

U.S. Antitrust Law and Taiwanese Companies

December 4, 2015

Agenda

1. Why Should Taiwanese Companies and their Executives Care about U.S. Antitrust Law?
2. Unlawful Conspiracy v. Lawful Collaboration: How to Tell the Difference Between the Two
3. Criminal Enforcement Initiatives and Trends in the U.S. and Beyond
4. Recap – Best Practices and Tips

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U.S. Antitrust Law Applies If:

- Are you selling directly to customers in the U.S.? **Yes.**
- Are you selling indirectly to customers in the U.S.? **Maybe.**
 - The U.S. also claims jurisdiction over conduct (i) anywhere in the world with a (ii) “direct, substantial, and reasonably foreseeable” (iii) effect on U.S. commerce.
 - So, you must also ask: Are you selling to customers who either resell or make finished products that may be sold to customers in the U.S.?

Effects of the Sherman Act

- Criminal Prosecution and Penalties
 - Individuals : U.S. law allows up to 10 years imprisonment, up to \$1M in fines and deportation/exclusion from the U.S.
 - Corporations: U.S. law allows significant fines
- Independent monitors; increased scrutiny by DOJ & others
- Effects on business
- Civil liability: Joint and several liability; treble damages; attorney's fees

The Sherman Act and Taiwanese Companies

- Criminal actions and follow-on civil litigation :
 - TFT-LCD; Air Cargo; Autolights; Aftermarket Sheet Metal
 - Jail time; hundreds of millions in fines; hundreds of millions more in civil liability
- Business disputes
 - *Lotes v. Hon Hai*: Taiwanese manufacturer alleged monopolization against USB competitors

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Sherman Act Section 1 Governs Conspiracies

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1

Sherman Act Section 1

Prohibits **agreements**

- Agreement or mutual understanding
- Does not need to be written or spoken – can be inferred or assumed - “wink of an eye”
- Unilateral decisions are legal
- In the U.S., agreement is the crime - does not matter if the agreement is carried out or if it succeeds

Sherman Act Section 1

In restraint of trade . . .

- Relates to pricing, customers, markets or capacity
- Includes any term of sale that affects price

That affects U.S. commerce

- Conduct must impact commerce in the U.S.
- This element has been the subject of significant recent litigation

Examples Of “Per Se” Illegal Agreements

- Price-fixing (broadly defined)
- Bid-rigging
- Output restrictions
- Allocating customers, products, or territories
- Boycott



Conspiracy to Sell Below Cost = Also Illegal

- Conspiring to sell below cost is illegal
- The Plaintiff is usually a competitor
- Taiwanese companies have been subject to below cost price fixing claims by competitors in the U.S.:
 - *Sabry Lee v. Genera et al.* – claim by fellow AM Lights company against Taiwanese AM lights companies
 - *Superior v. Gordon et al.* – claim by fellow AM sheet metal parts manufacturer against another

No Defense to “Per Se” Illegal Agreements

- Does not matter if agreement is only verbal
- Does not matter if agreement is only implied
- Does not matter if agreement is ineffective or not carried out
- Ignorance of law is NOT a defense

Lesson #1 – “Price” is a Broad Concept

- Price-fixing is about more than just “price”
 - Published and unpublished list prices
 - Payment terms (credit terms)
 - Discounts
 - Rebates
 - Pricing formula
 - Pricing levels, tiers or ranges
 - Margins
 - Anything that has an effect on price



Lesson #2 – Minimize Communications

- Don't talk with competitors about price (even generally) or about individual customers
 - Can be legitimate, but can be misconstrued as monitoring adherence to a cartel
 - Never do it without the law department's involvement
- Don't verify customer claims about competing bids
 - Do not contact competitors to verify that a customer is telling you the truth about a competing bid
- Note, information exchange is “per se” illegal in EU and elsewhere

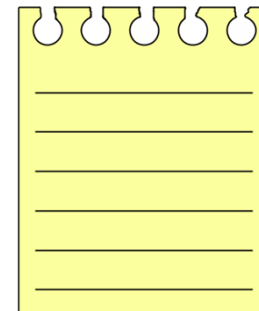
What If Competitors Contact Me?

