, but the increasing trend slowed down from 2008 to 2010. In recent years, more and more companies have introduced CP once again, led by business partners of conglomerates. As at the end of 2012, a total of 550 companies have introduced and operated CP.

Companies which Introduced CP

(Unit: one)

Year	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Companies which introduced CP (Accumulated)	14	57	100	167	223	261	318	337	368	378	487	550
Increased companies	14	43	43	67	56	38	57	19	31	10	109	63

FAIR TRADE COMMISSION
REPUBLIC OF KOREA

III

2013 Annual Report

Implementation of Policies Regarding Large Corporate Groups

1. Outline

In an effort to prevent adverse effects of economic concentration by large corporate groups and hindrance of the market economy, the Fair Trade Act has stipulated policies on large corporate groups, such as prohibition against mutual investment, restrictions on guarantees of an obligation, restrictions on voting rights of financial or insurance companies, the system for disclosure of present status of conglomerates and the holding company system. These systems are aimed at promoting balanced development between companies belonging to large corporate groups and independent companies or small and medium enterprises by establishing a foundation for fair market competition.

2. Designation of Conglomerates Subject to Restrictions on Mutual Investment as Infrastructure for Policies on Large Corporate Groups

The system of designating conglomerates subject to restrictions on mutual investment and guarantees of an obligation (hereinafter referred to as "conglomerates subject to restrictions on mutual investment) refers to a system to determine the scope of conglomerates governed by policies on large corporate groups. The KFTC designates conglomerates with assets of at least five trillion won of domestic affiliates belonging to the same conglomerates on April 1 (until April 15, in extenuating circumstances) every year as conglomerates subject to restrictions on mutual investment and has applied a policy on large corporate groups to domestic affiliates belonging to the same conglomerates.

The KFTC designated 63 conglomerates as conglomerates subject to restrictions on mutual investment in 2012, an increase of eight companies compared with

2011. The number of affiliates of 63 conglomerates subject to restrictions on mutual investment designated in 2012 stood at 1,831, an increase of 277 companies compared with last year. The total value of assets of 63 conglomerates subject to restrictions on mutual investment stood at 1,977.6 trillion won, total amount of liabilities at 1,001.3 trillion won, sales at 1,461.0 trillion won and net profits at 62.4 trillion won.

3. Reducing Risks Accompanying Insolvency by Operating System Restricting Guarantees of an Obligation

The Fair Trade Act prohibits guarantees of an obligation between affiliates belonging to conglomerates subject to restrictions on guarantees of an obligation (the same as conglomerates subject to restrictions on mutual investment). This is because guarantees of an obligation between affiliates lead to asymmetrical lending, worsening economic concentration, thereby depriving independent or small and medium companies of the fair opportunity of financing.

A total of 20 conglomerates guaranteed an obligation against affiliates, among 63 conglomerates subject to restrictions on guarantees of an obligation designated in 2012 and the scale of obligations stood at 694 billion won, decrease of 1,216.5 trillion won compared with the last year (2,910.5 trillion won)

4. Smooth Operation of System for Prohibiting Mutual Investment and System for Restricting Voting Rights of Financial or Insurance Companies

Mutual investment means at least two independent companies own stocks issued

by counterpart companies to each other. The system for prohibiting mutual investment was introduced when the first revision to the first Fair Trade Act was made in 1986, in an effort to hinder the abnormal expansion of conglomerates through formation of fictitious capital between affiliates.

The system for restricting voting rights of financial or insurance companies means a system to restrict exercise of voting rights against domestic affiliates' stocks acquired or owned by financial or insurance companies belonging to conglomerates subject to restrictions on mutual investment. In cases involving the system for restricting voting rights of financial or insurance companies, the KFTC checks whether any relevant law is violated, by conducting a regular inspection. In principle, a survey should be conducted each year, but the KFTC conducts a survey on violations every three or four years, in consideration of a burden on companies. In cases of the system for restricting voting rights of financial or insurance companies, many companies comply with regulations and the number of violations declined from seven cases in 2003 to three cases in 2006 and two cases in 2010. This is because this system is recognized as a widespread market rule rather than as regulations on individual companies.

5. Enhancement of Information Disclosure Related to Large Corporate Groups

The KFTC has implemented policies on large corporate groups by minimizing preliminary regulations and continuously strengthening post-surveillance, such as information disclosure. Disclosing information on large corporate groups under the Fair Trade Act is divided into the official notice system under which member companies of large corporate groups disclose information on their own under the Fair Trade Act and the information disclosure system under which the

KFTC processes data received from large corporate groups and disclose overall information on conglomerates.

A. System for Disclosure of Present Status of Conglomerates

The system for disclosure of present status of conglomerates was introduced in July 2009 to reinforce the oversight functions of the market, while encouraging companies to voluntarily enhance their transparency and responsibility, by showing information on the relevant conglomerates to interested parties to large corporate groups in a comprehensive and clear manner. Items to be disclosed are categorized into the current status of conglomerates, operation of the board of directors and executives, current status of stock holdings between affiliates, transactions with affiliate persons, and they should be disclosed for each quarter or once per year, depending on types of items. The KFTC can impose fines for negligence not exceeding 100 million won regarding violations of disclosure regulations.

The KFTC checked whether 311[6] companies belonging to seven conglomerates, including Hanhwa and Doosan, comply with disclosure of present status of conglomerates for the last three years (from January in 2009 until March in 2012) in 2012 and imposed fines of 357 million won on and issued warnings (109 cases) to 148 companies (261 cases) violating disclosure regulations.

B. System for Frequently Disclosing Major Matters of Unlisted Companies

The KFTC introduced and operated the system for disclosing major matters of unlisted companies, etc. in April 2005. Items to be disclosed are categorized into changes in major matters related to ownership or governance structure, matters

6) Hanhwa (53 subsidiaries), Doosan (24 subsidiaries), STX (26 subsidiaries), CJ (83 subsidiaries), LS (50 subsidiaries), Daewoo Shipbuilding & Marine Engineering co. (19 subsidiaries) and Dongbu (56 subsidiaries)

which cause a significant change in financial structure of a company and major matters related to management of a company.

The KFTC checked details of disclosure of unlisted companies belonging to seven conglomerates, which are also subject to the system for disclosure of present status of conglomerates, for the last five years (from April in 2007 until May in 2012) in 2012. As a result, it was found that 54 companies were involved in 76 violations (an average of 1.4 case), therefore the KFTC imposed fines for negligence of 178 million won in 55 cases and issued warnings in 21 cases.

C. System for Resolution by Board of Directors against Large-scale Internal Trade and Public Announcement

Under this system, all companies belonging to conglomerates subject to restrictions on mutual investment should publicly announce their transactions after resolution by the board of directors, when amount of internal transactions is at least five percent of the larger amount of the total ownership interest or capital, or when they engage in large-scale internal trade at a value of at least five billion won.

After the KFTC has verified whether companies comply with the disclosure system on 13 occasions from 2002 until 2012, it found that 356 companies were involved in 2,104 cases of violations, imposing fines for negligence of 22.091 billion won. It verified whether 350 affiliates belonging to seven conglomerates (three conglomerates in the first half of the year and four conglomerates in the second half of the year) comply with the disclosure system in 2012, and found that 26 companies were involved in 35 cases of violation of disclosure regulations.

D. Disclosure of Information, such as Stock Ownership, Governance Structure and Internal Transactions

The KFTC has disclosed the current status of stock holdings for each conglomerate in an effort to strengthen functions of market oversight and induce voluntary improvement in the ownership or governance structure of conglomerates and has expanded the scope of information disclosure into the current status of governance structure in 2010 and current status of internal transactions in 2011.

The current status of stakes owned by 63 conglomerates subject to restrictions on mutual investment announced in June, 2012 included inside ownership for each conglomerate (for each company), stock holdings between affiliates, circular equity investment, investment in affiliates of financial or insurance companies, current status of company disclosure and share ownership. In particular, it disclosed a share ownership profile for each conglomerate for the first time in 2012 to ensure that market participants, such as stockholders and creditors, are able to easily understand the current status of investments between heads of large companies or affiliates.

The KFTC has also analyzed and announced the current status of internal transactions of 1,373 companies which publicly announced the current status of large corporate groups, among 1,691 companies belonging to 46 private large corporate groups, excluding five newly designated groups from 51 private large corporate groups, in August 2012.

6. Inducing Advancement of Ownership or Governance Structure by Improving Holding Company System

A holding company means a company, the main business of which is governing businesses of other companies through share ownership. The government narrowly allowed the establishment or conversion of a holding company from 1999, on the assumption that supplementary measures to minimize problems related to excessive economic concentration are taken.

A total of 115 holding companies under the Fair Trade Act reported to the KFTC as of late September 2012, including 103 general holding companies and 12 financial holding companies. The number of holding companies under the Fair Trade Act has been on the rise since their establishment was narrowly allowed in February 1999 (from 25 holding companies in 2005 to 31 companies in 2006, 40 companies in 2007, 60 companies in 2008, 79 companies in 2009, 96 companies in 2010, 105 companies in 2011 and 115 companies in 2012). For the last year, 22 companies were converted into holding companies and 12 companies were excluded, recording a net increase of ten holding companies. Continued increase of holding companies can be attributed to improvement of the system in the direction of facilitating the establishment or conversion of a holding company, such as relaxing requirements for minimum share ratio of affiliates. In addition, as the market gives a positive assessment of the holding company system with simple and transparent ownership or governance structure, more and more companies have an interest in conversion into holding companies, leading to growth in the number of holding companies.

FAIR TRADE COMMISSION
REPUBLIC OF KOREA

IV

2013 Annual Report

Consumers' rights and Interests

1. Overview of Consumer Policy

A. Results of Major Promotions in 2012

(1) Formulation of basic plan and action plan for consumer policy

Consumer policy is promoted by diverse bodies including governmental organizations, such as administrative agencies of the central government and local governments; public organizations, such as the Korea Consumer Agency; civil consumer organizations and others, working under the direction of the Korea Fair Trade Commission (hereinafter referred to as the "FTC"). In order to promote consumer policy consistently in the mid-and long-term, the FTC has formulated a basic plan for consumer policy which is a master plan for national consumer policy every three years.

(2) Discovery and improvement of laws restricting rights and interests of consumers

Since 2009, the FTC has endeavored to discover systems or laws of ministries which restrict consumers' rights and interests and improve them in consultation with relevant ministries. In 2012, the FTC discovered seven tasks and discussed with the relevant ministries ways to improve them.

(3) Enactment and revision of consumer-related laws, public announcements and guidelines

The FTC has secured systematic foundations for the protection of rights and interests of consumers by enacting and revising consumer-related laws, enforcement decrees, public announcements, guidelines and other matters in 2012.

First, the "Public Announcement of Designation of Unfair Behaviors of Business Operators in Transactions with Consumers" was enacted to eliminate blind spots in regulating unfair behaviors of business operators which prevent consumers from making a rational choice and cause consumer damage. The said public announcement was enacted pursuant to Article 12 (2) of the "Framework Act on Consumers," which says, "The State may designate and publicly announce unfair behaviors of business operators which are feared to prevent consumers from making a rational choice and cause consumer damage." The said public announcement designates types of prohibited activities by business operators in transaction between business operator and consumer, such as compulsion to subscribe, conclusion of contract and performance of contract.

Second, in labeling and advertising, the "Public Announcement concerning Detailed Standards, etc. for Imposition of Fines on Business Operators in Violation of the Act on Fair Labeling and Advertising" was amended to raise the standard rate and standard amount for the imposition of fines and mitigate and remit fines only when actual efforts are made for compensation for damage not by means of voluntary correction, such as suspension of advertising, but by means of monetary compensation to consumers who sustain damage caused by false advertising. In addition, due to the increase of consumer damage caused by Internet advertising which is rising as one of representative advertising media, the "Guidelines for Examination of Internet Advertising" was enacted. The said public announcement provides general standards for examination of false advertisements in consideration of the characteristics of the Internet and also provides examination standards for each type of Internet advertisement, such as banner advertisement, search advertisement and advertising reviews and exanimation standards by Internet advertising contents, such as advertisements on the business operator himself/herself or other business operators or advertisements on details of products or transactional terms and conditions, together with respective

examples. In addition to that, for the prevention of consumer damage which may be caused by false marking and advertising regarding realty dealers, the "Guidelines for Examination of Labeling and Advertising of Sale and Lease of Commercial Buildings, etc." were changed to the "Guidelines for Examination of Labeling and Advertising of Sale and Lease of Land, Commercial Buildings, etc." to include types and cases of labeling and advertising of land.

Third, in the area of terms and conditions, in order to quickly and easily settle disputes caused by terms and conditions used in transactions between business operators, through the dispute mediation procedure, the "Act on the Regulation of Terms and Conditions" was amended to introduce the mediation systems for disputes over terms and conditions among business operators (amended on February 17, 2012 and entered into force on August 18, 2012)[7] and the Enforcement Decree of the same Act was amended to provide for detailed matters concerning subject-matter of mediation of disputes over terms and conditions, procedure and method of dispute mediation, collective dispute mediation, etc. As a result, it has become possible for agencies, franchisees, shops located in department stores (supermarket chains), suppliers to home shopping companies and other small and medium merchants and industrialists to receive compensation for damage caused by terms and conditions through the Adhesion Contract Dispute Mediation Council established in the Korea Fair Trade Mediation Agency.

Fourth, in the area of special-type transactions, in accordance with the "Act on Door-to-Door Sales, etc." enforced on August 18, 2012, which features the improvement of the definition clause of multi-level marketing and new establishment of clause of supported door-to-door sale and in order to reflect such amendments, the "Public Announcement of Fines against Business Operators in

7) It was possible to settle disputes caused by terms and conditions used in transactions between a business operator and consumer through the consumer dispute mediation system provided for in the "Framework Act on Consumers," but it was not possible to settle disputes caused by terms and conditions used in transactions between business operators through the consumer dispute mediation.

Violation of the Act on Door-to-Door Sales, etc." was enacted and the "Public Announcement of Door-to-Door Manual," Guidelines for Prosecution of Violations against the Act on Door-to-Door Sales, Etc.," "Public Announcement concerning Release of Information on Multi-Level Marketers and Supported Door-to-Door Sellers," "Public Announcement of Standards for Insured Amounts in Consumer Indemnification Insurance," and "Standards for Calculation of Damages for Breach of Contract Following Cancellation or Revocation of Continuous Transactions, etc." were revised.

Fifth, in the area of e-commerce, the "Act on Consumer Protection in Electronic Commerce Transactions, etc." was amended to protect consumers and build consumer confidence in e-commerce. The relevant major points are as follows:

1) Mail-order intermediaries have increased responsibility to confirm the identities of sellers to provide them to consumers;
2) The provisions on obligation of hosting service providers to render cooperation when dispute arise with consumers are newly established;
3) The obligation to give notification of details of settlement at the time of making an electronic payment is reinforced by making it obligatory to use standard settlement windows;
4) An on-line one-stop service was introduced to conveniently process cancellation of membership, cancellation of subscription and issuance of diverse certificates on-line;
5) Requirements for suspension of business and imposition of fines are expanded to enhance the effectiveness of measures taken against business operators violating laws.

In order to materialize the amendments to the said Act, the Enforcement Decree and Enforcement Regulations of the Act on Consumer Protection in Electronic

Commerce Transactions, etc. were also amended. In addition, in order to prepare specific standards for imposition of fines for violations against the Act on Consumer Protection in Electronic Commerce Transactions, etc., the "Public Announcement of Standards for Imposition of Fines on Business Operators in violation of the Act on the Consumer Protection in the Electronic Commerce Transactions, etc." was enacted, and in order to clarify cases of exemption from obligation to report mail-order business, the "Public Announcement of Standards for Exemption from Reporting Mail-Order Business" was enacted. Furthermore, as mail-ordering is not a face-to-face transaction, consumers need sufficient information on products before purchasing them. To this end, the "Public Announcement of Provision of Product Information" was enacted to make mail-oder business operators provide information essential for product purchase before transactions. The said public announcement stipulates that before transactions occur, business operators provide consumers with information on the country of origin, date of manufacture, person in charge of after-sale service, etc. of 34 items frequently traded on-line, such as clothes, food and electric appliances.

(4) Improvement of competence of consumers through expansion of information provision

The competence of consumers need be improved for them to play a leading role in the market by making a rational choice of purchase and for this, sufficient information needed to make purchasing choices must be provided to consumers.

(5) Enhancement of effectiveness of consumer indemnification

When a consumer sustains a loss upon transacting or using goods or services, the consumer may claim for the indemnification for the loss through damage redemption procedures provided by the Korea Consumer Agency or consumer

organizations or through civil actions. In general, consumer damage redemption is settled as follows: counselling → request for indemnification → recommendation of agreement → dispute mediation → lawsuit.

The FTC promoted diverse policies, including systematic improvement to enhance the effectiveness of consumer indemnification in 2012. It amended the Act on the Regulation of Terms and Conditions to establish the council for mediating disputes over terms and conditions so that disputes between business operators over terms and conditions can be also settled by dispute mediation. It also prepared and submitted to the National Assembly an amendment Bill to the Act on Fair Marking and Advertising for the easier institution of lawsuits by consumers damaged by false labeling and advertising. The amendment Bill provides that business operators may judicially claim compensation against violations even before the FTC' order for correction is declared final and definite and also provides for a damages recognition system to enable courts to recognize damage based on the overall purport of pleading and results of investigation of evidence when it is deemed that damage is caused by a violation of the Act on Fair Labeling and Advertising but it is extremely difficult to prove facts needed to prove the damages due to the nature of the damage.

To enhance effectiveness of consumer indemnification, the FTC promoted a program to support lawsuits instituted by consumers in 2012. When there are multiple consumers damaged by the same violation, if they come together to file a lawsuit jointly, the amount claimed tends to be increased and on the other hand, the costs of the lawsuit per person are decreased, thereby making the lawsuit easier to institute. In consideration of this point, it provided subsidies to cover the costs incurred from gathering consumers sustaining damage when a consumer organization intends to file a joint damage lawsuit by gathering consumers sustaining damage against a violation creating multiple victims, such

as bid rigging and false labeling and advertising. In 2012, it assisted five consumer damage lawsuits including illegal agreement on the prices of home appliances, illegal agreement of life insurance companies on interest rates, unfair terms and conditions of charnel houses, illegal agreement of stock companies on bond yield rates and rebates of pharmaceutical companies. The active institution of consumer damage lawsuits is expected to enhance the effectiveness of consumer indemnification and also prevent business operators from committing violations in fear of enormous financial burden.

2. Reinforcement of Functions to Provide Consumers with Information

A. Outline[8)]

In order to realize a society where consumers play a leading role, it is most important to provide consumers with useful and reliable information needed for them to make purchasing choices. Due to the imbalance of information between a business operator and consumers, however, consumers are not provided with sufficient information to make economic decisions in reality.

Business operators actually monopolizing product information have the tendency to provide consumers with distorted information by providing them advantageous information advantageous and concealing and abridging defects and unfavorable information. The provision of such inaccurate information exerts an influence on consumers' purchasing decision, which results in the malfunctioning of market mechanism not only by causing consumer damage, but also by impairing fair competition between business operators in prices, quality and services.

8) a fourth grade official in the Consumer Safety and Information Division

Accordingly, the FTC endeavors to regulate false labeling and advertising of business operators to prevent consumers from being provided with inaccurate information and operates the important information publication system which obliges business operators putting up labels and advertisements to include core information needed for consumer's making choice therein.

In 2012, the FTC took corrective measures at least equal to a warning against 245 cases of false labeling and advertising in total and discovered three violations of important information publication and imposed fines thereon.

Meanwhile, the FTC has been endeavoring to actively provide information for the prevention of spread of consumer damage since 2005 where consumer damage is sharply increasing in a short-term, by means of issuance of consumer damage warning and others. In 2012, it issued a consumer damage warning against six cases in total, including travel product sale disguised as a gift event (in May) and false and exaggerated advertisement of properties and effects of growth-promoting agents (in October).

In particular, it launched a consumer information portal site, Smart Consumer, in 2012 to provide diverse consumer information in connection with 68 governmental and public organizations and 102 Internet sites producing consumer information.

B. Provision of Consumer Information[9)]

(1) Construction of Smart Consumer

Smart Consumer is a kind of consumer information portal site providing diverse consumer information at one spot. Upon the completion of first phase

9) a fourth grade official in the Consumer Safety and Information Division

construction in 2011, Smart Consumer commenced services in January 2012.

Smart Consumer is comprised of three major sections: 'Comparison and Sympathy,' 'Consumer Tok Tok,' and 'Safety and Recall Information.' The Comparison and Sympathy section, which is a Korean style consumer report, provides comparative information of diverse products in terms of price and quality. The Consumer Tok Tok section provides product information based on evaluation by consumers who purchased the products. Lastly, the Safety and Recall Information section provides integrated recall information by item provided by each ministry.

In addition, Smart Consumer is consistently updating information useful for the daily lives of consumers in connection with 68 governmental and public organizations and 102 Internet sites[10] producing consumer information, such as price information, including gasoline prices and real estate actual transaction prices, consumer counseling information and indemnification information.

Meanwhile, the FTC has developed and launched the Smart Consumer Mobile Homepage and exclusive mobile applications to enable consumers to access information they need any time and anywhere.

(2) Provision of diverse consumer information

(A) Comparative information on products

Objective comparison and analysis data on the quality and prices of products help consumers make rational choices and ultimately work to induce enterprises to rationalize prices and improve product quality. In 2012, in order to provide

10) Smart Consumer had been constructed for two years from 2011 to 2012. At the first phase in 2011, 22 organizations and 40 Internet sites were connected and through the second phase in 2012, the numbers increased to the existing 68 organizations and 102 Internet sites.

comparative information on products at the level of developed nations, the FTC launched a Korean style consumer report which is called 'Comparison and Sympathy' and one of major contents of Smart Comsumer. The FTC has been providing comparative information of diverse products since March 2012, starting from hiking boots, Issue No. 1 of Comparison and Sympathy. In addition, it also provides guidelines for purchase, matters to pay caution in use and other information useful for daily life along with comparative information on products.

(B) Consumer evaluation information

Meanwhile, the FTC constructed Consumer Tok Tok as one of core contents of Smart Consumer, which enables consumers who have used products to directly participate in recording product information based on their experience of purchase. In 2012, the FTC conducted a consumer evaluation of three items including SUV automobiles, multiplex cinema houses, and skiing grounds, selected based on the results of survey of consumer demand conducted by certified research organizations.

(C) Price information by distribution channel and stage

For the spread of rational transactions and consumption culture, the FTC has provided diverse information on over-priced items due to monopolized market structures and consumers' irrational preference for highly priced products through the Korea Consumer Agency and consumer organizations since 2012 in terms of prices by distribution channel (department stores, supermarket chains, on-line shopping, etc.), margin by distribution stage, supply chain, price differences between Korea and foreign nations and consumers' consciousness of prices. The FTC provided price information on baby carriages, electric irons, cosmetics, automobile parts, etc. in 2012.

C. Correction of False Indication and Advertising[11)]

The following are details of major false indication and advertising cases handled in 2012:

(1) Illegal advertising by 16 overseas study support agencies

The FTC discovered and took corrective action against overseas study support agencies advertising as if they are providing overseas study services (including overseas language courses) with a high rate of admission to foreign prestigious universities or providing more outstanding services than other overseas study support agencies.

(2) Illegal advertising by 14 on-line start-up business consulting firms

The FTC discovered and took corrective action against 14 on-line start-up business consulting firms advertising exaggerated yield from sale and purchase of lease rights to food courts, commercial buildings, etc. and putting up fake items for sale.

(3) Illegal advertising by 13 skin and body shape management service providers

The FTC discovered, took corrective action against and imposed a fine in the amount of 30 million won on 13 skin and body shape management service providers falsely or exaggeratingly advertising the effect of their skin and body shape management services.

D. Evaluation

The FTC strived to prevent consumer damage caused by false indication and

11) a fifth grade official in the Consumer Safety and Information Division

advertising and establish fair trade order in 2012. In particular, the FTC is evaluated to have struck a note of warning against relevant markets by discovering and taking corrective action against false indication and advertising with respect to areas where consumer damage caused by false indication and advertising is increasing, such as oversea study support agencies, start-up business consulting business and skin and body shape management business, through conducting investigations by virtue of authority, and at the same time, have contributed to the prevention of consumer damage through the provision of correct market information.

In addition, the FTC enabled consumers to conveniently access to information they need by constructing Smart Consumer, a consumer information portal site, to provide them with diverse and reliable consumer information at one spot.

3. Ensuring Consumer Safety

A. Outline[12)]

As the FTC functions as a ministry, taking full charge of the recall system pursuant to Article 46 of the Framework Act on Consumers, it can request competent ministries to issue recalls when it is concerned that product defects may do harm to consumers. On the other hand, competent ministries are also actively handling relevant recall affairs by product in accordance with individual laws, such as the Motor Vehicle Management Act, the Framework Act on the Safety of Products and the Food Sanitation Act.

Meanwhile, the Consumer Safety Center of the Korea Consumer Agency is collecting information on diverse hazards through the consumer advisory center (Telephone No. 1372), fire stations, hospitals and other institutions pursuant

12) a fourth grade official in the Consumer Safety and Information Division.

to Article 52 of the Framework Act on Consumers and based on this, it takes necessary actions against relevant business operators, such as recommending correction and notification to competent administrative agencies. In 2012, it took actions against 186 cases of hazard information, such as recommending correction, notification to competent administrative agencies and proposal for systematic improvement.

B. Ensuring and Reinforcement of Consumer Safety[13)]

(1) Formulation and promotion of comprehensive plans for consumer safety

The policy challenges of the promotion plan in the area of consumer safety for the period from 2012 to 2014 are fixed as "systemizing safety policy," "reinforcing management of safety of imported goods," and “proactive response to areas vulnerable in safety under the basic direction of construction of safe consumption environments.

(2) Preparation of safety standards by item and proposing improvements to Relevant Organizations

In 2012, the FTC analyzed cases of harm received by the Korea Consumer Agency and thereamong discovered three cases of which the cause of harm was a lack or insufficient provision of safety standards in relevant laws. Since then, the FTC worked on a proposal for the improvement of safety standards for the said three cases through studying current laws and foreign cases. The proposal was presented to the Consumer Policy Commission after consulting with competent ministries and passed a resolution of the Consumer Policy Commission in December 2012.

13) a fifth grade official in the Consumer Safety and Information Division.

(3) Provision of diverse information for security of consumer safety

The FTC is providing consumers with diverse safety and recall information through Smart Consumer, a consumer information portal site launched in January 2012. Above all, it separately constructed a recall information section in Smart Consumer to provide recall information in real time by integrating recall information by item, such as food, industrial products, and automobiles in connection with sites operated by individual ministries to provide recall information by item.

4. Protection of Consumers Through Correction of Unfair Terms and Conditions[14)]

A. Outline

The Terms and Conditions Division of the FTC has been playing a role to examine and regulate unfair terms and conditions since 1992. The FTC conducts an abstract examination of terms and conditions to determine the effectiveness or ineffectiveness of the terms and conditions. For this, its duties can be divided largely into "examination and correction of individual cases concerning terms and conditions" and "dissemination of standard terms and conditions." The former means post ex facto or individual correction or deletion of clauses of terms and conditions according to the results of examination requested by legally interested persons or consumer organizations registered in accordance with the Framework Act on Consumers, focusing on whether they are in violation of the Act on the Regulation of Terms and Conditions, whereas the latter means approval and dissemination of terms and conditions prepared by business operators in a specific transacting area as standards, examined by the FTC so as to prevent the preparation and use of unjust adhesion contracts in advance. In addition, in

14) a fifth grade official in the Terms and Conditions Division .

order to respond timely to terms and conditions used in areas closed related with people's lives or where consumer damage occurs frequently, the FTC conducts separate investigations ex officio in addition to investigations of reported cases.

B. Results and Major Cases of Correction of Unfair Terms and Conditions

(1) Results of correction of unfair terms and conditions

(A) Requests for evaluation of terms and conditions and results of correction

During the period from the date the Act on the Regulation of Terms and Conditions entered into force until 2012, the FTC handled about 16,277 terms and conditions examination request cases, which includes the number of investigations it conducted ex officio. As people become more interested in terms and conditions examination and more aware of terms and conditions examination, the number of consultations and requests for examination of unfair terms and conditions is increased. Therefore, the area of terms and conditions evaluation will continue to expand due to increasing demand for examination of terms and conditions for new entries, such as mobile coupons, social commerce and smart phones and examination of terms and conditions concerning personal information used in on-line services.

(B) Results of investigation of unfair terms and conditions

The FTC conducted fact-finding surveys ex officio with respect to terms and conditions used in areas closely related with people's lives or in areas where consumer damage occurs frequently.

In 2012, the FTC investigated ex officio terms and conditions of 13 rent-a-car companies in Jeju, IPTV service terms and conditions of three IPTV service providers, terms and conditions of four mobile coupon companies, terms and conditions of four social commerce business operators, movie tickets of three cinema house operators, refund regulations of three airlines and four automobile maintenance franchise contracts and based on the findings of investigation, it took corrective action and issued an order for voluntary correction.

C. Examination and Correction of Terms and Conditions for Financial Transactions

(1) Outline

According to the statistical data of the Korea Consumer Agency, etc., the number of consumer petitions in finance is increased continuously.

In addition, according to the results of analysis conducted by the Korea Consumer Agency, damage cases concerning petty loans for the working classes are appearing in diverse forms, such as loss caused by deferred payment of interest and installment payments, loss caused by errors of credit banks, unjust collection of debts, excessive collection of interest and fees, loss caused by diverse types of fees, loss caused by changed interest rates, disadvantage in credit resulting from remaining records on late payments.

(2) Examination of terms and conditions for financial transactions and results of correction

By examining terms and conditions of banks in July 2012, the FTC requested the correction of 76 unfair clauses, including a clause exempting the bank from liability

and transferring the responsibility to a consumer without any ground for imputing a liability to the consumer, and a clause stipulating that all losses should be reverted to business connections.

In the examination of terms and conditions for credit cards in November 2012, the FTC requested the rectification of 59 clauses of unfair terms and conditions, such as clauses applying grounds to change diverse additional services of credit cards, etc. disadvantageously in excess of relevant laws and clauses failing to reflect the point that post ex facto notice must be given even when such change is made without prior notice.

D. Enactment and Revision of Standard Terms and Conditions

(1) Outline

Starting from the standard contract for sale of apartment unit (standard form of terms and conditions No. 10001), 69 standard terms and conditions are disseminated and used in 32 areas as at December 2012, including basic terms and conditions for bank credit transactions, standard contract for domestic and overseas trips, standard terms and conditions for the use of Internet cyber malls and standard exclusive contract for artists of popular culture.

The domestic on-line game markets expand year after year, and in relation to this, the number of consumer disputes increases accordingly. In response to this, the FTC enacted standard terms and conditions for on-line games in 2012. In addition, it enacted and disseminated standard terms and conditions (six types) for the use of long-term medical care expenses, to seek the improvement of rights and interests of long-term patients and settlement of fair contracting culture.

In addition, the FTC revised five standard terms and conditions, including standard terms and conditions for loan transactions, standard terms and conditions for overseas language courses agencies, standard terms and conditions for overseas study support agencies, basic terms and conditions for bank credit transactions and basic terms and conditions for electronic financial transactions.

E. Evaluation

In 2012, the FTC worked primarily on the correction of unfair terms and conditions used in areas closely related with people's lives, such as strengthened examination of unfair terms and conditions used in finance, enactment of standard terms and conditions for the establishment of transacting order for areas where consumer damage or disputes occur frequently and enactment of standard terms and conditions to protect rights and interests of consumers who are inferior parties to the contract.

In response to the appearance of new types of business, such as mobile coupons, social commerce and IPTV, the FTC has presented standards for fair market order to the relevant markets by enforcing the Act on the Regulation of Terms and Conditions and also contributed to the creation of practice of preparation of fair terms and conditions and establishment of fair market order in the new product markets. It has also guaranteed the rights of franchisees who are weaker parties to the contract by correcting automobile maintenance franchise contracts and corrected a large number of clauses of unfair terms and conditions used habitually without the perception of the Act on the Regulation of Terms and Conditions in business of which demand increases recently but which is operated by many small-scale businessmen, such as rent-a-car business and matrimonial services.

5. Protection of Rights and Interests of Consumers in Special-Type Sales and Installment Transactions[15)]

A. Outline

The term "special-type sale (special-type transaction)" means the following fivle types of transaction as provided for in the Act on Door-to-Door Sales, Etc.: door-to-door sale, telemarketing, multi-level marketing, recurring transactions and transaction for soliciting business. The term "installment transaction" generally refers to direct and indirect installment transactions and prepaid installment transactions as provided for in the Installment Transactions Act.

Of special-type transactions, door-to-door sale, telemarketing and multi-level marketing can be characterized by the method of selling without shops, which is different from selling in shops used by department stores, discount stores, etc. and by the method of marketing in which sellers actively solicit individual consumers face-to-face.

Recurring transactions involving contracting to supply goods, etc. continuously for one month or more, such as educational institutes, trade of fitness club membership and telecommunication service can be characterized by maintenance of continuous business relationships, whereas transactions for soliciting business can be characterized by the arrangement or provision of business opportunities instead of ordinary goods or services.

B. Positive Efforts on Market Improvement

(1) Promotion of systematic improvement

15) a fourth grade official in the Special-Type Transaction Division

(A) Amendment of enforcement decree and enforcement regulations of the Act on Door-to-Door Sales, Etc.

The Enforcement Decree and Enforcement Regulations of the Act on Door-to-Door Sales, etc. were amended on July 20, 2012 and August 16, 2012, respectively in consideration of the amended Act on Door-to-Door Sales, etc. promulgated on February 17, 2012 and needs for amendment raised in the course of administering the said Act. Due to the need to enact and revise subordinate public announcements and guidelines for the reflection of the amended matters, four public announcements and one regulation were revised and a public announcement of fines was enacted.

(B) Promotion of amendment of the Installment Transactions Act

In order to prevent consumer loss arising from a lack of provisions pertaining to contract assignment and solicitation agencies, the FTC presented an amendment Bill of the "Installment Transactions Act" to the National Assembly on December 26, 2012.

The major amendments to the Bill are as follows:

First, consumer damage arose in the course of assigning prepaid installment contracts to another prepaid instalment transaction business operator during which the assignor tends to fail to notify consumers of the fact of contract assignment or the assignee refuses the cancellation of contracts. To address this problem, it has become obligatory for the business operator intending to assign a contract to explain the details of contract assignment to the consumer and obtain a consent from him/her and for the prepaid installment transaction business operator taking over the relevant contract to succeed the duties provided for in this Act.

Second, prepaid installment transaction business operators invite members mostly through solicitors, such as door-to-door salespeople. However, due to the lack of regulations, it is feared to give rise to consumer damage, such as misselling or coercive contracting. In response to this, it has become obligatory for solicitors to explain product-related information to consumers prior to the conclusion of a contract and obtain confirmation therefrom by signing, affixing signature, sealing, recording, etc.

Third, even though some prepaid installment transaction business operators are violating the legal ratio of preservation of prepayments, it is difficult to force them to abide by the ratio due to the lack of grounds for regulation. To address this problem, grounds for measures for correction and suspension of business are prepared against the violation of the preservation ratio. In addition, prepaid installment transaction business operators or solicitors are prohibited from concluding prepaid installment contracts through multi-level marketing and matters found defective in the operation of current systems are improved or supplemented.

(2) Activities for improving and monitoring markets

(A) In the area of special-type transactions

In 2012, the FTC took corrective action against five cases including the case in which a fine was imposed on W, a university students' multi-level marketing company which used deceitful methods to solicit consumers, such as forcing juveniles, including university students, to subscribe to become a multi-level marketer and also forcing them to obtain loans for the purpose of purchasing goods to be promoted to a higher ranking multi-level marketer. In addition, the FTC gave a warning to 3 cases of minor violations including where a report

was filed as a voluntary action for correction after door-do-door business was conducted without reporting.

Meanwhile, the FTC investigated 20 multi-level marketing companies ex officio, such as companies likely to violate the amended Act on Door-to-Door Sales, etc. when it applies, telemarketing multi-level marketing companies under the pretext of finding employment and multi-level marketing companies targeting vulnerable social classes. As a result, it discovered ten companies suspected of violating laws due to registration of minors as salespersons and excessive payment of sponsor allowances and is preparing a severe action against them.

(B) In the Area of funeral services

In 2012, the FTC discovered violations committed by funeral service providers transferring members or acquiring members in the restructuring of funeral service providers, such as failure to preserve legal pre-payments by both of transferor and transferee with respect to pre-payments already made by the members and at the same time, non-payment of contract cancellation refunds following the cancellation of a membership contract, which happens when a funeral service provider lacking in the ability to preserve legal prepayments transfers its members to another funeral service provider. The FTC prosecuted three funeral service providers who transferred or acquired members and took corrective action against them. With respect to 21 funeral service providers of which business was closed down or the whereabouts of representatives of which were unknown, it requested police to investigate them.

C. Promotion of Consumer Protection Policy

(1) Redemption and prevention of consumer damage by utilizing autonomous functions of civil organizations

(A) Support for operation of consumer damage dispute mediation organizations

In disputes over returns and refunds, most consumers or salespeople prefer to settle the dispute quickly by paying compensation to corrective action against the business operator. In response to such demand for dispute mediation, the FTC actively supports the Autonomous Dispute Mediation Committee (December 2013) established in the Korea National Council of Consumer Organizations.

(B) Operation of multi-level marketing mutual aid association

As organizations for consumer indemnification in multi-level marketing, two organizations were launched under the authorization of the FTC at the end of 2002: direct sales mutual aid association and special-type sales mutual aid association.

Due to the prohibition on companies that failed to join a mutual aid association from engaging in business, many insolvent or illegal companies have been liquidated. It can be evaluated to conform to the initial policy goal seeking the creation of market environments in which only sound business operators can survive and unsound business operators inevitably become insolvent through the introduction of insurance principles to the markets of multi-level marketing. In 2012, nine companies were liquidated due to the cancellation of mutual aid contract.

(C) Operation of funeral service mutual aid associations

The Korea Sangjo Mutual Aid Cooperative and the Korea Mutual Aid Cooperative Association established a corporation on September 30, 2010 and October 5, 2010, respectively and started to provide consumer indemnification services. Both mutual aid associations conduct a on-the-spot survey of current state of management of funeral service providers each year to calculate credit evaluation rates needed for the calculation of securities and mutual aid fees which funeral service providers should pay to the mutual aid associations. They also play the role of inducing the rationalization of management of funeral service providers by cancelling mutual aid contracts with respect to insolvent funeral service providers.

(2) Reinforcement of provision of information to consumer, etc.

(A) Release of major information of prepaid installment transaction business operators

In order to prevent consumer damage in prepaid installment transactions and help consumers make rational choices, it is most important to provide consumers with information in advance.

Of the existing matters to be informed to the public, product description improved in 2012 in an attempt to provide the public with information, centering on matters demanded by consumers.

(B) Education of public officials of local governments

In 2012, the FTC provided 142 persons with education focusing on the amendment of the Act on Door-to-Door Sales, etc., monitoring of the obligation

to deposit pre-payments in prepaid installment transactions, administrative guidance for companies transferring members and other issues during trips or visits it made nationwide by dividing Korea into three zones.

D. Evaluation and Future Challenges

In 2012, the FTC aroused a law-abiding spirit in the market by taking strict action against violations and conducting activities for systematic improvement in special-type sales and installment transactions. In addition, it also actively conducted activities for the prevention of consumer damage.

The FTC imposed fines (4.4 billion won) for the first time on multi-level marketing companies committing violations and took strict action against violations targeting vulnerable social classes in an attempt to discourage business operators from committing violations in the conduct of multi-level marketing and make a signal to inspire a law-abiding spirit in the market.

In the area of funeral services, the FTC issued a recommendation for correction and warning to 62 companies violating the obligation to preserve pre-payments in an attempt to inspire a law-abiding spirit of business operators until 2014 in which 50% of legal preservation rate of prepayments is to be attained, and also sought the soft landing of the amendment of the Installment Transactions Act.

6. Reinforcement of Consumer Protection in E-Commerce Transactions[16)]

A. Outline

16) a fifth grade official in the E-Commerce Division

In e-commerce transactions, transactions are made without the seller and consumer meeting. Due to this characteristics of e-commerce transactions, consumer damage may arise in diverse forms, such as delivery of products having properties different from those indicated or advertised, non-delivery, erroneous delivery and exposure to the risk of deceitful transaction. In fact, it is confirmed that the number of consumer requests for compensation shows a tendency of continuous increase, keeping pace with the expansion of e-commerce transaction markets. In order to respond to this, therefor, it is necessary to monitor and rectify violations continuously and prepare measures for systematic improvement.

B. Major Points of Consumer Protection Policy

(1) Preparation of Guidelines for Commercial Activities of Internet Cafes and Blogs

Due to the huge number[17] of Internet cafes and blogs, and the difficulties in identifying operators of Internet cafes and blogs, it is difficult for relevant institutions, such as local governments, to have control over them and investigations ex officio or post ex facto measures also have limits to prevent consumer damage. Therefore, the FTC prepared on January 10, 2012 the Guidelines for Commercial Activities of Internet Cafes and Blogs (hereinafter referred to as the "Guidelines for Internet Cafes and Blogs") to allow portal site providers to autonomously manage commercial activities conducted in Internet cafes and blogs and concluded a performance contract with major portal site providers including Naver, Daum and Nate.

The major points of the Guidelines for Internet Cafes and Blogs are: portal site providers should render cooperation in making telemarketers observe the

17) The number of Internet cafes and blogs searched by the keywords, "purchase and shopping" in Internet search sites amounts to 64,000 in Naver and 35,000 in Daum.

obligation to indicate his/her identity, etc.; portal site providers should operate a consumer affairs center to deal with illegal and unjust commercial activities; and portal site providers should prepare and operate autonomous regulatory measures. In addition, measures to prevent business operators conducting illegal or unjust commercial activities or causing consumer damage from the selection of power blogs, outstanding cafes, etc. are also included in the "Guidelines for Internet Cafes and Blogs."

(2) Preparation of Guidelines for Autonomous Observation by Social Commerce

To encourage social commerce companies to make reform efforts and to propose to them standards to rectify market order, the FTC prepared the Guidelines for Autonomous Observation by Social Commerce on March 4, 2012 and concluded a performance contract with five major social commerce companies.[18] The guidelines provide that social commerce companies should prepare measures to eliminate fake products; introduce a 110% compensation system for the discovery of fake products, refund with the addition of ten percent of payments when the responsibility for refunds is attributable to the business operator and provide specific grounds for calculation of discount rates. In addition, they also provide that social commerce companies should refund 70% or more of the value of coupons not used within the validity period.

(3) Improvement and operation of announcement of shopping malls with frequent occurrence of civil petitions.

In low-value, repetitive e-commerce transactions, it is important to provide information on shopping malls in addition to post ex facto indemnification in order to prevent consumer damage beforehand. Therefore, the FTC supplemented announcement standards and drastically improved systems to expand the methods

18) Ticketmonster, Coupang, We Make Price, Groupon and Socialbee

of announcement in February 2012 so that the system of announcement of shopping malls with frequent occurrence of civil petitions can contribute to the prevention of consumer damage and be of help to making decision of purchase.

C. Evaluation and Future Challenges

It is significant that systematic foundations were prepared in 2012 to settle consumer damage continuously raised in e-commerce markets, according to the enforcement of the amendment of the Act on Consumer Protection in Electronic Commerce Transactions, etc., and the Enforcement Decree and Enforcement Regulations thereof and relevant public announcements. In addition, it is also significant that violations committed in diverse areas of e-commerce markets were corrected and efforts were made continuously to settle autonomous management culture for the prevention of consumer damage in the market.

7. Efficient Prevention and Redemption of Consumer Damage

A. Outline[19)]

For the efficient prevention and redemption of consumer damage, the FTC is operating a consumer advisory center and consumer-centered management certification system.

B. Construction and Operation of Consumer Advisory Center

The consumer advisory center greatly contributed to the promotion of rights and interests of consumers in 2012 through indemnification, ensuring consumer safety and prevention of illegal activities of business operators, etc.

19) a fifth grade official in the Consumer Policy Division

With respect to incidents of consumer damage received repeatedly or newly by the 1372 consumer advisory center, the FTC, Korea Consumer Agency, consumer organizations and local governments issued about 120 consumer damage warning to prevent losses from spreading.

The results of analysis of affairs consulted at the consumer advisory center were actively reflected in consumer policies promoted by the FTC. In addition, with respect to business operators found in violation as a result of analysis of consultation data, the FTC conducted separate investigations and took corrective action 18 times in total

Items mostly consulted during the period of 2012 came from the area of housing and real estate mortgage and information and communication area, such as smart phones, mobile phones, high-speed Internet and mobile telephone service.

C. Operation of Consumer-Centered Management (CCM) Certification System

(1) Outline of CCM certification system

(A) Significance of CCM certification system

The Consumer-Centered Management ("CCM") certification system is a system to evaluate and certify that an enterprise engages in all activities from the viewpoint of consumers and continuously improves relevant business management activities centering on consumers.

When a problem arises between a CCM-certified enterprise and a consumer, it is possible for the consumer to settle the problem with the relevant enterprise

more systematically and rationally by following the CCM operating system. It is also a merit that consumers can distinguish CCM-certified enterprises by CCM certification marks when comparing and choosing products or services.

Meanwhile, from the standpoint of the Government, it is expected to enormously reduce administrative costs for post ex facto settlement of disputes over consumer damage or corrective action.

(2) Incentives for CCM-certified enterprises

For the activation of CCM, four incentives are provided to CCM-certified enterprises, basically: autonomous handling of consumer damage cases, reduced sanctions for violations, awarding outstanding enterprises and use of certification marks.