- Explicitly reject any offers to fix prices
 - Even when rejected, this imposes risks on the company, so alert the legal department
 - For example, a competitor wants you to raise prices by 10%, but you were planning to do that anyway.
- Be careful of social interactions with competitors
 - Social or informal interactions with competitors can lead to improper business discussions if you are not careful



What If The Job Requires Contact?

- Discuss only what is necessary to do business
 - Don't get into unnecessary discussions about the market, customers, input costs, other products
 - Avoid discussing non-public information
- Keep notes about who attended, what is discussed
 - Make an agenda and create minutes of meetings
- Politely but firmly stop the conversation if necessary
- Get the legal department involved



“Rule of Reason”

- Weighs the procompetitive benefits versus the anticompetitive harms
- Analysis of agreement and overall collaboration
- Competitive effects assessed at time of potential harm

Resale Price Maintenance

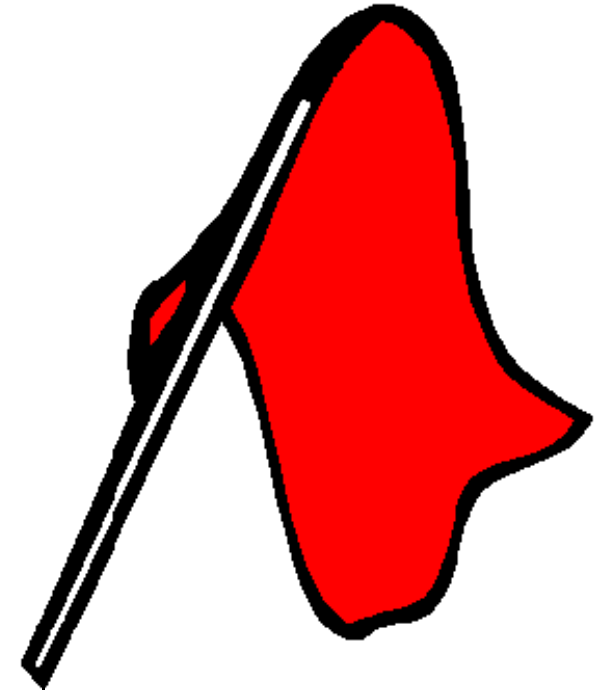
- **Maximum** resale price agreements
 - Agreement that a reseller will not sell above a particular price or price level
 - *Depends on reasonableness*
- **Minimum** resale price agreements
 - Agreement that a reseller will not sell below a particular price or price level
 - *Per se illegal in California, other states in the U.S.*

Other Types of Collaborations

- Production collaborations
- Marketing collaborations
- Buying collaborations
- Research & development collaborations

“Red Flags” to be Aware of:

- Few sellers
- Ultimate decision by the customer is based primarily on price
- High barriers to entry
- Repeat purchases or bidding events; and
- Contacts, or opportunities for contacts, between competitors



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Criminal Enforcement in the U.S.: Top Priorities

Foreign “Cartels” are Targets



- Earlier this year, DOJ said it would pursue indirect cases. A major announcement: DOJ has historically pursued direct and *per se* cases
- DOJ also recently said (April 2015) that prosecution of foreign cartels continues to be a top priority

International “Cartels” On Enforcement Radar

- Over 90% of the criminal fines imposed by the DOJ were obtained in connection with prosecution of international cartel activity
 - Nearly 50% of corporate defendants in criminal antitrust cases in the U.S. are foreign-based
 - Nearly 1/3 of all individual defendants in U.S. criminal actions are foreign-nationals
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Section 1 Enforcement (Criminal)