(3) Current state of CCM-certified enterprises

CCM-certified enterprises spreaded to diverse industries in 2012. A social commerce company newly obtained CCM certification, which is a kind of e-commerce utilizing the social network service (SNS). In addition to that, enterprises engaging in seven different types of business, such as door-to-door delivery, food service, city gas, convenience stores, logistics and medical institutions were newly included in CCM-certified enterprises. In 2012, 23 enterprises obtained CCM certification and so the number of CCM-certified enterprises amounted to 111 enterprises as at the end of 2012.

8. Reinforcement of Regional Consumer Policy[20)]

A. Outline

Regional consumer administration means that a local government promotes policies and business for prevention of consumer damage, prevention of spread of damage, and indemnification by mobilizing human resources and physical resources. As implied in the concept of regional consumer administration, it focuses on preventing, and preventing spread of, consumer damage and indemnification.

B. Major Regional Consumer Policies Promoted in 2012

(1) Provision of grants-in-aid to local governments

Currently, 16 metropolitan governments have a consumer life center in which consumer advisory services are provided by staff dispatched from consumer organizations of relevant regions. The FTC subsidizes the labor costs of counselling staff dispatched to local governments from the National Treasury for the activation of local consumer services. In 2012, the FTC provided 16 metropolitan governments with subsidies amounting to 222 million won by providing each local government with 3.468 million won in funding each quarter.

(2) Local Consumer Administration Workshop

The Local Consumer Administration Workship was held in April 2012 for the frank exchange of opinions on smooth business cooperation and business promotion between persons in charge of local consumer administration.

20) a fifth grade official in the Consumer Policy Division

In particular, in the Local Consumer Administration Workship held in 2012, there were discussions focusing on measures for management and checking for the promotion of sound development of health cooperatives and measures for the execution of the Public Announcement of Designation of Unjust Transacting Activities of Business Operators with Consumers which entered into force on July 1, 2012.

(3) Support for educational materials, etc. for consumer education

The FTC actively disseminated standard educational materials, etc. usable for consumer education implemented by local governments for local consumers.

The FTC developed standard educational materials targeting the elderly, housewives and marriage-based immigrants and disseminated them to local governments so they can use the standard educational materials for consumer education targeting lower-class consumers. In particular, it disseminated to local by translating them into two languages (English and Vietnamese) for the enhancement of effectiveness. Educational materials were also produced in such forms as books in braille and sound source files for the blind, and as videos showing lectures in sign language for the hearing-impaired. It also disseminated to local governments so that they can be used for consumer education for persons with disabilities.

(4) Evaluation and awarding of local consumer administration

With respect to local governments found outstanding during evaluation of outcomes of promotion of consumer policy of local governments (Daegu, Seoul and North Chungcheong Province and North Jeolla Province which were awarded a high score in evaluation among metropolitan cities and provinces ranked in the highest rank, "A" in the area of local consumer policy), a letter of commendation

and monetary rewards were awarded by the Chairperson of the FTC in the commemorative ceremony called "Consumer's Day" held in December 2012.

9. Trend of International Discussions on Consumer Policy[21)]

A. Outline

In the current situation in which international consumer damage and disputes are increasing due to globalized markets and increased cross-border transactions, intranational collaboration and cooperation are becoming far more important than ever. Accordingly, diverse conferences are held internationally and various activities are conducted to share each country's issues regarding consumers and policy measures and actively discuss matters arising from the areas in which international cooperation is needed.

To seek international cooperation in the area of consumers, the FTC is participating in the meetings of the OECD Committee on Consumer Policy (CCP), the International Consumer Protection Enforcement Network (ICPEN), the UN Commission on International Trade Law (UNCITRAL) and International Consumer Product Health and Safety Organization (ICPHSO).

B. Trend of Discussions of OECD Committee on Consumer Policy (CCP)

(1) Outline of OECD CCP

As one of 25 specialized committees under the OECD Directorate for Science, Technology and Industry (DST), the OECD Committee on Consumer Policy ("CCP") was established on November 12, 1969 to seek international cooperation

21) a fifth grade official of the Consumer Policy Division

with respect to consumer policy, and holds meetings twice a year in the OECD headquarters located in Paris, France. It devises consumer protection policies for e-commerce, sharply increasing upon the arrival of the age of informatization and examines and studies means concerned with each member nation's consumer policies and international trade in the direction that consumer's purchasing decisions enhance competitiveness in the market.

The Republic of Korea participated in the 48th Regular Meeting of OECD CCP in October 1994 as an observer nation, but is now acting officially, becoming the 29th OECD member nation in December 1996 and a second OECD member nation in Asia following Japan.

C. ICPEN

International Consumer Protection Enforcement Network ("ICPEN") is a network of consumer protection enforcement organizations, which was formed primarily by U.S. FTC in 1992 to ensure consumer protection in cross-border transactions through international cooperation and exchange of information. ICPEN is currently participated in by 36 organizations including OECD member nations, OECD and Commission of the EU and from Korea, the FTC and the Korea Consumer Agency acts as its official member organizations.

OECD CCP endeavors to create international regulations for consumer policies, whereas ICPEN focuses on international cooperation for effective enforcement among consumer policy enforcement authorities.

D. UNCITRAL

UNCITRAL (UN Commission on International Trade Law) was established as a body under the UN in 1966 to prepare international uniform regulations for

the area of commercial transactions and is participated in by 60 member nations currently.

Working Group 3, organized under UNCITRAL, has been working on the preparation of rules for Online Dispute Resolution (ODR) since 2010. Korean professor, Oh, Su-Geun, was elected as the chairperson of the working group and Korea is playing an important role in this. The FTC has been participating in the meetings of Working Group 3 as a member of a delegation comprised of public officials from the Ministry of Foreign Affairs and Trade, the Ministry of Justice and the Ministry of Knowledge Economy.

E. ICPHSO and ICPSC

The International Consumer Product Health and Safety Organization ("ICPHSO") was established by the U.S.A in 1993 as an international body to address heath and safety issues regarding consumer products in the middle of distribution in international markets or completed to be manufactured. It holds meetings twice a year: usually, Spring meetings held in the U.S.A and Autumn meetings are in Europe. In regular meetings, diverse interested parties, such as governmental organizations related to consumer product safety, law firms, civil organizations and mass media gather together to share and discuss each country's laws, current consumer safety-related issues and information and present advanced cases.

In Korea, the Korea Consumer Agency and the Korean Agency for Technology and Standards acts as regular members. The FTC started to participate from 2010, but does not have membership,

The International Consumer Product Safety Caucus ("ICPSC") was established in 2005 as a council of governmental organizations conducting tasks concerning

consumer product safety-related government policies, laws and market monitoring.

The ICPSC currently has seven member organizations from six nations, such as the Korea Consumer Agency, the Korean Agency for Technology and Standards, U.S. Commission on Consumer Policy, the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) of China, Australian Competition and Consumer Commission, the National Institute of Technology and Evaluation (NITE) of Japan, Health Canada and an international organization called the EU Product Safety Enforcement Forum of Europe. Regular meetings of the ICPSC are provided for by the articles of association to be held in connection with consumer product safety-related international conferences, such as the ICPHSO.

F. Korea-EU Consumer Policy Council

The first meeting of the Korea-EU Consumer Policy Council was held in October 2012 by an proposal of Korea. The consumer authorities of the Republic of Korea and the EU had discussions on the future establishment and operation of the consumer policy council and trend of consumer policies.

The Republic of Korea and the EU agreed to hold a bilateral meeting at least yearly in Paris, France where the OECD Headquarters are located or in Brussels, Belgium where the EU Headquarters are located before or after a Spring or Autumn meeting of OECD CCP. it was also agreed that persons in the position of director of a bureau or chief of a department participate in the meeting together with working-level staff relevant to matters on the agenda.

The EU introduced a consumer policy report featuring the consumer policy agenda and activities of the EU consumer authorities during the period from 2010

to 2011 and the Republic of Korea explained the importance of consumer policy and comparisons between the initial period of implementation and current status of operation by comparing with the initial period of enforcement. Both parties agreed to develop discussions into specific and substantial matters gradually in the future.

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Creation of Fair Trade Ecosystem between Conglomerates and Small and Medium Enterprises

1. Establishing a Foundation for Shared Growth of Conglomerates and Small and Medium Enterprises

It is important for conglomerates and small and medium enterprises to achieve a balance in growth, in order for our economy to grow consistently and join the ranks of advanced economies. Accordingly, related departments, including the KFTC, the Ministry of Knowledge and Economy and Small and Medium Business Administration, jointly announced measures to promote shared growth of conglomerates and small and medium enterprises in an effort to promote market-friendly shared growth on September 29, 2010.

Since these measures were announced, the KFTC has consistently promoted amendment of relevant laws and systems, such as laws or guidelines on fair transactions in subcontracting and procedures for concluding an agreement on fair trade and shared growth and standards for support, and laid the groundwork for mid-size firms which have led the growth of small and medium enterprises to participate in agreements on shared growth and fair trade. In addition, it announced outcomes of assessing a shared growth index of 56 conglomerates actively taking part in shared growth with the Commission on Shared Growth for the first time in 2012, expanding the foundation for a culture of shared growth.

A. Improvement of Unfair Subcontracting Practices

The KFTC has conducted a written fact-finding survey every year since 1999, in an effort to establish order in fair subcontracting practices and solve problems of avoiding making a report by small and medium subcontract businesses for fear of disadvantages, such as suspension of transactions and retaliation. In particular, as an effort to take special measures to eradicate placing oral orders, the KFTC began to apply procedures for voluntary correction, which have been applied only to

charges of non-payment, to charges of not issuing documents, based on results of conducting a written fact-finding survey in 2011.

The KFTC has conducted an ex officio investigation every year on areas in which many legal violations are found, in consideration of the situation of subcontractors who have difficulty in making a report concerning subcontract transactions.

The KFTC conducted an ex officio investigation on 25 companies engaged in ten business types, including eight business operators engaged in engineering business, software businesses, textile, primary metal, furniture, etc. in 2012. As a result, the number of measures against violations of the Fair Transactions in Subcontracting Act, including measures taken following a written fact-finding survey on subcontracting, stood at 1,100 in 2002, up 36.1% from 807 cases in 2011. Major corrective measures taken in 2012 included 27 prosecutions, 16 penalty surcharges and 9 fines for negligence.

The KFTC has continued its efforts to reinforce supervision and sanctions for improving unfair subcontracting practices in 2012 and it announced the outcomes of complying with agreements by 56 conglomerates subject to a shared growth index for the first time in May 2012. As a result of consistently inducing voluntary shared growth between conglomerates and small and medium enterprises, a culture of shared growth has begun to settle in Korean society. To help a culture of shared growth take root in Korean society, we should endeavor to create an environment where companies can voluntarily take part in a policy on shared growth by facilitating communications between conglomerates and small and medium enterprises.

2. Resolving Imbalance between Large Distribution Businesses and Suppliers

The KFTC has formulated various policies and reinforced its activities of conducting surveys on violations so as to rectify power abuse in transactions following power imbalance between large distribution businesses and small and medium suppliers, and create an environment in which small and medium suppliers are able to grow and develop, depending on their capacity.

A. Inducing Reduction and Stabilization of Transaction Fees

As a growing number of people are aware that the level of transaction fees of large distribution businesses is too high, the KFTC has induced the reduction and stabilization of transaction fees of large distribution businesses. Large distribution businesses, such as large supermarkets, department stores, TV home shopping stations and duty-free shops, decided to reduce and stabilize transaction fees and announced such decision, respectively.

B. Revising Standard Transaction Contracts and Checking Present Status

As the Act on Fair Transactions in Large Franchise and Retail Business and the Enforcement Decree thereof entered into force in January 1, 2012, matters related to a written contract have been revised in a reasonable manner. The KFTC has extensively revised standard transaction contracts in the area of distribution, and disseminated such contracts to make them available from February 9, 2012. From early May of 2012 until early July, it checked preparation and use of standard transaction contracts with suppliers, annex agreements on sales incentives and dispatch of detailers, etc. by six large distribution businesses.

C. Formulating Comprehensive Measures for Fair Trade in Distribution Sector

The KFTC finalized the direction of promoting fair trade in the distribution sector, proposing various feasible measures in a comprehensive manner, and announced it on January 29, 2013, to ensure that right trade practices can take root in the distribution sector.

D. Outcomes of Taking Corrective Measures against Violations

The KFTC took a total of 182 corrective measures (81 corrective orders and 101 warnings) from January 1, 2003 until December 31, 2012, with regard to violations of the Act on Fair Transactions in Large Franchise and Retail Business and the Large Retail Trade Business Notice and imposed penalty surcharges of 4,357 million won thereon. Among them, measures were taken in 14 cases in 2012 (12 corrective orders and two warnings), a slight increase in the number of total measures, compared with 2011.

3. Establishment of Fair Trade Order in Franchise Businesses

The KFTC has established fair trade order in the area of franchise business by ensuring transparency in processes of recruiting franchisees and fairness in processes of conducting franchise business transactions, and enacted and implemented the Fair Transactions in Franchise Business Act and Enforcement Decree thereof on November 1, 2002 to prevent damage suffered by franchisees.

A. Registration and Disclosure of Information Disclosure Statements

The KFTC has consistently promoted the registration and disclosure of information disclosure statements since May 2008, and the number of nationwide franchise headquarters stood at 2,678 as at the end of 2012 and the number of business marks (brands) at 3,311. Registered information disclosure statements have begun to be opened to the public since November 2008 via the franchise information disclosure system (http://franchise. ftc. go. kr). The number of visitors to the system recorded a more than two-fold increase every year, and more than one million persons visited the system in 2011 and 800,660 persons in 2012.

B. Outcomes from Operating Franchise Business Transactions Dispute Mediation Council

Considering that characteristics of franchise businesses are more related to civil cases and franchisees engage in a continuing transaction relationship with franchise headquarters, the KFTC requests the Franchise Business Transactions Dispute Mediation Council to mediate disputes between franchise headquarters and franchisees. The Council mediated a total of 3,454 cases of disputes for the last ten years, recording an average of 345 cases per year. It mediated a total of 609 cases in 2012, showing a slight slowdown trend in the number of mediation cases (up 14.2%).

C. Operation of Fair Trade Expert System

In an effort to supplement a lack of experience and expert knowledge of prospective franchisees and ensure that franchisees can easily receive legal advice related to franchise business transactions at low costs, the fair trade expert system was established under Articles 27 and 28 of the Fair Transactions in Franchise Business Act, and the Human Resources Development Service of Korea has been requested to administer a qualifying examination. The first qualifying examination

for fair trade experts was administered in 2003 and 62 candidates passed the examination, while a total of 420 candidates passed the examination in 2012.

D. Introduction of Exemplary Transaction Standards

The KFTC induced the introduction of exemplary transaction standards (for four business types, including bakery, chicken or pizza, coffee shops and convenience stores) for each franchise business type so as to formulate measures to voluntarily improve trade practices between the franchise headquarters and franchisees through communications and dialogue with franchise headquarters, and prevent adverse effects from unfair trade practices, laying the groundwork for shared growth between franchise headquarters and franchisees.

E. Outcomes from Taking Corrective Measures against Violations

Since the Fair Transactions in Franchise Business Act was enacted in 2002, the KFTC has taken a total of 956 corrective measures until December 31, 2012, including 187 corrective orders and 769 warnings. In 2012, it took 100 corrective measures, including 48 corrective orders and 52 warnings.

The KFTC is endeavoring to help a culture of shared growth to take root in the market, while market participants in franchise businesses comply with the fair transactions order.

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Strengthening International Cooperation on Competition Policies

1. Strengthening Bilateral Cooperation and FTA Negotiations

A. Reinforcing Bilateral Cooperation with Foreign Competitors

The KFTC has maintained friendly and cooperative relationships with developed nations, such as the U.S, Japan and EU, by holding meetings of the competition policy council therewith on a regular basis, so as to strengthen bilateral cooperation with foreign competitors in competitive areas.

In particular, it visited three competition authorities[1)] [Department of Commerce, China's National Development and Reform Commission (NDRC) and the State Administration for Industry & Commerce (SAIC)] of China, which has emerged as a new economic giant, to discuss common agendas of each country and conclude a MOU in 2012, laying the groundwork for expanding and strengthening the close international cooperation network in Northeast Asia, while maintaining bilateral cooperation with developed nations.

B. Strengthening FTA Negotiations

Competitive areas in the FTA are important for enhancing effects of trade liberalization through FTA and improving the welfare of consumers in both countries. This is because anti-competitive acts can offset effects of trade liberalization, even when trade liberalization is realized in areas of products and services through tariff elimination. Accordingly, in cases of FTAs promoted in recent years, law enforcement against anti-competitive acts have been reinforced by making a separate competitive area. In addition, actively taking part in FTA negotiations related to competition is expected to promote cooperation between competition authorities as well as contributing to reduction of competition law

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1) China established the division of labor system of Department of Commerce (review of business consolidation), NDRC (regulation on monopoly related to prices) and SAIC (regulation on monopoly related to non-price or unfair trade practices)

risks of companies located in a foreign country.

A total of eight FTAs went into effect[2] as of December 2012 and the Republic of Korea has engaged in FTA negotiations with China, Indonesia, Vietnam, Canada, etc. as from June 2013.

2. Trend in Multilateral Discussions on competition Policies and Responses

Market integration in the aftermath of globalization has emphasized a necessity to make economic policies, specific to the jurisdiction and influences of the territory of a particular country, harmonized with other policies in the international society. Against this backdrop, our system needs to be advanced and developed according to global standards so as to raise the possibility of predicting enforcement of competition laws, while not hindering business activities of companies. Currently, countries around the world are also endeavoring to reach an international consensus by actively taking part in multilateral organizations, such as OECD and ICN.[3]

A. Seoul International Competition Forum

Seoul International Competition Forum is an international platform for discussions on economic policies, which has been held by inviting experts in economic policies around the world every two years since 2002, after the KFTC held the first forum in 2001. The aim of holding a forum lies in exchanging information and experience

2) The Korea-Chile FTA went into effect in 2004, Korea-Singapore FTA in 2006, Korea-EFTA FTA in 2006, Korea-ASEAN FTA in 2009, Korea-Indonesia FTA in January 2010, Korea-EU FTA in July 2011, Korea-Peru FTA in August 2011, Korea-U.S FTA in March in 2012. The Korea-Turkey FTA was formally signed in August 2012 and Korea-Columbia FTA was concluded in June 2012.

3) International Competition Network: This is a consultative body between competition authorities world-wide, launched in October 2001, to achieve balance between worldwide competition laws and the competition system, and 127 competition law enforcement agencies in 111 countries take participate in the network.

in processes of enforcing competition laws and finding the right direction in implementing international competition policies, by discussing international issues of competition policies between persons in charge of competition authorities or international organizations and experts in competition laws.

The 7th Seoul International Competition Forum was held in Busan, where those in the highest rank of the major competition authorities world-wide and experts took part, so as to discuss international issues of competition policies on September 5, 2012. They joined a discussion on agendas, to which competition authorities world-wide are paying attention, such as direction-setting for competition policies in a new economic environment, possibility of achieving harmony between competition and consumer policies, protection of intellectual property rights and regulation on abuse of patents, etc.

KFTC's active participation and activities in multilateral meetings have contributed to establishing friendly relations with major nations world-wide and enhancing the status of the Republic of Korea. The KFTC has established itself as a competition authority which leads Asia, by holding the Seoul International Competition Forum, the largest meeting held in Asia on competition laws every two years.

3. Projects for Technical Support Regarding Competition Laws and Policies of Developing Countries

The KFTC has provided various technical support regarding competition laws and policies, including the International Workshop on Competition Policy, KOICA's training program on competition policy and Education program of OECD-KOREA Regional Center for Competition, and the internship system for employees in developing nations, dispatch of competition experts and the

Knowledge Sharing Program (KSP) are projects for technical support regarding competition laws and policies of developing countries added in 2012.

The outstanding characteristics of projects for technical support regarding competition policies in developing nations in 2012 lie in new means of providing technical support, in addition to existing projects for technical support, and attempts to provide strategic technical support.

ⓐ **The 16th International Competition Policy Workshop:** The KFTC held this workshop following the Seoul Competition Forum in Westin Chosun Hotel in Busan on September 6, 2012 by closely cooperating with the United Nations Conference on Trade and Development (UNCTAD) for selection of themes in the workshop and invitation of lecturers. At the workshop, 18 persons from 14 countries presented cases from each nation on strengthening international cooperation in areas of competition law and policies, application of competition laws to state companies and review of possibility of introducing the consent resolution system.

ⓑ **OECD Korean Center Competition Policy Workshop:** The OECD Competition Center in Asia established in May 2003, has held workshops every year, as education on competition policies for persons in charge of competition in each nation. It held six workshops on cartels, business consolidation and issues related to the competition law in the airline industry in 2012.

ⓒ **KOICA's training program on competition policy:** 20 employees from competition authorities of South America (Guatemala) and Africa (Tanzania), including Asian nations, took part in the program from April 10, 2012 to April 28, 2012.

ⓓ **Internship program for inviting employees of developing nations:** Two employees of the Eurasia Economic Commission, which intends to establish the competition authority and introduce competition laws for the first time as a newly-born international organization, held two seminars in the KFTC from December 2, 2012 to December 16, 2012 to introduce the draft of competition laws in their nations and jointly studied comparisons with competition laws in Korea.

ⓔ **Dispatch of experts to competition authorities in developing nations:** The KFTC promoted projects to dispatch experts to Indonesia 2012, formed a consensus on the necessity of the project and decided to continue the project in 2013.

ⓕ **Knowledge Sharing Programs (KSP):** The KSP on competition laws and polices is providing experience of the KFTC to developing nations through comprehensive consultations on economic policies over a long period. The KFTC and the Ministry of Strategy and Finance decided to provide knowledge on competition laws and policies to China in 2013 under this program and it is expected to continue until February 2014.

Technical support by KFTC has contributed to introduction of competition laws and policies by developing nations and establishment of the system for operating such policies, as well as establishing friendly relations with beneficiary countries and enhancing the status of the Republic of Korea. In particular, means of providing technical support has been diversified in 2012, leading to increased choices in such support. Along with the increased choices, the KFTC's projects for technical support regarding Competition policies of developing nations shall be implemented in a long-term and comprehensive manner.

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Case-handling Procedures & Institutions in the KFTC

(Office for General Counsel)

1. Introduction

Ensuring due process of law is a basic requirement to realize the rule of law. Particularly in a violation case of the competition law[1], there is a strong need to provide the concerned parties with an adequate and fair opportunity to make their own arguments, since a fierce debate on legal and economic issues often arises and even experts are divided on whether the concerned act infringes the competition law in the course of handling a case.

Recognizing this, the Korea Fair Trade Commission (KFTC) has continued to make effort to ensure further transparency, fairness and efficiency in the procedures of dealing with a case.

This report introduces the KFTC case-handling system and institutions to ensure fairness and transparency in the process of dealing with a competition law case.

2. Regulations Concerning KFTC Case-handling System

Case-handling procedures of the KFTC are governed by the "Monopoly Regulation and Fair Trade Act" (hereinafter referred to as the "Act"), its enforcement decree and "Regulation on Operation of KFTC Meetings and Case-handling Procedures" (hereinafter referred to as the "Regulation").

The basic aspects of the case-handling are stipulated in the Chapter 9 (Enforcement Agency) and 10(Investigation Procedures and Other Related Matters) of the" Act" while technical and specific matters are governed by the "Regulations". These provisions apply in the cases of merger as well as cartel conspiracy or unilateral act.

[1] Other than the "Monopoly Regulation and Fair Trade Act (MRFTA)", 11 laws are enforced by the KFTC. However, case handling procedures are governed by the MRFTA, which regulates essential parts of the competition law such as market dominance abuse or cartel conspiracy. The procedures applied to violations of other laws are the same as the MRFTA.

3. KFTC Case-handling Procedures

The KFTC handles a case in procedural order of ①origin of the case, ②investigation/examination by an official designated as an Examiner and ③deliberation/decision by the Committee. (Please refer to Appendix for the detailed case-handling procedure).

A. Origin of the Case (Detection of Legal Violence)

The KFTC can investigate cases *ex officio* where there is a suspicion of violation against the competition law. In addition, any person who believes that violation of the law has occurred may submit complaints to the Commission (Article 49.1 and 2 of the Act).

If the KFTC detects unlawful anticompetitive activity or receives a complaint concerning such activity, it conducts a preliminary examination to decide whether the case is subject to an investigation by the KFTC. Unless the preliminary examination finds the case fits into such occasions where it is not subject to KFTC enforcement or the complainant withdraws the complaint as set forth in Article 12 of the Regulation, the KFTC proceeds to investigate and examine the case (Article 11.1 of the Regulation).

B. Investigation & Examination Report

Once the examination on a case is launched, an official designated as an Examiner conducts investigation to collect evidence on the alleged violation and assesses the conduct based on the applicable law. For this, the investigation officers from the KFTC may conduct on-site investigation at an office or business place of the relevant company or business association to examine their business and management status, account books, documents and others, and take statements from the parties subject to investigation or interested parties under Article 50.2 of the Act. Also, the examiner may order the concerned company, business association or their executives to submit documents or other materials deemed necessary for the investigation and detain them in accordance with Article 50.3 of the Act.

In the case where the investigation finds violation of the law and, consequently, corrective measures - corrective order, surcharge, the filing of a complaint with the

prosecution or other sanctions - are considered necessary, the examiner draws up an Examination Report and files them with the Committee of the KFTC[2] [3]. The Examination Report shall be served to the defendant as soon as it is presented to the Committee.

The report shall include overview on the case (the defendant, factual evidence, investigation background, etc.), structure and condition of relevant markets, factual statement of committed act and its anti-competitiveness, laws and provisions alleged to be violated, the Examiner's suggestions on the measures to be taken against the violation and other relevant documents as attachment (Article 29.1 of the Regulation).

C. Committee Proceeding (Hearing)

After an Examination Report is filed, hearing is carried out in either a "plenary session" where all of the nine commissioners participate or a "chamber session" where the three of them are present, depending on the significance of the case. A plenary session convenes[4] for cases of significant economic impact, re-hearing cases, and cases on which resolutions have not been made in a chamber or which a chamber has decided to refer to a plenary session (Article 4 of the Regulation). Other cases not handled in a plenary session are presented to a chamber session.

In principle, the case presented to the Committee is referred to a hearing within 30days after replies of the defendants are received (Article 31 of the Regulation). The date of the hearing is notified to the defendant at least five days before the hearing according to Article 33 of the Regulation.

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[2] If the Examiner found that administrative penalty is not required, the Examiner has authorities to end the procedure or issue a warning.

[3] If a case is referred to a chamber session and its corrective measures does not contain surcharge or bringing the case to the prosecution, the hearing can be conducted through simplified procedure. The simplified procedure is carried out in the written format for the cases in which the agreement is made on the committed act and measures to be taken against the offense between the Examiner and the defendant (Article 28 and 60 of the Regulation). Such cases do not need to go through hearing in the oral format that requires lots of time and efforts. Nevertheless, if the chairman of the chamber deems that a different decision from the Examiner's suggestions on corrective measures needs to be made for the case, it may be referred to the official hearing despite the consent (Article 63 of the Regulation).

[4] Matters related to interpretation or application of laws/rules/notice and legal enactment or amendment are also submitted to a plenary session.

Procedures of hearing are similar to those of public trials, which proceed in the presence of Examiner and defendant. The proceedings involve identification questioning, opening statement, interrogation, the Examiner's suggestion on the corrective measures, closing statement (Article 34 through 43 of the Regulation). The detailed procedures are as follows;

① The chairman declares the opening of a hearing and identifies the involved parties. (Identification Questioning)

② After the Examiner outlines the Examination Report, the defendant (or his/her representative) replies to the Examiner's report (Opening Statement).

③ Commissioners question the Examiner and the defendant on relevant facts to verify the anti-competitiveness of the activity (Interrogation)

④ The Examiner states its suggestion as to corrective measures against the defendant.

⑤ The defendant makes a final statement on the suggested corrective measures of the examiner (Closing Statement)

D. Deliberation by the Committee

After the hearing, commissioners make a decision on measures to be taken against the defendant by agreement. If it is determined that there was a violation of the law, the committee may take corrective measures, impose surcharges or refer the case to the prosecution, but if not, the defendant will be free of suspicion. If it is decided that the defendant violated the law, but the violation is negligible, the committee may issue a warning.

E. Written Decision

In the case where the defendant faces penalty (corrective measures, surcharge, and filing to the prosecution) for the violation, the written decision is served to the defendant explaining in detail the penalty imposed on the defendant and the grounds for such determination.

F. Appeal against the KFTC Decision

(1) Filing for re-hearing & suspension of enforcement

A defendant who is dissatisfied with the decision by the KFTC may file a request for re-hearing to the KFTC within 30 days from the receipt of the written decision in accordance with Article 53.1. As this procedure is optional, the person may skip this process and directly appeal the decision to the court. As to a case requested for re-hearing, the KFTC shall hold a new hearing and make a decision within 60 days, but it can extend the decision-making period up to 30 days according to Article 53.2 of the Act.

(2) Filing a lawsuit

In the case where the person wants to file an appeal to the appellate court, the person shall file a lawsuit to the Seoul High Court within 30 days from the receipt of a written decision or re-hearing result according to Article 54 and 55 of the Act.

4. Institutions to Ensure Fairness and Transparency in Case-handling Procedures

A. Outline of Institutions in Force

As mentioned above, the KFTC has been fully committed to ensuring further fairness and transparency in case-handling procedures.

For example, several institutional improvements were made to case handling procedures based on discussions of a task force set up (for such purpose) in 2004, 2006 and 2008 comprising lawyers, legal scholars, economists and other outside experts. The cases in point are introducing extended hearing system (2004) and preparatory procedures for hearing, expanding the scope of documents accessible to a defendant to include supporting documents and Examiner's suggestion on corrective measures(2007, 2009), and providing further protection of confidential business information submitted by a defendant (2009).

B. Functional Separation of Investigators and Decision Makers

The KFTC consists of the Committee, which is a decision-making body, and the Secretariat, the body responsible for investigation and indictment.

In principle, the Committee does not engage in any investigation procedures. Instead, the Committee, which comprises nine commissioners, conducts hearings and deliberates on cases in plenary and chamber sessions. Any administrative measures of the KFTC such as corrective orders, surcharge and others should be imposed by the final deliberation of the Committee.

The Secretariat, on the other hand, is in charge of investigation and drafting & filing of the Examiner's Report to the Committee in accordance with Article 50.2 of the Act. The Secretariat, a hierarchical organization led by Secretary General, was established for administrative and investigative tasks according to Article 47 of the Act. Secretary General designates a director general of the headquarters or a head of a regional office as an Examiner in charge of a case investigation and the designated Examiner produces an Examination Report on the allocated case, which is subsequently filed to the Committee. The Committee then conducts the decision-making process in the form of adversarial proceedings (explained in 4.D.(2)).

C. Ensuring Transparent Investigation

(1) Prior notification of investigation plans

An investigator shall conduct investigation within the minimal scope of the authority deemed necessary for competition enforcement (Article 50.2 of the Act). In the case where the investigator carries out on-site investigation at the place of business, he/she shall give advance notification in writing informing the defendant of the purpose, period and place of the investigation. The investigation shall be carried out within the purpose and period set forth in that notification. In addition, the investigator shall show the concerned person a certificate indicating his/her authority for the investigation (Article 50.4 of the Act).

Where the concerned company is ordered to submit documents or materials necessary for the investigation, a written order for the submission shall be sent to the company (Article 15 and 17 of the Regulation).

(2) Contact between investigator/Examiner and defendant

There is no such regulation that prevents the defendant from officially contacting the investigator or the Examiner or presenting opinions in the course of the investigation. The contact between the investigator/the Examiner and the defendant is usually made in an office, investigation room or conference room.

However, specific violations, the level of evidence or other details are not revealed to the defendant during the investigation in principle, so the defendant is to be aware of the suspected violation or investigation result when the Examination Report is served.

D. Ensuring Fairness and Transparency in Hearing Process

(1) Offering supporting documents & opportunity to submit opinions

Upon the filing of an Examination Report to the Committee, the Examiner should serve it to the defendant as well and give the defendant sufficient time to reply to the report. The replies shall be submitted in written form.

The Report sent to the defendant is required to include attachments of supporting documents and reference data, which aims to ensure level playing ground for the defendant. Nevertheless, the Examiner may exclude insignificant materials or confidential information obtained from other businesses under Article 29 of the Regulation. In such case, the defendant may request the permission from the committee to read or copy the excluded documents (Article 29.2 of the Regulation).

Two weeks are given in principle for the defendant to reply to the Examination Report, but it can be adjusted flexibly depending on the situation. For example, where the parent company of the defendant is located in a foreign country or the case is complicated, the period can be prolonged. The defendant can also request the extension of the period.

(2) Adversarial proceeding of hearing

To ensure fairness in the hearing, the KFTC adopted adversarial proceedings where the Examiner and the defendant are given the same status and have equal opportunity to present oral arguments on the committed act and its anti-competitiveness.

In addition, the defendant and the Examiner, if considered necessary, may request an examination of evidence or presence of witness or competition law experts as a person of reference to seek their opinions (Article 41 of the Regulation). In such case, the person of reference can be cross-examined.

(3) Disclosure of hearing process and decision

The hearing process and decision of the KFTC is made public in general, but it may not be the case if there is a need to protect confidential information of the relevant company or business association (Article 43 of the Act). Disclosing the process of hearing and decision is an important tool to ensure transparency as the third party as well as interested parties can keep track of all the decision-making procedures.

(4) Sufficient opportunity for expressing opinions

The KFTC provides the relevant parties sufficient opportunity through various policies like hearing preparatory procedures or extended hearing system to express their opinions orally as well as in writing.

Once the replies of the defendant on the examination report are submitted, the chairman of a session may allow hearing preparatory procedures to be conducted, if necessary for efficient hearing (Article 30.2 of the Regulation). During the preparatory session, main issues and evidence are reviewed thoroughly enabling the defendant to clearly understand arguments of the Examiner and to express opinions on them. It makes the overall hearing process more efficient, since the issues on which the two parties reach an agreement can be excluded from the hearing. For example, the case of Intel's market dominance abuse (2008) came to a conclusion through only two

rounds of hearing, because the contentious issues were reviewed in the two written opinion exchanges and one round of preparation process.

Occasionally, hearing can be extended to the next round, if the case is found hard to produce the resolution in just one round of hearing. For instance, the cases of market dominance abuse by Microsoft (2005) and Qualcomm (2009) went through seven and six rounds of hearing respectively. Hearing can also proceed to the next round at the request of the concerned parties.

Furthermore, the KFTC provides simultaneous interpretation by installing interpretation booths at the request of foreign defendants or interested parties so that they can effectively exercise their defense right.

(5) Protection of confidential information submitted by defendant

The KFTC prevents the business secret infringement in the course of hearing by implementing appropriate regulations. If the defendant wants to make statements including confidential information, he/she may present written statements which specify the scope of the confidential information and desirable measures for its protection at least five days prior to the opening of the session. If the request is accepted, necessary measures will be taken, for instance, ordering other defendants to leave the room temporarily while the protected information is presented to the Committee. The information regarded as confidential is excluded from the disclosed decision later on. (Article 40.2 of the Regulation)

Also hearing can be conducted separately for each defendant in the case where there is a need to protect confidential business information or identity of leniency applicants (Article 44 of the Regulation). This system has been actively utilized as the use of leniency application started to be promoted after 2005.

D. Decision Disclosure & Case-handling Time Limit

(1) Disclosure of KFTC Determination

Any person can access decisions of the KFTC through its website. In principle, the disclosed decision does not include personal information of the involved natural

person - name, identification number, address and others - and confidential business information also can be excluded at the request of the relevant company.

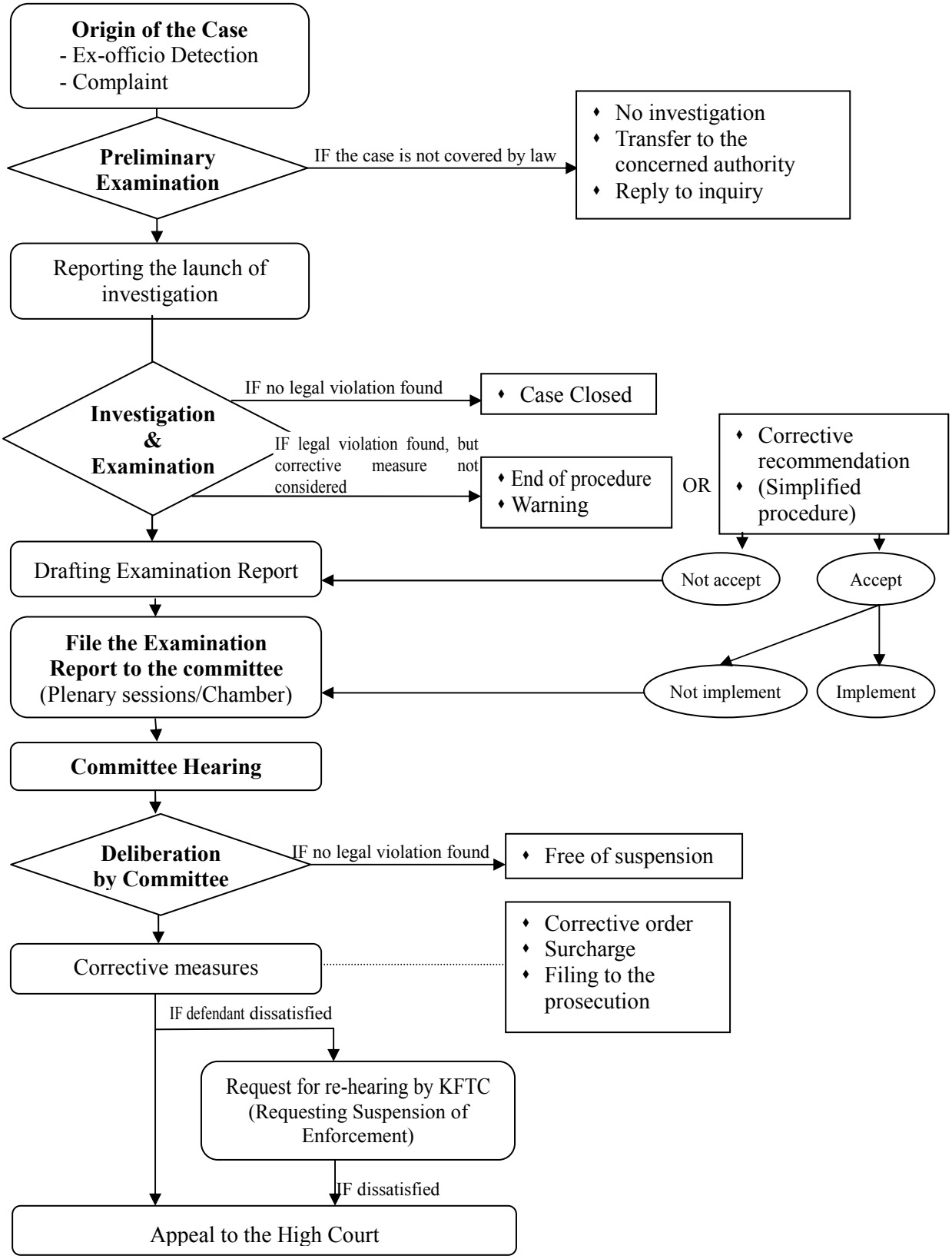
In the case where it is determined that the defendant did not violate the law or faces just a warning, a written decision is not made, but still, the results and rationale behind them shall be notified to both the complainant and the defendant of the case in an official written statement.

(2) Time limit for case-handling

The time limit required for investigation or case handling process is not set in the law, except for preliminary merger review and a re-hearing case. The decision of the former shall be made within 30 days from filing of a pre-merger notification and within 60 days for the latter. The period can be extended up to 90 and 30 days respectively (Article 12.9 and 53.2 of the Act).

Furthermore if five years or more have passed since violation of the law, the KFTC shall neither take corrective orders nor impose surcharges for the offence under Article 49.(4) of the Act.

[Appendix] Case Handling Procedure



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A Brief Overview of Criminal Cartel Enforcement in Japan

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Summary

Japan has both a criminal enforcement route for cartel enforcement, as well as an enforcement route by way of a civil administrative process. For many years, the Japan Fair Trade Commission (JFTC) has favored the civil process, where the main methods used for enforcement are issuing of cease and desist orders and surcharge payment orders. As such, there have been only a handful of criminal cartel cases in Japan to date. However, in line with the global trend towards stricter cartel enforcement, the use of the criminal enforcement route seems to be gradually gaining traction in Japan as well. To further support this, amendments have recently been made to Japan's Anti-Monopoly Act (AMA) to raise the statutory criminal fines, increase maximum prison terms and grant stronger investigative power to the JFTC.

Statutes and Enforcement Authority

Statutes

The main statute for cartel enforcement in Japan is the "Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947)", or simply the "Anti-Monopoly Act" (AMA).[1]

Under the AMA, cartels are prohibited as "Unreasonable Restraint of Trade" (Article 3)[2], which is defined as "such business activities, by which any entrepreneur, by contract, agreement or any other means irrespective of its name, in concert with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade." (Article 2(6))[3]

The sanctions provided by the AMA for conduct that falls within the "Unreasonable Restraint of Trade" are administrative orders and criminal sanctions.

More specifically, as for administrative orders, the JFTC may issue cease and desist orders (Article 7(1))[4] and may also issue surcharge payment orders for certain conduct that pertains to the price of

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[1] A translation of the AMA can be found in the JFTC website available at: http://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html . The excerpts of the Articles of the AMA appearing in the footnotes below are also from this website.

[2] Article 3 of the AMA provides in pertinent part as follows: "No entrepreneur shall effect … unreasonable restraint of trade."

[3] "Unreasonable Restraint of Trade" under the AMA covers both price fixing and bid-rigging. Besides this, for bid-rigging in a public auction or bid setting, Article 96-3(2) of the Penal Code provides that the individual may be imprisoned up to 2 years or subject to a criminal fine up to 2.5 million JPY. Further, if a government official leads/assists the bid-rigging, the official may face imprisonment up to 5 years or a criminal fine up to 2.5 million JPY under "the Act on Elimination and Prevention of Involvement in Bid-Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc." However, in this article I will focus only on the AMA.

[4] Article 7(1) of the AMA provides in pertinent part as follows: "In the case that there exists any act in violation of the provisions of Article 3 …, the Fair Trade Commission may, pursuant to the procedures as provided in Section 2 of Chapter VIII, order the relevant entrepreneur to cease and desist from the said acts, transfer a part

goods or services. The basic amount of the surcharge payment will be calculated as 10% of the sales of the relevant goods or services for a period up to 3 years prior to the date the conduct ceased (Article 7-2(1))[5].

As for criminal sanctions, the AMA provides that: criminal fines up to 5 million JPY and/or imprisonment up to 5 years (Article 89 and 92)[6] may be imposed on individuals; criminal fines up to 500 million JPY may be imposed on companies and other entities (Article 95)[7]; and criminal fines up to 5 million JPY may be imposed on top management of a company (Article 95-2)[8].

Enforcement Authority

The JFTC has the sole authority to impose the administrative orders. However, with respect to criminal sanctions, the JFTC only has the authority to file criminal accusations with the Public Prosecutors General (Article 96 (1))[9]. The Public Prosecutors Office, an extraordinary organ of the Ministry of Justice, then exercises sole discretion as to prosecution.

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of his/her business, or take any other measures necessary to eliminate such acts in violation of the said provisions."

[5] Article 7-2(1) of the AMA provides in pertinent part as follows: "In the case that any entrepreneur effects an unreasonable restraint of trade … , and such act falls under any of the following items, the Fair Trade Commission shall order the said entrepreneur, pursuant to the procedures as provided in Section 2 of Chapter VIII, to pay to the national treasury a surcharge of an amount equivalent to an amount calculated by multiplying the sales amount of the relevant goods or services calculated pursuant to the method provided by a Cabinet Order …, for the period from the date on which the entrepreneur effected the business activities constituting the said act to the date on which the business activities constituting the said act were discontinued (in the case that such period exceeds three years, the period shall be the three years preceding the date on which the business activities constituting the said act were discontinued; hereinafter referred to as "period of implementation") by ten percent (three percent in the case of retail business, or two percent in the case of wholesale business); provided, however, that in the case the amount thus calculated is less than one million yen, the Commission shall not order the payment of such a surcharge:

(i) Pertaining to consideration of goods or services; or

(ii) Substantially restraining any of the following with respect to goods or services and thereby affecting the consideration:

(a) Supply or purchase volume;

(b) Market share; or

(c) Transaction counterparties"

[6] Article 89 (1) of the AMA provides in pertinent part as follows: "Any person who falls under any of the following items shall be punished by imprisonment with work for not more than five years or by a fine of not more than five million yen:

(i) Any person who, in violation of the provisions of Article 3, has effected … unreasonable restraint of trade "; Further Article 92 provides in pertinent part as follows: "Any person who has committed any of the crimes provided in Articles 89 … may, according to the circumstances, be punished by cumulative imposition of both imprisonment with work and a fine."

[7] Article 95(1) of the AMA provides in pertinent part as follows: "When a representative of a juridical person, or an agent, an employee or any other worker of a juridical person or of an individual has, with regard to the business or property of the said juridical person or individual, committed a violation of the provisions in any of the following items, not only the offender shall be punished but also the said juridical person or individual shall be punished by the fine as prescribed in the respective items:.

(i) Article 89: Fine of not more than five hundred million yen…."

[8] Article 95-2 of the AMA provides in pertinent part as follows: "In the case of a violation of item (i) of paragraph (1) of Article 89 … , the representative of the relevant juridical person …who has failed to take necessary measures to prevent such violation despite the knowledge of a plan for such violation or who has failed to take necessary measures to rectify such a violation despite the knowledge of such a violation,shall also be punished by the fine as prescribed in the respective articles."

[9] Article 96(1) of the AMA provides in pertinent part as follows: "Any crime under Articles 89 … inclusive shall be considered only after an accusation is filed by the Fair Trade Commission."

In relation to the criminal enforcement of cartels, the JFTC has adopted a policy to provide guidance on what kind of cases are likely to be considered for criminal enforcement. According to the policy, the JFTC will file criminal accusations to actively seek criminal penalties on violations that: (a) substantially restrain competition in a particular field of trade, including price cartels, supply restraint cartels, market allocation agreements, bid rigging, group boycotts and private monopolization(these examples constitute serious cases that are likely to have a widespread influence on the national economy); or (b) involve firms or industries that are repeat offenders or do not take the appropriate measures to eliminate a violation, and for which the administrative measures of the JFTC are not considered sufficient to meet the aims of the Antimonopoly Act.[10]

Further, the policy provides that the JFTC and the prosecutorial authorities will hold "the Conference of Criminal Accusation" at the time criminal accusations are considered and exchange opinions and information on concrete problems of each case.[11] This is designed to insure the most legitimate and coordinated criminal accusations.

Finally, it should be noted that even in the event the JFTC decides that a certain case should be considered for criminal enforcement and a criminal accusation is filed, the JFTC may also issue an administrative order.[12] The AMA provides how an adjustment should be made between a criminal fine and a surcharge payment order.[13]

Practice and Recent Developments

The AMA has had provisions for criminal enforcement of cartels ever since it was enacted in 1947. However, in practice, criminal sanctions were not used for cartel enforcement for quite a long time. It was only in 1974 that the JFTC filed its first (and second) criminal accusation. Further, even after that, the JFTC did not file another criminal accusation for nearly 20 years (in 1991). As of August 2013, the JFTC has filed criminal accusations for cartels in only 16 cases since 1947.[14]

Starting in the 1990s, the JFTC began to take a stricter position on the enforcement of the AMA[15], and in line with this, the use of criminal enforcement was considered as one option. The adoption of the JFTC policy on enforcement of criminal cartels referred to above was one of the outcomes. After this

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[10] *See* "The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations" available at: (http://www.jftc.go.jp/en/legislation_gls/antimonopoly_rules.files/legislation_guidelinesamapdfpolicy_on_criminalaccusation.pdf)

[11] *Id.*

[12] For example in the most recent criminal accusation case concerning a cartel on industrial machinery bearings and automotive bearings, the JFTC has issued surcharge payment orders to 3 companies in the total of 13.3 billion JPY. The JFTC press release is available at: http://www.jftc.go.jp/en/pressreleases/yearly-2013/march/130329_2.html .

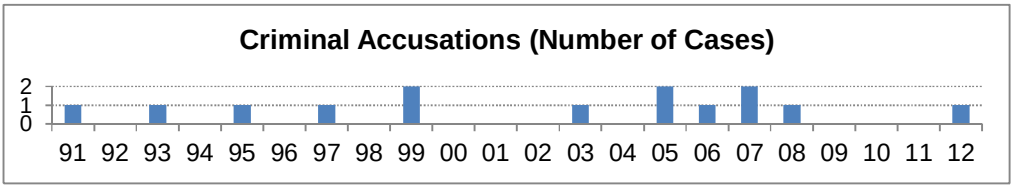
[13] Article 7-2(19) and Article 51 of the AMA provides for the methods of the adjustment which is in short to deduct half the amount of criminal fine from the surcharge payment amount.

[14] A summary of cases where the JFTC has filed criminal accusations since the enactment of the AMA could be found in the Japanese page of the JFTC website available at: http://www.jftc.go.jp/dk/dk_qa.files/kokuhatsu.pdf. Further, similar charts can be found in the JFTC's annual reports which are available at: http://www.jftc.go.jp/soshiki/nenpou/index.html. However, as of August 2013, the English page of the JFTC website available at: http://www.jftc.go.jp/en/about_jftc/annual_reports/index.html provides only outlines of the annual reports and these do not include the charts described above.

[15] The AMA has been amended accordingly. The 1991 amendment raised the basic rate for surcharge payment orders from 2% to 6% (which was further raised to 10% in 2005). The 1992 amendment increased the maximum criminal fine for companies and other entities from 5 million JPY to 100 million JPY, which was further increased to 500 million JPY in 2002.

policy was adopted, the JFTC has become more proactive in the criminal enforcement area, resulting in criminal accusations of 14 cases during the period from 1991 to 2012 (Figure 1).[16]

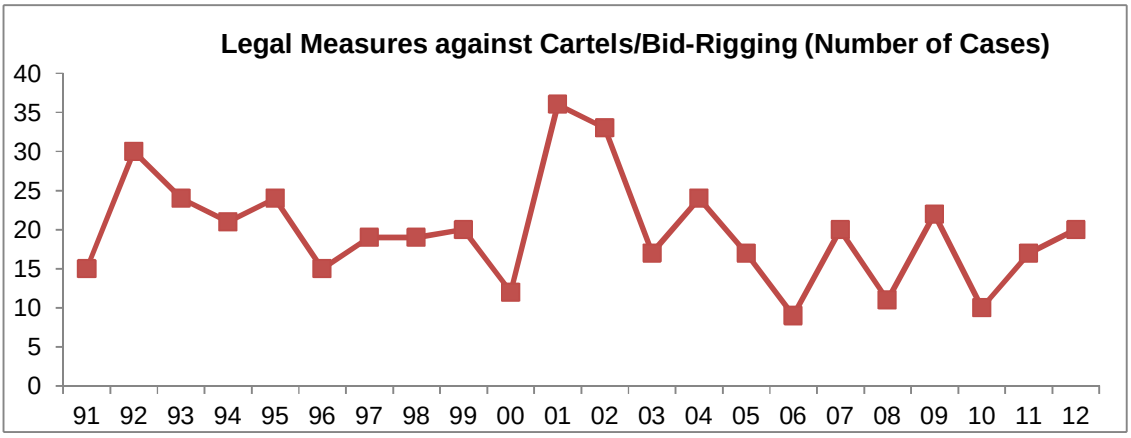
Figure 1



These numbers may appear low; however, given that there were only two criminal accusations in the forty years preceding the dates on the chart, this clearly demonstrates a trend toward increasing criminal enforcement.

On the other hand, for the period from 1991 to 2012 the JFTC issued administrative orders in approximately 20 cases per year (Figure 2).[17] This shows that in terms of the number of cases that the JFTC has taken legal measures there is no clear trend.

Figure 2



Outcomes of Criminal Cartel Enforcement

In the last 20 years, all of the criminal accusation cases were prosecuted and none were acquitted by the court. The courts have imposed criminal fines for companies and prison sentences and/or criminal fines for individuals. The highest criminal fine imposed on a company so far is 640 million JPY[18]. As for prison sentences for individuals, the maximum term imposed is 4 years, however, it should be

[16] *Supra* note 14.

[17] According to the JFTC annual reports from 1991 to 2011, the JFTC had issued an administrative order in from 9 to 36 cartel cases per year, and the average is 19.76. The annual report for 2012 has not been issued as of August 2013. However, a summary of the JFTC's enforcement action in fiscal year 2012 is available at: http://www.jftc.go.jp/en/pressreleases/yearly-2013/may/AMAinFY2012_Summary.files/AMAinFY2012_Summary.pdf .According to this summary the number of cases for 2012 is 20.

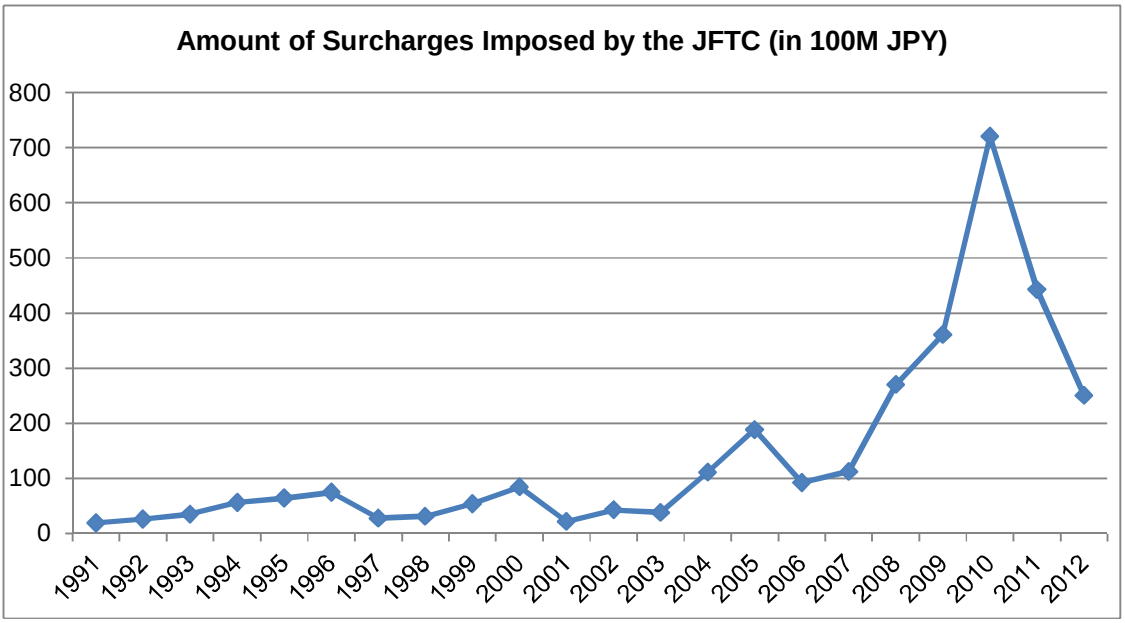
[18] As there were 4 separate counts, the total amount of fine imposed by the court exceeds the statutory maximum amount which is the maximum for one count of violation.

noted that in all cases concerning individuals the prison sentences[19]were suspended for a certain period (2 to 5 years), in which case the individual need not actually serve jail time so long as he/she does not commit another crime during that period.

Recent Developments towards an Even Stricter Enforcement

Cartel enforcement has been one of the main focuses of the JFTC's fundamental policy of prompt and effective law enforcement. The fact that the amount of surcharges imposed by the JFTC is generally in an increasing trend for the past 20 years suggests that the JFTC has been successful so far (Figure 3). [20]

Figure 3



The policy of vigorous cartel enforcement has also been adopted for criminal enforcement as well. In order to support such policy, several amendments were made to the AMA. To enhance the JFTC's ability to collect evidence to achieve aggressive criminal accusations, the 2005 amendment has authorized the JFTC to use compulsory measures for criminal investigations, namely the officers of the JFTC may inspect, search and seize based on court-issued warrants. Further, the 2009 amendment has increased the maximum jail term for unreasonable restraint of trade from the previous 3 years to the current 5 years.

These amendments have undoubtedly enabled the JFTC to further aggressively pursue criminal enforcement, and the most recent amendment increasing maximum penalties for cartels may lead to individuals actually serving jail time for their sentences.

Looking into the Future

[19] *See supra* note 14.

[20] These figures can be found in the JFTC annual reports and the summary, *supra* note 17. The surcharge payment order was introduced in 1977, and the calculation rate was increased in 1991 and further increased in 2005. *See supra* note 15.

As described above, the JFTC is in the course of actively enforcing the AMA, and the provisions for criminal cartel enforcement have been used as one important route for such aggressive enforcement during the past 20 years. Further, the AMA has been amended along the way to allow the JFTC to act even more aggressively. The next question would be how far the JFTC would go from here. In other words, would the JFTC go as far as the U.S. DOJ and consider imprisonment of individuals as a key to effective deterrence?[21] This question has become very topical especially after the U.S. DOJ aggressively sent numerous Japanese nationals to US prisons in relation to the auto parts cartel.[22]

Between 2008 and 2012, the JFTC had not filed a criminal accusation. So, when the JFTC filed a criminal accusation case in June 2012[23](its first criminal accusation case after the 2009 amendment of the AMA increasing the maximum jail term for individuals), the outcome drew attention. However, the outcome was basically in line with previous practice that no individual was sentenced to serve actual jail time.

Japanese authorities do not yet view imprisonment of individuals as a key tool for an effective enforcement. In addition, the Public Prosecutors Office and the courts may not consider incarcerating a first time offender of the AMA to be in line with their respective sentencing standards. These sentencing standards have formed over a long period of time through consideration of the appropriate sanctions for various types of criminal offenses. As such, while the sentencing level seems to be gradually increasing together with the amendments to the AMA, it might take some time before an individual will actually be sentenced to serve jail time in Japan for a cartel offence.

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[21] *For example see* Gregory J. Werden, Scott D. Hammond and Belinda A. Barnett Speech, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, Antitrust Division of the U.S. Department of Justice (March 2012) available at: http://www.justice.gov/atr/public/speeches/283738.pdf ("Monetary sanctions on corporations, even combining criminal fines with civil damages, are unlikely to be sufficient to deter cartels. Serious sanctions on culpable individuals therefore are required, and they are provided by the imprisonment of convicted individuals.")

[22] Based on the press releases of the U.S. DOJ available at: http://www.justice.gov/atr/public/press_releases/2013/index.html Prior to 2011, only 2 Japanese nationals had actually served in U.S. prison for an antitrust violation. However, since September 29, 2011 when the first plea agreement with individuals regarding the auto parts case was announced, 15 Japanese nationals have entered into plea agreements with the DOJ to serve in U.S. prison in relation to the auto parts investigation (as of August 2013).

[23] The JFTC filed a criminal accusation on June 14, 2012, regarding a price-fixing cartel case concerning industrial machinery bearings and automotive bearings. The JFTC filed a criminal accusation with the Public Prosecutor-General against manufacturers and distributers of those products etc., which formed and implemented agreements to raise the selling prices of those products. The JFTC press release is available at: http://www.jftc.go.jp/en/pressreleases/yearly-2012/jun/individual-000486.html .

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The American Antitrust Institute

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Date: March 20, 2014

Title: Why did they cross the Pacific? Extradition: A Real Threat to Cartelists?

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Abstract: On January 31, 2014, the DOJ added trophies to its list of achievements from the more than three-year long investigation into the auto parts cartels. A former president and a vice president of a Japan-based corporation agreed to plead guilty for their participation in a conspiracy to fix the price of auto parts. Including these two individuals, the DOJ has already brought charges against twenty six corporations and twenty nine individuals, most of whom are Japanese nationals. For reasons described in this paper, some Japanese antitrust practitioners are puzzled by this U.S. enforcement against Japanese nationals. Extradition to the U.S. may not have been a real threat. Nonetheless, more than twenty Japanese executives and employees decided to leave Japan to serve prison terms in the U.S. Why did they choose to cross the Pacific? How functional is the DOJ's extradition tool? This Working Paper focuses on a relatively unfamiliar area for the antitrust community: the usefulness of extradition in the context of cartel enforcement against Japanese nationals who have not voluntarily surrendered to the U.S. jurisdiction.

Keywords: Cartel Enforcement, International, Extradition, Criminal Sanction, Japan.

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Why did they cross the Pacific?
Extradition: A Real Threat to Cartelists?

Yoshiya Usami[1]

Introduction

On January 31, 2014, the Antitrust Division of the Department of Justice (DOJ) added trophies to its achievements from the more than three-year long investigation into the auto parts cartels. A former president and a vice president of a Japan-based corporation agreed to plead guilty for their participation in a conspiracy to fix the price of auto parts.[2] Including these two individuals, "the largest criminal investigation the Antitrust Division has ever pursued"[3] has already brought charges against twenty six corporations[4] and twenty nine individuals,[5] most of whom are Japanese nationals.[6] Antitrust authorities around the world have also been targeting more than eighty auto parts companies.[7]

Until late 1990's, the DOJ commonly recommended against prison sentences ("No-jail" recommendation) for foreign nationals who surrendered to the U.S.[8] One of the reasons for the "No-jail" recommendation was to obtain valuable cooperation from non-U.S. citizens for pursuing international cartels.[9] In 2000's, however, the DOJ strengthened its criminal cartel enforcement against foreign nationals, and the "No-jail" recommendation was virtually eliminated.[10] In addition, the DOJ indicated that it would request extradition of the fugitives who refused to cooperate and stayed outside the U.S.[11]

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[2] Press Release, U.S. Dep't of Justice, Former President and Vice President of Diamond Electric Agree to Plead Guilty to Participating in Auto Parts Price-Fixing Conspiracy, *available at* http://www.justice.gov/atr/public/press_releases/2014/303331.pdf.

[3] Sharis A. Pozen, Acting Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., remarks at the briefing on department's enforcement action in auto parts industry (Jan. 30, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/279740.pdf.

[4] *See* Table 1.

[5] *See* Table 2.

[6] *Id*; Twenty eight individuals are Japanese citizens.

[7] For an overview of the multinational investigations against the auto parts industries, *see* John M. Connor, *Is Auto Parts Evolving into a Supercartel?* (Am. Antitrust Inst. Working Paper No. 13-06, Nov. 7, 2013), *available at* http://www.antitrustinstitute.org/sites/default/files/AAI%20Working%20Paper%2013-06.pdf.

[8] Donald C. Klawiter & Jennifer M. Driscoll, *Sentencing Individuals in Antitrust Cases: The Proper Balance*, 23-2 ANTITRUST 75, 78 (2009).

[9] *Id*.

[10] *See* Scott Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, U.S. Dep't of Justice, Antitrust

In the auto parts cartel investigations by the DOJ, twenty two Japanese citizens have already agreed to plead guilty to serve prison terms in the U.S.[12] The fact that Japanese executives and employees voluntarily surrendered to the U.S. jurisdiction to serve prison terms was a stunning development not only for the Japanese business community but also for many Japanese antitrust practitioners. To be sure, it was not an unprecedented for Japanese nationals to serve prison term in the U.S.,[13] but the enforcement against auto parts cartels is astounding for its severity and breadth. It is said that the DOJ has been investigating more than 150 auto parts, whereas it has charged only a part of them until now. The ongoing investigations still make it hard to predict their end.

In the meantime, some Japanese antitrust practitioners showed their puzzlement over U.S. enforcement against Japanese nationals.[14] Even one of the former commissioners of the Japan Fair Trade Commission (JFTC) raised questions about enforcement decisions by the DOJ, especially about the cases where cartels had been formed in Japan for auto parts installed in vehicles manufactured in Japan for export to the U.S.[15]

Nonetheless, more than twenty Japanese executives and employees decided to leave Japan to serve prison terms in the U.S.[16] Why did they choose to cross the Pacific? One might think that even if they had chosen to stay in Japan, they would have been extradited and imprisoned in the U.S. But, was extradition a real threat to them? Is extradition truly a useful tool for the DOJ? This working paper focuses on a relatively unfamiliar area for the antitrust community: the value of the extradition statute, especially with respect to Japan, in the context of cartel enforcement. What hurdles would the DOJ face when it seeks extradition for Japanese

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Div., speech before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime: Charting New Waters in International Cartel Prosecutions (Mar. 2, 2006), *available at* http://www.justice.gov/atr/public/speeches/214861.pdf ("We will not agree to a "no-jail" sentence for any defendant.").

[11] *See* Scott Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, U.S. Dep't of Justice, Antitrust Div., speech before the ABA Antitrust Law Section's 56th Annual Spring Meeting: Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program (Mar. 26, 2008), *available at* http://www.justice.gov/atr/public/speeches/232716.pdf ("In order to track down and prosecute foreign nationals who participate in cartels affecting the United States, the Division will utilize INTERPOL Red Notices, border watches and extradition.").

[12] *See* Table 2.

[13] *See, e.g.*, Press Release, U.S. Dep't of Justice, Japanese Executive Agrees to Plead Guilty to Participating in an International Antitrust Conspiracy (Aug. 5, 2004), *available at* http://www.justice.gov/atr/public/press_releases/2004/204910.pdf; *See also, e.g.*, Press Release, U.S. Dep't of Justice, Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine Hose and Related Products (Dec. 10, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/240307.pdf.

[14] Kei Umebayashi, *Karuteru Jian ni okeru Beikoku no Keiji Shobatsu – Nihonjin ga Beikoku de Fukueki suru koto eno Iwakan wo Fumaete* [*Criminal Punishments for Cartel Cases in the U.S. – Based on a sense of incongruity to the fact that Japanese nationals serve prison terms in the U.S.*] 999 NEW BUSINESS LAW [NBL] 50 (Apr. 15, 2013)(Japan); Hiroshi Kimeda & Kaku Hirao, *Kokusai Karuteru Jian ni okeru Tōbō Hanzainin Hikiwatashi Tetsuduki wo meguru Mondaiten* [*Issues Regarding the Extradition Procedure for International Cartel Cases*] 749 KŌSEI TORIHIKI [FAIR TRADE] 35, 36 (Mar. 2013)(Japan).

[15] Akio Yamada, *Hot/Cool Player: Han Torasutohō no Ikigai Tekiyō ni Kansuru Gimon* [*Hot/Cool Player: Questions to the Extraterritorial Application of the Antitrust Law*], 1001 NBL 1 (May 15, 2013)(Japan).

[16] *See* Table 2.

nationals who have not voluntarily surrendered to the U.S. jurisdiction? To make it simple, the following analyses are based on a fact pattern, unless otherwise noted, where a cartel was formed in Japan for auto parts installed in vehicles manufactured in Japan for export to the U.S. or elsewhere. Most of the conduct challenged by the DOJ in auto parts involves this type of fact pattern.[17]

Procedure for Extradition

The procedures within Japan for an extradition from Japan to the U.S. are governed by Japanese domestic law for extradition[18] and a treaty between Japan and the U.S.[19] First of all, an extradition request from the U.S. to Japan "shall be made through the diplomatic channel."[20] Then, when the Minister of Foreign Affairs of Japan (MOFA) receives the request, he or she forwards it to the Minister of Justice of Japan (MOJ) with the related documents.[21] When the MOJ receives the documents from the MOFA, he or she, where any of designated exceptions does not apply, and when it is deemed appropriate, forwards the related documents to the Superintending Prosecutor of the Tokyo High Public Prosecutors Office (SPTHPPO) and orders an application to be made to the Tokyo High Court for examination as to whether the case is one in which the fugitive can be extradited.[22] If the Tokyo High Court finds that the fugitive can be extradited,[23] the MOJ, when he or she finds it appropriate to extradite the fugitive, orders the SPTHPPO to surrender the fugitive.[24] Then, the MOFA forwards the permit of custody to the requesting country.[25]

A decision made by the Tokyo High Court on whether the fugitive can be extradited is final and cannot be appealed. Therefore, even if the DOJ negotiates with the MOJ, and probably with the JFTC, and manages to persuade them to extradite a fugitive, the success of the extradition will depend on the Tokyo High Court's decision. In addition, even if the Tokyo High Court decides that the case *is* one in which the fugitive can be extradited, the MOJ has broad discretion as to whether the extradition is appropriate,[26] though it is unlikely that the MOJ deems it inappropriate to extradite once the Tokyo High Court decided that the fugitive can be extradited.[27]

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[17] *See, e.g.*, Information at 2, United States v. Furukawa Electric Co., Ltd., No. 2:11-cr-20612 (D. E.D. Mich. Sep. 29, 2011), *available at* http://www.justice.gov/atr/cases/f275900/275923.pdf; However, K. F. of Denso was only charged with obstruction of justice. Hence, some arguments in this paper may not be applicable to him.

[18] Tōbō Hanzainin Hikiwatashi Hō [Act of Extradition], Act No. 68 of July 21, 1953, *available at* http://www.japaneselawtranslation.go.jp/law/detail/?id=1879&vm=04&re=01&new=1.

[19] Treaty on Extradition between Japan and the United States of America, Mar. 3, 1978, 31 U.S.T. 892 [hereinafter *Extradition Treaty*].

[20] 31 U.S.T. 892, art. 8; *See* Act of Extradition, art. 3.

[21] Act of Extradition, art. 3.

[22] *Id* at art. 4.

[23] *Id* at art. 10.

[24] *Id* at art. 14.

[25] *Id* at art. 19.

[26] *Id* at art. 14; *See also* Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] July 27, 1994, Hei 6 (Gyō Ku) no. 38, 1521 HANREI JIHŌ [HANJI] 33 (Japan).

[27] Kimeda & Hirao, *supra* note 14, at 40.

Substantive Elements – Restrictions on Extradition

The substantive elements for extradition are also governed by the Act of Extradition and the Extradition Treaty. The Act of Extradition enumerates the restrictions on extradition as follows:

(1) a "political offense,"[28]
(2) when the requested offense is not punishable for three years or more according to the requesting country's laws (minimum prison term),[29]
(3) when there is no double criminality,[30]
(4) lack of "probable cause," except in a case where a fugitive was convicted in the requesting country for the requested offense,[31]
(5) when there is a pending criminal prosecution based on the act constituting the requested offense, or when there is the final judgment in such case,[32]
(6) when there is a pending criminal prosecution for an offense committed by the fugitive other than the requested offense, or when there is an enforceable sentence against him,[33] and
(7) extradite Japanese nationals.[34]

However, when an extradition treaty provides otherwise regarding item (2), (3), (6) or (7), the extradition treaty supersedes the restrictions in the Act of Extradition.[35] The Extradition Treaty modifies some restrictions enumerated in the Act of Extradition. For example, among other things, the Treaty reduces the minimum term of imprisonment for extraditable offences from three years to one year,[36] and it grants the requested country discretionary power to extradite its own nationals.[37] The Extradition Treaty also provides that (8) "[w]hen the offense for which extradition is requested has been committed outside the territory of the requesting [country], the requested [country] shall grant extradition if the laws of that [country] provide for the punishment of such an offense committed outside its territory, or if the offense has been committed by a national of the requested [country].[38]

In these restrictions, (3) double criminality, (4) probable cause, (5) pending procedure or the final judgment, (7) the principle that limits extradition of requested country's own citizens, and (8) offense committed outside the territory of the requesting country are, among other things, especially relevant to extradite an antitrust violator from Japan to the U.S.

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[28] Act of Extradition, art. 2, item. 1 and 2.
[29] *Id* at art. 2, item. 3.
[30] *Id* at art. 2, item. 4 and 5.
[31] *Id* at art. 2, item. 6.
[32] *Id* at art. 2, item. 7.
[33] *Id* at art. 2, item. 8.
[34] *Id* at art. 2, item. 9.
[35] *Id* at art. 2; Unlike the U.S., which has more than a hundred extradition treaties with foreign countries, Japan only has two extradition treaties: one with the U.S., and the other with South Korea.
[36] 31 U.S.T. 892, art. 2, para. 1.
[37] *Id* at art. 5.
[38] 31 U.S.T. 892, art. 6, para. 1.

Double Criminality

Under the principle of double criminality, an extradition is not allowed unless the offense for which extradition is requested is a crime in both the requesting and the requested countries (abstract/general double criminality).[39] In the antitrust law context, the Extradition Treaty enumerates "[a]n offense against the laws relating to prohibition of private monopoly or unfair business transactions"[40] as one of the extraditable offense when such an offense is punishable by both the requesting and the requested countries "by death, by life imprisonment, or by deprivation of liberty for a period of more than one year …."[41] The U.S. antitrust law prohibiting cartels, *i.e.*, section 1 of the Sherman Act,[42] satisfies this element since it has the maximum of a ten-year imprisonment term. The Japanese law prohibiting cartels, the Antimonopoly Act, also satisfies the element since it has criminal sanctions with the maximum of a five-year imprisonment for cartels.[43] Regarding a bid-rigging case, article 96-6 of the Penal Code[44] might satisfy the element since it has a three-year maximum prison term. The Penal Code for a bid-rigging, however, only applies for "public" auction or bid, therefore it does not apply to the auto parts cartels where manufacturers fixed the prices for the auto parts targeting private corporations.

Even if the elements of the abstract/general double criminality are satisfied, an extradition will not be allowed when the imposition or the execution of punishment for the requested offense would be barred by the laws of Japan (concrete/specific double criminality or punishability).[45] One of the typical bars by the laws of Japan in the antitrust context is a statute of limitations. In 2009, the amendment of the Antimonopoly Act strengthened the criminal punishment for cartels from a maximum of a three- year prison term to maximum of a five-year term.[46] Because of the amendment, the term for a statute of limitations for an act concluded after December 31, 2009 was extended from three years to five years.[47] The term for the statute of

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[39] Act of Extradition, art. 2, item 3 & 4; 31 U.S.T. 892, art. 2, para. 1; *See* Kēichi Aizawa, *Tōbō Hanzainin Hikiwatashi ni okeru Sōbatsusei* [*Double Criminality for Extradition*], *in* SHIN-JITSUREI KEIJI SOSHŌHŌ (1) SŌSA [NEW EXAMPLES FOR CRIMINAL PROCEDURE (1) INVESTIGATIONS] 304, 308-10 (Ryuichi Hirano & Kōya Matsuo eds., 1998)(Japan); *See also* Keiji Isaji & Atsushi Yamashita, *Beikoku Han Torasutohō eno Kigyō Taiō – Keijibatsu no Jijitsujō no Tetsuduki Kankatsu to sono Haikei kara Kōsatsu suru* [*Dealing with the U.S. Antitrust Law by Corporations – Consider through the De Facto Procedural Jurisdiction of Criminal Punishment and its Background*] 1010 NBL 22, 26-7 (Oct. 2013)(Japan).

[40] 31 U.S.T. 892, schedule 45.

[41] *Id* at art. 2, para. 1.

[42] 15 U.S.C. § 1.

[43] Shiteki Dokusen no Kinshi oyobi Kōsei Torihiki no Kakuho ni kansuru Hōritsu [Antimonopoly Act], Act No. 54 of April 14, art. 89, 1947 (Japan), *available at* http://www.jftc.go.jp/en/legislation_gls/amended_ama09/amended_ama09_11.html.

[44] KEIHŌ [PEN. C.], art. 96-6 (Japan).

[45] Act of Extradition, art. 2, item 5; 31 U.S.T. 892, art. 4, para. 1, item 4; *See* Aizawa, *supra* note 39, at 308-11; *See also* Isaji & Yamashita, *supra* note 39, at 27.

[46] Antimonopoly Act, art. 89 (1947), *amended by* Act No. 51 of June 10, 2009.

[47] KEIJI SOSHŌHŌ [KEISOHŌ][C. CRIM. PRO.], art. 250, no. 5 (Japan), *available at* http://www.japaneselawtranslation.go.jp/law/detail/?id=2056&vm=04&re=01&new=1; Seirei no. 253 of Oct. 28, 2009 (Japan).

limitations for an act concluded before January 1, 2010 remains three years.[48] Therefore, a request for the extradition would face a five-year or three-year statute of limitations, depending on when the act for which extradition is sought was concluded. Conspiracy periods for most auto parts cartels lasted beyond January, 2010,[49] therefore the five-year statute of limitations would apply in those cases. However, if an individual who participated in a certain conspiracy had withdrawn from the conspiracy before January, 2010, he might only be subject to the three-year statute of limitations and would not be subject to extradition.[50]

In addition to a statute of limitations, the absence of accusation by the JFTC could be a hurdle for extradition. In general, absence of a complaint in the offense indictable only on complaint has not been deemed as a bar to extradition.[51] Thus, it seems that the same argument applies to the case where the JFTC's accusation is absent. However, the reason for the interpretation that the absence of complaint is not a bar for extraditing the offender who committed the offence indictable only on complaint is unclear. In fact, the wording of the punishability does not explicitly exclude such cases.[52] In addition, considering the fact that the JFTC exclusively has discretion whether or not to pursue a criminal sanction[53] based on its expertise,[54] it is not necessarily inconceivable that the absence of criminal enforcement by the JFTC could be seen as a bar for the extradition under Japanese laws.[55]

Probable Cause

The Act of Extradition provides that an extradition cannot be allowed "when there is no probable cause to suspect that the fugitive committed the act constituting the requested offense."[56] The Extradition Treaty also provides a similar provision.[57] Thus, when the DOJ wants to extradite an alleged violator, it has to prove that there is probable cause to suspect that the

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[48] Act No. 51 of June 10, 2009, art. 18; C. CRIM. PRO., art. 250, no. 6

[49] *See* Table 1.

[50] *See* Kimeda & Hirao, *supra* note 14, at 40-1.

[51] Shigeki Itō, *Tōbō Hanzainin Hikiwatashihō Kaisetsu* [*Commentary on the Act of Extradition*] 16-6 HŌSŌ JIHŌ [SŌJI] 1, 28 (1964)(Japan); Toshiyuki Baba, *Nichibei Hanzainin Hikiwatashi Jōyaku no Zenmen Kaisei ni tsuite* [*About the Comprehensive Amendment of the Treaty on Extradition between Japan and the United States of America*] 31-8 HŌRITSU NO HIROBA [HIROBA] 56, 60 (1978)(Japan).

[52] *See* 31 U.S.T. 892, art. 4, para. 4 ("In the case of a request for extradition emanating from the United States, when the imposition or the execution of punishment for the offense for which extradition is requested would be barred by reasons prescribed under the laws of Japan …."); *See also* Act of Extradition, art. 2, item 5 ("A fugitive shall not be extradited in any of the following circumstances; … (v) When…the imposition or the execution of punishment on the fugitive for the requested offense would be barred under the laws and regulations of Japan.").

[53] Antimonopoly Act, art. 96, para. 1.

[54] HITOSHI SAEKI, CHŪSHAKU DOKUSEN KINSHIHŌ [COMMENTARY ON THE ANTIMONOPOLY ACT] 842 (Tetsu Negishi ed., 2009)(Japan).

[55] Isaji & Yamashita, *supra* note 39, at 27; *See* Umebayashi, *supra* note 14, at 56; Nobuaki Mukai, *Jōhō Kōkan ya Tōbō Hanzainin Hikiwatashi Tō no Tōkyokukan Renkei to "Ikigai Chōsa" wo Meguru Kadai ni tsuite no Shiron* [*Essays on Issues Regarding Inter-Agencies Cooperation on Information Exchange and Extradition, and "Extraterritorial Investigation"*] 1462 JURISUTO [JURIST] 52, 55 (Jan. 2014)(Japan).

[56] Act of Extradition, art. 2, item 6.

[57] 31 U.S.T. 892, art. 3 ("Extradition shall be granted only if there is sufficient evidence to prove … that there is probable cause to suspect … that the person sought has committed the offense for which extradition is requested ….").

person sought has committed the requested offense, *i.e.*, a violation of the U.S. antitrust law. Whether the DOJ will succeed in proving the probable cause depends on Japanese prosecutors. In other words, Japanese prosecutors, who might not necessarily be familiar with the U.S. antitrust laws, have to prove, before the Tokyo High Court, that there is probable cause that the person sought has committed the violation of the section 1 of the Sherman Act, not a violation of the Japanese Antimonopoly Act.

This procedural structure might bring an unexpected result to the DOJ. In fact, in 2004, a request by the U.S. government to extradite a Japanese citizen for alleged economic espionage[58] and some other related offenses was rejected by the Tokyo High Court.[59] In this case, the U.S. and Japanese governments must have had close discussions between them regarding whether the alleged offense was extraditable, and must have concluded positively. The High Court's decision rejecting the request, therefore, must have been unexpected for both governments.[60] When the DOJ wants to extradite a Japanese national based on the Sherman Act violation, they will have to face a similar risk before the Tokyo High Court.

Pending Procedure or Final judgment

"When the person sought has been prosecuted or has been tried and convicted or acquitted by the requested [country] for the offense for which extradition is requested," a person sought cannot be extradited.[61] Therefore, if the JFTC chooses criminal sanction toward a given case, and the case goes to the criminal court in Japan, a person in the given case cannot be extradited. This principle seems to have its base on the concepts of double jeopardy[62] and/or *non bis in idem* – not twice for the same.[63] Double jeopardy and/or *non bis in idem* do not necessarily bar second prosecution for the same act by different sovereigns.[64] Thus, assuming, *arguendo*, that the JFTC and the DOJ pursue the given case only for the fairness of the market within their respective territories, one might conclude that the extradition from Japan to the U.S. would be permissible.[65] However, the Extradition Treaty prohibits the extradition when the requested offense is pending or the final judgment was rendered. This restriction is based on the understanding that either criminal prosecution or extradition is enough to deter international

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[58] *See* Economic Espionage Act of 1996, 18 U.S.C.S. § 1831.
[59] Tōkyō Kōtō Saibansho [Tōkyō High Ct.] March 29, 2004, Hei 16 (Te) no. 20, 1155 HANREI TAIMUZU [HANTA] 118 (Japan).
[60] *See Court Rejected U.S. Request for Extradition in Industrial Spy Case*, JAPAN TIMES, Mar. 30, 2004, *available at* http://www.japantimes.co.jp/news/2004/03/30/national/court-rejects-u-s-request-for-extradition-in-industrial-spy-case/#.Uve5Hj15Muc.
[61] 31 U.S.T. 892, art. 4, para. 1; *See* Act of Extradition, art. 2, item. 7 ("A fugitive shall not be extradited … [w]hen a criminal prosecution for an offence based on the act constituting the requested offense is pending in a Japanese court, or when the judgment in such case has become final,").
[62] U.S. Const. amend. V.
[63] NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION], art. 39 (Japan), *available at* http://www.japaneselawtranslation.go.jp/law/detail/?id=174&vm=04&re=01&new=1.
[64] *See, e.g*, Abbate v. United States, 359 U.S. 187 (1959) (permitting a federal prosecutor for bringing federal criminal charges against the same act previously prosecuted under state law); *See also, e.g*, Bartkus v. Illinois, 359 U.S. 121 (1959) (permitting a state prosecutor for bringing state criminal charges against the same act previously prosecuted under federal law); Baba, *supra* note 51, at 59.
[65] Umebayashi, *supra* note 14, at 55.

crimes and that the parties to the Treaty respect principles of comity.[66] In addition, *non bis in idem* is considered, at least in Japan, applicable to the facts within the "identity of the charged acts."[67] The Japanese government may prosecute a person in the given case only on account of anticompetitive effects in the domestic market. Even under these circumstances, extraditing the person sought in the same case for the same acts – although it might not necessarily be impossible – seems to contradict the basic understanding for extradition and, at least, with the concept of *non bis in idem.* Thus, it might be conceivable to say that Japan would not extradite the person sought in such a case.[68]

Limitation to Extradite Own Citizens

The Act of Extradition prohibits the Japanese government from extraditing its own citizens.[69] The Extradition Treaty also declares that the requested country shall not be bound to extradite its own citizens.[70] Different from the Act of Extradition, however, the Extradition Treaty grants the requested country the power to extradite its own citizens in its discretion.[71] The MOJ has broad discretion as to whether the extradition of Japanese citizens is appropriate.[72] Although there is no firm standard for the MOJ to rely on, he should, in general, take into account diplomatic consideration to the requesting country, necessity of preserving domestic law and order, protection of human rights for the person who may be extradited, and various domestic and foreign considerations.[73]

When it comes to the criminal accusation, the JFTC has taken the position that it should seek criminal penalties for "[v]icious and serious cases which are considered to have wide spread [sic] influence on people's livings …."[74] The JFTC has usually taken, based on its policy, administrative action toward the cartels, rather than pursuing criminal prosecutions against individuals. In one of the auto parts cases – the bearing cartel – the JFTC pursued criminal prosecutions against individuals for the first time after about three and a half years.[75] The rest of the auto parts cases so far ended up with administrative sanctions against corporations, namely

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[66] Baba, *supra* note 51, at 59; Toshiyuki Baba, *Nichibei Hanzainin Hikiwatashi Jōyaku ni tsuite* [*About the Treaty on Extradition between Japan and the United States of America*] 720 JURIST 73, 76 (Jul. 1, 1980)(Japan).
[67] *See* C. CRIM. PRO., art. 312, para. 1.
[68] *See* Umebayashi, *supra* note 14, at 55-6.
[69] Act of Extradition, art. 2, item. 9.
[70] 31 U.S.T. 892, art. 5.
[71] *Id*.
[72] Act of Extradition, art. 14.
[73] *See* 1521 HANJI 33.
[74] Japan Fair Trade Comm'n, Dokusen Kinshihō Ihan ni taisuru Keiji Kokuhatsu oyobi Hansoku Jiken no Chōsa ni Kansuru Kōsei Torihiki Iinkai no Hōshin [The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations] (Oct. 7, 2005), *available at* http://www.jftc.go.jp/en/legislation_gls/antimonopoly_rules.files/legislation_guidelinesamapdfpolicy_on_criminalaccusation.pdf.
[75] Japan Fair Trade Comm'n, Jikuuke Seizō Hanbai Gyōsha ni yoru Kakaku Karuteru Jiken ni Kakaru Kokuhatsu ni tsuite [The JFTC filed a criminal accusation on the price-fixing cartel over industrial machinery bearings and automotive bearings] (Jun. 14, 2012), *available at* http://www.jftc.go.jp/en/pressreleases/yearly-2012/jun/individual-000486.files/2012-JUne-14.pdf.

cease and desist orders and surcharge orders.[76] Based on the JFTC's policy and its past enforcements, it is natural to assume that the JFTC regards administrative sanctions as sufficient deterrence against most cartel activities.[77] Under the present situation where the JFTC has not vigorously imposed criminal sanction on cartel participants, the MOJ would likely defer to the decision by the JFTC, especially, in the case in which double sanctions could be imposed by the DOJ and the JFTC.[78]

The principle of proportionality should also be taken into consideration in this context. This is "[t]he principle that the use of force should be in proportion to the threat or grievance provoking the use of force."[79] Assuming it applies to the MOJ's discretion, his decision regarding the propriety of the extradition has to be rational.[80] Therefore, it seems that one could argue that the MOJ's discretion could be limited by the JFTC's decision not to take criminal sanction against the given case since the JFTC exclusively has discretion as to whether or not to pursue criminal sanction based on its expertise. It could also be argued that an extradition of a Japanese citizen sought in such a case where the JFTC did not apply a criminal sanction deviates from a rational exercise of the MOJ's discretion and, in fact, could be seen as a handover of its sovereignty.[81]

One of the reasons for the Extradition Treaty to modify the principle that limits extradition of the requested country's own citizens is to avoid irrational outcomes in the case where the offence was committed in the requesting country by the requested country's citizen and the offender escaped to the requested country.[82] In the given case where a cartel was formed in Japan for auto parts installed in vehicles manufactured in Japan for export to the U.S. or elsewhere, the JFTC *may* choose to pursue criminal sanctions against the offender in such a case. Therefore, the above mentioned reason for permitting extradition of the requested country's own

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[76] The amount of surcharge is calculated by multiplying the sales amount of the relevant goods or services during the period in which the unreasonable restraint of trade was implemented. The maximum period is three years. The calculation rates are, as described in the table below, varied from one percent to ten percent depending on the type of industry to which a corporation belong and size of the corporation. Antimonopoly Act, art. 7-2, para 1 and para. 5.

Type of Industry	General Size	Mid and Small Size
General	10 %	4 %
Retailers	3 %	1.2 %
Wholesalers	2 %	1 %

The rate will be increased to 150 per cent of the original rate if the company was subject to a payment order for surcharge due to unreasonable restraint of trade or private monopolization within the past 10 years. Antimonopoly Act, art. 7-2, para 7. In addition, the calculation rate for the surcharge will be increased to 150 per cent of the original rate if the company played a major role in a given case. Antimonopoly Act, art. 7-2, para 8. If the company's activities fall into both of the above categories, the calculation rate of surcharge will be doubled. Antimonopoly Act, art. 7-2, para 9.

[77] Umebayashi, *supra* note 14, at 56-57; *See* Isaji & Yamashita, *supra* note 39, at 29.

[78] Umebayashi, *supra* note 14, at 56-57; *See* Isaji & Yamashita, *supra* note 39, at 29.

[79] BLACK'S LAW DICTIONARY 1338 (9th ed. 2009).

[80] *See* Kimeda & Hirao, *supra* note 14, at 42.

[81] *See* Umebayashi, *supra* note 14, at 56.

[82] Baba, *supra* note 51, at 60-61; Baba, *supra* note 66, at 77.

citizen does not seem to apply, or, at least, the necessity for modifying the principle that limits extradition seems relatively weaker.

Offense Committed Outside the Territory of the Requesting Country

The extradition treaty provides that when the requested offense for which extradition is sought has been committed outside the territory of the requesting country, extradition shall be granted if the laws of the requested country provide for the punishment of such an offense committed outside the territory of requested country.[83] Hence, even if an extraterritorial application is permissible under the Sherman Act to the offense committed outside the U.S., one cannot be extradited if the Japanese Antimonopoly Act is not applicable to an offense committed outside Japan, which is equivalent to the offense for which extradition is requested.[84]

The principle for the Japanese penal system is to punish criminals who committed a crime within its territory (territoriality principle).[85] This principle also applies to the criminal penalties in the Japanese Antimonopoly Act.[86] Therefore, at least, on its face, the Japanese Antimonopoly Act does not apply to the offense committed outside Japan. Hence, one might conclude that the extradition would not be granted where the offense for which extradition is requested has been committed outside the U.S. However, interpretation of the application of the territorial principle requires further discussion.