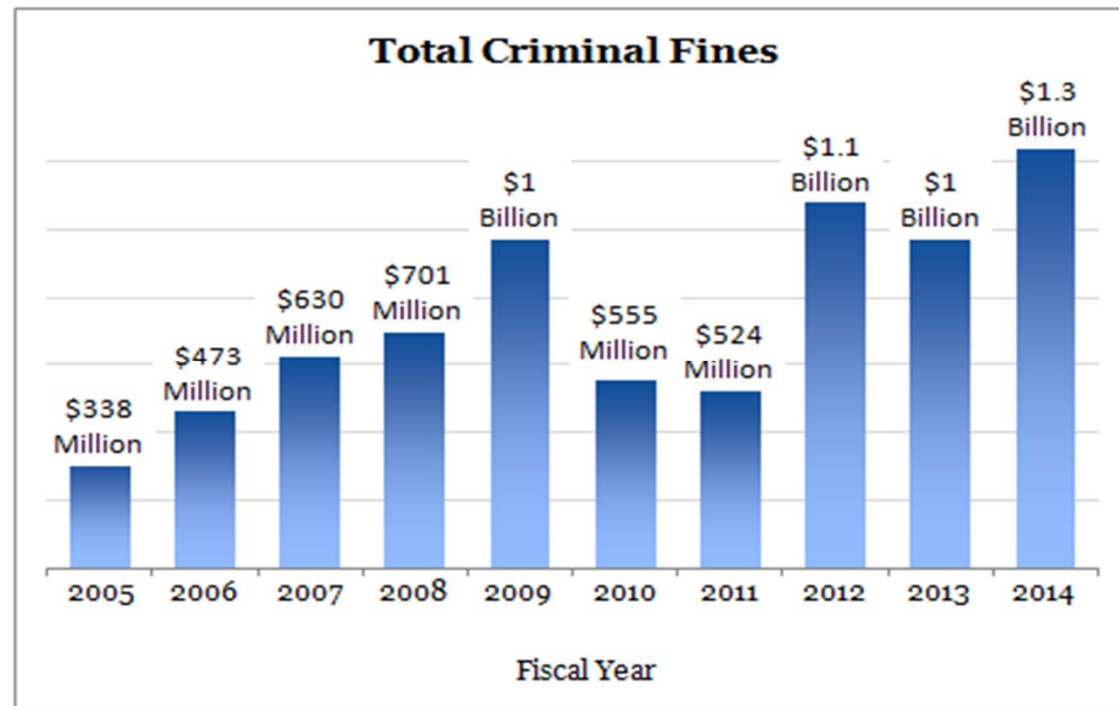
But I live in Taiwan and don't travel to the U.S. . . .



- Taiwan has no extradition treaty, but “fugitives” subject to INTERPOL “Red Notice” (acts as request for arrest/extradition)
- In 2014, DOJ extradited first person on antitrust charges
- And deportation/exclusion from U.S. means you cannot come to the U.S. for any reason (business or personal)