Despite the absence of provisions explicitly permitting application of the Antimonopoly Act to an offense committed outside Japan, there is a theory that the territoriality principle comprehends a case where not only the act, but the result, as a part of the structural elements, occurs in the territory of Japan.[87] Assuming that this theory applies to the Antimonopoly Act, it could be deemed as an offense committed within Japan where the result, "a substantial restraint of competition,"[88] occurs within Japan even if the conspiracy occurred outside Japan.[89] Thus, for example, the Antimonopoly Act would be applicable to the case where some U.S. manufacturers agree in the U.S. territory to fix the price for certain parts exported directly to Japan.[90] However, it is still unclear whether the criminal sanction in the Antimonopoly Act would be applicable to a case where some U.S. manufacturers agree in the U.S. to fix price for certain parts, and then the final products which contain those parts are exported in Japanese market.[91]

Most arguments regarding the relationship between an extradition and the offense committed outside the territory of the requesting country end at this extent. These arguments seem to assume that the allegations by the DOJ have been based on the effects doctrine and/or

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[83] 31 U.S.T. 892, art. 6, para. 1.
[84] If the offense for which extradition is requested has been committed by a citizen of the requesting country, however, this limitation would not apply; *See* 31 U.S.T. 892, art. 6, para. 1.
[85] PEN. C., art. 1.
[86] TADASHI SHIRAISHI, DOKUSEN KINSHIHŌ [ANTIMONOPOLY ACT] 638 (2nd ed. 2009)(Japan).
[87] SAEKI, *supra* note 54, at 813.
[88] Antimonopoly Act, art. 2, para. 6.
[89] Umebayashi, *supra* note 14, at 55; Isaji & Yamashita, *supra* note 39, at 27.
[90] Umebayashi, *supra* note 14, at 55; Isaji & Yamashita, *supra* note 39, at 27.
[91] Umebayashi, *supra* note 14, at 55.

the Foreign Trade Antitrust Improvement Act (FTAIA).[92] However, rather than invoking the effects doctrine and/or the FTAIA, the DOJ seems to have been applying the U.S. antitrust law to the auto parts cartels because at least some of the acts were committed on U.S. soil.[93] If that is the case, perhaps, the above arguments might not be applicable to the auto parts cases. But, it still depends on the interpretation of "the offense committed outside the territory."[94]

In any event, there has been no case whatsoever in which the JFTC applied criminal punishments to cartel cases where non-Japanese nationals colluded with others outside Japan. The JFTC so far lacks effective and practical tools, such as a plea bargaining system, to bring criminal punishments to foreign cartelists. In addition, based on the assumption that the JFTC regards administrative sanctions as enough deterrence for most cartels, it is unlikely that the JFTC would apply criminal punishments in cases where non-Japanese nationals colluded with others outside Japan, at least, in near future.[95] If that is the case, the interpretation enabling extradition in the case where the offense committed outside the requesting country – in this case, the U.S. – seems to give an option only to the U.S., but not to Japan, to extradite the requested country's nationals.[96] Even assuming that such an interpretation is theoretically possible, it seems that one could argue that the application of the interpretation would result in an unbalanced treatment between two countries unless Japanese enforcer obtain effective and practical tools to bring criminal sanctions to foreign cartelists.

Why Did They Cross the Pacific?

Based on the analyses above and the fact that there have been no reports to date that Japanese nationals were extradited for cartel offenses from Japan to the U.S., it is conceivable that extradition has not been a useful tool for the DOJ to capture Japanese cartelists who had decided to stay in Japan. Why, then, did more than twenty Japanese executives and employees in the auto parts cartels decided to serve prison terms in the U.S.?[97] There might be three plausible and independent, yet compatible, reasons for their decision.

First, uncertainty of extradition in actual cases might have driven them to their decision. Despite the hurdles the DOJ would face, as described above, and the fact that no extraditions for Japanese nationals have been reported for antitrust violations, no defense counsels could have been able to give 100 percent assurance to their client that they would not be extradited in the given cases. The complexities of interpretations regarding extradition and the lack of clear precedence in this field make it difficult to predict the outcomes of individual decisions whether or not to stay in Japan, If one had decided not to plead guilty, then had been extradited to the U.S. and had faced a trial, he would have probably received a higher sentence than he got with a plea

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[92] 15 U.S.C. 6 (a).
[93] Yasumi Ochi, *Buhin Karuteru Mondai to Nichi-Bei-Ō Dokusen Kinshihō no Ikigai Tekiyō* [*Issues on Parts Cartels and Extraterritorial Applications of Japanese, the U.S., and EU Antimonopoly Acts*] 41-11 KOKUSAI SHŌJI HŌMU [JOURNAL OF THE JAPANESE INSTITUTE OF INTERNATIONAL BUSINESS LAW] 1609, 1609-11 (2013).
[94] 31 U.S.T. 892, art. 6, para. 1.
[95] Isaji & Yamashita, *supra* note 39, at 27.
[96] *See id*. at 27-8.
[97] Conversely, six individuals who did not agree to plead guilty and were indicted in the auto parts cartels seem to have decided to stay in Japan; *See* table 2.

agreement. Individuals in the auto parts cases had to place a bet on their fortune among possible extradition and ensuing higher sentence, a failure in DOJ's extradition request to Japanese government, and probability to get a not-guilty verdict.[98] Taking these factors into account, many Japanese nationals might have decided to minimize the uncertainty of extradition and possibilities of higher sentences.

The second plausible reason for their decision might be the assurance to travel freely for business activities in the U.S. after they completed their terms of imprisonment.[99] In fact, a foreign cartelist can be excluded from the U.S. for at least fifteen years even if his conviction does not result in a jail sentence.[100] In addition, even if one chooses not to travel to the U.S. territory, he would face possible extradition if he enters or tries to enter one of the 190 member countries of the International Criminal Police Organization (INTERPOL).[101] As the DOJ has taken the position that it would "plac[e] indicted international fugitives on "Red Notice" list maintained by INTERPOL,"[102] a fugitive who is on "Red Notice" – lookout lists for people sought by a particular country – could be extradited once he is identified by one of the INTERPOL member countries.[103] As a matter of fact, a Japanese citizen who had been indicted in the U.S. for cartelizing was arrested after trying to enter India,[104] although the extradition was ultimately unsuccessful.[105] In this extent, extradition could be a possible threat to a fugitive who wants to travel outside Japan. A possible exclusion from the U.S. for at least fifteen years can also be a serious career killer especially for an international business person in his prime.[106] Recognizing these considerations, an international business person in his prime could reasonably choose to serve a short prison term in the U.S. and obtain an assurance to travel freely after his term of imprisonment.[107] Furthermore, it is said that the most defendants who agreed to plead guilty in the auto parts cartels have been imprisoned in minimum security prisons which have comparatively freer environments than higher security prisons.[108] Comparing possible extradition

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[98] Toshiaki Tada, *Teidan - Kokusai Karuteru Kisei no Saizensen* [*Three-man talks - The Frontline of International Cartel Control*], 1462 JURIST 12, 28 (Jan. 2014)(Japan)

[99] The DOJ itself acknowledged this notion, *see* Memorandum of Understanding Between the Antitrust Division United States Department of Justice and the Immigration and Naturalization Service United States Department of Justice at 1 (Mar. 15, 1996)[hereinafter Memorandum], *available at* http://www.justice.gov/atr/public/criminal/9951.pdf ("[T]he chief inducement for aliens charged with antitrust offenses to submit to U.S. jurisdiction is the ability to resume travel for business activities in the United States …."); *See also*, Isaji & Yamashita, *supra* note 39, at 23-5.

[100] Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006); 8 U.S.C. § 1182(h)(1)(A)(i) (2006); Eric Grannon & Nicolle Kownacki, Are Antitrust Violations Crimes Involving Moral Turpitude? 36-3 THE CHAMPION 40, 41 (Apr. 2012).

[101] Kimeda & Hirao, *supra* note 14, at 37; Isaji & Yamashita, *supra* note 39, at 24-5.

[102] Hammond, *supra* note 11.

[103] J. William Rowley, D. Martin Low & Omar K. Wakil, *Increasing the Bite Behind the Bark: Extradition in Antitrust Cases*, THE ANTITRUST SOURCE 1, 8 (Apr. 2007),

[104] *See* Dalip Singh, *Japanese Held*, TELEGRAPH (India), Dec. 21, 2002.

[105] Rowly, Low & Wakil, *supra* note 103.

[106] Grannon & Kownacki, *supra* note 100, at 41.

[107] Umebayashi, *supra* note 14, at 55; Isaji & Yamashita, *supra* note 39, at 24; Tetsuya Nagasawa, *Three-man talks - The Frontline of International Cartel Control*, 1462 JURIST 12, 26.

[108] Isaji & Yamashita, *supra* note 39, at 22-23; Hiroyuki Oka, *Jidōsha Buhin Karuteru ni Taisuru Nichi-Bei Tōkyoku no Sochi to Hōteki Mondaiten* [*Enforcements against the Auto Parts Cartels by Japanese and the U.S. Authorities and Legal Issues*], 41-6 JOURNAL OF THE JAPANESE INSTITUTE OF INTERNATIONAL BUSINESS LAW 811, 817-8 (2013).

by INTERPOL member states and exclusion from the U.S. for more than fifteen years with a relatively short term imprisonment in a minimum security prison, perhaps, it might not necessarily be surprising phenomenon that Japanese business persons decided to cross the Pacific and face punishment in the U.S.

The third possible reason might be the assurances of employment after the terms of imprisonment. Although no such arrangement has been found in publicly available sources so far, there could be arrangements, formally or informally, between companies and individuals that the companies would allow individuals who decided to serve prison terms in the U.S. to return to their previous companies, or, at least, related companies when they finish their terms of imprisonment.[109] However, since publicly available sources are limited until now, detail analyses in this respect still need to be developed based on further research.

Closing

As the above analyses show, it might be natural to see, until now, that the threat of extradition from Japan to the U.S. was not the main reason for the cartelists in the auto parts cartels to voluntarily surrender to the U.S. to serve their prison terms. The DOJ itself has acknowledged the difficulties in securing jurisdiction over foreign nationals by extradition.[110] In fact, a famous extradition case involving an antitrust offense was unsuccessful; the U.S. failed to extradite a British national from the UK to the U.S. based on a price-fixing charge. Ian Norris, a British national was indicted on a price-fixing charge and related obstruction-of-justice charges in the U.S.[111] His extradition based on a price-fixing charge was, however, actually rejected for lack of double criminality,[112] although he was eventually extradited to the U.S. on the obstruction-of-justice charges. Yet, the DOJ has said that it would seek extradition for alleged offenders who do not voluntarily surrender to the U.S. to cooperate with its investigations.[113] It is, in fact, said that the DOJ has indicated to defendants in the auto parts investigations that it would seek extradition unless they surrender to the U.S. jurisdiction.

If the DOJ succeeds in an antitrust extradition despite the hurdles described in this paper, it is going to be a huge game changer for U.S. cartel enforcement and the cartelists who have chosen to stay in their home countries. At the same time, when the Japanese government makes decisions on an extradition request for alleged Sherman Act violations in a given case, it should be accountable for its decision, especially when it extradites its own citizen in a case where a cartel was formed in Japan. In such a case, the JFTC and the Japanese government may seek criminal sanctions against individuals. If the JFTC and the Japanese government seek criminal sanctions, cartelists in that case cannot be extradited because of the pending criminal procedure as described above. Despite its authority and capability to use criminal sanctions against

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[109] *See* Oka, *supra* note 108 (speculating that there might be an underlying structure that the company recommends a curved out executive/employee to serve his prison term exchange for a promise that they will allow him to go back to the company, the executive/employee wants to go back to the company after his imprisonment, and the DOJ welcomes this treatment to secure foreign nationals' imprisonment).
[110] Memorandum, *supra* note 98 ("[T]he Antitrust Division generally cannot secure jurisdiction over aliens charged with antitrust offenses by extradition ….").
[111] United States v. Norris, No. 03-632 (E.D. Pa. Sept, 28, 2004)(second superseding indictment).
[112] Norris v. United States, [2008] UKHL 16.
[113] *See* Hammond, *supra* note 11.

individuals, if the JFTC does not seek criminal sanctions and the Japanese government entrusted the case to the U.S. by extraditing its own citizens, they should explain the legitimacy and the reasonableness of their decision to the public. On the other hand, when the Japanese government decides not to extradite the person sought, the JFTC should, if possible, take an appropriate action, either administrative or criminal, against the alleged violations.

Table 1: Corporate Participants with the DOJ*				
Corporate	Market/Product(s)	Conspiracy Period	Fine	Plea Agreement
Furukawa Electric Co., Ltd (Furukawa)	Wire Harnesses (WH)	1/2000-1/2010	$200 million	Plea Agreement
Yazaki Corp. (Yazaki)	(1) WH (2) Instrument Panel Clusters (Meters) (3) Fuel Senders	(1) 1/2000-2/2010 (2) 12/2002-2/2010 (3) 3/2004-2/2010	$470 million	Plea Agreement
Denso Corp. (Denso)	(1) Electronic Control Units (ECUs) (2) Heater Control Panels (HCPs)	(1) 1/2000-2/2010 (2) 1/2000-2/2010	$78 million	Plea Agreement
Fujikura Ltd. (Fujikura)	WH	1/2006-2/2010	$20 million	Plea Agreement
Autoliv Inc. (Autoliv)**	(1) Seatbelts, Airbags and Steering Wheels (2) Seatbelts	(1) 3/2006-2/2011 (2) 5/2008-2/2011	$14.5 million	Plea Agreement
TRW Deutschland Holding GmbH (TRW)***	Seatbelts, Airbags and Steering Wheels	1/2008-6/2011	$5.1 million	Plea Agreement
Tokai Rika Co., Ltd. (Tokai Rika)	(1) HCPs (2) Obstruction of Justice	(1) 9/2003-2/2010 (2) 2/2010	$17.7 million	Plea Agreement
Nippon Seiki Co., Ltd. (Nippon Seiki)	Meters	4/2008-2/2010	$1 million	Plea Agreement
G.S. Electech Inc. (G.S.)	Speed Sensor Wire Assemblies	1/2003-2/2010	$2.75 million	Plea Agreement
Diamond Electric Manufacturing Co., Ltd. (Diamond Electric)	Ignition Coils	7/2003-2/2010	$19 million	Plea Agreement
Panasonic Corp. (Panasonic)	(1) Switches (2) Steering Angle Sensors (3) Automotive High Intensity Discharge (HID) Ballasts	(1) 9/2003-2/2010 (2) 9/2003-2/2010 (3) 7/1998-2/2010	$45.8 million	Plea Agreement
Hitachi Automotive Systems Ltd. (Hitachi)	Starter Motors, Alternators, Air Flow Meters, Valve Timing Control Devices, Fuel Injection Systems, Electronic Throttle Bodies, Ignition Coils, Inverters and Motor Generators	1/2000-2/2010	$195 million	Plea Agreement
Jtekt Corp. (Jtekt)	(1) Bearing (2) Electric Powered Steering Assemblies	(1) 2000-7/2011 (2) 2005-10/2011	$103.27 million	Plea Agreement
Mitsuba Corp. (Mitsuba)	(1) Windshield Washer Systems, Windshield Wiper Systems, Starter Motors, Power Window Motors and Fan Motors (2) Obstruction of	(1) 1/2000-2/2010 (2) 2/2010	$135 million	Plea Agreement

	Justice			
Mitsubishi Electric Corp. (MELCO)	Starter Motors, Alternators and Ignition Coils	1/2000-2/2010	$190 million	Plea Agreement
Mitsubishi Heavy Industry Ltd. (Mitsubishi Heavy)	Compressors and Condensers	1/2001-2/2010	$14.5 million	Plea Agreement
NSK Ltd. (NSK)	Bearing	2000-7/2011	$68.2 million	Plea Agreement
T.RAD Co., Ltd. (TRAD)	Radiators and Automatic Transmission Fluid Warmers (ATF warmers)	11/2002-2/2010	$13.75 million	Plea Agreement
Valeo Japan Co., Ltd. (Valeo)	Air Conditioning System	4/2006-2/2010	$13.6 million	Plea Agreement
Yamashita Rubber Co., Ltd. (Yamashita)	Automotive Anti-Vibration Rubber	4/2003-5/2012	$11 million	Plea Agreement
Takata Corp. (Takata)	Seatbelts	1/2003-2/2011	$71.3 million	Plea Agreement
Toyo Tire & Rubber Co., Ltd. (Toyo)	(1)Automotive Anti-Vibration Rubber (2)Automotive Constant-velocity-joint boots	(1) 3/1996-5/2012 (2) 1/2006-9/2010	$120 million	(Plea Agreement)
Stanley Electric Co., Ltd. (Stanley)	Automotive High-intensity Discharge (HID) Lamp Ballasts	7/1998-2/2010	$1.44 million	Plea Agreement
Koito Manufacturing Co., Ltd. (Koito)	(1) Lighting Fixtures (2) HID Lamp Ballasts	(1) 6/1997-7/2011 (2) 7/1998-2/2010	$56.6 million	(Plea Agreement)
Aisan Industry Co., Ltd. (Aisan)	Electronic Throttle Bodies	10/2003-2/2010	$6.86 million	Plea Agreement
Bridgestone Corp. (Bridgestone)	Automotive Anti-Vibration Rubber	1/2001-12/2008	$425 million	(Plea Agreement)

* As of March 18, 2014.
** Autoliv is a Stockhom-based company.
*** TRW is a Germany-based subsidiary of US-based TRW Automotive Holdings Corp.
**** "Plea Agreement" with parenthesis indicates that the actual plea agreement was not yet found in the DOJ website.

Table 2: Individual Participants with the DOJ*				
Individual	Market/Product(s)	Prison Time	Fine	Plea Agreement
J. F. (Furukawa)	WH	1 year & 1 day	$20,000	Plea Agreement
H. N. (Furukawa)	WH	15 months	$20,000	Plea Agreement
T. U. (Furukawa)	WH	18 months	$20,000	Plea Agreement
T. H. (Yazaki)	WH	2 years	$20,000	Plea Agreement
R. K. (Yazaki)	WH	2 years	$20,000	Plea Agreement
S. O. (Yazaki)	WH	15 months	$20,000	Plea Agreement
H. T. (Yazaki)	WH	15 months	$20,000	Plea Agreement
K. K. (Yazaki)	WH	14 months	$20,000	Plea Agreement
T. S. (Yazaki)	Meters	14 months	$20,000	Plea Agreement
N. I. (Denso)	HCPs	1 year & 1 day	$20,000	Plea Agreement
M. H. (Denso)	HCPs	14 months	$20,000	Plea Agreement
Y. S. (Denso)	(1) ECUs (2) HCPs	16 months	$20,000	Plea Agreement
H. W. (Denso)	HCPs	15 months	$20,000	Plea Agreement
K. F. (Denso)	Obstruction of Justice	1 year & 1 day		(Plea Agreement)
H. Y. (Ohio subsidiary of a Japanese automotive supplier)	Automotive Anti-Vibration Rubber	1 year & 1 day	$20,000	(Plea Agreement)
T. M. (Autoliv)	Seatbelts	1 year & 1 day	$20,000	Plea Agreement
S. O. (G.S.)	Speed Sensor Wire Assemblies			Indicted
R. F. (Fujikura)	WH			Indicted
T. N. (Fujikura)	WH			Indicted
S. K. (Panasonic)	Switches and Steering Angle Sensors			Indicted
T. K. (U.S. subsidiary of a Japan-based automotive anti-vibration rubber product supplier)	Automotive Anti-Vibration Rubber	1 year and 1 day	$20,000	(Plea Agreement)
G. W. ** (U.S. subsidiary of a Japan-based automotive products supplier)	Seatbelts	14 months	$20,000	Plea Agreement
Y. U. (Takata)	Seatbelts	19 months	$20,000	(Plea Agreement)
S. I. (Takata)	Seatbelts	16 months	$20,000	(Plea Agreement)
Y. F. (Takata)	Seatbelts	14 months	$20,000	(Plea Agreement)
M. H. (Japanese automotive supplier)	Automotive Anti-Vibration Rubber			Indicted
K. N. (Japanese automotive supplier)	Automotive Anti-Vibration Rubber			Indicted
S. I. (Diamond Electric)	Ignition Coils	16 months	$5,000	(Plea Agreement)
T. I. (Diamond Electric)	Ignition Coils	13 months	$5,000	(Plea Agreement)

* As of March 18, 2014.
** G.W. is a U.S. citizen.
*** "Plea Agreement" with parenthesis indicates that the actual plea agreement was not yet found in the DOJ website.

In the

United States Court of Appeals

For the Seventh Circuit

No. 14-8003

MOTOROLA MOBILITY LLC,

Plaintiff-Appellant,

v.

AU OPTRONICS CORP., *et al*.,

Defendants-Appellees.

Petition for Leave to Take an Interlocutory Appeal from the
United States District Court for the Northern District of Illinois,
Eastern Division.
No. 09 C 6610 — **Joan B. Gottschall**, *Judge*.

SUBMITTED MARCH 13, 2014 — DECIDED MARCH 27, 2014

Before POSNER, KANNE, and ROVNER, *Circuit Judges*.

POSNER, *Circuit Judge*. This case is before us on the plaintiff's unopposed petition for leave to take an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), from an order that the district judge has certified for an immediate appeal. We grant the petition for reasons explained below; and because the petition and the defendants' response, together with the district judge's opinion explaining her order and the record in the district court, provide an ample basis for deciding the

appeal, we dispense with further briefing and with oral argument.

Motorola and its foreign subsidiaries buy liquid-crystal display (LCD) panels and incorporate them into cellphones manufactured by either the parent or the subsidiaries. The suit accuses several foreign manufacturers of the panels of having violated section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing on the prices to charge for them. Only about 1 percent of the panels were bought by, and delivered to, Motorola in the United States; the other 99 percent were bought by, paid for, and delivered to its foreign subsidiaries (mainly Chinese and Singaporean). Forty-two percent of all the panels were bought by the subsidiaries and incorporated by them into products that were then shipped to Motorola in the United States for resale by Motorola (which did none of the manufacturing). Another 57 percent of the panels were also bought by the subsidiaries, but were incorporated into products that were sold abroad as well (42 percent plus 57 percent plus 1 percent equals 100 percent of the allegedly price-fixed panels). The 57 percent never entered the United States, so never became domestic commerce. See 15 U.S.C. §§ 6a, 6a(1)(A). And so, as we're about to see, they can't possibly support the Sherman Act claim.

Motorola says that it "purchased over $5 billion worth of LCD panels from cartel members [i.e., the defendants] for use in its mobile devices." That is incorrect. All but 1 percent of the purchases were made by Motorola's foreign subsidiaries, which are not plaintiffs in this litigation.

In response to a motion for partial summary judgment by the defendants, the district judge ruled that Motorola's claim regarding the 42 percent (plus the 57 percent, but we'll ig-

nore that, as a frivolous element of Motorola's claim) is barred by 15 U.S.C. § 6a(1)(A), a provision of the Foreign Trade Antitrust Improvements Act that says that the Sherman Act (only section 1 of that Act, but to simplify our opinion we'll now drop that qualification) "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations," and also, in either case, unless the "effect gives rise to a claim" under federal antitrust law. See, e.g., *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161–62 (2004); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 853–54 (7th Cir. 2012) (en banc).

We agree with the district judge and the parties that in the language of section 1292(b) the judge's order presents "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Motorola's antitrust suit against the defendants, now in its fifth year, is a complicated affair. If 99 percent of the transactions on which the suit is based can be eliminated from the litigation at a stroke (the 42 percent at issue in this appeal plus the 57 percent clearly barred by the Foreign Trade Antitrust Improvements Act from challenge under the Sherman Act) before the litigation moves into high gear, there will be a considerable economy. Although as we're about to explain we think the district judge's ruling correct, there is room for a difference of opinion, as evidenced by the fact that the judge presiding at the multidistrict-litigation phase of the proceeding had ruled

for Motorola on the issue of the Sherman Act's applicability to the 42 percent. So, as in *Minn-Chem, Inc. v. Agrium, Inc.*, *supra*, 683 F.3d at 848, which also involved an interlocutory appeal presenting issues under the Foreign Trade Antitrust Improvements Act, Motorola's appeal is properly before us and we proceed to the merits.

If the defendants conspired to sell LCD panels to Motorola in the United States at inflated prices, they would be subject to the Sherman Act because of the foreign trade act's exception for importing. That is the 1 percent, which is not involved in the appeal. Regarding the 42 percent, Motorola must show that the defendants' price fixing of the panels that they sold abroad and that became components of cellphones imported by Motorola had "a direct, substantial, and reasonably foreseeable effect" on commerce within the United States. There was (assuming price fixing is proved) doubtless *some* effect; and it was foreseen by the defendants if they knew that Motorola's foreign subsidiaries intended to incorporate some of the panels into products that they would sell to Motorola in the United States. And who knows what "substantial" means in this context? But what is missing from Motorola's case is a "direct" effect. The effect is indirect—or "remote," the term used in *Minn-Chem, Inc. v. Agrium, Inc.*, *supra*, 683 F.3d at 856–57, to denote the kind of effect that the statutory requirement of directness excludes.

The alleged price fixers are not selling the panels in the United States. They are selling them abroad to foreign companies (the Motorola subsidiaries) that incorporate them into products that are then exported to the United States for resale by the parent. The effect of component price fixing on the price of the product of which it is a component is

indirect, compared to the situation in *Minn-Chem*, where "foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) *sold that product to U.S. customers*." *Id*. at 860 (emphasis added). It is closer to the situation in which we said the foreign trade act would block liability under the Sherman Act: the "situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States." *Id*.

Motorola contends, and at this stage in the litigation we must assume the truth of the contention, that it determined what the subsidiaries paid for the LCD panels. It must have thought the price okay, or it wouldn't have let the subsidiaries pay it. It may or may not have known that it was a cartel price. But we cannot see what difference any of this makes. Suppose Motorola had bought the panels from the defendants outright, then resold the panels to its foreign subsidiaries, which used them in manufacturing cellphones that they then exported to the United States. The effect on prices in the United States would be the same as if the foreign subsidiaries had negotiated the price charged by the alleged cartel to Motorola, because the price would be the same—it would be the cartel price. And so the (indirect) effect on U.S. domestic commerce (the sale of the cellphones in the United States) would be the same.

Motorola's claim is upended by another—and independent—requirement that must be satisfied for the statutory exemption in 15 U.S.C. § 6a(1)(A) to apply: the "effect" of the defendants' practice on domestic U.S. commerce must "give[] rise to" an antitrust claim. The effect

of the alleged price fixing on that commerce in this case is mediated by Motorola's decision on what price to charge U.S. consumers for the cellphones manufactured abroad that are alleged to have contained a price-fixed component. No one supposes that Motorola could be sued by its U.S. customers for an antitrust offense merely because the prices it charges for devices that include such components may be higher than they would be were it not for the price fixing. (We say may be, not would be, because Motorola's ability to pass on the higher price to consumers would depend on competition from other cellphones and on consumer demand for cellphones.) So the effect in the United States of the price fixing could not give rise to an antitrust claim. Motorola's claim against the defendants is based not on any illegality in the prices Motorola charges (in which event Motorola would be suing itself, as in William Gaddis's novel satirizing law, *A Frolic of His Own* (1994)), but rather on the effect of the alleged price fixing on Motorola's foreign subsidiaries. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, *supra*, 542 U.S. at 173–74. And as we said in the *Minn-Chem* case, "U.S. antitrust laws are not to be used for injury to foreign customers." 683 F.3d at 858. The subsidiaries are "foreign customers," being fully subject to the laws of the countries in which they are incorporated and operate—and "a corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties." *Disenos Artisticos E Industriales, S.A. v. Costco Wholesale Corp.*, 97 F.3d 377, 380 (9th Cir. 1996).

Furthermore, derivative injury rarely gives rise to a claim under antitrust law, especially a claim by the owner of or an

investor in the company that sustained the direct injury. *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 877 F.2d 1333, 1335–36 (7th Cir. 1989). Such a claim would be redundant, because if the direct victim received full compensation there would be no injury to the owner or investor—he or it would be as well off as if the antitrust violation had never occurred. If Motorola's foreign subsidiaries have been injured by violations of the antitrust laws in the countries in which they do business, they have remedies; if the remedies are inadequate, or if the countries don't have or don't enforce antitrust laws, these were risks that the subsidiaries (and hence Motorola) assumed by deciding to do business in those countries. What they didn't have if they overpaid was a claim under the Sherman Act; no more does their parent.

But we don't want to rest our decision entirely on the statutory language (the requirement of a "direct effect" on domestic commerce and the separate requirement that that "effect" give rise to a Sherman Act claim), without considering the practical stakes in the expansive interpretation urged by Motorola. The stakes are large and cut strongly against its position. Nothing is more common nowadays than for products imported to the United States to include components that the producers had bought from foreign manufacturers. See Gregory Tassey, "Competing in Advanced Manufacturing: The Need for Improved Growth Models and Policies," *Journal of Economic Perspectives*, vol. 28, no. 1, p. 27, 31–35 (Winter 2014); Dick K. Nanto, "Globalized Supply Chains and U.S. Policy" 4–10 (Congressional Research Service, CRS Report for Congress, Jan. 27, 2010), http://assets.opencrs.com/rpts/R40167_20100127.pdf (visited March 26, 2014). Motorola itself acknowledges "that a sub-

stantial percentage of U.S. manufacturers utilize global supply chains and foreign subsidiaries to effectively compete in the global economy." Many foreign manufacturers are located in countries that do not have or, more commonly, do not enforce antitrust laws, or whose antitrust laws are far more lenient than ours, especially when it comes to remedies. As a result, the prices of many products exported to the United States are elevated to some extent by price fixing or other anticompetitive acts that would be forbidden by the Sherman Act if committed in the United States. Motorola argues that "the district court's ruling would allow foreign cartelists to come to the United States" and "unfairly overcharge U.S. manufacturers." Not true; the defendants did not sell in the United States and, if they were overcharging, they were overcharging other foreign manufacturers—the Motorola subsidiaries.

The Supreme Court has warned that rampant extraterritorial application of U.S. law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, *supra*, 542 U.S. at 165. The Foreign Trade Antitrust Improvements Act was intended to prevent such "unreasonable interference with the sovereign authority of other nations." *Id*. at 164. The position for which Motorola contends would if adopted enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and "resent[ment at] the apparent effort of the United States to act as the world's competition police officer," a primary concern motivating the foreign trade act. *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 960–62 (7th Cir. 2003) (en banc) (dissenting opinion), over-

ruled on other grounds by *Minn-Chem, Inc. v. Agrium, Inc., supra*. It is a concern to which Motorola is oblivious.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC, Plaintiff-Appellant, v. AU OPTRONICS CORP., et al., Defendants-Appellees.	)))))))))))	No. 14-8003 On Interlocutory Appeal from an Order of the United States District Court for the Northern District of Illinois Case No. 09-cv-6610 (The Honorable Joan B. Gottschall)

UNOPPOSED MOTION OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION FOR LEAVE TO FILE THE ATTACHED AMICUS BRIEF IN SUPPORT OF PANEL REHEARING OR REHEARING *EN BANC*

The United States and the Federal Trade Commission respectfully move for leave to file the attached amicus brief in support of panel rehearing or rehearing *en banc* under Federal Rule of Appellate Procedure 29(a) and Seventh Circuit Rule 35. This case raises important issues regarding the proper interpretation of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). The United States and the Federal Trade Commission enforce the federal antitrust laws and have a strong interest in the correct interpretation of the FTAIA.

In this case, Motorola Mobility LLC has alleged a global conspiracy to fix the price of LCD panels incorporated into cellphones and other popular consumer devices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. On March 27, 2014, a three-judge panel of this Court granted Motorola's petition for interlocutory appeal and simultaneously rendered a decision concluding that the FTAIA bars Motorola's claims

for damages based on overcharges on LCD panels that were delivered to its foreign subsidiaries abroad for incorporation into cellphones sold in the United States.

The panel did not have the benefit of the government's views before rendering its decision. The United States and the Federal Trade Commission believe that the attached amicus brief setting forth the government's views would be of substantial assistance to the Court.

On April 23, 2014, the United States asked counsel for the parties what their position would be on a motion for leave to file a government amicus brief in support of panel rehearing or rehearing *en banc*. Thomas Goldstein informed the government that Motorola consents. Derek Ludwin informed the government that he is authorized to represent that defendants-appellees do not oppose the motion and that, because they have not yet seen the motion for leave, they have not yet determined whether they intend to a file a response to the motion.

The government will file 30 copies of the amicus brief should the Court grant the motion.

Respectfully submitted,

April 24, 2014

/s/ Nickolai G. Levin
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC,	)	No. 14-8003
Plaintiff-Appellant,	)	On Interlocutory Appeal from an Order of the United States District Court for the Northern District of Illinois
v.	)	
AU OPTRONICS CORP., et al.,	)	
Defendants-Appellees.	)	Case No. 09-cv-6610 (The Honorable Joan B. Gottschall)

DECLARATION

I, Nickolai G. Levin, a member of the Bar of the District of Columbia, declare as follows:

1. The United States and the Federal Trade Commission enforce the federal antitrust laws.

2. The United States and the Federal Trade Commission have a strong interest in the proper interpretation of the Foreign Trade Antitrust Improvements Act of 1982.

3. On April 23, 2014, I asked counsel for the parties what their position would be on a motion for leave to file a government amicus brief in support of panel rehearing or rehearing *en banc*. Thomas Goldstein informed the government that Motorola consents. Derek Ludwin informed the government that he is authorized to represent that defendants-appellees do not oppose the motion and that, because they have not yet seen the motion for leave, they have not yet determined whether they intend to a file a response to the motion.

I affirm under penalties of perjury that the foregoing is true and correct pursuant to 28 U.S.C. § 1746.

April 24, 2014

/s/ Nickolai G. Levin
Nickolai G. Levin

CERTIFICATE OF SERVICE

I, Nickolai G. Levin, certify that on April 24, 2014, I electronically filed the foregoing Unopposed Motion of the United States and the Federal Trade Commission for Leave To File an Amicus Brief in Support of Panel Rehearing or Rehearing *En Banc* and supporting declaration with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. If the motion is granted, I will send 30 copies of the attached amicus brief to the Clerk of the Court by FedEx.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

April 24, 2014

/s/ Nickolai G. Levin
Nickolai G. Levin

No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC,

Plaintiff-Appellant,

AU OPTRONICS CORP., et al.,

Defendants-Appellees.

On Interlocutory Appeal from an Order of the
United States District Court for the Northern District of Illinois
Case No. 09-cv-6610 (The Honorable Joan B. Gottschall)

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF PANEL REHEARING OR REHEARING *EN BANC*

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STATEMENT OF INTEREST

The United States and the Federal Trade Commission enforce the federal antitrust laws and have a strong interest in the correct interpretation of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which added Section 6a to the Sherman Act, 15 U.S.C. § 6a. Section 6a makes the Sherman Act's other sections inapplicable to conduct involving export or wholly foreign commerce except when that conduct (i) has a "direct, substantial, and reasonably foreseeable effect" on certain U.S. commerce and (ii) that effect "gives rise to a claim." The FTAIA also added Section 5(a)(3) to the FTC Act, 15 U.S.C. § 45(a)(3), which closely parallels Section 6a. This amicus brief addresses both prongs of the effects exception, and is submitted pursuant to Federal Rule of Appellate Procedure 29(a) and Seventh Circuit Rule 35.

STATEMENT OF ISSUES

1. Whether the panel erred in holding that fixing the price of a component sold abroad cannot have a direct effect on U.S. domestic or import commerce in products incorporating the component.

2. Whether the panel erred in holding that such an effect cannot give rise to an antitrust claim in the United States.

STATEMENT

This case involves a global conspiracy to fix the price of LCD panels incorporated into cellphones and other popular consumer devices. Without the benefit of briefing by the parties and amici or oral argument, the panel affirmed summary judgment on a basis neither advanced by the parties nor adopted by either of the district courts that ruled on summary judgment. The panel held that Section 6a precludes any antitrust

claims for price fixing of products sold abroad, no matter how massively and predictably U.S. consumers were harmed. The panel decision should be vacated.

1. Section 1 of the Sherman Act is a criminal statute that outlaws agreements "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. This includes conspiracies among competitors to fix prices, which are criminally prosecuted as felonies. In addition to criminal prosecutions, the government can "institute proceedings in equity to prevent and restrain [Section 1] violations." *Id.* § 4. Also, "any person" who is "injured . . . by reason of" a violation can seek treble damages, *id.* § 15, and "any person" can seek "injunctive relief . . . against threatened loss or damage by a violation," *id.* § 26.

Congress enacted the Foreign Trade Antitrust Improvements Act of 1982, which added Section 6a to the Sherman Act, with the express purpose to "increase United States exports of products and services," Pub. L. No. 97-290, § 102(b), 96 Stat. 1233, 1234. Section 6a provides that:

> Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a; *see also* 15 U.S.C. § 45(a)(3) (FTAIA addition to the FTC Act).

Section 6a "seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements . . . however anticompetitive, as long as those arrangements adversely affect only foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004). Congress also sought to ensure that purchasers in the United States remained fully protected by the federal antitrust laws. Accordingly, conduct involving "[i]mport trade and commerce are excluded at the outset from the coverage of the FTAIA in the same way that domestic interstate commerce is excluded." *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 854 (7th Cir. 2012) (*en banc*). And the FTAIA leaves conduct involving export or wholly foreign commerce inside the Sherman Act's reach when "the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the 'effect' must 'giv[e] rise to a [Sherman Act] claim.'" *Empagran*, 542 U.S. at 162 (quoting 15 U.S.C. §§ 6a(1), (2)).

2. Motorola Mobility Inc. (Motorola) filed suit against foreign makers of LCD panels in the Northern District of Illinois, alleging that defendants violated Section 1 of the Sherman Act by conspiring to fix the price of LCD panels world-wide from 1996 to 2006. Motorola alleged that the conspiracy not only raised prices on LCD panels but also led to increased prices on cellphones and other products in which the panels were incorporated, many of which were "specifically destined for sale and use in the United States." 07-1827 N.D. Cal. Dkt. 3173, at 52.

Motorola sought damages for overcharges based on three categories of price-fixed panels: (I) LCD panels purchased by Motorola that were delivered to it in the United

States, (II) LCD panels purchased by Motorola's foreign subsidiaries and delivered to them outside the United States, where they were incorporated into cellphones later sold in the United States, and (III) LCD panels purchased by the foreign subsidiaries and delivered to them outside the United States, where they were incorporated into cellphones later sold in foreign countries.

The case was transferred to the Northern District of California for pretrial proceedings as part of multi-district litigation. Defendants moved for partial summary judgment, arguing that Section 6a barred Motorola's Category II and III damages claims. The MDL Court denied the motion, holding that the evidence of price-fixing conduct in the United States sufficiently established that the conduct had a direct, substantial, and reasonably foreseeable effect on U.S. commerce, which gave rise to Motorola's claims. 07-1827 N.D. Cal. Dkt. 6422, at 5.

The case was remanded to the Northern District of Illinois for trial. Defendants sought reconsideration of the MDL Court's denial of partial summary judgment, arguing *only* that any effect the price-fixing conspiracy had on U.S. commerce did not give rise to Motorola's Category II and III claims so they are barred by Section 6a. 09-6610 N.D. Ill. Dkt. 182, at 15. The district court granted the motion. It assumed that the conspiracy had a direct effect on U.S. commerce, but held that this effect did not give rise to the claims at issue because Motorola had not shown that these injuries were proximately caused by the domestic effect rather than by the price fixing itself. *Id.* at 17. The court also held that even if "Motorola's domestic approval of the prices that its foreign affiliates paid [were] an effect that gave rise to its Sherman Act claims," that effect would not be "a 'substantial' effect on American domestic or import commerce." *Id.* at 18.

3. On March 13, 2014, Motorola filed an uncontested petition for interlocutory appeal. On March 27, a panel of this Court (Judges Posner, Kanne, and Rovner) granted the petition. While recognizing that this was a "complicated" case with "room for a difference of opinion," the panel nevertheless "dispense[d] with further briefing and with oral argument" and affirmed the summary judgment order. Op. 2-3. The panel concluded that Section 6a applied to Motorola's Category II and III claims and that they did not meet the requirements of the effects exception.[1] The panel deemed "frivolous" the Category III claims seeking damages based on price-fixed panels incorporated into cellphones sold in foreign countries, because those panels "never entered the United States, so never became domestic commerce." *Id*.

For the Category II claims seeking damages based on panels incorporated into cellphones sold in the United States, the panel acknowledged that, if the price fixing were proved, there was "doubtless *some* effect" on U.S. commerce in cellphones, and this effect was foreseeable. Op. 4. "And who knows what 'substantial' means in this context?" *Id*. Nevertheless, the panel held that the "effect" was "indirect—or 'remote,' the term used in *Minn-Chem*." *Id*. "The effect of component price fixing on the price of the product of which it is a component is indirect, compared to the situation in *Minn-Chem*, where 'foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) *sold that product to U.S. customers*.'" *Id*. at 4-5 (quoting *Minn-Chem*, 683 F.3d at 860; emphasis added by panel).

[1] The panel noted that Section 6a would not apply (and thus Section 1 would apply) to Motorola's Category I claims seeking damages based on LCD panels sold to Motorola in the United States, because they are within Section 6a's import commerce exclusion, but that these claims are not involved in this appeal. Op. 4.

The panel further held that the Category II claims also failed the effects exception's requirement that the effect on U.S. commerce "give[s] rise to" an antitrust claim. Op. 5. The conspiracy's effect on domestic commerce in cellphones "is mediated by Motorola's decision on what price to charge U.S. consumers for the cellphones manufactured abroad" that contain price-fixed LCD panels. *Id.* at 6. Motorola could not be "sued by its U.S. customers for an antitrust offense merely because the prices it charges for devices that include such components may be higher than they would be were it not for the price fixing," nor could Motorola sue itself. *Id.* Thus, "the effect in the United States of the price fixing could not give rise to an antitrust claim." *Id.*

The panel also rested its decision on "practical" considerations apart from the statutory language. Op. 7. In its view, allowing the Category II claims would "enormously increase the global reach of the Sherman Act," "creating friction with many foreign countries." *Id.* at 8.

ARGUMENT

Defendants' motion for reconsideration raised a single issue: whether the effect on U.S. commerce gave rise to Motorola's Category II and III claims. 09-6610 N.D. Ill. Dkt. 182, at 15. The panel, however, held Motorola's claims deficient on a separate, broader basis: that a conspiracy to fix the price of a component cannot have a direct effect on domestic or import commerce in the products incorporating that component as a matter of law. The panel thus limited the application of a federal criminal statute on a basis not found in the decision under review or addressed by the parties in their briefing in this Court or in the court below. The panel also did not have the benefit of views from the government or other affected amici.

Rehearing or rehearing *en banc* is necessary because the panel decision conflicts with *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 853-54 (7th Cir. 2012) (*en banc*), and other Circuit precedent, and raises exceptionally important questions about the reach of the Sherman Act. The panel decision should be vacated because its resolution of these questions threatens the ability of government law enforcement and private actions to prevent and redress massive harm to U.S. consumers.

I. The Panel's View Of The Effects Exception's Directness Requirement Conflicts With *Minn-Chem* And Other Circuit Precedent

"Congress' foremost concern in passing the antitrust laws was the protection of Americans." *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314 (1978). When adding the FTAIA to the antitrust laws, Congress "preserv[ed] antitrust protections in the domestic marketplace for all purchasers." H.R. Rep. No. 97-686, at 10 (1982), *reprinted* in 1982 U.S.C.C.A.N. 2487, 2495. Thus, Section 6a leaves the Sherman Act applicable to anticompetitive conduct involving U.S. domestic or import commerce, and to conduct involving U.S. export commerce and wholly foreign commerce when that conduct harms U.S. domestic or import commerce (or certain export commerce).

In *Minn-Chem*, the *en banc* Court rejected the idea that an effect on U.S. commerce is "direct" only "if it follows 'as an immediate consequence' of the defendant's activity." 683 F.3d at 857. As the Court explained, "[s]uperimposing the idea of 'immediate consequence' on top of the full [integrated] phrase ['direct, substantial, and reasonably foreseeable'] results in a stricter test than the complete text of the statute can bear." *Id.* Moreover, demanding an "'immediate' consequence on import or domestic commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage." *Id.* The Court was thus "persuaded that the

Department of Justice's approach"—that "'direct'" means only "a reasonably proximate causal nexus"—"is more consistent with the language of the statute" and properly "addresses the classic concern about remoteness," excluding "from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce." *Id.*

The panel purported to apply *Minn-Chem*, but its decision undercuts *Minn-Chem*'s holding by declaring the effects here too "remote." Op. 4-5. The panel found significant that, unlike in *Minn-Chem*, the defendants here did not sell the Category II panels directly "*to U.S. customers*." *Id.* (quoting *Minn-Chem*, 683 F.3d at 860; emphasis added by panel). But when a foreign cartel fixes the price of goods sold directly to U.S. customers, the import commerce exclusion applies. *See Minn-Chem*, 683 F.3d at 854-55 (the import commerce exclusion applies to goods "being sent directly into the United States," i.e., "pure import commerce"). Limiting the effects exception to direct sales to U.S. customers would render the exception "superfluous . . . or insignificant," violating a "cardinal principle" of statutory interpretation. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

In applying the effects exception, this Court has recognized that "domestic and foreign markets are interrelated and influence each other." *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836, 842 (7th Cir. 2003). Congress created the effects exception because it understood that conduct involving wholly foreign commerce can have significant anticompetitive effects on U.S. domestic or import commerce and wanted that conduct to remain subject to the Sherman Act's protections. *Cf. id.* (holding that the effects exception applied to claims brought by a foreign plaintiff involving its purchase of copper futures contracts on the London Metals Exchange).

To be sure, some effects on U.S. commerce would be indirect or too remote. For instance, the effect would not be direct where the causal connection between the conduct and the U.S. effect is "so attenuated that the consequence is more aptly described as mere fortuity," *Paroline v. United States*, No. 12-8561, Slip. Op. 7 (U.S. Apr. 23, 2014). *Cf.* 1B Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272f2, at 295-96 (4th ed. 2013) (the "higher local price for electricity" outside the United States caused by "an agreement among non-American producers in Africa" to raise the price of electrical transformers would cause U.S. exporters to export "fewer electricity-using machines," but "obvious[ly]" that effect would not put the agreement in "the Sherman Act's reach"). But the existence of several steps in the causal chain does not alone render an effect indirect or too remote. In *Loeb Industries v. Sumitomo Corp.*, 306 F.3d 469 (7th Cir. 2002), this Court held the injury of copper wire producers was "direct" because it was not too remote from unlawful activity in the copper futures market. *Id.* at 486-89.

Similarly, injuries to indirect purchasers are not too remote, even when they are several steps removed from the antitrust defendant in the chain of distribution. *See In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 399-401 (3d Cir. 2000). While *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), would ordinarily bar indirect purchasers from recovering damages for these injuries, such indirect purchasers can seek injunctive relief. *Warfarin Sodium*, 214 F.3d at 399-400; *see also U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 627 (7th Cir. 2003) (*Illinois Brick*'s "direct-purchaser doctrine does not foreclose equitable relief").

In the decision under review in *Illinois Brick*, this Court had held that a downstream (indirect) purchaser's injury based on passed-on overcharges is not too remote, *Illinois v. Ampress Brick Co.*, 536 F.2d 1163, 1164-66 (7th Cir. 1976), and the Supreme Court

specifically declined to disturb that holding, *see Illinois Brick*, 431 U.S. at 728 n.7. This conclusion—that downstream injuries are not too remote—comports with classical principles of proximate causation: "The test is not to be found in any arbitrary number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injury." 1 J.G. Sutherland & John R. Berryman, *A Treatise on the Law of Damages* 35-36, 77 (2d ed. 1893)

Applying these principles to the record, the conspiracy's effect on U.S. commerce in cellphones is direct. The natural and probable consequence of increasing the price of a critical and substantial component like LCD panels is an increase in the price of cellphones. Nor does the effect become speculative or uncertain because it is "mediated" by Motorola's decision on what price to charge for its cellphones. Op. 6. There is evidence that the overcharges on the price-fixed panels have been passed on to cellphone purchasers in the United States. *See, e.g.*, 07-1827 N.D. Cal. Dkt. 7843-4, ¶ 451, at 196-97. Thus, the "effect of defendants' anticompetitive conduct did not change significantly between the beginning of the process (overcharges for LCD panels) and the end (overcharges for [cellphones incorporating those panels])," and it "'proceeded without deviation or interruption' from the LCD manufacturer to the American retail store." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011). This is why the effect on U.S. commerce in cellphones is "doubtless" (Op. 4).

Unless vacated, the panel's narrow view of the statutory term "direct" is likely to constrain the government's ability to effectively prosecute cartels that substantially and intentionally harm U.S. commerce and consumers, as well as prevent those injured in the United States from redressing that harm. "Nothing is more common nowadays than for products imported to the United States to include components that the producers

had bought from foreign manufacturers." Op. 7. Anticompetitive conduct involving those component purchases often causes significant harm in the downstream consumer markets. *See, e.g.*, 1B Areeda & Hovenkamp, *Antitrust Law* ¶ 272i1, at 309 ("Many, perhaps most, restraints are on 'intermediate' goods," but effects "that occur in upstream markets quickly filter into consumer markets as well.").

Lastly, the "practical" considerations cited by the panel, including the need to avoid "friction with many foreign countries," Op. 7-8, do not support its view that the Sherman Act cannot apply here. Congress "deliberately" phrased Section 6a to "include commerce that . . . was wholly foreign," *Empagran*, 542 U.S. at 163, leaving the Sherman Act applicable to conduct involving such commerce when it sufficiently affects U.S. domestic or import commerce. It has been well-established since Judge Hand's opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796 (1993); *see Minn-Chem*, 683 F.3d at 855. When enacting the FTAIA, Congress was thus fully aware that "America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs," *Empagran*, 542 U.S. at 165, but nonetheless determined that application of those laws was reasonable when it redressed domestic harm, because of the United States' interest in protecting U.S. consumers from anticompetitive conduct.

That congressional determination "avoid[s] unreasonable interference with the sovereign authority of other nations" because it is consistent with principles of prescriptive comity. *Id.* at 164. While "comity counsel[s] against" applying U.S. antitrust laws to foreign conduct causing only foreign injuries, the situation is different "where

that conduct also causes domestic harm." *Id.* at 166, 169. Our "courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Id.* at 165. Indeed, the "extraterritorial application of antitrust laws on the basis of the effects doctrine is by now widely accepted" around the world. Florian Wagner-von Papp, *Competition Law and Extraterritoriality*, in *Research Handbook on International Competition Law* 21, 57 (Ariel Ezrachi ed. 2012).

The panel also was incorrect to suggest that finding the effects on U.S. commerce in this case to be "direct" would "enormously increase the global reach of the Sherman Act." Op. 8. It is a "well-established principle that the U.S. antitrust laws reach foreign conduct that harms U.S. commerce." *Minn-Chem*, 683 F.3d at 858; *cf. United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) ("the case law now conclusively establishes [that the Sherman Act authorizes antitrust actions] predicated on wholly foreign conduct which has an intended and substantial effect in the United States"). "When an international cartel has effects both within and without our borders, American law applies to at least the domestic effects." *United States v. Leija-Sanchez*, 602 F.3d 797, 801 (7th Cir. 2010). As this Court noted in *Minn-Chem*, it is important for our courts to protect U.S. consumers from foreign price-fixing conspiracies because the price fixers' host countries "often have no incentive" to enforce their antitrust laws because they "would logically be pleased to reap economic rents from other countries" whose consumers ultimately bear the burden of the inflated prices. 683 F.3d at 860.

Holding that the effect on U.S. cellphone purchasers is direct would not open U.S. courts to damages claims from plaintiffs around the world. *Empagran* specifically holds

that even if the first prong of the effects exception is satisfied and the government or domestic purchasers could bring an antitrust claim, foreign plaintiffs could not recover damages for their independently caused foreign harm. *See* 542 U.S. at 173-75. This is so because Section 6a's effects exception separately requires that the direct effect on U.S. commerce gives rise to the plaintiff's claim. *Id*. This "independent" requirement (Op. 5) "will protect many a foreign defendant." *Minn-Chem*, 683 F.3d at 858.

Indeed, resolving a case on the basis of the second prong of the effects exception—the "gives rise to" requirement—does not threaten the government's ability to prevent anticompetitive harm like the panel's holding on the first prong does. The second prong is claim-specific and thus tailored to the particular injury for which a particular plaintiff seeks redress. For the reasons explained above, the record establishes a "direct" effect on U.S. commerce in cellphones causing harm to many U.S. consumers that Congress intended to be redressable under the Sherman Act. Whether Motorola's Category II claims are an appropriate means of doing so is a separate question which the panel failed to analyze properly.

II. Whether The Effect On U.S. Commerce Gives Rise To Motorola's Claims Warrants Further Briefing And Argument

Even if the anticompetitive conduct has a direct, substantial, and reasonably foreseeable effect on U.S. domestic, import, or certain export commerce, Section 6a's effects exception applies to a particular plaintiff's claim only when "such effect gives rise to a claim." 15 U.S.C. § 6a(2). And not any claim will do; it must be "the 'plaintiff's claim' or 'the claim at issue.'" *Empagran*, 542 U.S. at 174-75. This requires "a direct causal relationship, that is, proximate causation," between the conduct's effects on U.S. commerce and the plaintiff's injury. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417

F.3d 1267, 1271 (D.C. Cir. 2005); *accord In re Dynamic Random Access Memory Antitrust Litig.*, 546 F.3d 981, 988 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007). As a result, the Sherman Act "can apply and not apply to the same conduct" depending on the connection of the particular plaintiff's injury to the requisite effect. *Empagran*, 542 U.S. at 173-74.

Here, the panel concluded that Motorola's Category II claims were "upended by" the "give[] rise to" requirement. Op. 5. But the panel mistakenly believed that "the effect in the United States of the price fixing [in this case] could not give rise to an antitrust claim" by anyone for any reason. Op. 6. The panel thus never addressed the pertinent question of whether there is a close causal connection between the effect on U.S. commerce and Motorola's injuries.

While the panel correctly observed that U.S. consumers cannot sue a device manufacturer for incorporating a price-fixed component—even if incorporation of that component caused the price of the device to increase—and that the manufacturer could not sue itself, Op. 6, those observations are beside the point. Regardless of whether U.S. consumers can sue *the device manufacturer* (here, Motorola), they clearly can sue *the conspirators* (here, the LCD makers) at least for injunctive relief "against threatened loss or damage." 15 U.S.C. § 26.[2] The government also has ample authority to seek an

[2] While *Illinois Brick* ordinarily bars "indirect purchasers" from recovering "passed-on" overcharges from a price-fixing conspiracy, thereby "concentrating full recovery for the overcharge in the direct purchasers" and avoiding the "risk of duplicative recoveries," 431 U.S. at 728-35, it is an open question whether this bar exists when the Sherman Act does not apply to the direct purchasers' claims because they cannot satisfy the "gives rise to" requirement, 15 U.S.C. § 6a(2). In that circumstance, it may be that indirect purchasers whose claims do arise from the effect on U.S. commerce can recover damages because full recovery cannot be concentrated in the direct purchaser and duplicative recoveries are not possible. *Cf. U.S. Gypsum*, 350 F.3d at 627 (*Illinois Brick* does not apply when "there is no risk of double recovery (and no need to calculate elasticities in order to apportion damages among multiple tiers)").

equitable remedy or criminal punishment for a Sherman Act offense that involves wholly foreign conduct that has the requisite effect on U.S. commerce. *Empagran*, 542 U.S. at 170-71; *cf. Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398 (2d Cir. 2002) ("[T]he Sherman Act contains its own enforcement provision that can be invoked by the United States even when no plaintiff has suffered an injury."), *abrogated on other grounds by Empagran*, 542 U.S. 155.

Moreover, whether anyone could sue Motorola for an antitrust violation does not answer the relevant inquiry of whether Motorola can sue the defendants under the Sherman Act. Motorola has alleged that the upstream panel market is "inextricably linked and intertwined" with the downstream U.S. cellphone market because the LCD panels were "the most expensive and significant component of [its cellphones]" and had "no independent utility" apart from the products in which they were incorporated. 07-1827 N.D. Cal. Dkt. 3173, at 23, 53; *cf. Blue Shield of Va. v. McCready*, 457 U.S. 465, 477, 484 (1982) (injury "inextricably intertwined" with antitrust violation established "proximate cause" necessary for antitrust standing); *Empagran*, 542 U.S. at 171 (distinguishing *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, No. 75 Civ. 5828, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977), in which the foreign injury was "inextricably bound up with the domestic restraints of trade"). Neither the panel nor the court below addressed whether these allegations would, if proved, establish the requisite causal connection between the U.S. effects and Motorola's injuries. This issue warrants briefing and argument.

CONCLUSION

The Court should vacate the panel decision and order briefing and argument before the panel or *en banc* court.

Respectfully submitted.

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April 24, 2014

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 12-point Georgia font in text and 11-point Georgia font in the footnotes.

April 24, 2014

/s/ Nickolai G. Levin
Nickolai G. Levin

CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on April 24, 2014, I electronically filed the foregoing Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing *En Banc* with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. Once the brief is accepted for filing by the Clerk's Office, I will send 30 copies to the Clerk of the Court by FedEx.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

April 24, 2014

/s/ Nickolai G. Levin
Nickolai G. Levin

Department of Justice

STATEMENT

OF

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

AND

RONALD T. HOSKO
ASSISTANT DIRECTOR
CRIMINAL INVESTIGATIVE DIVISION
FEDERAL BUREAU OF INVESTIGATION

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON

"CARTEL PROSECUTION: STOPPING PRICE FIXERS AND PROTECTING CONSUMERS"

PRESENTED ON

NOVEMBER 14, 2013

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Chairman Klobuchar, Ranking Member Lee, and distinguished members of the Subcommittee, thank you for inviting us to appear before you today to discuss how cartels steal money from American consumers and why criminal enforcement against cartels is a cornerstone of the work of the Department of Justice's Antitrust Division. The FBI is a key and long-standing partner in virtually all Antitrust Division cartel investigations. Working together we are making a difference for American consumers.

The subcommittee is right to spotlight cartel misconduct. This criminal misbehavior, whether international, national or local, harms both American consumers and businesses. The courts agree. They unanimously condemn cartel offenses "because of their pernicious effect on competition and lack of any redeeming virtue," *N. Pac. Ry. Co. v. United State*s, 356 U.S. 1, 5 (1958), and describe criminal antitrust offenses as "the supreme evil of antitrust," *Verizon v. Trinko*, 540 U.S. 398, 408 (2004). Judicial precedent and common sense tell us the same thing: price fixing, bid rigging, and other criminal antitrust crimes cause direct and unambiguous antitrust harm.

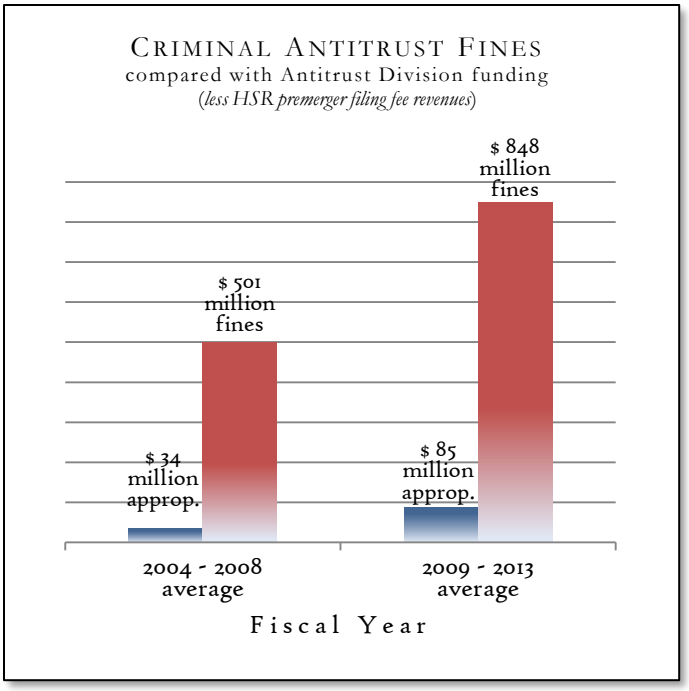
Our efforts to uncover and prosecute cartel behavior are, and need to be, robust. We target domestic and international cartels and prosecute those who rob consumers of their hard-earned dollars—both corporations and individuals, whether foreign or domestic. The Antitrust Division and the FBI use all available investigative tools to detect and prosecute violators of U.S. antitrust laws.

The Department of Justice applies resources and expertise from its Fraud Section, Antitrust Division, Civil Division, Public Integrity Section, Office of International Affairs, and the Asset Forfeiture and Money Laundering Section, as well as U.S. Attorneys' Offices across the country to support prosecutions relating to these criminal cases. The FBI assists the Antitrust Division through its International Corruption Unit (ICU), which, in addition to antitrust offenses, investigates allegations of corruption of U.S. public officials and fraud against the U.S. Government (among others). The FBI found conceptual and analytical synergy in grouping these activities since investigations in any one of these areas has the potential to lead to operational intelligence in another, and its robust liaison relationships with foreign law enforcement and regulatory officials often aid the investigations. Moreover, the FBI's assistance in Antitrust Division investigations benefit ICU personnel, who gain expertise in conducting multinational criminal investigations and navigating judicial processes supporting those matters.

Aggressively pursuing criminal price fixers and bid riggers benefits us in many ways. Enforcement ensures that the specific bad conduct is eliminated. At the same time, other wrongdoers are put on notice and are dissuaded from continuing their illegal conduct. Finally, those contemplating price fixing realize the serious adverse consequences and are deterred from committing the crime in the first instance. At the end of the day, our enforcement actions result in lower prices for consumer goods and services, including computers, televisions, automobiles, shipping, hospital services, and financial services.

Let us start with our most recent cartel enforcement statistics. During Fiscal Year 2013 the Antitrust Division filed 50 criminal cases, and obtained $1.02 billion in criminal fines. The criminal antitrust fines imposed in these cases reflect the harm that cartels inflict on consumers; under the Sentencing Guidelines they take into account the total value of sales affected by the defendant's participation in the cartel. In those 12 months we charged 21 corporations and 34 individuals and courts imposed 28 prison terms with an average sentence of just over two years per defendant.

American taxpayers are well-served by effective cartel enforcement. In the last ten fiscal years, the Antitrust Division has obtained criminal fines averaging nearly $675 million per year. That is more than 10 times its average annual appropriation of $60 million (net of the division's share of offsetting collections of Hart-Scott-Rodino fees collected by the FTC). In just the last five fiscal years the division averaged nearly $850 million in criminal fines versus an average appropriation of about $85 million (again, net of HSR fees). These fines do not go to the Antitrust Division, but rather are contributed to the Crime Victims Fund, which helps victims of all types of crime throughout the country. They are provided assistance with medical and counseling expenses, assistance in the form of shelter, crisis intervention, and justice advocacy, and money for state and local services to crime victims.



The Evolution of Cartel Enforcement at the Antitrust Division

The Antitrust Division's cartel enforcement successes are the result of many years of building and implementing an enforcement strategy that couples strong sanctions with incentives for voluntary disclosure and timely cooperation. The Antitrust Division's Corporate Leniency Program is a particularly effective investigative tool for detecting large-scale international price-fixing cartels. But, it is not the only tool. The division and the FBI uncover cartel behavior using a variety of tools, including internal investigative efforts, customer complaints and submissions to our Citizen Complaint Center, outreach efforts with law enforcement agents, information from auditors, trade groups, business and law students, suspicious documents uncovered in civil investigations, and everyday news stories. Collaboration with federal and state agencies is also key to detecting and investigating cartels.

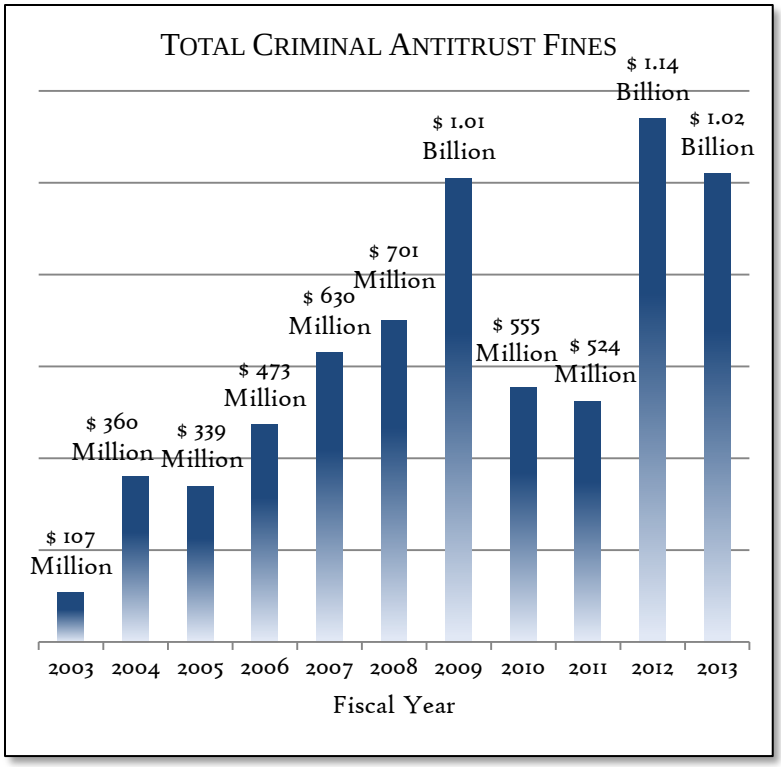
Our progress in detecting and prosecuting cartels can be traced to a deliberate change in strategy and approach implemented over the last two decades. In the early 1990's, recognizing the harm that international cartels pose to American businesses and consumers, the division made investigating and prosecuting international cartels a top priority. What did we do?

- We adopted a corporate leniency program that provides incentives for companies, both domestic and foreign, to investigate and self-report to the Antitrust Division their involvement in antitrust crimes. This dramatically increased the rate of self-disclosure by corporations.

- We strengthened our ties with the FBI to partner better on investigations, make more use of FBI covert techniques and financial expertise, and expedite our investigation and prosecutions.

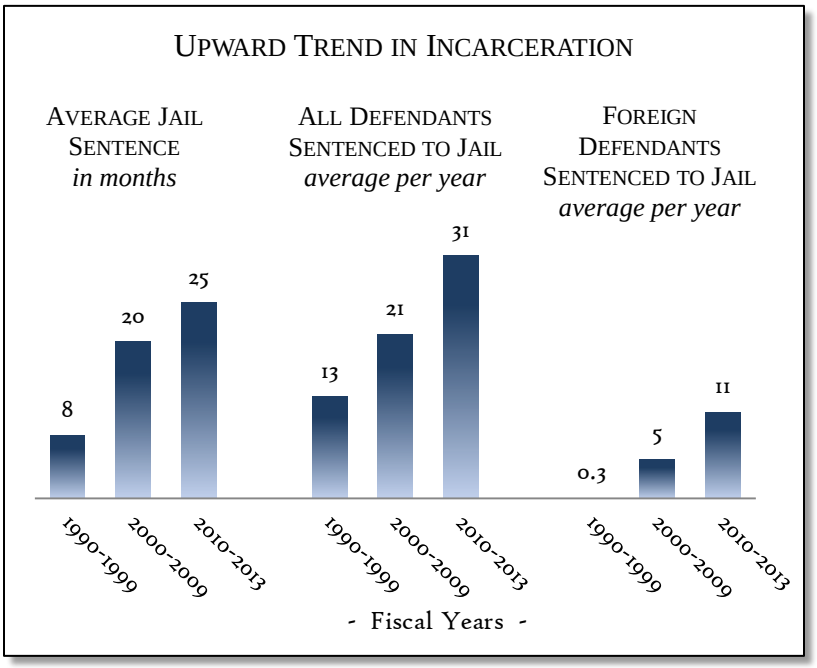
- We engaged bilaterally and multilaterally with competition authorities around the world to achieve a general consensus on attacking cartels and coordinating our approach to detection, investigation and prosecution.

These strategies have resulted in a dramatic increase in exposing the world's largest price-fixing cartels. In recent years we prosecuted cartels involving air transportation (more than $1.8 billion in criminal fines obtained), liquid crystal displays (more than $1.39 billion in criminal fines obtained), and auto parts. Attorney General Holder recently described the auto parts investigation as the largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope and the potential volume of commerce affected by the alleged illegal conduct. The investigation is far from over. Thus far we have obtained more than $1.6



billion in fines. In each of these matters, the FBI is a strong partner with the Antitrust Division, providing invaluable contributions to our investigations, including in interviews, searches, and forensic work.

Criminal fines cannot and do not tell the whole story. Large criminal penalties make cartel behavior less attractive. But the threat of jail time for the company officials responsible for injuring consumers is itself a powerful deterrent. The Antitrust Division has pursued stiff penalties against individuals. Today more individuals involved in cartel activity are being sent to jail and are being jailed for longer periods of time than ever before. In the 1990's, jail sentences for Antitrust Division defendants averaged eight months. Today the average prison sentence for Antitrust Division defendants is 25 months. Culpable foreign nationals who injure American consumers do not escape our grasp either. In the last four years, courts have sentenced an average of 11 foreign nationals to jail per year. That compares with a total of three foreign nationals sentenced to jail in the ten years from 1990 through 1999.



Specific Cartel Enforcement

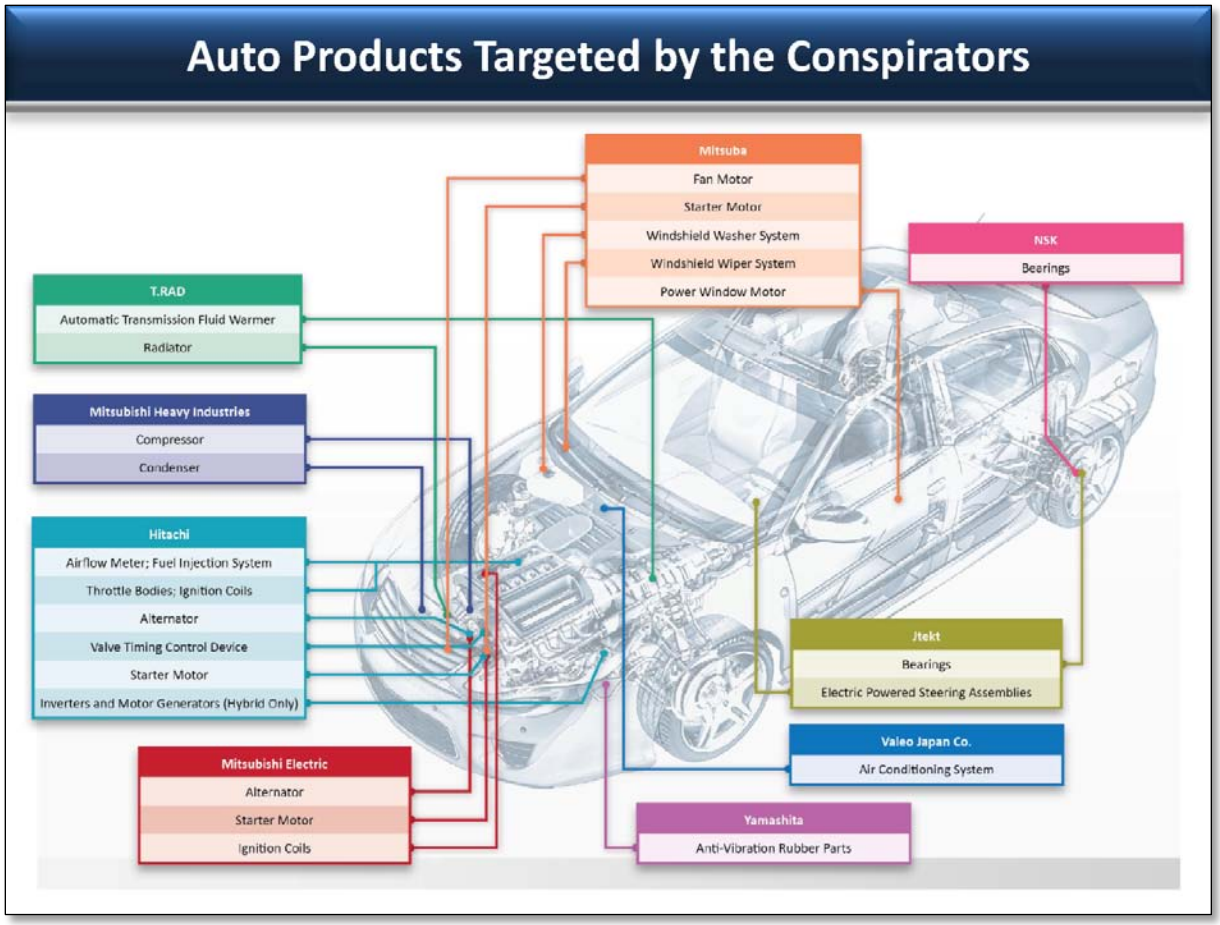
Our ongoing and recent activities demonstrate how effective cartel enforcement makes an enormous, measurable difference to consumers and the economy. I will start with large-scale international cartels that affect wide swaths of the economy and then I will turn to more local cartels that also have demonstrable adverse effects.

Investigations of large international cartels pose significant challenges—with documents, witnesses, and wrongdoers often located outside the U.S. We have developed over time a shared commitment with enforcers around the world to fighting international cartels. We work closely in addressing these challenges.

This has significantly increased our ability to effectively investigate and prosecute these cartels. Cooperation with our sister agencies around the world allows for coordinated raids in cross-border cartel investigations, helping to preserve crucial evidence, increases access to foreign-located evidence, and induces cooperation from foreign subjects of investigations that previously had been lacking.

Our ongoing auto parts investigation exemplifies how the Antitrust Division and the FBI cooperate with our foreign counterparts. The investigation included FBI search warrants executed on the very same day and conducted at the very same time as searches by enforcers in other countries. During the ongoing investigation the department has coordinated with antitrust agencies of Japan, Canada, the Republic of Korea, Mexico, Australia, and the European Commission.

What has this effort thus far produced? To date the division has charged a total of 21 companies and 21 executives. All 21 companies have either pleaded guilty or have agreed to plead guilty. The immediate victims of these conspiracies include such automotive manufacturers as Ford, General Motors, Chrysler, Honda, Toyota, Nissan, Subaru, Mazda and Mitsubishi. The parts involved included safety



systems such as seatbelts, airbags, and antilock brake systems, making it costlier for car makers to provide many safety features. Many car models were fitted with multiple parts that were fixed by the auto parts suppliers. In September, Attorney General Holder announced nine corporate guilty pleas involving more than $740 million in criminal fines. Those September charges involved more than a dozen separate conspiracies spanning over a decade and involving numerous auto parts suppliers from around the globe that targeted U.S. manufacturing, U.S. businesses and U.S. consumers. The cases filed to date involve conduct affecting over $8 billion in auto parts sold to car manufacturers in the U.S. and parts used in more than 25 million cars purchased by American consumers. The multiple conspiracies charged in September affected U.S. automobile plants in 14 states: Alabama, California, Georgia, Illinois, Indiana, Kansas, Kentucky, Michigan, Mississippi, Missouri, Ohio, Tennessee, Texas, and Wisconsin. And as the Attorney General said in the recent announcement, our work in this area is not finished.

Cartels involving components of finished products are not unique to the auto industry. For example, the joint Antitrust Division/FBI investigation into LCD panels uncovered long-running price-fixing conspiracies that affected some of the largest computer manufacturers in the world, including Hewlett Packard, Dell and Apple. These conspiracies injured every family, school, business, charity and government agency that paid more for notebook computers, computer monitors and LCD televisions during the conspiracy. The conspirators fixed the prices of at least $23.5 billion in panels that came into the United States, either as raw panels or incorporated in finished products. At last year's trial of AUO, one of the cartel ringleaders, the division's economic expert testified that the conspirators increased their margin by an average of $53 for each and every flat panel the conspirators made over the course of four years. This figure demonstrates concretely the very real costs this price-fixing conspiracy imposed on American businesses and consumers. The division has obtained more than $1.39 billion in criminal fines in this investigation.

In recent years we detected and prosecuted of number of cartels affecting shipping services. An increase in shipping prices can influence the prices of a wide array of goods. The division, with the assistance of the FBI, uncovered a number of conspiracies involving air cargo services affecting over $20 billion in commerce, and the air cargo investigation led to the discovery of conspiracies involving freight forwarding services affecting over $350 million in commerce, and air passenger transportation involving over $4 billion in commerce. In the air cargo and freight forwarding conspiracies, various fees and surcharges were imposed on customers for shipments of goods to and from the U.S., including agreements on

the amount and timing of surcharges in the period before the Christmas holiday shopping season. We obtained total fines of over $1.9 billion in the air transportation and freight forwarding investigations, coordinating with the Australian Competition and Consumer Commission, the European Commission, the New Zealand Commerce Commission, the U.K. Office of Fair Trading, the Japan Fair Trade Commission, the Brazilian competition agency, and other agencies. And, the division has an ongoing investigation into price fixing, bid rigging and other anticompetitive conduct in the coastal water freight transportation industry. So far, three companies and six individuals have pleaded guilty or have been convicted at trial, and have been ordered to pay more than $46 million in criminal fines in a price-fixing conspiracy involving coastal freight services between the continental United States and Puerto Rico.

In addition, the division's investigation into bid rigging in municipal bonds markets has been conducted with the assistance of the FBI and Internal Revenue Service – Criminal Investigation, and also coordinated with other federal and state law enforcement agencies that have parallel investigations, including the U.S. Securities and Exchange Commission, the Office of the Comptroller of the Currency and the Federal Reserve Bank of New York, and a working group of 20 State Attorneys General. This investigation, like others, demonstrates how coordination of parallel investigations enhances our ability to identify and prosecute significant crimes. To date, a total of 20 individuals have been charged as a result of the department's ongoing municipal bonds investigation and 19 have been convicted or pleaded guilty, and one company has pleaded guilty. Those implicated have agreed to pay a total of nearly $745 million in restitution, penalties, and disgorgement to federal and state agencies. Conspirators went to great lengths to defraud municipalities across the country, from soliciting intentionally losing bids for investment agreements to paying out kickbacks to manipulate the competitive bidding process. These actions deprived American towns and cities of competitive interest rates for the investment of tax-exempt bond proceeds used by municipalities for various public works projects, such as building or repairing schools, hospitals and roads, water pollution abatement projects, and low-cost housing, and to refinance outstanding debt. These complex, seemingly uninteresting backroom deals have a real impact on taxpayers, who should benefit from a municipal bond issue and are ultimately responsible for paying it off. In addition, corrupt bidding schemes serve to weaken the public's trust in the municipal bond market and prevent public entities from enjoying the benefits of a true competitive bidding process.

While large-scale international cartels can involve significant volumes of commerce, the FBI and the Antitrust Division are acutely aware that local or regional cartels also have the potential to significantly harm consumers. In local communities the division continues to uncover collusive schemes among real estate speculators aimed at eliminating competition at real estate foreclosure auctions. The division continues to investigate with the FBI and HUD inspectors general bid rigging and fraud in local real estate markets in Alabama, California, Georgia, and North Carolina. The division and FBI have uncovered patterns of misconduct through which conspirators worked together to keep public auction prices artificially low by making agreements not to bid against one another, instead designating a winning bidder to obtain selected properties at public real estate foreclosure auctions. Conspirators also conducted their own unofficial "knockoff" auctions open only to members of the conspiracy—often taking place at or near the courthouse steps where the public auctions were held—paying each other off and diverting money to co-conspirators that otherwise would have gone to pay off the mortgage and other holders of debt secured by the properties, and, in some cases, the defaulting homeowner. The division's real estate foreclosure auction investigations have resulted in recent cases against 64 individuals and 3 companies. Altogether, these investigations have uncovered bid rigging and fraud on auctions involving more than 3,400 foreclosed homes, and have caused more than $23 million in loss, primarily to mortgage holders. The division also has uncovered similar schemes involving public tax lien auctions, including an ongoing investigation of tax lien auctions in New Jersey that has resulted in guilty pleas from 11 individuals and three companies.

Conclusion

Together, the FBI's and the Antitrust Division's dedicated public servants are working hard to hold both corporations and individuals responsible for cartel behavior. American consumers are the beneficiaries of that dedication. We are honored to be part of this hard-working team and to be associated with a law enforcement mission that is delivering real benefits to American consumers.

Division Update Spring 2014

Criminal Program

Antitrust Division 2014 Criminal Enforcement Update

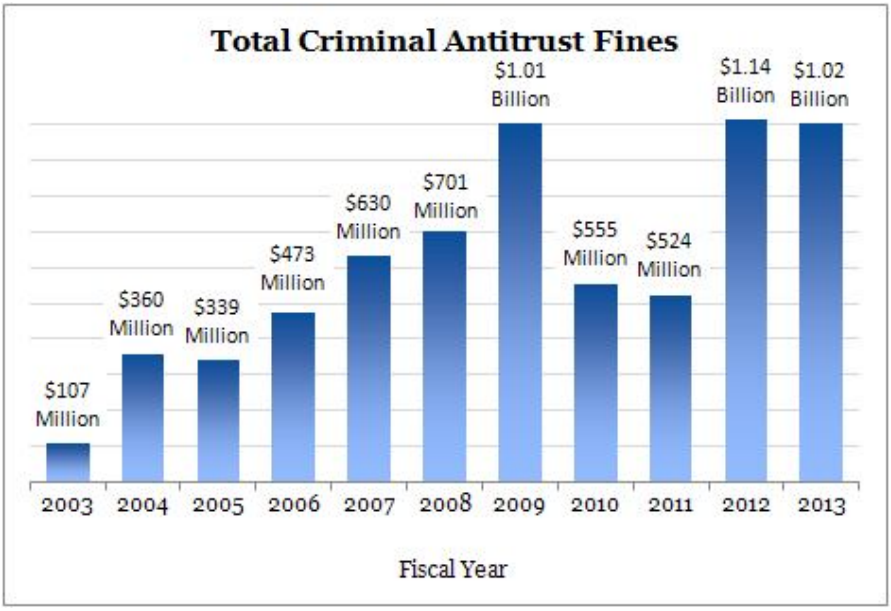
The Antitrust Division's vigorous criminal enforcement efforts continued in the past year. The Division obtained significant fines and prison sentences, including the longest sentence involving a Sherman Act violation and other criminal activity, and won jury trial victories relating to its Superfund fraud and real estate foreclosure auctions investigations. The Division also obtained a conviction against the first defendant charged in its investigation of an ocean shipping cartel. And it achieved additional convictions in its investigations of bid rigging involving airline charter services and a number of cartels involving auto parts.

In total, the Division filed 50 criminal cases and obtained just over $1 billion in criminal fines in fiscal year 2013. In these cases, the Division charged 21 corporations and 34 individuals and courts imposed 28 prison terms with an average sentence of just over two years per defendant.

The Division also established a second criminal office in Washington, D.C. Its initial focus will be investigating real estate foreclosure auction bid rigging in the southeastern United States, and over time it will expand to include a full portfolio of matters.

More Than $1 Billion in Criminal Fines in 2013 and More Than $4 Billion in 5 Years

The FY 2013 $1.02 billion criminal fine total is one of the highest ever obtained by the Division and the third time since 2009 that the Division exceeded the $1 billion fine mark. Since 2009, the Division has obtained more than $4 billion in criminal fines. The average annual criminal fine total of $847 million in this period compares with the Division's average annual direct appropriation of about $85.5 million. Since January 2009, the Division has filed 339 criminal cases, a more than 60 percent increase over the prior five-year period.



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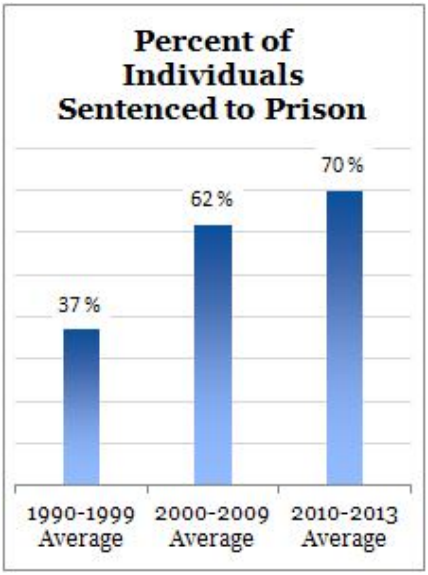
Criminal fines the Antitrust Division obtains do not go to the Division, but rather are contributed to the Crime Victim's

Fund, helping those victimized by crimes throughout our country.

Record Sentence Part of Trend Toward More Frequent Imprisonment, Longer Sentences

The Division continued its pursuit of culpable individuals—holding them accountable is the most effective way to deter and punish cartel activity. This year, in connection with its coastal shipping investigation, the Division obtained a five-year prison sentence, the longest ever for a Sherman Act violation. And in the Division's investigation of kickbacks at Environmental Protection Agency Superfund sites, a defendant was sentenced to 14 years in prison for antitrust violations, fraud, and other criminal activity.

Individuals prosecuted by the Division are being sent to prison with increasing frequency and for longer periods of time. During FY 2013, 68 percent of the individuals sentenced in Division cases received prison time. The Division now is sending nearly twice as many defendants to prison as it did in the 1990s, with those defendants serving longer terms. In FY 2013, the average prison sentence for Division defendants was 25 months, more than three times the average of eight months in the 1990s.



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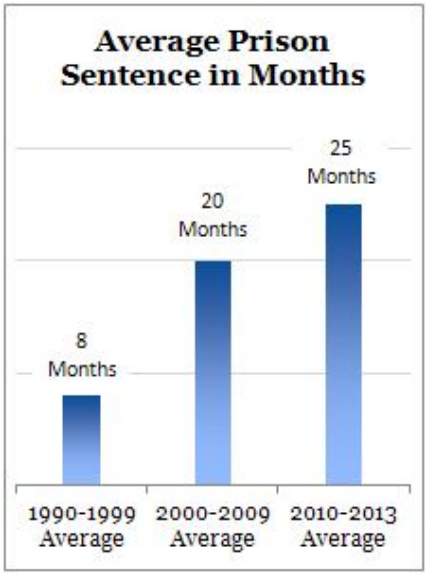

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Ten foreign nationals were sentenced to imprisonment during FY 2013, with an average sentence of 15 months. The Division remains committed to ensuring that culpable foreign nationals, just like U.S. co-conspirators, serve prison sentences for violating the U.S. antitrust laws and to using all appropriate tools to find and arrest or extradite international fugitives.

Criminal Trial Success

The Division secured two significant criminal trial wins in the past year.

Real Estate Foreclosure Auctions Cartel

On March 11, 2014, following a four-week trial, an Eastern District of California jury convicted two real estate investors of conspiring to rig bids at public real estate foreclosure auctions in San Joaquin County, California. One of the defendants also was convicted of obstruction of justice for destroying evidence related to the crimes. The jury could not reach a verdict on a count of conspiracy to commit mail fraud against these two defendants. The jury found a third defendant, an auctioneer, not guilty.

The convicted investors and their co-conspirators agreed to suppress and restrain competition by rigging bids to obtain selected properties offered at public auctions. Evidence showed that after the conspirators' designated bidder bought a property at a public auction, they often would hold a second, private auction, at which each participating conspirator would bid the amount above the public auction price he or she was willing to pay. The conspirator who bid the highest amount at the end of the private auction won the property. The difference between the price at the public auction and that at the second auction was the group's illicit profit, and it was divided among the conspirators in payoffs. This was money that otherwise would have gone to pay off mortgages and, in some cases, the defaulting homeowners. The bid-rigging conspiracy lasted from at least September 2008 until at least October 2009. To date, 46 individuals either have pled guilty or agreed to plead guilty in connection with the real estate foreclosure auctions investigation in northern

California.

Press Release

March 11, 2014

Two Real Estate Investors Convicted for Roles in Bid-Rigging Conspiracy in San Joaquin County, Calif. Real Estate Foreclosure Auctions

Superfund Kickback Scheme

On September 30, 2013, following a two-week trial, a jury in New Jersey returned guilty verdicts on 10 counts charged in the indictment against a former project manager for a prime contractor, for his central role in conspiracies that spanned seven years and involved kickbacks in excess of $1.5 million at two Environmental Protection Agency Superfund sites. The defendant was convicted of engaging in separate conspiracies with three subcontractors at two New Jersey Superfund sites—Federal Creosote in Manville, N.J., and Diamond Alkali in Newark, N.J. He also was convicted of engaging in an international money laundering scheme, major fraud against the United States, accepting illegal kickbacks, committing two tax violations, and obstruction of justice. The defendant was acquitted on two counts involving certain fraud and kickback charges. As part of the conspiracies, he and co-conspirators at his former company accepted kickbacks from subcontractors in exchange for the award of subcontracts at Federal Creosote. He also provided co-conspirators with their competitors' bid prices, which allowed them to submit higher bid prices and still be awarded the subcontracts. On March 3, 2014, the defendant was sentenced to 14 years in prison and to pay a $50,000 fine. The court will order restitution at a later date.

To date, more than $6 million in criminal fines and restitution have been imposed in the course of this investigation, and six individuals have been sentenced to serve more than 24 years in total prison time.

Press Releases

March 3, 2014

Former Project Manager Sentenced to Serve Time in Prison for Role in Bid Rigging and Other Fraudulent Schemes Involving Two EPA Superfund Sites in New Jersey

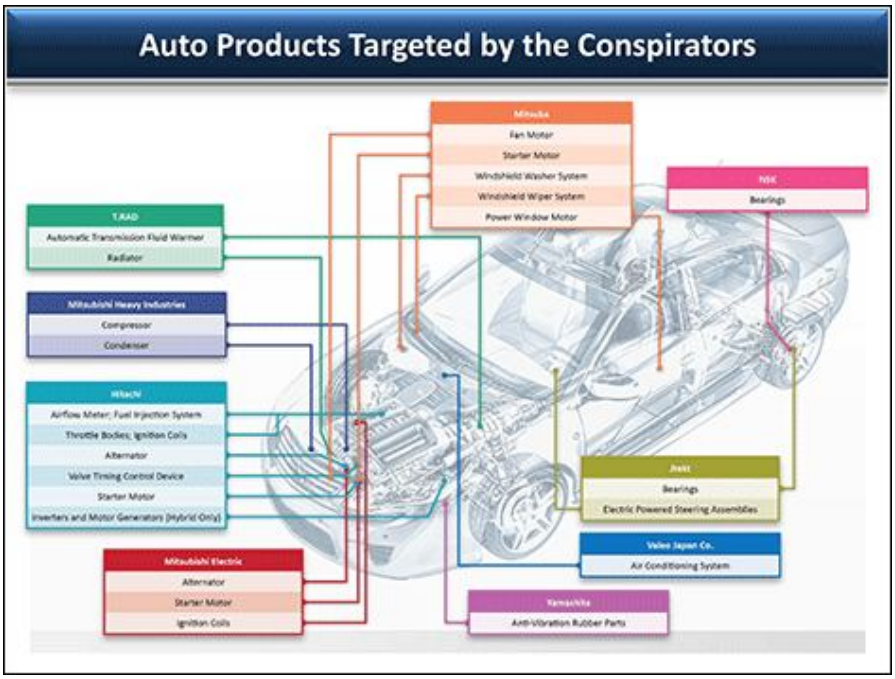
September 30, 2013

Former Project Manager Convicted for Role in Conspiracy Schemes Involving Two EPA Superfund Sites in New Jersey

Ongoing Investigations Continue to Produce Results

Auto Parts

The Division's ongoing automobile parts investigation has yielded unprecedented results. On September 26, 2013, the Division undertook the largest simultaneous enforcement action in its history, bringing charges against nine companies, which agreed to the imposition of a total of more than $740 million in fines, and two individuals. Recently, the investigation also yielded the fourth-largest criminal antitrust fine ever imposed—a $425 million fine against Bridgestone Corporation.



Companies and parts charged on September 26, 2013. Click the image to view a larger version.

To date, the investigation has resulted in charges against 26 companies and 29 individuals and more than $2 billion in criminal fines for participation in conspiracies to fix prices of and rig bids on automobile parts, including safety systems such as seat belts, air bags, steering wheels, and antilock brake systems, and critical parts such as antivibration rubber, instrument panel clusters, starter motors, and wire harnesses. Twenty-three of the individuals have pleaded guilty or agreed to plead guilty and have agreed to serve prison sentences ranging from a year and a day to two years. The Division continues to cooperate on this investigation with its counterparts in Japan, South Korea, the EC, and Canada, among others.

View auto parts investigation press releasesand case filings.

Financial Fraud: Real Estate Foreclosure and Tax Liens Auctions; LIBOR; and Municipal Bonds

As of March 2014, due to the Division's efforts, 90 defendants have pleaded guilty to real estate foreclosure and tax liens conspiracies across the United States that suppress and restrain competition in ways that harm our communities and already financially distressed homeowners.