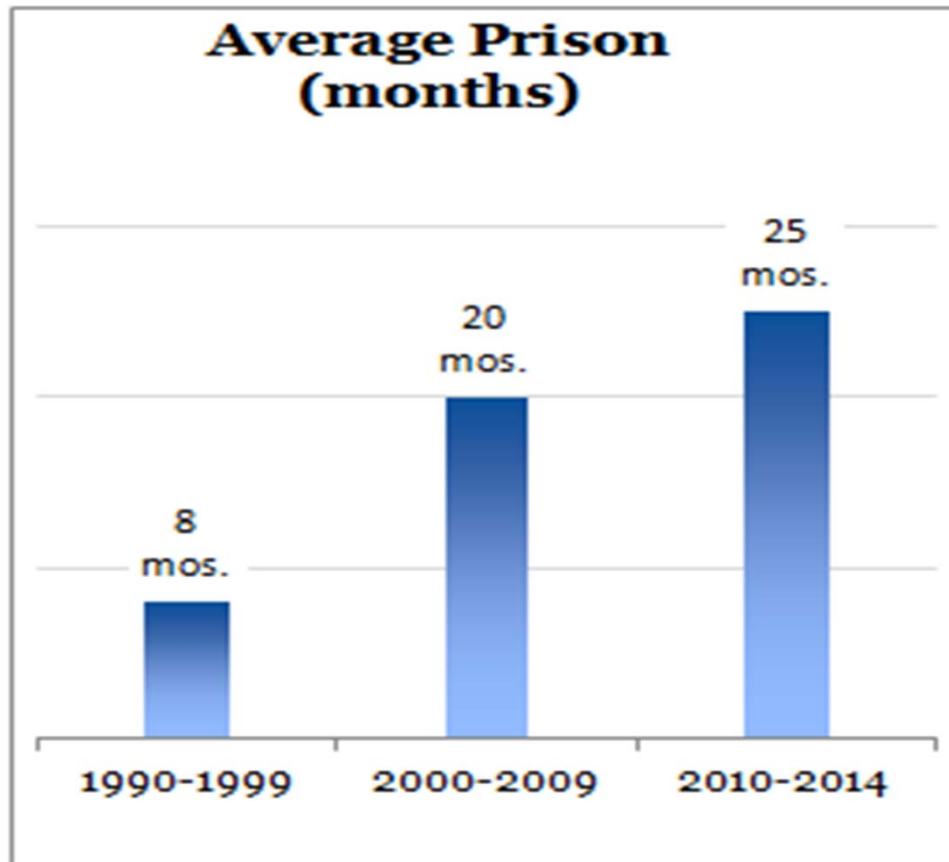
The Numbers Add Up

In FY2014, DOJ obtained nearly \$1.3 billion in criminal fines and penalties, the largest amount ever in a single fiscal year, and reflective of an increasing trend



Jail Time Is Increasing

Longer sentences. Average sentence is 25 months as compared to just 8 months in the 1990s



Amnesty Program

- DOJ Antitrust Division - “Corporate Leniency Program” (“Amnesty”) is “the most important investigative tool for detecting cartel activity”
- Full immunity to the first company to report and to all current and former employees who agree to cooperate; all others prosecuted
- Civil corollary, ACPERA, de-trebles damages

Antitrust Only Immunity

- BUT crimes unrelated to the antitrust offense may be prosecuted
 - I.e., if applicant rigged bids and also bribed a foreign public official (violating the FCPA), then the Antitrust Division would not prosecute the bid-rigging *or* the bribe if the bribe was made in connection with the bid rigging
 - But if the bribe was not made in connection with the bid rigging, then it could prosecute the FCPA violation
 - And other state/federal agencies can still prosecute because leniency only binds the Antitrust Division

To Qualify For Immunity:

- Were you the ringleader or originator of the activity? **If yes, no immunity**
- Will you cooperate fully with the DOJ (provide witnesses, testify in the U.S., open your books to prosecutors)? **If not, no immunity**
- Did you, upon discovery of the conduct, take prompt and effective action to terminate your company's involvement? **If not, no immunity**