The Division has partnered with the FBI to combat a pattern of collusive schemes among real estate speculators aimed at eliminating competition at real estate foreclosure auctions. Instead of competitively bidding at public auctions for foreclosed properties, groups of real estate speculators work together to keep public auction prices artificially low by paying each other to refrain from bidding or holding unofficial "knockoff" auctions among themselves. The Division has taken recent action against real estate investors who purchased rigged properties in Alameda, Contra Costa, San Francisco, and San Mateo Counties, California, as well as Mobile, Alabama, and Atlanta, Georgia. As described above, the Division recently secured convictions at trial against two real estate investors for conspiring to rig bids at real estate foreclosure auctions in San Joaquin County, California.

View real estate foreclosure auctions investigation press releasesand case filings.

Similar collusive conduct also has been detected among bidders for public tax liens, and eleven individuals and three companies have pleaded guilty as part of an ongoing investigation into bid rigging and fraud related to such auctions in New Jersey. Additionally, four individuals and two entities were indicted on November 19, 2013.

View municipal tax lien auctions investigation press releasesand case filings.

The Division is investigating this type of anticompetitive conduct at auctions in multiple states. Through its work combating bid rigging and collusion at public auctions, the Antitrust Division has been a major contributor to the efforts of the Financial Fraud Enforcement Task Force(FFETF) to investigate and prosecute financial crimes.

In the LIBOR (London InterBank Offered Rate)/Euribor investigation, the Division, in conjunction with the Criminal Division, obtained a conviction against Rabobank, which agreed to pay $325 million in criminal penalties. The Division also filed criminal complaints against three former brokers and five former traders for their roles in manipulating LIBOR

and/or Euribor benchmark interest rates. In all, the Division has obtained $475 million in criminal fines and penalties in this ongoing investigation, and the total global criminal and regulatory fines, penalties, and disgorgement obtained by enforcement authorities is over $3.7 billion. The broader investigation relating to LIBOR and other benchmark rates has required, and has greatly benefited from, a diligent and wide-ranging cooperative effort among various enforcement agencies both in the United States and abroad. The FBI, Securities and Exchange Commission, Commodity Futures Trading Commission, U.K. Financial Conduct Authority and Serious Fraud Office, Japanese Ministry of Justice, Japan Financial Services Agency, Swiss Financial Market Supervisory Authority, Dutch Public Prosecution Service, and Dutch Central Bank all have played major roles in the LIBOR investigation.

View LIBOR investigation press releasesand case filings.

The Division, in concert with other federal agencies, continues to obtain convictions in criminal conspiracies involving bid rigging in the municipal bond investments market. The schemes under investigation involve unlawful agreements to manipulate the bidding process on municipal investment and related contracts—financial instruments that were used to invest the proceeds of, or manage the risks associated with, bond issuances by municipalities and other public entities. The bonds these crimes affect support critical municipal infrastructure, like roads, schools, and other projects.

View municipal bonds investigation press releasesand case filings.

Most recently, the Division has taken action against former UBS and Bank of America executives. To date the Division's ongoing investigation has resulted in criminal charges against 20 former executives of various financial services companies and one corporation. Seventeen of the 20 executives charged have pleaded guilty or were convicted at trial. In addition, financial institutions have agreed to pay a combined total of nearly $750 million in restitution, penalties, and disgorgement to federal and state agencies for their roles in the conduct.

Airline Charter Services

On February 24, 2014, the Division obtained the fifth guilty plea to arise out of its ongoing investigation into fraud and anticompetitive conduct in the airline charter services industry. A former employee of Aviation Fuel International, Inc. (AFI) pleaded guilty to a felony charge filed in Kansas City, Missouri. The charge against him stemmed from the investigation into kickback payments by AFI and its employees to the former vice president of ground operations for Ryan International Airlines. The defendant worked for AFI from June 2007 to March 2008, and during that time Ryan's vice president received kickback payments from AFI on aviation fuel, services, and equipment sold by AFI to Ryan. AFI's owner and operator pleaded guilty on March 6, 2014, bringing the total number of guilty pleas to six.

Four of the six individuals who have pleaded guilty have been ordered to serve sentences ranging from 16 to 87 months in prison and to pay more than $580,000 in restitution.

Press Releases

September 12, 2013

Former Airline Executive Sentenced to Prison for Schemes to Defraud Illinois-Based Ryan International Airlines

August 14, 2013

Florida Airline Fuel Supply Company and Its Owner Indicted for Role in Scheme to Defraud Illinois-Based Ryan International Airlines

July 22, 2013

Former Owner of Two Florida Airline Fuel Supply Companies Charged for Role in Scheme to Defraud Illinois-Based Ryan International Airlines

Ocean Shipping

On February 27, 2014, the Division brought the first charges in its investigation of a conspiracy involving ocean shipping services. Compañía Sud Americana de Vapores S.A. (CSAV), a Chilean corporation, was the first company charged in the conspiracy to suppress and eliminate competition by allocating customers and routes, rigging bids, and fixing prices for the sale of international ocean shipping services for roll-on, roll-off cargo. This is noncontainerized cargo that can be rolled onto and off an ocean-going vessel and includes new and used cars and trucks, as well as construction, mining, and agricultural equipment. CSAV has agreed to pay an $8.9 million criminal fine.

Press Release

February 27, 2014

South American Company Agrees to Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks

Division News

New Leadership, New Office for Antitrust Division Criminal Program

New Leadership in the Division's Appellate Section

Meet David Gelfand—the Division's Deputy Assistant Attorney General for Litigation

Spotlight on Division Staff: Tracy Greer

The Antitrust Division's *Pro Bono* Program: Spotlight on Jay Owen

Economic Analysis: Mergers That Increase Bargaining Leverage

Civil and Criminal Trial Successes

Highlights

Bridgestone Corp. Agrees to Plead Guilty and to Pay $425 Million Criminal Fine for Price Fixing on Auto Parts Installed in U.S. Cars

US Airways and American Airlines Required to Divest Facilities at Seven Key Airports to Enhance System-Wide Competition and Settle Merger Challenge Offering More Choice and More Competitive Airfares for Consumers

Court Rules Apple Inc. Violated Antitrust Laws by Conspiring to Raise E-Book Prices; Proposed Remedy Provides for Court-Appointed External Monitor, Antiretaliatory Measures and Prohibits Apple from Engaging in Future Anticompetitive Conduct

Court Finds Bazaarvoice Inc.'s Acquisition of PowerReviews Inc. Violates Antitrust Laws; Proposed Remedy Requires Selling Off All PowerReviews Assets, Provides Syndication Services to the Divestiture Buyer and Removes Trade-Secret Restrictions

Division's Efforts to Combat Real Estate Foreclosure Auction Fraud Yields 72 Guilty Pleas to Date—45 in Northern California, 11 in Southern Alabama, 2 in North Carolina, 3 in Northern Georgia, and 11 in Eastern California—and 2 Trial Convictions

Anheuser-Busch InBev and Grupo Modelo Required to Divest Piedras Negras Brewery, Perpetual Licenses to Modelo Beer Brands and Other Assets to Maintain Competition in Beer Industry Nationwide

Nine Auto Parts Manufacturers Agree to Plead Guilty and to Pay More Than $740 Million in Criminal Fines for Fixing Prices on Auto Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars; Two Executives Agree to Plead Guilty

Former Project Manager Sentenced to Serve 14 Years in Prison for Role in Bid Rigging/Fraud Schemes Involving Two EPA Superfund Sites in NJ

Former Sea Star Line President Sentenced to Serve Five Years in Prison for Role in Price-Fixing Conspiracy Involving Coastal Freight Services; Longest Ever Sentence for a Sherman Act Violation

Contacts

See our Contact Information page to contact certain offices or individuals in the Division.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	Case No. 14-CR-00068
Plaintiff,	)	
v.	)	
	)	JUDGE ZOUHARY
BRIDGESTONE CORPORATION	)	
	)	
Defendant.	)	

FILED
2014 APR 30 AM 11:46
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

PLEA AGREEMENT

The United States of America and Bridgestone Corporation ("the defendant"), a corporation organized and existing under the laws of Japan, hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P.").

RIGHTS OF DEFENDANT

1. The defendant understands its rights:

(a) to be represented by an attorney;

(b) to be charged by Indictment;

(c) as a corporation organized and existing under the laws of Japan, to decline to accept service of the Summons in this case, and to contest the jurisdiction of the United States to prosecute this case against it in the United States District Court for the Northern District of Ohio;

(d) to plead not guilty to any criminal charge brought against it;

(e) to have a trial by jury, at which it would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for it to be found guilty;

(f) to confront and cross-examine witnesses against it and to subpoena witnesses in its defense at trial;

(g) to appeal its conviction if it is found guilty; and

(h) to appeal the imposition of sentence against it.

AGREEMENT TO PLEAD GUILTY AND WAIVE CERTAIN RIGHTS

2. The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(g) above. The defendant also knowingly and voluntarily waives the right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742, that challenges the sentence imposed by the Court if that sentence is consistent with or below the recommended sentence in Paragraph 9 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b)-(c). Nothing in this paragraph, however, will act as a bar to the defendant perfecting any legal remedies it may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct. The defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct. Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty to a one-count Information to be filed in the United States District Court for the Northern District of Ohio. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate

competition in the automotive parts industry by agreeing to allocate sales of, to rig bids for, and to fix, raise, and maintain the prices of automotive anti-vibration rubber products sold to Toyota Motor Corporation, Nissan Motor Corporation, Fuji Heavy Industries, Ltd., Suzuki Motor Corporation, Isuzu Motors, Ltd., and certain of their subsidiaries, affiliates and suppliers (collectively, "Automobile and Component Manufacturers") in the United States and elsewhere, from at least as early as January 2001 until at least December 2008, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

3. The defendant will plead guilty to the criminal charge described in Paragraph 2 above pursuant to the terms of this Plea Agreement and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 5 below.

ELEMENTS OF THE OFFENSE CHARGED

4. The elements of a violation of 15 U.S.C. § 1, to which the defendant will plead guilty, are as follows:

First, that a conspiracy that amounted to an unreasonable restraint of trade or commerce among the several States or with foreign nations was knowingly formed, and existed at or about the time alleged;

Second, that the defendant knowingly entered into the conspiracy; and

Third, that either acts taken in furtherance of the conspiracy were in the flow of interstate or foreign commerce, or the conspirators' general business activities infected by the conspiracy substantially affected interstate or foreign commerce.

FACTUAL BASIS FOR OFFENSE CHARGED

5. Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts beyond a reasonable doubt:

(a) For the purposes of this Plea Agreement, the "relevant period" is that period from at least as early as January 2001 until at least December 2008. During the relevant period, the defendant was a corporation organized and existing under the laws of Japan. The defendant had its principal place of business in Kyobashi, Tokyo, Japan, and U.S. subsidiaries in various locations, including Findlay, OH. During the relevant period, the defendant was a manufacturer of automotive anti-vibration rubber products, was engaged in the sale of automotive anti-vibration rubber products to Automobile and Component Manufacturers in the United States and elsewhere, and employed 5,000 or more individuals. Automotive anti-vibration rubber products are comprised primarily of rubber and metal, and are installed in automobiles to reduce engine and road vibration.

(b) During the relevant period, the defendant, through certain of its officers and employees, including high-level personnel of the defendant, participated in a conspiracy with other persons and entities engaged in the manufacture and sale of automotive anti-vibration rubber products, the primary purpose of which was to suppress and eliminate competition by agreeing to allocate sales of, to rig bids for, and to fix, raise, and maintain the prices of automotive anti-vibration rubber products sold to Automobile and Component Manufacturers in the United States and elsewhere. In furtherance of the conspiracy, the defendant, through certain of its officers and employees, engaged in discussions and attended meetings with representatives of other companies involved in the manufacture and sale of automotive anti-vibration rubber products until at least December 2008. During such discussions and meetings, agreements were reached to allocate sales of automotive anti-vibration rubber products sold to Automobile and Component Manufacturers, to rig bids quoted to Automobile and Component

Manufacturers for automotive anti-vibration rubber products, and to fix, raise, and maintain the prices, including coordinating price adjustments requested by Automobile and Component Manufacturers, of automotive anti-vibration rubber products sold to Automobile and Component Manufacturers in the United States and elsewhere. The charged conduct affected the defendant's sales of automotive anti-vibration rubber products to Automobile and Component Manufacturers in the United States and elsewhere until at least May 2012, which totaled approximately $750 million.

(c) During the relevant period, automotive anti-vibration rubber products sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution of automotive anti-vibration rubber products, as well as payments for automotive anti-vibration rubber products, traveled in interstate and foreign commerce. The business activities of the defendant and its co-conspirators in connection with the production and sale of automotive anti-vibration rubber products that were the subject of this conspiracy were within the flow of, and substantially affected, interstate and foreign trade and commerce.

(d) Acts in furtherance of the conspiracy were carried out within the Northern District of Ohio, Western Division, and elsewhere. Automotive anti-vibration rubber products that were the subjects of the conspiracy were sold to Automobile and Component Manufacturers by the defendant in the Northern District of Ohio.

(e) The defendant agrees that the above summary fairly and accurately sets forth the defendant's offense conduct and a factual basis for the guilty plea. The defendant further agrees that the facts set forth above are true and could be established beyond a reasonable doubt if the case were to proceed to trial. The defendant

acknowledges that the above summary does not set forth each and every fact that the United States could prove at trial, nor does it necessarily encompass all of the acts which the defendant committed in furtherance of the offense to which the defendant is pleading guilty.

MAXIMUM SENTENCE

6. The defendant understands that the statutory maximum penalty which may be imposed against it upon conviction for a violation of Section One of the Sherman Antitrust Act is a fine in an amount equal to the greatest of:

(a) $100 million (15 U.S.C. § 1);

(b) twice the gross pecuniary gain the conspirators derived from the crime (18 U.S.C. § 3571(c) and (d)); or

(c) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (18 U.S.C. § 3571(c) and (d)).

7. In addition, the defendant understands that:

(a) pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but not more than five years;

(b) pursuant to U.S.S.G. § 8B1.1 of the United States Sentencing Guidelines ("U.S.S.G.," "Sentencing Guidelines," or "Guidelines") or 18 U.S.C. § 3563(b)(2) or § 3663(a)(3), the Court may order it to pay restitution to the victims of the offense; and

(c) pursuant to 18 U.S.C. § 3013(a)(2)(B), the Court is required to order the defendant to pay a $400 special assessment upon conviction for the charged crime.

SENTENCING GUIDELINES

8. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider, in determining and imposing sentence, the Guidelines Manual in effect on the date of sentencing unless that Manual provides for greater punishment than the Manual in effect on the last date that the offense of conviction was committed, in which case the Court must consider the Guidelines Manual in effect on the last date that the offense of conviction was committed. The parties agree that there is no *ex post facto* issue under the November 1, 2013, Guidelines Manual. The Court must also consider the other factors set forth in 18 U.S.C. § 3553(a) in determining and imposing sentence. The defendant understands that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant understands that although the Court is not ultimately bound to impose a sentence within the applicable Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a).

SENTENCING AGREEMENT

9. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), and subject to the full, truthful, and continuing cooperation of the defendant and its related entities, as defined in Paragraph 12 of this Plea Agreement, the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose, a sentence requiring the defendant to pay to the United States a criminal fine of $425 million, pursuant to 18 U.S.C. § 3571(d), payable in full before the thirtieth (30th) day after the date of judgment with interest accruing under 18 U.S.C. § 3612(f)(1)-(2) and no order of restitution ("the recommended sentence"). The parties agree that there exists no aggravating or mitigating circumstance of a kind, or to a degree,

not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Sentencing Guidelines justifying a departure pursuant to U.S.S.G. § 5K2.0. The parties agree not to seek at the sentencing hearing any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The parties further agree that the recommended sentence set forth in this Plea Agreement is reasonable.

(a) The defendant understands that the Court will order it to pay a $400 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B), in addition to any fine imposed.

(b) In light of the availability of civil causes of action, which potentially provide for a recovery of a multiple of actual damages, the recommended sentence does not include a restitution order for the offense charged in the Information.

(c) The United States will recommend, and the defendant will not oppose, that a term of probation be imposed for a period of three years, and, as a condition of probation, that the defendant report once per year to the Probation Office and to the United States regarding all aspects of its antitrust compliance program, beginning no later than one year after the date of conviction. Should the defendant fail to make timely and complete reports regarding its antitrust compliance program, the United States reserves the right to recommend, as a condition of probation, that the Court order the defendant to hire an independent court-appointed monitor at the defendant's expense. The parties understand that the Court's denial of any of the recommendations in this Paragraph will not void this Plea Agreement.

(d) The United States and the defendant jointly submit that this Plea Agreement, together with the record that will be created by the United States and the

defendant at the plea and sentencing hearings, and the further disclosure described in Paragraph 10, will provide sufficient information concerning the defendant, the crime charged in this case, and the defendant's role in the crime to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553. The United States and the defendant agree to request jointly that the Court accept the defendant's guilty plea and impose sentence on an expedited schedule as early as the date of arraignment, based upon the record provided by the defendant and the United States, under the provisions of Fed. R. Crim. P. 32(c)(1)(A)(ii), U.S.S.G. § 6A1.1, and Local Criminal Rule 32.2(b)(5). The Court's denial of the request to impose sentence on an expedited schedule will not void this Plea Agreement.

(e) The United States contends that had this case gone to trial, the United States would have presented evidence to prove that the gain derived from or the loss resulting from the charged offense is sufficient to justify a fine of $425 million, pursuant to 18 U.S.C. § 3571(d). For purposes of this plea and sentencing only, the defendant waives its rights to contest this calculation.

10. Subject to the full, truthful, and continuing cooperation of the defendant and its related entities, as defined in Paragraph 12 of this Plea Agreement, and prior to sentencing in the case, the United States will fully advise the Court of the fact, manner, and extent of the defendant's and its related entities' cooperation, their commitment to prospective cooperation with the United States' investigation and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct.

11. The United States and the defendant understand that the Court retains complete discretion to accept or reject the recommended sentence provided for in Paragraph 9 of this Plea Agreement.

(a) If the Court does not accept the recommended sentence, the United States and the defendant agree that this Plea Agreement, except for Paragraph 11(b) below, will be rendered void.

(b) If the Court does not accept the recommended sentence, the defendant will be free to withdraw its guilty plea (Fed. R. Crim. P. 11(c)(5) and (d)). If the defendant withdraws its plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement, or made in the course of plea discussions with an attorney for the government will not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Federal Rule of Evidence 410. In addition, the defendant agrees that, if it withdraws its guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any offense referred to in Paragraph 14 of this Plea Agreement will be tolled for the period between the date of signature of this Plea Agreement and the date the defendant withdrew its guilty plea or for a period of sixty (60) days after the date of signature of this Plea Agreement, whichever period is greater.

DEFENDANT'S COOPERATION

12. The defendant and its related entities (for purposes of this Plea Agreement, the defendant's "related entities" are entities in which the defendant directly or indirectly had a greater than 50% ownership interest as of the date of signature of this Plea Agreement, including,

but not limited to Bridgestone APM Company), will cooperate fully and truthfully with the United States in the prosecution of this case; the current federal investigation of violations of federal antitrust and related criminal laws involving the manufacture or sale of automotive anti-vibration rubber products and other rubber automotive parts or components; and any litigation or other proceedings arising or resulting from such investigation to which the United States is a party (collectively, "Federal Proceeding"). Federal Proceeding includes, but is not limited to, an investigation, prosecution, litigation, or other proceeding regarding obstruction of, the making of a false statement or declaration in, the commission of perjury or subornation of perjury in, the commission of contempt in, or conspiracy to commit such offenses in, a Federal Proceeding. The full, truthful, and continuing cooperation of the defendant and its related entities will include, but not be limited to:

(a) producing to the United States all documents, information, and other materials, wherever located, not protected under the attorney-client privilege or the work-product doctrine, (and with translations into English when requested), in the possession, custody, or control of the defendant or any of its related entities, that are requested by the United States in connection with any Federal Proceeding; and

(b) using its best efforts to secure the full, truthful, and continuing cooperation, as defined in Paragraph 13 of this Plea Agreement, of the current and former directors, officers and employees of the defendant or any of its related entities as may be requested by the United States, but excluding Yasuo Ryuto, Yusuke Shimasaki, Yoshiyuki Tanaka, and Isao Yoshida (who have been separately charged), including making these persons available in the United States and at other mutually agreed-upon locations, at the defendant's expense, for interviews and the provision of testimony in

grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding. Current directors, officers, and employees are defined for purposes of this Plea Agreement as individuals who are directors, officers, or employees of the defendant or any of its related entities as of the date of signature of this Plea Agreement.

13. The full, truthful, and continuing cooperation of each person described in Paragraph 12(b) above, will be subject to the procedures and protections of this paragraph, and will include, but not be limited to:

(a) producing in the United States and at other mutually agreed-upon locations all documents, including claimed personal documents and other materials, wherever located, not protected under the attorney-client privilege or the work-product doctrine, (and with translations into English), that are requested by attorneys and agents of the United States in connection with any Federal Proceeding;

(b) making himself or herself available for interviews in the United States and at other mutually agreed-upon locations, not at the expense of the United States, upon the request of attorneys and agents of the United States in connection with any Federal Proceeding;

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. § 1503, *et seq.*), or conspiracy to commit such offenses;

(d) otherwise voluntarily providing the United States with any material or information not requested in (a) - (c) of this paragraph and not protected under the

attorney-client privilege or work-product doctrine that he or she may have that is related to any Federal Proceeding;

(e) when called upon to do so by the United States in connection with any Federal Proceeding, testifying in grand jury, trial, and other judicial proceedings in the United States fully, truthfully and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making a false statement or declaration in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402), and obstruction of justice (18 U.S.C. § 1503, *et seq.*); and

(f) agreeing that, if the agreement not to prosecute him or her in this Plea Agreement is rendered void under Paragraph 15(c), the statute of limitations period for any Relevant Offense as defined in Paragraph 15(a) will be tolled as to him or her for the period between the date of signature of this Plea Agreement and six (6) months after the date that the United States gave notice of its intent to void its obligations to that person under this Plea Agreement.

GOVERNMENT'S AGREEMENT

14. Subject to the full, truthful, and continuing cooperation of the defendant and its related entities, as defined in Paragraph 12 of this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, the United States agrees that it will not bring further criminal charges against the defendant and its related entities for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of an antitrust conspiracy involving the manufacture or sale of automotive anti-vibration rubber products, or any antitrust conspiracy under investigation by the United States as of the date of signature of this Plea Agreement

involving the manufacture or sale of rubber automotive parts or components by the defendant and its related entities to automobile manufacturers and their subsidiaries, affiliates, and suppliers. The nonprosecution terms of this paragraph do not apply to (a) civil matters of any kind; (b) any violation of the federal tax or securities laws or conspiracy to commit such offenses; (c) any crime of violence; (d) any acts of subornation of perjury (18 U.S.C. § 1622), making a false statement (18 U.S.C. § 1001), obstruction of justice (18 U.S.C. § 1503, *et seq.*), contempt (18 U.S.C. §§ 401-402), or conspiracy to commit such offenses.

15. The United States agrees to the following:

(a) Upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, and subject to the exceptions noted in Paragraph 15(c), the United States agrees that it will not bring criminal charges against any current or former director, officer or employee of the defendant or its related entities for any act or offense committed before the date of signature of this Plea Agreement and while that person was acting as a director, officer or employee of the defendant or its related entities that was undertaken in furtherance of an antitrust conspiracy involving the manufacture or sale of automotive anti-vibration rubber products, or any antitrust conspiracy under investigation by the United States as of the date of signature of this Plea Agreement involving the manufacture or sale of rubber automotive parts or components by the defendant and its related entities to automobile manufacturers and their subsidiaries, affiliates, and suppliers ("Relevant Offense"), except that the protections granted in this paragraph do not apply to Yasuo Ryuto, Yusuke Shimasaki, Yoshiyuki Tanaka, and Isao Yoshida;

(b) Should the United States determine that any current or former director, officer, or employee of the defendant or its related entities may have information relevant to any Federal Proceeding, the United States may request that person's cooperation under the terms of this Plea Agreement by written request delivered to counsel for the individual (with a copy to the undersigned counsel for the defendant) or, if the individual is not known by the United States to be represented, to the undersigned counsel for the defendant;

(c) If any person requested to provide cooperation under Paragraph 15(b) fails to comply fully with his or her obligations under Paragraph 13, then the terms of this Plea Agreement as they pertain to that person, and the agreement not to prosecute that person granted in this Plea Agreement, will be rendered void, and the United States may prosecute such person criminally for any federal crime of which the United States has knowledge, including, but not limited to any Relevant Offense;

(d) Except as provided in Paragraph 15(e), information provided by a person described in Paragraph 15(b) to the United States under the terms of this Plea Agreement pertaining to any Relevant Offense, or any information directly or indirectly derived from that information, may not be used against that person in a criminal case, except in a prosecution for perjury or subornation of perjury (18 U.S.C. §§ 1621-22), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. § 1503, *et seq.*), contempt (18 U.S.C. §§ 401-02), or conspiracy to commit such offenses;

(e) If any person who provides information to the United States under this Plea Agreement fails to comply fully with his or her obligations under Paragraph 13 of this Plea Agreement, the agreement in Paragraph 15(d) not to use that information or any

information directly or indirectly derived from it against that person in a criminal case will be rendered void;

(f) The nonprosecution terms of this paragraph do not apply to civil matters of any kind; any violation of the federal tax or securities laws or conspiracy to commit such offenses; any crime of violence; or perjury or subornation of perjury (18 U.S.C. §§ 1621-22), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. § 1503, *et seq.*), contempt (18 U.S.C. §§ 401-02), or conspiracy to commit such offenses; and

(g) Documents provided under Paragraphs 12(a) and 13(a) will be deemed responsive to outstanding grand jury subpoenas issued to the defendant or any of its related entities.

16. The United States agrees that when any person travels to the United States for interviews, grand jury appearances, or court appearances pursuant to this Plea Agreement, or for meetings with counsel in preparation therefor, the United States will take no action, based upon any Relevant Offense, to subject such person to arrest, detention or service of process, or to prevent such person from departing the United States. This paragraph does not apply to an individual's commission of perjury or subornation of perjury (18 U.S.C. §§ 1621-22), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. § 1503, *et seq.*), contempt (18 U.S.C. §§ 401-402), or conspiracy to commit such offenses.

17. The defendant understands that it may be subject to suspension or debarment action by state or federal agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls what action, if any, other agencies may take. However, the

Antitrust Division agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such action of the fact, manner and extent of the cooperation of the defendant and its related entities as a matter for that agency to consider before determining what action, if any, to take. The defendant nevertheless affirms that it wants to plead guilty regardless of the suspension or debarment consequences of its plea.

REPRESENTATION BY COUNSEL

18. The defendant has been represented by counsel and is fully satisfied that its attorneys have provided competent legal representation. The defendant has thoroughly reviewed this Plea Agreement and acknowledges that counsel has advised it of the nature of the charge, any possible defenses to the charge and the nature and range of possible sentences.

VOLUNTARY PLEA

19. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement and Attachment A (filed under seal). The United States has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

20. The defendant agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that the defendant or any of its related entities have failed to provide full, truthful, and continuing cooperation, as defined in Paragraph 12 of this Plea Agreement, or have otherwise violated any provision of this Plea Agreement, the United States will notify counsel for the defendant in writing by personal or

overnight delivery, email, or facsimile transmission and may also notify counsel by telephone of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph), and the defendant and its related entities will be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. The defendant agrees that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant or its related entities for any offense referred to in Paragraph 14 of this Plea Agreement, the statute of limitations period for such offense will be tolled for the period between the date of signature of this Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement.

21. The defendant understands and agrees that in any further prosecution of it or its related entities resulting from the release of the United States from its obligations under this Plea Agreement, because of the defendant's or any of its related entities' violation of this Plea Agreement, any documents, statements, information, testimony, or evidence provided by it, its related entities, or the current or former directors, officers, or employees of it or its related entities to attorneys or agents of the United States, federal grand juries or courts, and any leads derived therefrom, may be used against it or its related entities. In addition, the defendant unconditionally waives its right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Federal Rule of Evidence 410.

ENTIRETY OF AGREEMENT

22. This Plea Agreement and Attachment A (filed under seal) constitute the entire agreement between the United States and the defendant concerning the disposition of the

criminal charge in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

23. The undersigned is authorized to enter this Plea Agreement on behalf of the defendant as evidenced by the Resolution of the Board of Directors of the defendant attached to, and incorporated by reference in, this Plea Agreement.

24. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

25. A facsimile or PDF signature will be deemed an original signature for the purpose of executing this Plea Agreement. Multiple signature pages are authorized for the purpose of executing this Plea Agreement.

DATED: 4/30/14

BY: _____
Name: Shingo Kubota
Title: Vice President and Officer
Chief Compliance Officer
Compliance
Bridgestone Corporation

BY: _____
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Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, FEBRUARY 13, 2014
WWW.JUSTICE.GOV

AT
(202) 514-2007
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BRIDGESTONE CORP. AGREES TO PLEAD GUILTY TO PRICE FIXING ON AUTOMOBILE PARTS INSTALLED IN U.S. CARS

Company Agrees to Pay $425 Million Criminal Fine

WASHINGTON — Bridgestone Corp., a Tokyo, Japan-based company, has agreed to plead guilty and to pay a $425 million criminal fine for its role in a conspiracy to fix prices of automotive anti-vibration rubber parts installed in cars sold in the United States and elsewhere, the Department of Justice announced today.

According to a one-count felony charge filed today in U.S. District Court for the Northern District of Ohio in Toledo, Bridgestone engaged in a conspiracy to allocate sales of, to rig bids for and to fix, raise and maintain the prices of automotive anti-vibration rubber parts it sold to Toyota Motor Corp., Nissan Motor Corp., Fuji Heavy Industries Ltd., Suzuki Motor Corp., Isuzu Motors Ltd. and certain of their subsidiaries, affiliates and suppliers, in the United States and elsewhere. In addition to the criminal fine, Bridgestone also has agreed to cooperate with the department's ongoing auto parts investigations. The plea agreement is subject to court approval.

In October 2011, Bridgestone pleaded guilty and paid a $28 million fine for price-fixing and Foreign Corrupt Practices Act violations in the marine hose industry, but did not disclose at the time of the plea that it had also participated in the anti-vibration rubber parts conspiracy. Bridgestone's failure to disclose this conspiracy was a factor in determining the $425 million fine.

"The Antitrust Division will take a hard line when repeat offenders fail to disclose additional anticompetitive behavior," said Brent Snyder, Deputy Assistant Attorney General for the Antitrust Division's criminal enforcement program. "Today's significant fine reaffirms the division's commitment to holding companies accountable for conduct that harms U.S. consumers."

According to the charges, Bridgestone and its co-conspirators carried out the conspiracy through meetings and conversations in which they discussed and agreed upon bids, prices and allocating sales of certain automotive anti-vibration rubber products. After exchanging this information with its co-conspirators, Bridgestone submitted bids and prices in accordance with those agreements and sold and accepted payments for automotive anti-vibration rubber parts at

collusive and noncompetitive prices. Bridgestone's involvement in the conspiracy to fix prices of anti-vibration rubber parts lasted from at least January 2001 until at least December 2008.

"The Cleveland Division of the FBI is committed to aggressively investigating price-fixing and other antitrust violations," said Special Agent in Charge Stephen D. Anthony. "The illegal activity in this case threatened the basic tenet of free competition. We are pleased with the acceptance of responsibility along with the significant penalty which will be paid by Bridgestone for this conspiracy to fix prices. Together with our partners in the Department of Justice's Antitrust Division, we will continue to combat illegal practices which threaten consumers across the United States."

Bridgestone manufactures and sells a variety of automotive parts, including anti-vibration rubber parts, which are comprised primarily of rubber and metal, and are installed in suspension systems and engine mounts as well as other parts of an automobile. They are installed in automobiles for the purpose of reducing road and engine vibration.

Including Bridgestone, 26 companies have pleaded guilty or agreed to plead guilty in the department's ongoing investigation into price fixing and bid rigging in the automotive parts industry. The companies have agreed to pay a total of more than $2 billion in criminal fines. Additionally, 28 individuals have been charged.

Bridgestone is charged with price fixing in violation of the Sherman Act, which carries maximum penalties of a $100 million criminal fine for corporations. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine.

Today's prosecution is the result of an ongoing federal antitrust investigation into price fixing, bid rigging and other anticompetitive conduct in the automotive parts industry, which is being conducted by each of the Antitrust Division's criminal enforcement sections and the FBI. Today's charge was brought by the Antitrust Division's Chicago Office and the FBI's Cleveland Field Office, with the assistance of the FBI headquarters' International Corruption Unit and the U.S. Attorney's Office for the Northern District of Ohio. Anyone with information concerning this investigation should contact the Antitrust Division's Citizen Complaint Center at 1–888–647–3258, visit www.justice.gov/atr/contact/newcase.html or call the FBI's Cleveland Field Office at 216-522-1400.

# # #

14-157

DEPARTMENT OF JUSTICE

"FREQUENTLY ASKED QUESTIONS REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (November 19, 2008)"

By:

SCOTT D. HAMMOND
Deputy Assistant Attorney General
for Criminal Enforcement

BELINDA A. BARNETT
Senior Counsel
Antitrust Division
U.S. Department of Justice

FREQUENTLY ASKED QUESTIONS
REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM
AND MODEL LENIENCY LETTERS
(November 19, 2008)

The Antitrust Division first implemented a leniency program in 1978 and substantially revised the program with the issuance of a Corporate Leniency Policy in 1993 and a Leniency Policy for Individuals in 1994.[1] Through the Division's leniency program, a corporation can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Division, and meeting other specified conditions.

The Division has issued several speeches providing guidance on how the leniency program is implemented. It has also adopted model conditional leniency letters for both corporate and individual applicants to memorialize the agreement made with a leniency applicant.[2] The vast majority of the information in this paper restates what is available in prior policy statements. Therefore, this paper is meant to be a comprehensive and updated resource, and to provide guidance, on recurring issues regarding the implementation of the Division's Corporate Leniency Policy and Individual Leniency Policy. This paper discusses: (1) leniency application procedures; (2) the criteria for obtaining leniency under the Corporate Leniency Policy; (3) the criteria for obtaining leniency under the Individual Leniency Policy; (4) the conditional leniency letter; (5) the final, unconditional leniency letter and potential revocation of conditional leniency; and (6) confidentiality regarding leniency applications.

The Division's implementation of its leniency program has been greatly influenced by the views and input of the private bar and business community. The Division will continue to solicit their suggestions on how to make the program fair, transparent, and predictable. Therefore, we expect that we will periodically update and reissue these Frequently Asked Questions. Updated versions will be identified by a new posting date in the title of the paper.

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[1] The Division's Corporate Leniency Policy and Leniency Policy for Individuals are available at http://www.justice.gov/atr/public/criminal/leniency.html.

[2] The model conditional leniency letters are available at http://www.justice.gov/atr/public/criminal/leniency.html.

I. Leniency Application Procedures

Application Contact Information

1. ***Who does counsel for a potential applicant contact to apply for leniency?***

The Division's Deputy Assistant Attorney General for Criminal Enforcement ("Criminal DAAG") reviews all requests for leniency.[3] An applicant's counsel may contact the Criminal DAAG directly at 202-514-3543 to apply for leniency. However, counsel is not required to call the Criminal DAAG to initiate an application, but instead may contact any one of the Division's five specific criminal investigative offices.[4] For example, if there is an existing investigation involving the subject matter of the application, it likely will be more expeditious for counsel to contact the investigating staff. In such cases, Division staff will promptly alert the Criminal DAAG of the application.

Securing a Marker

The Division understands that when corporate counsel first obtains indications of a possible criminal antitrust violation, authoritative personnel for the company may not have sufficient information to know for certain whether the corporation has engaged in such a violation, an admission of which is required to obtain a conditional leniency letter.[5] Counsel should understand, however, that time is of the essence in making a leniency application. The Division grants only one corporate leniency per conspiracy, and in applying for leniency, the company is in a race with its co-conspirators and possibly its own employees who may also be preparing to apply for individual leniency. On a number of occasions, the second company to inquire about a leniency application has been beaten by a prior applicant by only a matter of hours. Thus, the Division has established a marker system to hold an applicant's place in the line for leniency while the applicant gathers more information to support its leniency application.

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[3] Note that the Corporate Leniency Policy, which was issued in 1993, states that the Director of Operations reviews corporate leniency applications, and the Leniency Policy for Individuals, which was issued in 1994, states that the Deputy Assistant Attorney General for Litigation reviews individual leniency applications. Both of the leniency policies were written before the Division created the Criminal DAAG position and gave that position oversight of the Division's criminal enforcement program, including the Division's leniency program.

[4] The phone numbers for making leniency applications to specific criminal investigative offices in the Division are: Chicago Office 312-984-7219; New York Office 212-335-8019; San Francisco Office 415-934-5319; Washington Criminal I Section 202-307-1166; and Washington Criminal II Section 202-616-5949.

[5] See discussion at question 5 below.

2. *What is a marker, and how is it used in the leniency application process?*

The Division frequently gives a leniency applicant a "marker" for a finite period of time to hold its place at the front of the line for leniency while counsel gathers additional information through an internal investigation to perfect the client's leniency application. While the marker is in effect, no other company can "leapfrog" over the applicant that has the marker.

To obtain a marker, counsel must: (1) report that he or she has uncovered some information or evidence indicating that his or her client has engaged in a criminal antitrust violation; (2) disclose the general nature of the conduct discovered; (3) identify the industry, product, or service involved in terms that are specific enough to allow the Division to determine whether leniency is still available and to protect the marker for the applicant; and (4) identify the client.[6] As noted above, when corporate counsel first obtains indications of a possible criminal antitrust violation, authoritative personnel for the company may not have sufficient information to enable them to admit definitively to such a violation. While confirmation of a criminal antitrust violation is not required at the marker stage, in order to receive a marker counsel must report that he or she has uncovered information or evidence suggesting a possible criminal antitrust violation, e.g. price fixing, bid rigging, capacity restriction, or allocation of markets, customers, or sales or production volumes. With respect to the product or service involved in the violation, in some cases, an identification of the industry will be sufficient for the Division to determine whether leniency is available. For example, there may be no pending investigations of any products or services in that particular industry. In other cases, an identification of the specific product or service or other identifying information, such as the geographic location of affected customers or one or more of the subject companies, may be necessary in order for the Division to determine whether leniency is available.

Because companies are urged to seek leniency at the first indication of wrongdoing, the evidentiary standard for obtaining a marker is relatively low, particularly in situations where the Division is not already investigating the wrongdoing. For example, if an attorney gave a compliance presentation and after the presentation an employee reported to the attorney a conversation the employee had overheard about his employer's potential price-fixing activities, this information would be sufficient to obtain a marker. However, the burden is higher when the Division already is in possession of information about the illegal activity. For example, it is not enough for counsel to state merely that the client has received a grand jury subpoena or has been searched during a

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[6] It is also possible in limited circumstances for counsel to secure a very short-term "anonymous" marker without identifying his or her client. An anonymous marker is given when counsel wants to secure the client's place first in line for leniency by disclosing the other information listed above, but needs more time to verify additional information before providing the client's name. For example, the Division might give counsel two or three days to gather additional information and to report the client's identity to the Division.

Division investigation and that counsel wants a marker to investigate whether the client has committed a criminal antitrust violation.

A marker is provided for a finite period. The length of time an applicant is given to perfect its leniency application is based on factors such as the location and number of company employees counsel needs to interview, the amount and location of documents counsel needs to review, and whether the Division already has an ongoing investigation at the time the marker is requested. A 30-day period for an initial marker is common, particularly in situations where the Division is not yet investigating the wrongdoing. If necessary, the marker may be extended at the Division's discretion for an additional finite period as long as the applicant demonstrates it is making a good-faith effort to complete its application in a timely manner.

II. Corporate Leniency Criteria

3. ***What are the criteria for obtaining corporate leniency, and is corporate leniency available both before and after an investigation has begun?***

Leniency is available for corporations either before or after a Division investigation has begun. The Corporate Leniency Policy includes two types of leniency, Type A Leniency and Type B Leniency. Type A Leniency is available only before the Division has received any information about the activity being reported from any source, while Type B is available even after the Division has received information about the activity. Detailed below are the criteria for each type of leniency.

Leniency Before an Investigation Has Begun ("Type A Leniency")

Leniency will be granted to a corporation reporting illegal antitrust activity before an investigation has begun if the following six conditions are met:

(1) At the time the corporation comes forward, the Division has not received information about the activity from any other source.

(2) Upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its participation in the activity.

(3) The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation.

(4) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.

(5) Where possible, the corporation makes restitution to injured parties.

(6) The corporation did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

If the corporation does not meet all six of the Type A Leniency conditions, it may still qualify for leniency if it meets the conditions of Type B Leniency.

Alternative Requirements for Leniency ("Type B Leniency")

A company will qualify for leniency even after the Division has received information about the illegal antitrust activity, whether this is before or after an investigation is formally opened, if the following conditions are met:

(1) The corporation is the first to come forward and qualify for leniency with respect to the activity.

(2) At the time the corporation comes in, the Division does not have evidence against the company that is likely to result in a sustainable conviction.

(3) Upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its part in the activity.

(4) The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation that advances the Division in its investigation.

(5) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.

(6) Where possible, the corporation makes restitution to injured parties.

(7) The Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing corporation's role in the activity, and when the corporation comes forward.

The "First-in-the-Door" Requirement

4. ***Can more than one company qualify for leniency?***

No. Under both Type A and Type B, only the first qualifying corporation may be granted leniency for a particular antitrust conspiracy. Condition 1 of Type A leniency requires that the Division has not yet received information about the illegal antitrust activity being reported from any other source, and Condition 1 of Type B leniency requires that the company is the first to come forward and qualify for leniency. Under the policy that only the first qualifying corporation receives conditional leniency,[7] there have been dramatic differences in the disposition of the criminal liability of corporations

[7] The conditional nature of the Division's leniency letters is discussed in Section IV below.

whose respective leniency applications to the Division were very close in time. Thus, companies have a huge incentive to make a leniency application as quickly as possible.

Criminal Violation

5. ***Does a leniency applicant have to admit to a criminal violation of the antitrust laws before receiving a conditional leniency letter?***

Yes. The Division's leniency policies were established for corporations and individuals "reporting their illegal antitrust activity," and the policies protect leniency recipients from criminal conviction. Thus, the applicant must admit its participation in a criminal antitrust violation involving price fixing, bid rigging, capacity restriction, or allocation of markets, customers, or sales or production volumes before it will receive a conditional leniency letter. Applicants that have not engaged in criminal violations of the antitrust laws have no need to receive leniency protection from a criminal violation and will receive no benefit from the leniency program.

When the model corporate conditional leniency letter was first drafted, the Division did not employ a marker system. Thus, companies received conditional leniency letters far earlier in the process, often before the company had an opportunity to conduct an internal investigation. However, the Division's practice has changed over time. The Division now employs a marker system, and the Division provides the company with an opportunity to investigate thoroughly its own conduct. While the applicant may not be able to confirm that it committed a criminal antitrust violation when it seeks and receives a marker, by the end of the marker process, before it is provided with a conditional leniency letter, it should be in a position to admit to its participation in a criminal violation of the Sherman Act. The Division may also insist on interviews with key executives of the applicant who were involved in the violation before issuing the conditional leniency letter. A company that argues that an agreement to fix prices, rig bids, restrict capacity, or allocate markets might be inferred from its conduct but that cannot produce any employees who will admit that the company entered into such an agreement generally has not made a sufficient admission of criminal antitrust violation to be eligible for leniency. A company that, for whatever reason, is not able or willing to admit to its participation in a criminal antitrust conspiracy is not eligible for leniency. Previously the model conditional leniency letters referred to the conduct being reported as "*possible* [. . . price fixing, bid rigging, market allocation] or other conduct violative of Section 1 of the Sherman Act." (emphasis added). Because applicants must report a criminal violation of the antitrust laws before receiving a conditional leniency letter, the word "possible" has been deleted from the model letter, and a reference to "or other conduct constituting a criminal violation of Section 1 of the Sherman Act" has been added to the model letters.[8]

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[8] Model Corporate Conditional Leniency Letter, introductory paragraph and paragraph #1; *see also* Model Individual Conditional Leniency Letter, introductory paragraph and paragraph #1.

Non-Antitrust Crimes

6. ***Does the Division's leniency program apply to any non-antitrust crimes?***

As explained below, in some instances, the Division's leniency program provides some protection for non-antitrust violations, and in some instances, it does not. The model corporate conditional leniency letter provides leniency from the Antitrust Division "for any act or offense [the applicant] may have committed [time period covered] in connection with the anticompetitive activity being reported." Thus, this language provides leniency from the Antitrust Division not only for a criminal antitrust violation, but also for other offenses committed in connection with the antitrust violation. For example, conduct that is usually integral to the commission of a criminal antitrust violation, such as mailing, faxing, or emailing bids agreed upon with competitors, can constitute other offenses, such as mail or wire fraud violations or conspiracies to defraud. On occasion, other types of offenses may also occur in connection with a criminal antitrust violation. A cartelist may bribe a purchasing agent to steer contracts to the designated winning bidders in connection with a bid-rigging scheme, or payoffs received in connection with a bid-rigging scheme may not be reported as income to the Internal Revenue Service. As stated above, the protections of a conditional leniency letter apply to such additional offenses that are committed in connection with the antitrust violation.

The conditional leniency letter, however, only binds the Antitrust Division, and not other federal or state prosecuting agencies. For example, if a qualifying leniency applicant participated in a bid-rigging conspiracy and also bribed a foreign public official in return for steering contracts in violation of the Foreign Corrupt Practices Act ("FCPA"), the Antitrust Division would not prosecute the leniency applicant for either the bid-rigging conspiracy or the FCPA violation if the FCPA violation was committed in connection with the bid rigging. If the FCPA violation was not committed in connection with the bid rigging, the leniency letter would provide no protection from the Antitrust Division with respect to the FCPA violation. Moreover, the leniency letter would not prevent the Criminal Division of the U.S. Justice Department or any other prosecuting agency from prosecuting the applicant for a FCPA violation regardless of whether that violation was committed in connection with the antitrust offense. If the applicant has exposure for an antitrust and non-antitrust violation, the applicant may seek non-prosecution protection for the non-antitrust violation in a separate agreement in return for self-reporting that violation to the relevant prosecuting agency pursuant to the Department's Principles of Federal Prosecution of Business Organizations.[9] The factors that will be weighed in deciding whether to prosecute a company for non-antitrust conduct can be found at U.S.A.M. 9-28.300. To date, in situations where the additional offense has consisted of conduct that is usually integral to the commission of any criminal antitrust violation, such as mail or wire fraud or conspiracy to defraud resulting from the mailing or wire transmission of announcements of fixed prices, there have been

[9] U.S. Attorney's Manual ("U.S.A.M.") 9-28.000, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

no instances where a separate prosecuting agency has elected to prosecute such conduct by a leniency applicant.

Expanding Leniency Protection for Subsequently Discovered Conduct

7. *If during the course of its internal investigation, an applicant discovers evidence that the anticompetitive activity was broader than originally reported, for example, in terms of its geographic scope or the products covered by the conspiracy, will the applicant's leniency protection be expanded to include the newly discovered conduct?*

Yes, under the conditions discussed below. Companies frequently apply for leniency before completing their own internal investigations in order to ensure their place at the front of the line. As a result, the Division may learn from one of the applicant's employees of anticompetitive activity that is more extensive than the conduct originally reported and thus that falls outside the scope of the conditional leniency letter. For example, an applicant's executives may report evidence showing that the anticompetitive activity was broader in terms of its geographic scope or the products covered by the conspiracy. In such cases, assuming that the applicant has not tried to conceal the conduct, that it is providing full, continuing, and complete cooperation, *and that the applicant can meet the criteria for leniency on the newly discovered conduct it reported,* the leniency coverage will be expanded to include such conduct. If the newly discovered conduct is part of the original conspiracy reported, the leniency protection for the expanded conduct typically will be accomplished by issuing an addendum to the original leniency letter. However, if the newly discovered conduct constitutes a separate conspiracy, the new leniency protection will be provided in a separate corporate conditional leniency letter.

"Amnesty Plus"

8. *If a company is under investigation for one antitrust conspiracy but is too late to obtain leniency for that conspiracy, can it receive any benefits in its plea agreement for that conspiracy by reporting its involvement in a separate antitrust conspiracy?*

Yes. A large percentage of the Division's investigations have been initiated as a result of evidence developed during an investigation of a completely separate conspiracy. This pattern has led the Division to take a proactive approach to attracting leniency applications by encouraging subjects and targets of investigations to consider whether they may qualify for leniency in other markets where they compete. For example, consider the following hypothetical fact pattern.

> *As a result of cooperation received pursuant to a leniency application in the widgets market, a grand jury is investigating the other four producers in that market, including XYZ, Inc., for their participation in an international cartel. As part of its internal investigation, XYZ, Inc., uncovers information of its executives' participation not only in a widgets cartel but also in a separate conspiracy in the sprockets market. The*

government has not detected the sprockets cartel because the leniency applicant was not a competitor in that market and no other investigation has disclosed the cartel activity. XYZ, Inc. is interested in cooperating with the Division's widgets investigation and seeking leniency by reporting its participation in the sprockets conspiracy. Assuming XYZ, Inc. qualifies for leniency with respect to the sprockets conspiracy, what benefits can XYZ, Inc. receive by following this path?

XYZ, Inc. can obtain what the Division refers to as "Amnesty Plus." In such a case, the Division would grant leniency to XYZ, Inc. in the sprockets investigation, meaning that XYZ, Inc. would pay zero dollars in fines for its role in the sprockets conspiracy and none of its officers, directors, and employees who admitted to the Antitrust Division their knowledge of, or participation in, the sprockets conspiracy and fully and truthfully cooperated with the Division would receive prison terms or fines in connection with the sprockets conspiracy. *Plus*, the Division would recommend to the sentencing court that XYZ, Inc. receive a substantial additional discount in its fine for its participation in the widgets cartel-- *i.e.*, a discount that takes into consideration the company's cooperation in both the widgets and sprockets investigations,[10] and would, therefore, be greater than the discount it would have received for cooperation in the widgets investigation alone. Consequently, XYZ, Inc. would receive dual credit for coming forward and cooperating in the sprockets investigation both in terms of obtaining leniency in that matter and in terms of receiving a greater reduction in the recommended widgets fine.

9. *How is the Amnesty Plus discount calculated?*

The size of the Amnesty Plus discount depends on a number of factors, including: (1) the strength of the evidence provided by the cooperating company in the leniency product; (2) the potential significance of the violation reported in the leniency application, measured in such terms as the volume of commerce involved, the geographic scope, and the number of co-conspirator companies and individuals; and (3) the likelihood the Division would have uncovered the additional violation absent the self-reporting, *i.e.*, if there were little or no overlap in the corporate participants and/or the culpable executives involved in the original cartel under investigation and the Amnesty Plus matter, then the credit for the disclosure would be greater. Of these three factors, the first two are given the most weight.[11]

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[10] *See* United States Sentencing Guidelines §8C4.1 (substantial assistance departure), *available at* http://www.ussc.gov/guidelin.htm.

[11] For a fuller discussion of the Division's Amnesty Plus program as well as the benefits generally of providing "second-in-the-door" cooperation, see Scott D. Hammond, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Speech Before the ABA Antitrust Section 2006 Spring Meeting (March 29, 2006), *available at* http://www.justice.gov/atr/public/speeches/215514.pdf.

10. ***If the leniency applicant is a subject or target of, or a defendant in, a separate investigation, will the applicant's conditional leniency letter contain any changes from the model corporate conditional leniency letter?***

Yes. An additional paragraph will be included when necessary in the model corporate conditional leniency letter to make clear that the protection afforded to the company and its executives pursuant to the letter, as well as their cooperation obligations, extend only to the activity reported pursuant to the leniency application and not to the separate investigation. In so doing, the letter will detail the company's acknowledgement of its status and that of its directors, officers, and employees as subjects, targets, or defendants in the separate investigation; the lack of effect of the conditional leniency letter on the ability of the United States to prosecute it and its directors, officers, and employees in that separate investigation; and the lack of effect of the separate investigation on the cooperation obligations of the company and its directors, officers, and employees under the conditional leniency letter. Specifically, the model paragraph for such a situation is as follows:

> 5. **Gadget Investigation**: Applicant acknowledges that it is a [subject/target of] [defendant in] a separate investigation into [price-fixing, bidding-rigging, and market-allocation] activity, or other conduct constituting a criminal violation of Section 1 of the Sherman Act, 15 U.S.C. § 1,[and related statutes,] in the gadget industry [insert geographic scope--e.g. in the United States and elsewhere] and that some of its current and former directors, officers, or employees are, or may become, subjects, targets, or defendants in that separate investigation. Nothing in this Agreement limits the United States from criminally prosecuting Applicant or any of its current or former directors, officers, or employees in connection with the gadget investigation. The status of Applicant or any of its current or former directors, officers, or employees as a subject, target, or defendant in the gadget investigation does not abrogate, limit, or otherwise affect Applicant's cooperation obligations under paragraph 2 above, including its obligation to use its best efforts to secure the ongoing, full, and truthful cooperation of covered employees, or the cooperation obligations of covered employees under paragraph 4 above. A failure of a covered employee to comply fully with his or her obligations described in paragraph 4 above includes, but is not limited to, regardless of any past or proposed cooperation, not making himself or herself available in the United States for interviews and testimony in trials, grand jury, or other proceedings upon the request of attorneys and agents of the United States in connection with the anticompetitive activity being reported because he or she has been, or anticipates being, charged, indicted, or arrested in the United States for violations of federal antitrust [and related statutes]involving the gadget industry. Such a failure also includes, but is not limited to, not responding fully and truthfully to all inquiries of the United States in connection with the anticompetitive activity being reported because his or her responses may also relate to, or tend to incriminate him or her in, the gadget investigation. Failure to comply fully with his or her cooperation obligations further includes,

> but is not limited to, not producing in the United States all documents, including personal documents and records, and other materials requested by attorneys and agents of the United States in connection with the anticompetitive activity being reported because those documents may also relate to, or tend to incriminate him or her in, the gadget investigation. The cooperation obligations of paragraph 4 above do not apply to requests by attorneys and agents of the United States directed at [price-fixing, bid-rigging, or market-allocation] activity in the gadget industry if such requests are not, in whole or in part, made in connection with the anticompetitive activity being reported. The Antitrust Division may use any documents, statements, or other information provided by Applicant or by any of its current or former directors, officers, or employees to the Division at any time pursuant to this Agreement against Applicant or any of its current or former directors, officers, or employees in any prosecution arising out of the gadget investigation, as well as in any other prosecution.[12]

In addition, directors, officers and employees of the applicant who are subjects, targets, or defendants in the separate investigation but who are interviewed by the Division in connection with his or her employer's leniency application will be given a separate letter in which the individual acknowledges his or her status in the separate investigation and acknowledges that the leniency letter governs the conditions of the individual's eligibility for leniency protection with respect to the anticompetitive activity being reported pursuant to the leniency letter. Specifically, the model letter for these acknowledgements states:

> Dear [Name]:
>
> On_____, 20XX the Antitrust Division of the United States Department of Justice and [Generic Company, Ltd. ("Applicant")] entered into an agreement granting Applicant conditional leniency for its participation in [price fixing, bid rigging, and market allocation] or other conduct constituting a criminal violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the widget industry [insert geographic scope: e.g., in the United States and elsewhere] ("Applicant Agreement"). A copy of the Applicant Agreement is attached. You are a "covered employee" as defined in paragraph 2(c) of the Applicant Agreement. You are also a [subject/target of] [defendant in] the Antitrust Division's gadget investigation as referenced in paragraph 5 of the Applicant Agreement.
>
> The Applicant Agreement governs the terms and conditions of your eligibility for leniency protection in the widget investigation. Your signature below signifies that you have read, understood, and will comply with the terms

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[12] Paragraph #5, Model Dual Investigations Leniency Letter, *available at* http://www.justice.gov/atr/public/criminal/leniency.html.

and conditions of the Applicant Agreement. Please sign, and have your attorney sign, below in acknowledgment.[13]

Meaning of "Discovery of the Illegal Activity"

11. ***Both Type A and Type B leniency require that "[t]he corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity." How does the Division interpret "discovery of the illegal activity being reported," especially when high-level officials of the company participated in the cartel?***

Questions have arisen about what it means for the corporation to "discover" the illegal activity being reported. More specifically, in cases (usually involving small, closely held corporations) where the top executives, board members, or owners participated in the conspiracy, it has been suggested that the corporation may not be eligible for leniency because the corporation's "discovery" of the activity arguably occurred when those participants joined the conspiracy.

The Division, however, generally considers the corporation to have discovered the illegal activity at the earliest date on which either the board of directors or counsel for the corporation (either inside or outside) was first informed of the conduct at issue. Thus, the fact that top executives, individual board members, or owners participated in the conspiracy does not necessarily bar the corporation from eligibility for leniency. The purpose of this interpretation is to ensure that as soon as the authoritative representatives of the company for legal matters -- the board or counsel representing the corporation -- are advised of the illegal activity, they take action to cease that activity. In the case of a small closely held corporation in which the board of directors is never formally advised of the activity, because all members of the board are conspirators, the corporation still may qualify under this provision if the activity is terminated promptly after legal counsel is first informed of the activity.

[13] Model Dual Investigations Acknowledgement Letter for Employees, *available at* http://www.justice.gov/atr/public/criminal/leniency.html.

12. ***Does the grant of conditional leniency always cover activity up until the date of the conditional leniency letter?***

The grant of conditional leniency usually protects the applicant for any activity committed in connection with a criminal antitrust violation prior to the date of the conditional leniency letter. This is because, in the vast majority of cases, leniency applicants approach the Division promptly after discovery of the anticompetitive activity in order to enhance the likelihood that they are the first applicant and that a co-conspirator or an employee does not beat them in the race to obtain leniency. In such cases, paragraph #3 of the Division's model corporate conditional leniency letter provides that "[T]he Antitrust Division agrees not to bring any criminal prosecution against Applicant for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported." In rare cases in which there is a significant lapse in time between the date the applicant discovered the anticompetitive activity being reported and the date the leniency application was made, and hence there is a significant lapse in time between the date the applicant was required to take prompt and effective action to terminate its participation in the conspiracy and the date the applicant reported the activity to the Division, the Division reserves the right to grant conditional leniency only up to the date the applicant represents it terminated its participation in the activity. Thus, in such cases, the Division also likely will insist on insertion of a discovery date and a termination date in paragraph #1 of the corporate conditional leniency letter. The discovery date and termination date representations would be that the applicant "discovered the anticompetitive activity being reported in or about [month/year] and terminated its participation in the activity in or about [month/year]."[14] The applicant bears the burden of proving the accuracy of this representation.[15]

<u>Termination of Participation in Anticompetitive Activity</u>

13. ***What constitutes "prompt and effective action to terminate [the applicant's] participation in the anticompetitive activity being reported upon discovery of the activity?"***

The model corporate conditional leniency letter requires a leniency applicant to promptly terminate its participation in the anticompetitive activity being reported upon

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[14] *See* n.2, Model Corporate Conditional Leniency Letter.

[15] Model Corporate Conditional Leniency Letter, paragraph #1. ("Applicant agrees that it bears the burden of proving its eligibility to receive leniency, including the accuracy of the representations made in this paragraph and that it fully understands the consequences that might result from a revocation of leniency as explained in paragraph 3 of this Agreement.") Logically, the applicant, as the party seeking leniency and representing that it is eligible, has the burden of establishing its eligibility for leniency.

discovering the illegal conduct.[16] This prerequisite to obtaining leniency exists because, as a matter of good public policy, the Division does not believe that it would be appropriate to provide leniency to a company that discovers illegal conduct but then elects to continue engaging in that conduct. What constitutes prompt and effective action will, of course, depend on the particular circumstances in each leniency matter. A primary consideration is what steps are taken by management in response to the discovery of the anticompetitive activity being reported. For example, a company must not use managers or executives who were involved in the anticompetitive activity to investigate the activity, to formulate the company's response to the discovery of such activity, or to determine the appropriate disciplinary action against employees who participated in the activity. Other considerations are the size of the applicant corporation, its corporate structure, the complexity of its operations involved in the reported activity (including its geographic scope), and the nature of the reported activity.

A company terminates its part in anticompetitive activity by stopping any further participation in that activity, unless continued participation is with Division approval in order to assist the Division in its investigation. The Division will not disqualify a leniency applicant whose illegal conduct ended promptly after it was discovered merely because the applicant did not take some particular action. Moreover, as an exercise of prosecutorial discretion, if the Division was persuaded that the company and its high-level management had done everything that could reasonably be expected of them to terminate the company's involvement in the anticompetitive activity being reported, the Division would not revoke a company's conditional acceptance into the leniency program because a lower-level employee in one of the company's remote offices continued for some short period of time to have conspiratorial contacts with his or her counterpart. On the other hand, if any of the applicant's executives or high-level managers who were members of the conspiracy prior to discovery, continue to act in furtherance of the conspiracy despite that company's remedial actions, then the company should recognize that the Division may decide that the applicant did not promptly and effectively end its participation in the conspiracy.

A company that seeks a marker from the Division immediately after discovering anticompetitive conduct, and that effectively terminates its involvement in that activity at about the same time, will be viewed by the Division as having taken prompt and effective action. To date, almost every company that has sought leniency from the Division has done so shortly after discovering the anticompetitive activity being reported. On the other hand, an applicant that discovers anticompetitive activity but, instead of reporting the activity to the Division, keeps the culpable employees in the same positions with no repercussions or inadequate supervision and fails to prevent those employees from continuing to engage in the anticompetitive activity, can expect the Division to decline to grant it conditional leniency. As with the discovery representation, the applicant has the

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[16] *Id.* ("Applicant represents . . . that . . . it . . . took prompt and effective action to terminate its participation in the anticompetitive activity being reported upon discovery of the activity.")

burden of proving that it took prompt and effective action, and will not receive final leniency unless it satisfies its burden of proof.[17]

Leniency applicants most commonly effectuate termination by reporting the anticompetitive activity to the Division and refraining from further participation - unless continued participation is with Division approval. Applicants may be asked to assist the Division in the conduct of a covert investigation, by, for example, participating in consensually monitored discussions with other members of the conspiracy.[18] Whether the Division's investigation is overt or covert, however, there is a risk of obstruction resulting from unauthorized disclosures about the application or the investigation. Therefore, at the outset of the leniency application, the applicant should discuss with the Division staff who within the company can be told about the leniency application as well as when and how they should be informed.

Not the Leader or Originator of the Activity

Part A of the Corporate Leniency Policy, section A6, requires that "[t]he corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity." Similarly, Part B of the Corporate Leniency Policy, section B7, requires that:

> The Division determine[] that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

The model corporate conditional leniency letter incorporates this requirement in paragraph #1, which requires the applicant to represent that it "did not coerce any other party to participate in the anticompetitive activity being reported and was not the leader in, or the originator of, the activity." As with the discovery and termination representations, the applicant bears the burden of proving the accuracy of this representation.[19]

14. *How does the Division define what it means to be "the leader in, or originator of, the activity"?*

The leniency policy refers to "*the* leader" and "*the* originator of the activity," rather than "*a*" leader or "*an*" originator. Applicants are disqualified from obtaining

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[17] *Id., supra* note 15.

[18] When an applicant's employees are participating in cartel meetings and communications at the direction of the Antitrust Division to assist with a covert investigation, the employees are deemed to be agents of the Antitrust Division under U.S. law and are no longer deemed co-conspirators.

[19] Model Corporate Conditional Leniency Letter, paragraph #1, *supra* note 15.

leniency only if they were clearly the single organizer or single ringleader of a conspiracy. If, for example, there are two ringleaders in a five-firm conspiracy, then all of the firms, including the two leaders, are potentially eligible for leniency. Or, if in a two-firm conspiracy, each firm played a decisive role in the operation of the cartel, both firms may qualify for leniency. In addition, an applicant will not be disqualified under this condition just because it is the largest company in the industry or has the greatest market share if it was not clearly the single organizer or single ringleader of the conspiracy. Wherever possible, the Division has construed or interpreted its program in favor of accepting an applicant into the leniency program in order to provide the maximum amount of incentives and opportunities for companies to come forward and report their illegal activity.

Cooperation Obligations

15. ***What are the corporate applicant's cooperation obligations?***

Type A leniency requires that "[t]he corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation." Type B leniency requires that "[t]he corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation." Both Type A and Type B leniency require that "[t]he confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials." Paragraph #2 of the model corporate conditional leniency letter describes specific cooperation obligations of the applicant, such as provision of documents, information, and materials wherever located; using its best efforts to secure the cooperation of its current directors, officers, and employees;[20] and paying restitution to victims.

Production of Attorney-Client or Work-Product Privileged Communications or Documents

16. ***As part of the applicant's cooperation obligations, will the applicant be required to provide communications or documents protected by the attorney-client privilege or work-product doctrine?***

Paragraphs #2 and #4 of the model corporate conditional leniency letter state that the applicant and its directors, officers, and employees are not required to produce communications or documents protected by the attorney-client privilege or work-product doctrine as part of their cooperation. Moreover, as stated in the introductory paragraph of the model leniency letter, the Division does not consider disclosures made by counsel in furtherance of the leniency application to constitute a waiver of the attorney-client privilege or the work-product privilege. While the Division does not require or request

[20] In specific cases, the Division, in its discretion, may also agree to cover former employees. See discussion at question 19 below.

the production of privileged communications or documents and does not refuse to grant leniency because a corporation has not produced such privileged information, some corporations, after consulting its counsel, have concluded that a voluntary disclosure of privileged communications and/or documents was in the best interest of the corporation.

Effect of Refusal of Individual Executives to Cooperate

17. ***If one or more individual corporate executives refuse to cooperate, will the corporate applicant be barred from leniency on the basis that the confession is no longer a "corporate act" or that the corporation is not providing "full, continuing, and complete" cooperation?***

In order for the confession of wrongdoing to be a "corporate act" and in order for the cooperation to be considered "full, continuing, and complete," the corporation must, in the Division's judgment, be taking all legal, reasonable steps to cooperate with the Division's investigation. The model corporate conditional leniency letter requires the company to use "its best efforts to secure the ongoing, full, and truthful cooperation of [its] directors, officers and employees."[21] If the corporation is unable to secure the full and truthful cooperation of one or more individuals, that would not necessarily prevent the Division from granting the leniency application. However, the number and significance of the individuals who fail to cooperate, and the steps taken by the company to secure their cooperation, would be relevant to the Division's determinations of whether there is a corporate confession, whether the corporation's cooperation is truly "full, continuing, and complete," and whether the Division is receiving the benefit of the bargain if certain key executives are not cooperating. Of course, in such situations, the non-cooperating individuals would lose the protection given to cooperating employees under the corporate conditional leniency letter, and the Division would be free to prosecute such individuals for the antitrust crime and any related offenses.

Definition of Current Employees

18. ***How is "current director, officer, or employee" defined for purposes of the cooperation obligations and leniency protection of the corporate conditional leniency letter?***

Status as a "current director, officer, or employee" is defined at the time the corporate conditional leniency letter is signed. Thus, leniency coverage for individuals who are directors, officers and employees of the applicant at the time the letter is signed will continue even if they leave their employment as long as they satisfy the obligations of the corporate conditional leniency letter.

[21] Model Corporate Conditional Leniency Letter, paragraph #2(c).

Coverage of Former Employees

19. ***Can an applicant's former directors, officers, and employees be included in the scope of the conditional leniency letter?***

The Corporate Leniency Policy does not refer to former directors, officers or employees, so the Division is under no obligation to grant leniency to those former representatives. However, the Division has the authority to agree not to prosecute former directors, officers and employees who come forward to cooperate and often reaches such agreements. It is therefore possible, and in many cases advisable, for the applicant to seek to include in the corporate conditional leniency letter protection for former directors, officers or employees or certain named former directors, officers, or employees on the same basis as current ones. The model letter provides optional language for the inclusion of former directors, officers or employees in paragraphs #2(c)-(f), #3, and #4. As noted in footnote 3 of the model corporate conditional leniency letter, whether the Division includes former directors, officers, or employees in the agreement depends on a number of factors, such as whether the applicant is interested in protecting these persons and, most importantly, whether it has the ability to secure the cooperation of key former directors, officers, and employees.

Restitution

20. ***What is the meaning of the qualifier in the Corporate Leniency Policy that "[w]here possible, the corporation makes restitution to injured parties"?***

There is a strong presumption in favor of requiring restitution in leniency situations. Restitution is excused only where, as a practical matter, it is not possible. Examples of situations in which an applicant might be excused from making restitution include situations where the applicant is in bankruptcy and is prohibited by court order from undertaking additional obligations, or where there was only one victim of the conspiracy and it is now defunct. Another example of a situation where the Division will not require the applicant to pay full restitution is if doing so will substantially jeopardize the organization's continued viability. Paragraph #2(g) of the model letter requires that the applicant make "all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution." Thus, the applicant must demonstrate to the Division that it has satisfied its obligation to pay restitution before it will be granted final leniency. Restitution is normally resolved through civil actions with private plaintiffs. Under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, Title 2, §§ 211-214, 118 Stat. 661, 666-668, a leniency applicant may qualify for detrebling of damages if the applicant cooperates with plaintiffs in their civil actions while the applicant's former co-conspirators will remain liable for treble damages on a joint and several basis.

No Criminal Case

21. ***What are the applicant's restitution obligations if the Division ultimately brings no criminal case?***

In certain cases where a corporation has otherwise met the requirements for leniency and has agreed to pay restitution, the Division may ultimately determine that either (1) the leniency applicant has not engaged in any criminal antitrust conduct or (2) even though the leniency applicant has engaged in criminal antitrust conduct, prosecution of the other conspiracy participants is not justified under the Principles of Federal Prosecution given the weakness of the evidence or other problems with the case. The issue has arisen as to whether, in such cases, the leniency applicant still has to pay restitution as agreed in the corporate conditional leniency letter.

If the Division's investigation ultimately reveals that the leniency applicant has not engaged in any criminal antitrust conduct, the Division will not grant leniency because it is unnecessary. Obligations placed on the applicant by the Leniency Policy or the applicant's conditional leniency letter with the Division no longer apply once the Division determines there is no underlying criminal antitrust conduct. In such cases, the Division will so advise the applicant in writing and the applicant will have no duty to pay restitution. If the leniency applicant has already paid restitution or is in the process of doing so, the applicant must resolve the matter with the recipient. Once the Division decides not to grant leniency, the applicant has no duty toward the Division, nor does the Division have any duty to help "reverse" any steps taken by the applicant to make restitution. Due to the Division's use of a marker system, however, this situation is much less likely to occur today. Through the marker system, the applicant has the opportunity to conduct a thorough internal investigation and the Division has the opportunity to interview key corporate executives before a conditional leniency letter is issued. Thus, any issues regarding whether a criminal antitrust violation occurred should be resolved during the marker stage.

If, on the other hand, the Division concludes that the leniency applicant has engaged in criminal antitrust activity and conditionally grants the leniency application, but later closes the investigation without charging any other entity in the conspiracy, the obligation to pay restitution will remain in effect. In such a case, the Division will notify the leniency applicant and the subjects of the investigation in writing that the investigation has been closed. In such cases, the leniency applicant may withdraw its application if it so chooses, and, if it does, the obligations undertaken by the applicant pursuant to the conditional leniency letter - including the payment of restitution - will no longer be in effect. If the applicant withdraws its application, the Division, for its part, will technically no longer be prohibited from prosecuting the applicant and will not provide any additional assurances of non-prosecution. Again, the Division will not assist in restoring any restitution already paid if the leniency application is withdrawn. Moreover, if the applicant chooses to withdraw its leniency application, it will not qualify for detrebling of civil damages under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. Also, once an applicant has fulfilled all of the conditions for

leniency and the Division has issued a final leniency letter, the Division does not permit the leniency recipient to withdraw its leniency application.

Foreign Parties

22. ***What are the applicant's restitution obligations to foreign parties in international conspiracies?***

The 2008 revisions to the model corporate conditional leniency letter explicitly recognize the holdings of F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) and Empagran S.A. v. F. Hoffmann-La Roche Ltd., 417 F.3d 1267 (D.C. Cir. 2005), that damages for violations of the Sherman Antitrust Act do not include foreign effects independent of and not proximately caused by any adverse domestic effect. Paragraph #2(g) of the model letter now states: "However, Applicant is not required to pay restitution to victims whose antitrust injuries are independent of any effects on United States domestic commerce proximately caused by the anticompetitive activity being reported."

Leniency for Corporate Directors, Officers, and Employees

23. ***What are the conditions for leniency protection for the applicant's directors, officers, and employees?***

If a corporation qualifies for Type A leniency, all directors, officers, and employees of the corporation who admit their involvement in the criminal antitrust violation as part of the corporate confession will also receive leniency if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation. In addition, the applicant's directors, officers, and employees who did not participate in the conspiracy but who had knowledge of the conspiracy and cooperate with the Division are also covered by the conditional leniency letter, as detailed below. If their corporation qualifies for Type B leniency, the Corporate Leniency Policy states that individuals who come forward with the corporation will still be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually. In practice, however, the Division ordinarily provides leniency to all qualifying current employees of Type B applicants in the same manner that it does for Type A applicants.

Paragraph #4 of the corporate conditional leniency letter details the specific conditions for leniency protection for the applicant's directors, officers, and employees who had knowledge of, or participated in, the anticompetitive activity being reported by the applicant. The conditions are: (1) verification of the applicant's representations in paragraph #1 of the corporate conditional leniency letter; (2) the applicant's full, continuing, and complete cooperation as defined in paragraph #2 of the letter; (3) admission by the pertinent director, officer, or employee of his or her knowledge of, or participation in, the anticompetitive activity being reported; and (4) the individual's full and truthful cooperation with the Division in its investigation of the activity. The specific

cooperation obligations of the individuals are also defined in paragraph #4 of the corporate conditional leniency letter, such as the provision of documents, records and other materials and information; participation in interviews; and the provision of testimony. As noted below, the Division reserves the right to revoke the conditional protections of the corporate conditional leniency letter with respect to any director, officer, or employee who the Division determines caused the corporate applicant to be ineligible for leniency, who continued to participate in the anticompetitive activity being reported after the corporation took action to terminate its participation in the activity and notified the individual to cease his or her participation in the activity, or who obstructed or attempted to obstruct an investigation of the anticompetitive activity at any time, whether the obstruction occurred before or after the date of the corporate conditional leniency letter.[22]

III. Criteria under the Leniency Policy for Individuals

24. ***What are the criteria for leniency under the Leniency Policy for Individuals?***

An individual who approaches the Division on his or her own behalf to report illegal antitrust activity may qualify for leniency under the Leniency Policy for Individuals. As with a corporate applicant, an individual leniency applicant is required to admit to his or her participation in a criminal antitrust violation.[23] The individual must not have approached the Division previously as part of a corporate approach seeking leniency for the same conduct. Once a corporation attempts to qualify for leniency under the Corporate Leniency Policy, individuals who come forward and admit their involvement in the criminal antitrust violation as part of the corporate confession will be considered for leniency solely under the provisions of the Corporate Leniency Policy. They may not be considered for leniency under the Leniency Policy for Individuals.

Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun if the following three conditions are met.[24]

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[22] See Section V below and Model Corporate Conditional Leniency Letter, paragraph #4.

[23] See also discussion at question 6 above regarding the Division's policy regarding coverage of non-antitrust crimes, which applies to individual leniency applicants as well as to corporate applicants.

[24] As with the model corporate conditional leniency letter, the model individual conditional leniency letter provides that the leniency protection applies to "any act or offense [the applicant] may have committed prior to the date of this letter in connection with the anticompetitive activity being reported." Model Individual Conditional Leniency Letter, paragraph #3. With respect to an individual leniency applicant, if a significant lapse in time occurs between the applicant's termination of his or her participation in the anticompetitive activity being reported and the date the applicant reported the activity to the Division, the Division reserves the right to grant conditional

(1) At the time the individual comes forward to report the activity, the Division has not received information about the activity being reported from any other source.

(2) The individual reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation.

(3) The individual did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

Any individual who does not qualify for leniency under the individual or corporate leniency policies may still be considered for statutory or informal immunity.

Paragraph #2 of the model individual conditional leniency letter describes specific cooperation obligations of the individual applicant, such as the production of documents, records and other materials and information; participation in interviews; and provision of testimony. As is the case with a corporate applicant, an individual applicant is not required, and will not be asked, to produce communications or documents privileged under the attorney-client privilege or work-product doctrine.[25]

Regarding the leadership condition, an individual leniency applicant is required to represent in his or her leniency letter that, "in connection with the anticompetitive activity being reported, [he/she] did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the activity" in order to establish his or her eligibility for leniency. The applicant bears the burden of proving the accuracy of this representation.[26] As with a corporate applicant, an individual applicant would only be disqualified from obtaining leniency based on leadership role if he or she is clearly the single organizer or single ringleader of a conspiracy. Accordingly, in situations where the conspirators are viewed as co-equals or where there are two or more conspirators that

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leniency only up to the date applicant terminated his or her participation in the activity. Model Individual Conditional Leniency Letter, n.2.

[25] Model Individual Conditional Leniency Letter, paragraph #2(a), (d). Of course, as with a corporate applicant, an individual, after consulting with counsel, may conclude that a voluntary disclosure of privileged communications or documents is in his or her best interest.

[26] Model Individual Conditional Leniency Letter, paragraph #1 ("Applicant agrees that [he/she] bears the burden of proving [his/her] eligibility to receive leniency, including the accuracy of the representations made in this paragraph and that [he/she] fully understands the consequences that might result from a revocation of leniency as explained in paragraph 3 of this Agreement.").

are viewed as leaders or originators, any of the participants may qualify under the Individual Leniency Policy.

IV. The Conditional Leniency Letter

25. ***What is the conditional leniency letter, and why is it conditional?***

The conditional leniency letter is the initial leniency letter given to a leniency applicant. The Division has a model corporate conditional leniency letter and a model individual conditional leniency letter.[27] The initial grant of leniency pursuant to the letters is conditional because a final grant of leniency depends upon the applicant performing certain obligations over the course of the criminal investigation and any resulting prosecution of co-conspirators, such as establishment of its eligibility; its full, truthful and continuing cooperation; and its payment of restitution to victims, as set forth in the letter, and the final grant also depends on the Division verifying the applicant's representations regarding its eligibility. Only those who qualify for leniency should receive its rewards. After all of the applicant's obligations have been satisfied (usually after the investigation and prosecution of co-conspirators have been concluded) and the Division has verified the applicant's representations regarding eligibility, the Division will issue the applicant a final leniency letter confirming that the conditions of the conditional leniency letter have been satisfied and that the leniency application has been granted.

The conditional nature of the leniency initially granted is reflected in the model leniency letters. The introductory paragraph of the model corporate and individual conditional leniency letters states that the agreement "is conditional." Further, the letters state in paragraph #3 that, "[s]ubject to verification of Applicant's representations in paragraph 1 above, and subject to [Applicant's/its] full, continuing, and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept Applicant into [Part A/Part B of the Corporate Leniency Program/the Individual Leniency Program]." The letters also state in the introductory paragraph that the agreement "depends upon Applicant (1) establishing that [it/he or she] is eligible for leniency as [it/he or she] represents in paragraph 1 of [the] Agreement, and (2) cooperating in the Antitrust Division's investigation as required by paragraph 2 of [the] Agreement." As noted above, the applicant, as the party seeking leniency, has the burden of establishing its eligibility for leniency.[28] The introductory paragraph further notes that, "[a]fter Applicant establishes that [it/he or she] is eligible to receive leniency and provides the required cooperation, the Antitrust Division will notify Applicant in writing that [it/he or she] has been granted unconditional leniency."

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[27] Both model conditional letters are available at http://www.justice.gov/atr/public/criminal/leniency.html.

[28] *See supra* n.15.

Although many of the leniency requirements are fulfilled during the criminal investigation, the Division understands that applicants want assurances up front, even if conditional, that they will receive non-prosecution protection at the conclusion of the investigation if they fulfill the requirements of the leniency program. The Division's conditional leniency letters address that need. In contrast, many voluntary disclosure programs of other prosecuting agencies do not provide any upfront assurances regarding non-prosecution. Thus, the alternative to the conditional letter would be for the Division to give no assurances until the conclusion of the investigation and prosecution of co-conspirators. The conditional leniency letters, however, provide companies and their executives with a transparent and predictable disclosure program, and have been very effective both for the Division in setting forth the requirements of leniency and for applicants in meeting those requirements.

V. The Final Leniency Letter

26. ***How and when does an applicant receive a final, unconditional leniency letter?***

As noted above and in the model corporate and individual conditional leniency letters, after the applicant "establishes that [it/he/she] is eligible to receive leniency," as represented in paragraph #1 of the conditional leniency letter, "and provides the required cooperation," as set forth in paragraph #2 of the conditional leniency letter, "the Antitrust Division will notify Applicant in writing that [it/he/she] has been granted unconditional leniency."[29] Normally this would occur after the investigation and any resulting prosecutions of the applicant's co-conspirators are completed.

27. ***Before an applicant is granted final, unconditional leniency, under what circumstances can the Division revoke an applicant's conditional leniency, and will the Division provide the applicant with any advance notice of a staff recommendation to revoke conditional leniency?***

If the Division determines, before it grants an applicant a final, unconditional leniency letter, that the applicant "(1) contrary to [its/his/her] representations in paragraph 1 of [the conditional leniency letter], is not eligible for leniency or (2) has not provided the cooperation required by paragraph 2 of [the conditional leniency letter]," the Division may revoke the applicant's conditional acceptance into the leniency program.[30] Before the Division makes a final determination to revoke a corporate applicant's conditional leniency, it will notify applicant's counsel in writing of staff's recommendation to revoke the leniency and provide counsel with an opportunity to meet with the staff and Office of

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[29] Model Corporate Conditional Leniency Letter, introductory paragraph; Model Individual Conditional Leniency Letter, introductory paragraph.

[30] Model Corporate Conditional Leniency Letter, paragraph #3; Model Individual Conditional Leniency Letter, paragraph #3.

Criminal Enforcement regarding the revocation.[31] During the time that a recommendation to revoke an applicant's leniency is under consideration, the Division will suspend the applicant's obligation to cooperate so that the applicant is not put in the position of continuing to provide evidence that could be used against it should the conditional leniency be revoked. In the history of the Division's leniency program, the Division has revoked only one conditional leniency letter out of the more than 100 conditional leniency letters entered.

28. ***When can an applicant or its employees judicially challenge a Division decision to revoke conditional leniency?***

Paragraph #3 of the model corporate and individual conditional leniency letters states that the applicant "understands that the Antitrust Division's Leniency Program is an exercise of the Division's prosecutorial discretion, and [it/he/she] agrees that [it/he/she] may not, and will not, seek judicial review of any Division decision to revoke [its/his/her] conditional leniency unless and until [it/he/she] has been charged by indictment or information for engaging in the anticompetitive activity being reported." Paragraph #4 of the model corporate conditional leniency letter also notes that "[j]udicial review of any Antitrust Division decision to revoke [an individual's] conditional non-prosecution protection granted [under the corporate conditional leniency letter] is not available unless and until the individual has been charged by indictment or information." The Division's leniency program is an exercise of prosecutorial discretion generally not subject to judicial review. Accordingly, the proper avenue to challenge a revocation of a leniency letter is to raise the letter as a defense post-indictment. Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 183-187 (3d Cir. 2006).

29. ***If a corporate conditional leniency letter is revoked, what will happen to the protection provided in the letter for the corporation's directors, officers, and employees?***

If the Division revokes a corporation's conditional acceptance into the leniency program, the conditional leniency letter it received "shall be void."[32] Thus, the protection provided to employees pursuant to the letter no longer exists. However, as a matter of prosecutorial discretion, even if the Division revokes a company's conditional leniency letter, the Division will elect not to prosecute individual employees, so long as they had fully cooperated with the Division prior to the revocation and, in the Division's view, were not responsible for the revocation.

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[31] Model Corporate Conditional Leniency Letter, paragraph #3. The individual conditional corporate leniency letter provides this notice will be given absent exigent circumstances, such as risk of flight. Model Individual Conditional Leniency Letter, paragraph #3.

[32] Model Corporate Conditional Leniency Letter, paragraph #3.

30. ***Under what circumstances can the protection granted to an individual under a corporate conditional leniency letter be revoked?***

As noted in the model corporate conditional leniency letter, if an director, officer, or employee covered by the leniency letter fails to comply with his or her obligations under the letter, the Division may revoke any conditional leniency, immunity, or non-prosecution granted to the individual under the letter.[33] Also, the Division reserves the right to revoke the conditional non-prosecution protections of the corporate conditional leniency letter with respect to any director, officer, or employee who the Division determines caused the corporate applicant to be ineligible for leniency under paragraph #1 of the corporate conditional leniency letter, who continued to participate in the anticompetitive activity being reported after the corporation took action to terminate its participation in the activity and notified the individual to cease his or her participation in the activity,[34] or who obstructed or attempted to obstruct an investigation of the anticompetitive activity at any time, whether the obstruction occurred before or after the date of the corporate conditional leniency letter.[35]

31. ***What notice or process will be given to an individual if the Division is contemplating revoking his or her conditional protections provided in a corporate conditional leniency letter?***

Absent exigent circumstances, such as risk of flight, before the Division makes a final determination to revoke an individual's conditional leniency, immunity, or non-prosecution provided under a corporate conditional leniency letter, it will notify in writing the individual's counsel and the corporate applicant's counsel of staff's recommendation to revoke the protections provided in the letter and provide counsel with an opportunity to meet with the staff and Office of Criminal Enforcement regarding the revocation.[36] During the time that a revocation recommendation is under consideration, the Division will suspend the individual's obligation to cooperate so that the individual is not put in the position of continuing to provide evidence that could be used against him or her should his or her conditional protections be revoked. If the Division revokes

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[33] Model Corporate Conditional Leniency Letter, paragraph #4.

[34] Such notice ordinarily is part of the corporation's prompt and effective action to terminate its participation in the anticompetitive activity being reported. It need not be specific to the individual or the individual's particular conduct so long as it reasonably notifies the director, officer, or employee that he or she should not participate in the illegal activity. General instructions or guidance by the corporation not to engage in cartel or illegal conduct generally, made prior to the corporation's discovery of the anticompetitive activity being reported, do not constitute such notice for purposes of this provision.

[35] Model Corporate Conditional Leniency Letter, paragraph #4.

[36] *Id.*

conditional leniency, immunity, or non-prosecution granted to a director, officer, or employee of a corporate applicant, the Division may use against such individual any evidence provided at any time by the corporate applicant, the individual, or other directors, officers, or employees of the applicant.[37]

VI. Confidentiality

32. ***What confidentiality assurances are given to leniency applicants?***

The Division holds the identity of leniency applicants and the information they provide in strict confidence, much like the treatment afforded to confidential informants. Therefore, the Division does not publicly disclose the identity of a leniency applicant or information provided by the applicant, absent prior disclosure by, or agreement with, the applicant, unless required to do so by court order in connection with litigation.

33. ***Will the Division disclose information from a leniency applicant to a foreign government?***

The leniency program has been the Division's most effective generator of international cartel prosecutions. Invariably, however, when a company is considering whether to report its involvement in international cartel activity, a concern is raised as to whether the Division will be free to disclose the information to any foreign governments in accordance with its obligations under bilateral antitrust cooperation agreements. As noted above, the Division's policy is to treat the identity of, and information provided by, leniency applicants as a confidential matter, much like the treatment afforded to confidential informants. Moreover, the Division has an interest in maximizing the incentives for companies to come forward and self-report antitrust offenses. In that vein, it would create a strong disincentive to self-report and cooperate if a company believed that its self-reporting would result in investigations in other countries and that its cooperation - in the form of admissions, documents, employee statements, and witness identities - would be provided to foreign authorities pursuant to antitrust cooperation agreements, and then possibly used against the company.

While the Division has been at the forefront in advocacy and actions to enhance international cartel enforcement, and the Division has received substantial assistance from foreign governments in obtaining foreign-located evidence in a number of cases, in the final analysis, the Division's overriding interest in protecting the viability of the leniency program has resulted in a policy of not disclosing to foreign antitrust agencies information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure. This aspect of the Division's leniency nondisclosure policy will not insulate the leniency applicant from proceedings in other countries. But it will ensure that cooperation provided by a leniency applicant will not be disclosed by the Division to its foreign counterparts pursuant to antitrust cooperation agreements without the prior

[37] *Id.*

consent of the leniency applicant. The Division first announced this policy in 1999, and it is the Division's understanding that virtually every other jurisdiction that has considered the issue has adopted a similar policy.

DEPARTMENT OF JUSTICE

The 54th Annual
American Bar Association
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"Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations"

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Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations

I. Introduction

The rewards for admission into the Division's Corporate Leniency Program to the first qualifying company to come forward and report a cartel offense have been much touted.[1] While the top prize is reserved for the amnesty applicant, a company that moves quickly to secure its place as "second in the door" and provides valuable cooperation can also reap substantial benefits. This paper discusses the rewards and incentives available for "second-in" companies that approach the Division after the opportunity for amnesty has passed.

A key component in the success of the Division's cartel enforcement program, particularly the Corporate Leniency Program, is transparency and predictability. Specifically, companies and their executives must be able to predict with a high degree of certainty the rewards if they self report and cooperate, and the consequences if they do not. With leniency, the rewards for the company and its qualifying employees – no criminal convictions, no criminal fines, and no jail sentences – are as predictable as they are extraordinary.

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[1] For a copy of the Division's Corporate Leniency Policy and a fuller discussion of its application see Antitrust Division, U.S. Department of Justice Corporate Leniency Policy (1993), *available at* http://www.usdoj.gov/ atr/public /guidelines/0091.htm; Gary R. Spratling, The Corporate Leniency Policy: Answers To Recurring Questions, Speech Before the ABA Antitrust Section 1998 Spring Meeting (Apr. 1, 1998), *available at* http://www.usdoj.gov/atr/ public/speeches/1626.htm; Gary R. Spratling, Making Companies An Offer They Shouldn't Refuse, Speech Before the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999), *available at* http://www.usdoj.gov/ atr/public/speeches/ 2247.htm; Scott D. Hammond, Detecting And Deterring Cartel Activity Through An Effective Leniency Program, Speech Before the International Workshop on Cartels (Nov. 21-22, 2000), *available at* http://www.usdoj.gov /atr/public/speeches/ 9928.htm; Scott D. Hammond, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?, Speech Before the Fifteenth Annual National Institute On White Collar Crime (Mar. 8, 2001), *available at* http://www.usdoj.gov/ atr/public/speeches/7647.htm; Scott D. Hammond, Cornerstones of an Effective Leniency Policy, Speech Before the ICN Workshop on Leniency Programs (Nov. 22-23, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206611.htm.

The rewards for second-in companies are not as uniform, because the value of a second-in company's cooperation can vary dramatically from case to case. While a second-in company's cooperation typically will significantly advance an investigation, there are times when the cooperation is either cumulative or no longer needed. For example, second-in cooperation likely would more significantly advance an investigation of a five-firm conspiracy than a two-firm conspiracy. Second-in cooperation could come at the outset of an investigation when the Division is still developing key evidence against others, or after significant evidence already has been provided through an amnesty applicant or a successful covert investigation complete with consensual monitoring and coordinated search warrants. The second-in company's cooperation could include self reporting on previously unidentified cartels warranting "Amnesty Plus" credit,[2] or be limited to conduct already detected. The second-in company could offer its cooperation immediately after learning of the existence of the investigation, or only after it receives a target letter or after it has been indicted.

If the Division were to establish an absolute, fixed discount for second-ins without consideration of these types of variables, then the need for proportionality would be sacrificed for increased transparency. Proportional treatment also often requires consideration of factors shared only with the sentencing court and not the public, factors such as the state of the investigation at the time of the cooperation, the nature and extent to which the cooperation advanced the investigation, and whether the cooperation earned Amnesty Plus credit for disclosing undetected cartel offenses. The Division carefully weighs all of these variables in measuring the value of a company's cooperation to ensure proportional treatment of cooperating parties across all Division matters.

This paper hopefully will provide more transparency as to the potential rewards and incentives available for second-in companies and the factors considered in determining the size of the cooperation discount. The paper focuses on the benefits earned by Crompton Corporation for being second-in-the-door in the Division's rubber chemicals investigation and provides information that was not public at the time the company was sentenced.[3] Crompton represents one end of the spectrum – a company that provided exemplary cooperation and, in return, received an *extraordinary* 59% discount off its minimum Guidelines criminal fine, representing a more than $70 million reduction in its fine. Of course, the risk for the Division in selecting this example is that other companies may come forward and claim that they deserve the same percentage reduction received by Crompton.

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[2] The Division's Amnesty Plus program is described below in Section II.E.

[3] United States v. Crompton Corporation, No. CR 04-0079 MJJ (N.D. Cal. 2004).

However, as described below, the bar was set very high in the Crompton case. Any company that hopes to match or even approach Crompton's discount will have to earn it.

II. Potential Rewards for Second-In Cooperation

A. Reward #1: Reducing The Scope Of Affected Commerce Used To Calculate A Company's Guidelines Fine Range

One significant benefit a second-in company may receive actually comes before – and may turn out to be even more valuable than – the calculation of the cooperation discount off its Guidelines fine range.[4] If a company's cooperation pursuant to a plea agreement reveals that the suspected conspiracy was broader

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[4] The calculation of a corporate defendant's Guidelines fine range is based largely upon the company's volume of commerce in the product or service affected by the cartel for the entire duration of the conspiracy. The company's base fine under the Guidelines is generally 20% of the company's volume of commerce. U.S.S.G. §§2R1.1(d)(1); 8C2.4(a)-(b). The base fine is then multiplied by a minimum and maximum multiplier to arrive at the Guidelines fine range. U.S.S.G. §8C2.7. In cartel cases, U.S.S.G. §2R1.1(d)(2) provides that the minimum multiplier must be at least .75, so the bottom of the Guidelines range would be at least 15% of the volume of commerce. The minimum and maximum multipliers are determined from the company's culpability score, which is based on factors such as the number of employees in the company or relevant business unit, the involvement in or the tolerance of the offense by high-level or substantial authority personnel, the company's prior criminal history, any obstruction of justice by the company, and the company's cooperation and acceptance of responsibility. U.S.S.G. §§8C2.5, 8C2.6. In determining where within the range the fine should fall, the Guidelines provide that the Court consider, among other factors, the company's role in the offense, the need for deterrence, the need for the sentence to reflect the seriousness of the offense, the gain or loss caused by the conspiracy, measures taken by the company to prevent a recurrence of the offense, the lack of an effective compliance program, and the prior criminal record of any high-level personnel who were involved in, tolerated or were willfully ignorant of the cartel. U.S.S.G. §8C2.8. The Guidelines Manual is available at http://www.ussc.gov/guidelin.htm. For a discussion of the impact on antitrust sentencing of United States v. Booker, 543 U.S. 220 (2005), which changed the nature of the U.S. Sentencing Guidelines from mandatory to advisory, *see* Scott D. Hammond, Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High for Non-Cooperating Defendants, Speech Before the ABA Section of Antitrust Law Spring Meeting (Mar. 30, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/208354.htm.

than had been previously identified – either in terms of the length of the scheme or the products, contracts or commerce affected – then the Division's practice is not to use that self-incriminating information in determining the applicable Guidelines range, except as provided in Section 1B1.8(b) of the U.S. Sentencing Guidelines.[5] It is not uncommon for a second-in corporate defendant to have its fine drastically reduced on this basis. For example, an amnesty applicant may not have evidence of the origins or the full scope of a cartel because it joined an ongoing conspiracy, it was only a peripheral player, or its executives who participated in the cartel's formation are no longer employed by, or available to, the applicant. Under any of these scenarios, a second-in company with information that expands the scope of the cartel would not only receive a substantial cooperation discount below the minimum Guidelines fine, but also the company's volume of affected commerce for cartel activity previously unknown to the Division would not be included in the defendant's Guidelines fine calculation. There are numerous examples of corporate defendants that have benefitted greatly by providing timely cooperation and qualifying for this §1B1.8(b) credit.[6]

The Division's practice in this area is particularly generous in light of two considerations. First, the Division is *not required* to restrict the use of self-incriminating information in calculating a defendant's applicable Guidelines fine range, unless it binds itself as part of a plea/cooperation agreement. As noted above, however, the Division's practice is to agree to such language in its plea agreements as an additional inducement for companies to cooperate fully. Second, U.S.S.G. §1B1.8(b)(5) and its corresponding Application Note 1 make clear that a defendant who qualifies for §1B1.8 credit may not be entitled to a "double dip" by also obtaining a departure based on substantial assistance.[7] While the Guidelines grant sentencing courts discretion to refuse to depart, the Division has routinely recommended that companies that qualify for §1B1.8 credit also receive downward departures, and there are no examples where a court has failed to accept the government's recommendation to grant a downward departure on this basis.

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[5] *See* U.S.S.G. § 1B1.8(a)-(b).

[6] *See e.g.* United States v. Hynix Semiconductor Inc., CR 05 00249 SI (N.D. Cal. 2005); U.S. v. Jo Tankers B.V., Crim. No.: 04-221 (E.D. Pa. 2004); U.S. v. Odfjell Seachem AS, Crim. No.: 03-654 (E.D. Pa. 2003).

[7] *See* U.S.S.G. §1B1.8, Application Note 1 ("[S]ubsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities); e.g., a court may refuse to depart downward on the basis of such information.").

B. Reward #2: Obtaining A Substantial Cooperation Discount

The reward to second-in companies for timely cooperation that undergoes the most scrutiny is the amount of the fine reduction. Second-in companies that provide cooperation that substantially advances an investigation can expect to receive a plea agreement that recommends a substantial assistance departure pursuant to U.S.S.G. §8C4.1 and a fine below the minimum Guidelines range. The amount of the recommended departure – often referred to as the "cooperation discount" – is measured as a percentage and reflects the overall value of the cooperation provided. As discussed below, the cooperation discount is applied to a specific point within the Guidelines range. Cooperation discounts for second-in companies are, on average, in the range of 30% to 35% off of the bottom of the Guidelines fine range.[8] Subsequent cooperators may still qualify for a cooperation discount below the Guidelines minimum if they provide substantial assistance. However, their cooperation discount will be lower, often substantially lower, than the second-in company, unless the company's cooperation includes the disclosure of undetected violations that warrant extraordinary Amnesty Plus credit.[9]

Section III below discusses the key factors that the Division considers when measuring and assessing a company's cooperation discount and looks at how these factors were applied in the Crompton case.

C. Reward #3: Securing A Low Starting Point For Application Of The Cooperation Discount

As noted above, the cooperation discount is applied to a specific point within the Guidelines sentencing range. Except in a few situations that are described

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[8] For example, in the Division's parcel tanker investigation, Odfjell received a 30% discount off the bottom of its minimum Guidelines sentence. Odfjell contacted the Division to offer its cooperation the day after the investigation went overt. It made its key personnel available to the Division in a timely manner, and two of its top executives agreed to submit to U.S. jurisdiction, serve jail terms, and cooperate with our investigation. For its cooperation, Odfjell was rewarded with a 30% discount off its minimum Guidelines fine.

[9] While it is possible that a corporate defendant could obtain an even greater cooperation discount than an earlier cooperator by disclosing an Amnesty Plus "whopper," no corporate defendant has ever leapfrogged over another on this basis. That is not surprising, however, given that the majority of the Amnesty Plus recipients are second-in companies who have already positioned themselves to earn the best deal short of corporate amnesty. *See* Section II.E below.

below, the cooperation discount starting point for a number-two company is the minimum Guidelines fine. This reward for early cooperators can be extremely valuable. Subsequent cooperating companies that come forward *after* the second-in company may face a cooperation discount starting point well above the minimum Guidelines fine. Some may encounter cooperation starting points as high as the middle to the top of the Guidelines range, depending on how late the company is to accept responsibility.

In the case of Crompton, its Guidelines fine range was between $121 and $242 million. Crompton's cooperation discount of 59% was applied to the minimum Guideline fine of $121 million, resulting in a fine of $50 million. Therefore, before even applying the 59% cooperation discount, Crompton benefitted from having the minimum Guidelines fine as its cooperation discount starting point. For example, if Crompton's cooperation starting point had been at the middle of the range ($181 million) and its cooperation discount remained the same, Crompton would have faced a fine of $75 million.

There are two principal situations in which the cooperation discount for a second-in company will *not* be applied to the minimum Guidelines fine. The first situation is where the company had a significant leadership role in the conspiracy. The company's role in the offense will result in a sentencing enhancement, much like high-level, culpable individuals face at sentencing. The U.S. Sentencing Guidelines specifically recognize this factor, particularly in antitrust offenses,[10] and the Division has applied it in calculating corporate fines. For example, an organization with significant market power that organizes and coordinates collusive activities with its smaller competitors should expect to get this bump. The Division, however, recognizes the difference between a significant leadership role and the more common situations in which multiple players each have equally important roles in coordinating and implementing illegal agreements; in the latter situations, no upward adjustment is warranted.

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[10] U.S.S.G. §8C2.8(a)(2) lists as one of the factors to consider in determining a corporate fine within the Guidelines range "the organization's role in the offense." Application Note 1 to this Guideline cites specifically to antitrust offenses:

> This consideration is particularly appropriate if the guideline fine range does not take the organization's role in the offense into account. For example, the guideline fine range in an antitrust case does not take into consideration whether the organization was an organizer or leader of the conspiracy. A higher fine within the guideline fine range ordinarily will be appropriate for an organization that takes a leading role in such an offense.

The other situation is "Penalty Plus." The Division's Penalty Plus program is the flip side of its Amnesty Plus program.[11] As discussed more fully below, Amnesty Plus induces companies that are already under investigation by the Division to clean house and report violations in other markets where they compete. Companies that elect not to take advantage of the Amnesty Plus opportunity risk harsh consequences. If a company fails to discover and report the second offense, and then later finds itself negotiating a plea after the conduct is discovered by the Division, then it should expect to receive a cooperation discount starting point at least as high as the *midpoint* of the Guidelines range for the second offense. If the Division learns that the company discovered the second offense and simply decided not to report it when it had a chance to qualify for Amnesty Plus credit, then the sentencing consequences will be even more severe. In that case, if the conduct is discovered and successfully prosecuted, the Division's policy is to urge the sentencing court to consider the company's and any culpable executives's failure to report the conduct voluntarily as an aggravating sentencing factor. We will request that the court impose a term and conditions of probation for the company pursuant to U.S.S.G. §8D1.1 - §8D1.4, and we will pursue a fine or jail sentence at or above the *upper end* of the Guidelines range. In addition to the considerations above, where a corporate defendant has a prior criminal history, its culpability score may be increased resulting in a higher Guidelines fine range.[12]

D. Reward #4: Securing More Favorable Treatment For Culpable Executives

Second-in companies that move quickly to cooperate also have an opportunity to minimize the number of individual employees who are subject to prosecution and maximize the opportunity for those culpable executives that are subject to prosecution to receive favorable plea resolutions. Most corporate plea agreements provide a non-prosecution agreement for company employees who cooperate fully in the investigation. Yet certain culpable employees, employees who refuse to cooperate, and employees against whom the Division is still developing evidence may not receive any protection under the company plea agreement. These individuals are often referred to as "carve outs," meaning they are excluded (or "carved out") of the company deal. Culpable carve outs must negotiate separate plea agreements or face indictment. Most companies place a high value on

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[11] *See* Scott D. Hammond, An Update of the Antitrust Division's Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law Fall Forum Cartel Enforcement Roundtable (Nov. 16, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/213247.htm.

[12] U.S.S.G. §8C2.5(c).

minimizing the number of carve outs.[13]

Second-in companies that cooperate early in an investigation often have the advantage of being able to offer new and significant evidence through multiple employees. When this is the case, the Division will typically carve out only the highest-level culpable individuals as well as any employees who refuse to cooperate; mid- to lower-level employees who provide significant evidence furthering the investigation will be offered non-prosecution protection under the corporate plea agreement. In addition, those employees who are carved out often are able to negotiate more favorable deals because they are in a position to offer valuable cooperation early on in an investigation.

In *Crompton*, three high-level employees were carved out of the corporate plea agreement.[14] Subordinates of these carve-outs who engaged in illegal conduct, however, received full protection as part of the company plea in return for their cooperation. In comparison, Bayer AG, the number-three company in the rubber chemicals investigation, had *five* high- and mid-level individuals carved out of its corporate plea agreement.[15] Similarly in the Division's DRAM investigation,

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[13] For a fuller discussion of the Division's carve-out policies see Scott D. Hammond, Charting New Waters in International Cartel Prosecutions, Speech Before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime (Mar. 2, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/ 214861.htm. On April 12, 2013, the Division revised its carve-out practice by limiting employees carved out to those the Division has reason to believe were involved in criminal wrongdoing and who are potential targets of a Division investigation and by listing the names of uncharged carve outs in a plea agreement appendix filed under seal. *See* Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division's Carve-Out Practice Regarding Corporate Plea Agreements, http://www.justice.gov/atr/public/press_releases/2013/295747.pdf.

[14] Two of the Crompton carve outs have been charged and have pled guilty. *See* Plea Agreement, United States v. James J. Conway, CR 04-0302 MJJ (N.D. Cal. filed Nov. 4, 2004); Plea Agreement, United States v. Joseph B. Eisenberg, CR 04-0296 MJJ (N.D. Cal. filed Nov. 18, 2004). Division case filings are available at http://www.usdoj.gov/atr/cases.html.

[15] Two of those employees have now been indicted by the Department and are international fugitives. *See* Indictment, United States v. Jurgen Ick, CR 05 00520 MJJ (N.D. Cal. filed Aug. 10, 2005); Indictment, United States v. Gunter Monn, CR 05 00519 MJJ (N.D. Cal. filed Aug. 10, 2005). Two other employees pled and were sentenced to four months jail each. *See* Plea Agreement, United States v. Martin

second-in Infineon had *four* individuals carved out of its plea agreement,[16] while third-in Hynix had *five* carve outs[17] and fourth-in Samsung had *seven*.[18]

E. Reward #5 : Increasing The Likelihood That A Company Will Qualify For Amnesty Plus Credit

Here is a remarkable statistic: roughly half of the Division's current international cartel investigations were initiated by evidence obtained as a result of an investigation of a completely separate market. Most of the corporate defendants in international cartel cases are multinational companies selling hundreds of different products. It will come as no surprise then to learn that the Division's experience is that if a company is fixing prices in one market, the chances are good that it is doing so in other markets as well. If an executive readily meets with competitors to allocate customers, then he or she has likely done it before in his or her career. And, if you go back further in time, you will likely find a mentor who taught the colluding executive the tricks of the trade. Armed with this experience,

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Petersen, CR 04-0386 MJJ (N.D. Cal. Dec. 2, 2004); Plea Agreement, United States v. Wolfgang Koch, CR 05-0314 MJJ (N.D. Cal. June 24, 2005).

[16] The four Infineon carve outs have been charged and sentenced to serve jail terms ranging from four months to six months. *See* Plea Agreement, United States v. T. Rudd Corwin, CR 4-0397 PJH (N.D. Cal. Dec. 15, 2004); Plea Agreement, United States v. Heinrich Florian, CR 04-0397 PJH (N.D. Cal. Dec. 15, 2004); Plea Agreement, United States v. Günter Hefner, CR 04-0397 PJH (N.D. Cal. Dec. 15, 2004); Plea Agreement, United States v. Peter Schaefer, CR 04-0397 PJH (N.D. Cal. Dec. 15, 2004).

[17] Four of the Hynix carve outs have been charged, pled guilty, and have been sentenced to serve jail terms ranging from five to eight months. *See* Plea Agreement, United States v. Dae Soo Kim, CR 06-0126 PJH (N.D. Cal. Mar. 1, 2006); Plea Agreement, United States v. Chae Kyun Chung, CR 06-0126 PJH (N.D. Cal. Mar. 1, 2006); Plea Agreement, United States v. Kun Chul Suh, CR 06-0126 PJH (N.D. Cal. Mar. 1, 2006); Plea Agreement, United States v. Choon Yub Choi, CR 06-0126 PJH (N.D. Cal. Mar. 1, 2006).

[18] Three of the Samsung carve outs have been charged and have agreed to plead guilty. *See* Information, United States v. Sun Woo Lee, Yeongho Kang, Young Woo Lee, CR 06-0180 CRB (N.D. Cal. filed Mar. 22, 2006); Press Release, Dept. of Justice, Three Samsung Executives Agree to Plead Guilty, Serve Jail Time for Participating in DRAM Price Fixing Conspiracy (Mar. 22, 2006), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/215199.htm.

the Division has had great success engaging in a strategy of "cartel profiling" techniques aimed at ferreting out violations that sprout "cartel trees" – where one investigation will eventually give root to prosecutions in a half-dozen or more different markets.[19]

The Division's success in rolling one investigation into another is well known within the antitrust bar and business community. Companies understand that they cannot afford to remain blissfully ignorant by limiting the scope of their internal investigation. Nor, can they hunker down and hope for the best if their internal investigation reveals antitrust violations in other markets before it is detected by the Division. The risks and the consequences to the company and its executives are too great. Instead, companies are taking advantage of the Division's Amnesty Plus Policy, which provides for more lenient treatment in an ongoing investigation when a cooperating company discovers an unrelated antitrust violation and reports it to the Division.

As the name suggests, the rewards for Amnesty Plus are twofold. The cooperating company not only receives the benefits of full amnesty in the uncovered offense, but also receives a substantial additional discount in its fine for its participation in the first conspiracy. The size of the additional discount depends on a number of factors, including: (1) the strength of the evidence provided by the cooperating company in the amnesty product; (2) the potential significance of the uncovered case, measured in such terms as the volume of commerce involved, the geographic scope, and the number of co-conspirator companies and individuals; and (3) the likelihood the Division would have uncovered the cartel absent the self reporting, *i.e.*, if there is little or no overlap in the corporate participants and/or the culpable executives involved in the original cartel under investigation and the Amnesty Plus matter, then the credit for the disclosure will be greater.[20]

The main beneficiaries of the Amnesty Plus program have been second-in companies that are quick to clean house to determine whether they have antitrust exposure in other markets where they might qualify for Amnesty Plus credit. Crompton is a prime example of a company whose independent board of directors decided to leave no stone unturned in its commitment to investigate, identify and report antitrust violations after the rubber chemical investigation commenced. As discussed below, the board's strategy resulted in the company receiving an

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[19] *See* Scott D. Hammond, Cornerstones of an Effective Leniency Policy, Speech Before the ICN Workshop on Leniency Programs (Nov. 22-23, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206611.htm.

[20] Of these three factors, the first two are given the most weight.

extraordinary reduction in its rubber chemicals fine, and it also allowed the company to win the race for amnesty – thereby securing nonprosecution protection for the company and its employees – on multiple additional products that have already resulted in substantial penalties against co-conspirators.

F. Reward #6: Qualifying As A Candidate For Affirmative Amnesty

As noted above, when the Division is investigating suspected international cartel conduct in one market, the chances are about even that it will lead to the Division opening up an investigation into cartel conduct in a second, unrelated market. Sometimes, the second-in company detects it before we do and qualifies for Amnesty Plus credit. Other times, the Division discovers it first. When the Division uncovers it first, staff may elect to approach one of the subject companies with information about the suspected cartel and provide it with an opportunity to cooperate in the covert investigation in return for amnesty. This strategy, known as "affirmative amnesty," gives the amnesty candidate a head start in the race for amnesty when its competitors will not even be aware that the gun has sounded. In return, the Division seeks cooperation from an insider who will expose the inner-workings of the cartel.

The Division is very circumspect in its application of the affirmative amnesty strategy. Once the Division discloses the existence of the investigation to the affirmative amnesty candidate, it runs the risk that word of the investigation will leak to the other subjects, thereby losing the element of surprise and jeopardizing the preservation of documents and testimony. Notwithstanding the heightened risk of obstructive conduct, the Division has successfully employed this strategy on a number of occasions by targeting companies – usually publicly-owned multinational companies – that have already established their bona fides by accepting responsibility, cleaning house, and offering full and timely cooperation on other Division criminal matters. Typically, only companies that have obtained amnesty, amnesty plus, or second-in cooperation status would warrant consideration as a candidate for affirmative amnesty.

III. Calculating the Cooperation Discount Percentage: The Crompton Case

Turning to the calculation of the cooperation discount, three key factors largely determine the size of the discount. Those factors are (1) the timing of the cooperation; (2) the value and significance of the information provided; and (3) whether the company brings forward evidence of other collusive activity and receives an additional Amnesty Plus discount.

A. Timing of Cooperation

The old adage, "timing is everything," certainly applies to the value the Division will place on a company's offer to cooperate. It is not enough to accept responsibility and pledge cooperation to obtain the benefits outlined in this paper, the cooperation must come at a time when it will substantially advance the investigation. The Division typically places a premium on getting the first plea/cooperation agreement to spark the investigation and to put pressure on other companies to accept responsibility. Those companies who belatedly offer their cooperation only after learning that a co-conspirator has offered to plead and cooperate will find the Division taking a much harder line in plea negotiations. The Division's practice is to give the second-in company a significantly better cooperation discount than the third company. While the gap between the second and third companies may not be as stark as it is between the amnesty applicant and the second-in, it is typically greater than it is between the third and the fourth company, and so on.

The need for speed clearly was not lost on Crompton's counsel or its board of directors. Within days of first learning of the investigation, Crompton's counsel met with Division staff, admitted responsibility for its activities in the rubber chemicals conspiracy and provided a proffer outlining the preliminary findings of its internal investigation. Crompton promptly identified for staff key documents relating to activities under investigation and provided extensive attorney proffers based on internal interviews and its own document review. The company also provided an overview of additional areas of its internal investigation to be conducted. Crompton's early cooperation allowed the Division to conserve and focus its resources and to immediately put additional pressure on other subject companies and individuals to cooperate.

Crompton's cooperation also highlights an issue related to the sequence of when cooperation begins to take place. Specifically, when does the company begin to provide meaningful cooperation, including access to relevant information, documents, and witnesses? Does a company provide access to key evidence uncovered in its internal investigation before a disposition has been agreed upon with the Division, or wait and hold onto the evidence until the last "t" is crossed in hopes of using it as leverage to negotiate a more favorable plea agreement? We encounter both strategies, although we naturally encourage and will reward companies that provide early and full access to their evidence. Companies that wait too long in holding onto their evidence as a bargaining tool also run the risk that the value of the evidence will decrease over time as the investigation continues.

B. The Significance Of Evidence Provided In The Ongoing Investigation

To receive a substantial discount, a cooperating company must provide evidence, wherever located, of the illegal activity under investigation. This evidence

can come through witnesses, documents, and other information. In the case of Crompton, key documents and witness proffers were provided initially to the Division. Later, certain Crompton employees with knowledge of conspiratorial activity who had been identified by the company were offered full protection through the company deal and interviewed by the Division.

Invariably, companies like Crompton that are able to provide significant evidence to the Division also conduct very thorough internal investigations utilizing a variety of investigative methods to locate, preserve, and produce relevant evidence. Only after a company has demonstrated that it has committed significant resources to locating and preserving potentially relevant evidence, documents, and witnesses, wherever located worldwide, will the Division be fully satisfied that all potentially relevant evidence has been produced.

Crompton's efforts to quickly locate and preserve evidence at the start of the rubber chemicals investigation were exemplary. Within hours of learning of the investigation, Crompton secured a massive amount of documents that were considered relevant or possibly relevant to the Division's investigation. Some of these documents were identified by Crompton to the Division as soon as the first meeting with Division staff. Crompton, with operations worldwide, also immediately searched for and secured foreign-located documents possibly relevant to the investigation. The company went so far as to conduct simultaneous raids of two of it own foreign offices and the office of a joint venture it was involved in to ensure the preservation of relevant and probative documents. In the end, Crompton produced more than 500,000 documents – in both electronic and paper form – and more than thirty witnesses. The evidence implicated not only other entities, but its own executives carved out of the company deal.

In the rubber chemicals investigation, the Crompton plea agreement was followed by plea agreements with Bayer AG,[21] former Crompton executives Joseph Eisenberg and James Conway, and two former Bayer AG executives, Martin Petersen and Wolfgang Koch, and indictments against two additional former Bayer AG executives, Gunter Monn and Jurgen Ick. Bayer AG was sentenced to pay a $66 million fine for its participation in the rubber chemicals cartel. As noted above, Petersen and Koch were sentenced to four month jail terms. Eisenberg and Conway are awaiting sentencing, and Ick and Monn are international fugitives.[22]

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[21] *See* Plea Agreement, United States v. Bayer AG, CR 04-0235 MJJ (N.D. Cal. Dec. 9, 2004).

[22] *See* footnotes 14 and 15 above.

C. Amnesty Plus

The final factor that the Division will consider when measuring the value of a company's cooperation is whether it disclosed any previously undetected antitrust offenses so as to warrant Amnesty Plus credit. The Crompton case is a prime example of how both the Division and the company under investigation can benefit from this program.

At the start of the rubber chemicals investigation, Crompton immediately launched a company-wide probe to identify any potentially collusive activities involving other products. Its internal investigation eventually led to amnesty applications in four other product areas – ethylene propylene diene monomers (EPDM); heat stabilizers; acrylonitrile-butadiene rubber (NBR); and polyester polyols – with combined annual U.S. sales in the hundreds of millions.[23] All four investigations are currently active, and the Division is getting results. The NBR investigation already has resulted in cases filed again Bayer AG and Zeon Chemicals and fines more than $15 million. The polyester polyols investigation has resulted in a fine of $33 million against Bayer Corporation. More cases are expected from these investigations. Attached at the end of this paper is a chart showing the convictions to date of cases resulting from Amnesty Plus leads initiated by Crompton's cooperation.

IV. Conclusion

Although the rewards for being first in the door and receiving amnesty can't be beat, a second-in company also receives significant rewards in reduced fines and more favorable treatment of its culpable executives if the company offers timely and substantial cooperation against remaining subjects in an investigation. To maximize the rewards, however, the company must act quickly and approach the Division as early as possible in the investigation and be prepared to leave no stone unturned in its effort to cooperate with the Division. Evidence, wherever located, must be quickly located, preserved and provided to the Division as soon as possible. The cooperation rewards are even greater (and the future risk of penalty-plus minimized) if the company thoroughly cleans house and takes advantage of the Division's Amnesty Plus program by providing evidence of other cartel activity. Second-in cooperators with a proven record of cleaning house and offering full cooperation also become the most likely candidates for affirmative amnesty.

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[23] The Division has a policy of treating the identity of amnesty applicants as a confidential matter. However, in this case, Crompton issued public statements announcing its acceptance into the Division's Corporate Leniency Program on each of these four products.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

****AMENDED** CIVIL MINUTES - GENERAL**

Case No.	09 MDL 2007-GW(PJWx)	Date	August 26, 2013
Title	*In Re: Aftermarket Automotive Lighting Products Antitrust Litigation*		

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	Wil Wilcox	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: (IN CHAMBERS): COURT ORDER

Pursuant to Defendants' request, upon review, the Court issues its Tentative as final, but has redacted/sealed certain portions to maintain confidentially of certain previously sealed materials. ***Plaintiffs' Motion for Order That TYC Forfeited Any Claim to the Benefits of Limited Civil Liability under the Antitrust Criminal Penalty Enhancement and Reform Act [571], is GRANTED.***

Defendants TYC Brother Industrial Co., Ltd. and Genera Corporation's Motion for Summary Judgment That: 1) the Alleged Conspiracy Ended September 3, 2008; 2) Sabry Lee (U.S.A.), Inc. Withdrew from the Alleged Conspiracy in September 2005; 3) Products in Appendix A to the Amended Complaint are to be Excluded from the Action; 4) Parts Manufactured by Only One Defendant Were Not Subject to the Alleged Conspiracy; and 5) Purchases of Class Members, LKQ/Keystone and Empire/POY That Settled and Provided Full Releases to TYC and Genera Are to Be Excluded from Action [590], is set for hearing on **August 29, 2013 at 8:30 a.m.**

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Initials of Preparer JG

In re Aftermarket Automotive Lighting Products Antitrust Litigation, Case No. 2-09-ML-02007-GW (PJWx) - Ruling on Plaintiffs' Motion for Order That TYC Forfeited Any Claim to the Benefits of Limited Civil Liability Under the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA")

******This ruling is being distributed only to the parties. Some of the documentation submitted in connection with the motion was filed under seal. Should either party wish this ruling redacted so as to maintain the confidentiality of sealed material, such request should be made to the Court immediately. Otherwise, this Order will be publicly docketed.******

I. Background

On July 29, 2013, this Court issued a tentative order indicating that, *before* trial,[1] it was inclined to rule on Direct Purchaser Plaintiffs' ("DPPs" or "Plaintiffs") motion for an order that TYC Brother Industrial Co. Ltd ("TYC") and Genera Corporation ("Genera") (collectively, "Defendants") are not entitled to certain damages-limiting benefits available under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213, 118 Stat. 661, 665 (June 22, 2004) ("ACPERA").[2] The parties have since filed supplemental briefing on the ACPERA issue, which is once again before the Court. For the reasons expressed below, the Court would GRANT Plaintiffs' motion and hold that Defendants are not entitled to the benefits of ACPERA.

In October 2008, the DPPs filed their initial complaints based on Defendants' alleged conspiracy to fix prices in aftermarket automotive lighting products. Docket No. 612 at 9. [redacted] the DOJ to build its criminal case against other firms and individuals between September 12, 2008 and September 25, 2012, when Eagle Eyes Traffic Ind. Co., Ltd.'s ("Eagle Eyes") Vice Chairman Homy Hong-Ming Hsu changed his plea before the start of his scheduled trial in October 2012.

On March 17, 2009, the DPPs filed their first consolidated complaint against Defendants. Lang Decl. ¶ 8. [redacted] *Id.* ¶ 5. However, also on March 23, 2009, the DOJ moved for the first of multiple stays and/or protective orders granted by this Court limiting TYC and Genera's

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[1]In their initial motions, the parties disputed whether the Court should make the ACPERA determination before or after trial. For the reasons expressed in the tentative ruling and at the hearing, the Court determined that the ACPERA determination should be made *before* trial. *See generally* Tentative Order.

[2]In its tentative order, the Court referred to Genera as a "subsidiary" of TYC. In fact, Defendants state that Genera is a partially-owned affiliate of TYC. Def. Supp. Br. at 1. n. 1.

[3]As discussed in Footnote 5, *infra*, this reporting was apparently spurred by Sabry Lee Limited and Sabry Lee USA, Inc.'s ("Sabry Lee") filing of a civil suit alleging a conspiracy by aftermarket replacement auto lights companies, including TYC and Genera, to lower the prices of certain replacement parts and drive Sabry Lee out of business.

ability to provide discovery to DPPs for some of the period between March 2009 and June 2012. *Id.* ¶ 7. TYC and Genera maintain that they were "unable to produce witnesses for depositions during broad periods of time in this litigation due to deposition stays and protective orders obtained by the DOJ." Def. Mot. at 9. Nevertheless, beginning on November 4, 2009, after the Court lifted its first stay on document discovery, TYC and Genera began producing merits-related records to DPPs. Lang Decl. ¶ 12.

The production of these records continued between November 2009 and February 16, 2010, when TYC and Genera's counsel provided DPPs with the first of nine attorney proffers. [redacted] Between February 2010 and 2012, Defendants also provided over 120,000 pages of documents to the DPPs – as well as 2,000 pages of Chinese to English translations at Defendants' expense – offered witnesses for DPPs to informally interview, secured the voluntary appearance of a former TYC employee and Taiwanese national with no ties to the United States, and produced seven witnesses for depositions in the US and Taiwan. *See generally* Timeline of Cooperation, Halle Decl. ¶ 3, Ex. A. Defendants argue that their cooperation has been both satisfactory and timely, and that they are thus entitled to the benefits of ACPERA.

II. Analysis

A. ACPERA

ACPERA was enacted to provide "increased incentives for participants in illegal cartels to blow the whistle on their co-conspirators and cooperate with the Justice Department's Antitrust Division" by limiting "a cooperating company's civil liability to actual, rather than treble damages in return for the company's cooperation in both the resulting criminal case as well as any subsequent civil suit based on the same conduct." *Oracle Am., Inc. v. Micron Techn., Inc., et al.*, 817 F. Supp. 2d 1128, 1132 (N.D. Cal. 2011) (citing 150 Cong. Rec. S3613 (2004) (statement of Senator Hatch)).[4] Prior to passage of ACPERA, the Justice Department's Corporate Leniency Policy allowed for amnesty from criminal charges, but not from civil liability. *Oracle Am.*, 817 F. Supp. 2d at 1132. "ACPERA was designed to limit damages for cooperating conspirators to the actual damages attributable to their own conduct, rather than facing treble damages." *Id.* Total liability is also limited to single damages "without joint and several liability." *Id.* (quoting 150 Cong. Rec. S3614). In other words, if the court in which the civil action is brought determines that the leniency applicant "has provided satisfactory cooperation to the claimant with respect to the civil action," the applicant is liable only for actual – not treble – damages and only for damages from its own product sales, not from the sales of its co-conspirators. *See* ACPERA, § 213(a)-(b).

Satisfactory cooperation "shall include":

> (1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;
>
> (2) furnishing all documents or other items potentially relevant to the civil

[4]Relevant excerpts from the Congressional Record are attached as Exhibit 3 to the Hartley Declaration. Many of the documents referenced in this Order have not yet been electronically docketed because they have been lodged under seal.

> action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and
> (3)
>
> (A) in the case of a cooperating individual –
>
> (i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require;
>
> (ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or
>
> (B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).

ACPERA, § 213(b)(1)-(3). Where, as here, the initial contact by the antitrust leniency applicant with the Antitrust Division occurs after a Sherman Act civil action is commenced, the court shall consider the "timeliness of the applicant's initial cooperation with the claimant" in making the determination concerning satisfactory cooperation. *Id.* § 213(c).[5] The applicant must provide "substantial cooperation not only in the criminal case brought against the other cartel members, but also in any civil case brought by private parties that is based on the same unlawful conduct." 150 Cong. Rec. S 3615 (quoting Sen. Leahy); *see also id.* (The limitation on damages granted by ACPERA "is only available to corporations and their executives if they provide adequate and timely cooperation to both the Government investigators as well as any subsequent private plaintiffs bringing a civil suit based on the covered criminal conduct . . . . And again, the legislation requires the amnesty applicant to provide full cooperation to the victims as they prepare and pursue their civil lawsuit.") (quoting Sen. Hatch).

Defendants argue that they are entitled to the benefits of ACPERA because they: (1) provided a total of nine attorney proffers to Plaintiffs since 2010 covering key witnesses and documents; (2) responded promptly and accurately to scores of email and telephonic inquiries from DPPs' counsel about facts related to documents and witnesses, and about Genera's sales, rebate data,

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[5]On September 3, 2008, Sabry Lee filed *Sabry Lee, Inc. v. Genera Corp. et al.*, No. 08-CV-5758-GW (PJWx), a civil suit alleging conspiracy by aftermarket replacement auto lights manufacturers and their distributors to lower the prices of certain aftermarket replacement auto lights to drive Sabry Lee out of business. This lawsuit included allegations that TYC's actions resulted in overcharges to its customers. Pl. Reply at 11-12 (citing paragraphs 1, 20, and 23 of the Sabry Lee Complaint). [redacted] Plaintiffs filed their initial Complaints against Defendants in October of 2008. The Court would reject Defendants' argument that they are not subject to ACPERA's timeliness requirement for the reasons set forth in Plaintiffs' Reply and Supplemental Brief. *See* Pl. Supp. Br. at 10-11; Pl. Reply at 16-18.

and customers; (3) arranged the complete depositions of several current employees in the US and Taiwan; (4) provided "timely and fulsome" responses to all of Plaintiffs' discovery requests without requiring any motion practice; (5) extended offers in 2011 to interview TYC witnesses; (6) secured the voluntary appearance of a former TYC employee located outside the United States; and (7) "timely produced over 13 years worth of transactional data and over 50,000 pages of documents" including 2,000 pages of Chinese-to-English translations of TYC documetns. *See generally* Def. Opp.; Def. Supp. Br. For the reasons expressed below, the Court would find that this cooperation – or its manner of execution – is not sufficient to limit Defendants' liability under ACPERA.

Initially, the Court notes that Defendants cannot be faulted for keeping their cooperation confidential when the DOJ asked them to do so. Nor can Defendants be faulted for complying with the multiple stays and/or protective orders granted by this Court with respect to discovery in this Action. However, Plaintiffs do not argue that Defendants should have formally produced witnesses or responded to formal discovery requests during this period. The more relevant point, as noted by Plaintiffs, is that Defendants were *never* prohibited from giving attorney proffers such as the one provided in February 2010 – or other forms of cooperation. In fact, the stay on merits depositions was still in effect when Defendants provided the February 2010 proffer. Lang Decl. ¶ 15; *see also* First Harley Decl. ¶ 11 (discussing proffers that ultimately never occurred during the Court's first six month discovery stay). Moreover, the requests from the DOJ to keep Defendants' cooperation confidential lasted only until March 23, 2009, and the additional stays and protective orders issued by this Court were not so sweeping that they would have prevented Defendants from providing additional cooperation to Plaintiffs.

Furthermore, the cooperation provided to Defendants following the February 2010 proffer amounts to little more than compliance with discovery obligations under the federal rules. The production of documents, translations, responses to inquiries, depositions, and offer to make witnesses available were, in essence, compliance with discovery. *See, e.g.,* Second Hartley Decl. ¶¶ 9, 11-17. ACPERA, however, requires more. Section 213(b) obligates a leniency applicant in a civil action to provide a "full account" of "*all* facts known" and "*all* documents" that are *potentially* relevant to the civil action." ACPERA, §213(b) (emphasis added). The Committee Report indicates that ACPERA's "use of the term 'potentially relevant' is intended to preclude a parsimonious view of the facts or documents to which a claimant is entitled." Second Hartley Decl., Ex. 30, 150 Cong. Rec. H 3658 (June 2, 2004) (remarks of Rep. Sensenbrenner).

Here, Defendants had access to information indicating, *inter alia*, that TYC and Depo entered into a price-fixing agreement in 1999. First Hartley Decl. Ex. 8 at 2-5. At the first proffer in February 2010, however, Defendants failed to provide Plaintiffs with "*all* facts" (much less potentially relevant facts) known to them suggesting that the conspiracy began in 1999. For instance, in January 2009, Drue Hsia, the President of Genera, participated in an extensive interview with the DOJ in which he discussed a variety of evidence that was directly relevant to the initiation of the conspiracy. *See* Pl. Mot. At 6-7; Reply at 15-19; Hartley Decl. ¶ 12 & Ex. 8. In 2013, Plaintiffs obtained a copy of a DOJ memorandum summarizing the January 2009 interview, after the DOJ filed it in support of a sentencing issue in related criminal proceedings against Eagle Eyes' Vice Chairman Hsu. Hartley Decl. ¶ 12 & Exs. 8, 19. That DOJ memorandum indicates the breadth of facts "known to [Defendants] . . . that [were] potentially relevant to the civil action," ACPERA, §213(b)(1), and yet went undisclosed to Plaintiffs in a timely fashion. The information disclosed to the DOJ concerned potential price fixing arrangements between TYC and Depo in 1999, the

decision to bring Eagle Eyes and E-Lite automotive into the price-fixing conspiracy in late 2000 or early 2001, the conspirators' responses to competitors and new entrants, the conspirators' monitoring and enforcement of the agreement, and the identity of key conspiracy participants. Hartley Decl. ¶ 12 & Ex. 8. Defendants' counsel also attended the January 2009 interview.[6] In other words, Defendants were aware of these facts for more than one year prior to the February 2010 proffer. Instead of offering *all* of these facts and any other *potentially* relevant information to Plaintiffs, however, Defendants "never disclosed – at the February 2010 proffer or at any subsequent time – that the conspiracy began in 1999 – despite their knowledge of that fact." Pl. Mot. at 9; Hartley Decl. ¶ 21. Even accepting Defendants' argument that they were unable to verify the accuracy of that information or the specific "start" date of the conspiracy – all of which was apparently reliable enough to provide to the DOJ – ACPERA required Defendants to provide Plaintiffs with a "full account" of facts *potentially* relevant to the conspiracy. Defendants did not do so.

While Defendants argue that they "did not have the DOJ's interview memorandum with Mr. Hsia" for much of this litigation, that is irrelevant to the question of whether Defendants failed to timely disclose all known facts or documents that were potentially relevant to the civil action, *i.e.* the inquiry under ACPERA. The point is that the *known facts* described in the memorandum demonstrate that Defendants failed to provide timely, "satisfactory cooperation" to Plaintiffs. Defendants' suggestion that they did not mislead Plaintiffs because Defendants were simply focusing on the earliest meetings that involved "specific pricing proposal[s]" is equally unpersuasive. Def. Supp. Br. at 7. ACPERA required Defendants to affirmatively disclose, for example, the fact that Mr. Hsia said that he had meetings with co-conspirators to end the "price war" between TYC and Depo as early as 1999, and that "[a]t some point, the prices were raised back to what they were before the price war." First Hartley Decl., Ex. 8 at 5.[7]

By the time Plaintiffs confirmed through non-TYC witnesses that the conspiracy began as early as 1999, it was too late to effectively move to further amend the complaint. *See* Third Hartley Decl. ¶ 4. The Court had already certified Plaintiffs' class and notice had been sent out. *Cf. In re TFT-LCD Antitrust Litig.*, 618 F. Supp. 2d 1194, 1196 (N.D. Cal. 2009) ("Plaintiffs argue persuasively that the value of an applicant's cooperation diminishes with time, and they note that plaintiffs are about to embark on significant and costly discovery that, at least in part, could be obviated if the applicant cooperated with plaintiffs . . . [T]he Court is mindful of these concerns, and will certainly consider all of these factors if and when an amnesty applicant seeks to limit liability

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[6]Defendants do not dispute that counsel for *both* TYC and Genera attended this interview.

[7]Obviously such disclosure would need to be balanced against the individual criminal defendants' Fifth Amendment rights. However, "for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals," *Braswell v. United States,* 487 U.S. 99, 104 (1988) and, in this case, the Court is not convinced that Defendants' degree of delay or failure to disclose is sufficiently justified by concerns for the individual defendants' constitutional rights. Nor would the Court find that Mr. Hsia's untimely death prevented the corporate Defendants from disclosing facts relevant to the conspiracy at an earlier juncture; Defendants' counsel attended the DOJ meetings, and Defendants cannot excuse their extensive delay simply because they "did not want to proffer facts to DPPs in haste, when those facts might later turn out to be less than completely accurate." Def. Supp. Br. at 13. To obtain the benefits of ACPERA, Defendants cannot simply decide to withhold potentially relevant facts for an extended period of time by claiming they are investigating the accuracy of that information.

under ACPERA[.]").

In addition, [redacted] To obtain the benefits of ACPERA, Defendants were obligated to affirmatively disclose *all* of this information to Plaintiffs in a timely fashion.[8]

Finally, Defendants assert that, in ruling on the ACPERA motion, the Court should consider the fact that "claimants representing two-thirds of Genera's class period sales (and about half of the overall certified 'class') have settled with TYC and Genera, and have received restitution." Def. Supp. Br. at 3. While this fact is undoubtedly relevant to any potential trial in this Action, the Court is not persuaded that, under the plain language of the statute, a side settlement benefitting some but not all class members is, in and of itself, evidence of "satisfactory cooperation" under ACPERA. *See also* Pl. Supp. Br. at 1-2; Pl. Reply at 5-6.

For the reasons expressed above, and for those further delineated by Plaintiffs in their Motion, Reply, and Supplemental Briefing on this issue, the Court would hold that Defendants are not entitled to the damages-limiting benefits of ACPERA.[9]

B. Summary Judgment

Given that Defendants filed their motion for summary judgment on July 5, 2013 (Docket No. 590), almost immediately after Plaintiffs filed their request for an ACPERA determination on July 1, 2013 (Docket No. 571), the Court did not have a chance to address the question of whether

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[8] Defendants' arguments regarding the varying availability of specific witnesses are not particularly persuasive in this case. The issue is whether these corporate entities provided a "full account" of the "potentially relevant," known facts to Plaintiffs in a timely fashion. Rescheduling interviews with these specific employees was not the only way Defendants could have provided Plaintiffs with the relevant information – particularly given that this information was unquestionably "known" following the interviews with the Justice Department.

[9] The parties' briefing addresses specific instances of purported cooperation spanning approximately five years. The Court would decline to address each specific instance of cooperation disputed by the parties. Suffice it to say that, having considered "appropriate pleadings from the claimant," the Court would determine that, overall, Defendants have not provided "satisfactory cooperation" in this civil action such that they are entitled to the benefits of ACPERA. Though not necessary for resolving the instant motion, the Court should observe that, in the "only reported determination of ACPERA benefits to date" cited by Defendants (Def. Opp. at 11), *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320 (N.D. Ill. 2005), the parties actually entered into a settlement cooperation agreement. No such agreement existed in this case, and Defendants have failed to meet the high standards required by ACPERA.

Defendants could potentially be held jointly and severally liable for the sales of their co-conspirators. Having now resolved that question, the Court would set a hearing on Defendants' summary judgment motion for Thursday, August 29, 2013.

III. Conclusion

The Court GRANTS Plaintiffs' motion for an order that Defendants forfeited the benefits of limited civil liability under ACPERA.