Practical Consequences of Immunity

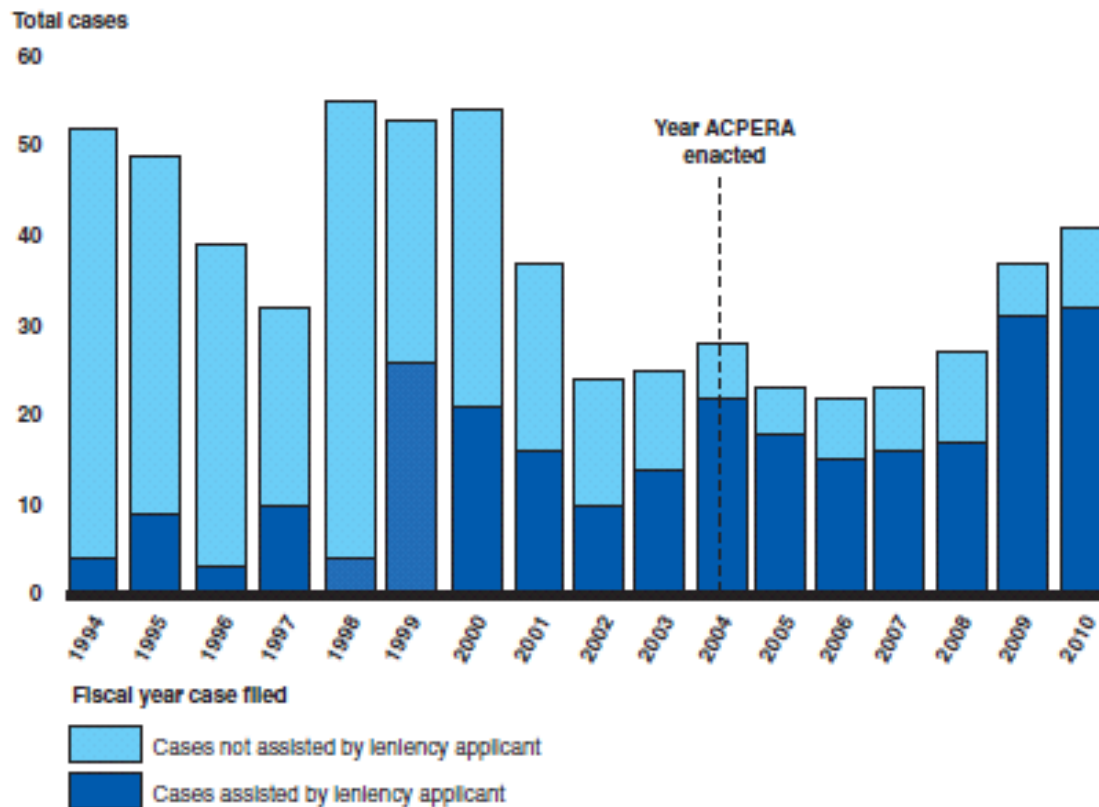
- Creates a race to the prosecutor's door.
- “Severe sanctions” for those who do not self-report/obtain amnesty
- Can lead to global domino effect: global coordination by authorities and leniency applicants; need to assess global risk and exposure in other jurisdictions
- Program for individual creates potential for an amnesty race between a corporation and its own employees

“Amnesty Plus” Program – Exposure of Other Collusion

- Company in a current investigation discloses second, unrelated conspiracy in a separate industry/market. It receives immunity in “new” investigation and more favorable treatment in “old” investigation
- Nearly half of DOJ’s investigations are from “Amnesty Plus”
- “[E]xposure of a single member of a single cartel has the potential to bring a series of cartels tumbling down like a house of cards”
- Creates more of an incentive to cooperate against co-conspirators

DOJ's Increased Reliance on Leniency Applicants To File Cases

Figure 8: Number of Criminal Cartel Cases Filed Each Fiscal Year, Broken Out by Those Assisted and Not Assisted by a Leniency Applicant



Source: GAO analysis of Antitrust Division data.

Amnesty programs used around the world in cases involving Taiwanese manufacturers such as in the LCD, Air Cargo, and Aftermarket Autolights cases

Enforcement Efforts Growing Around the World

- Strict competition laws also in EU and throughout Asia – now enforced in over 100 countries
- Europe is significant risk area: fines typically higher, and more conduct considered illegal (i.e., information sharing)
-
- Over 50 countries have an amnesty program, including in EU, Canada, Japan, Brazil, South Africa, Mexico, Korea and Taiwan

Enforcement Efforts Growing Around the World

- ASEAN countries are supposed to have antitrust policies by the end of the year if they want to be in ASEAN free-trade zone
- Nearly all ASEAN countries have an antitrust policy.
- Many of these policies include enforcement regimes and leniency policies; hard to predict outcomes in these countries



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Do's and Don'ts: Practical Tips

- **Tips for dealing with competitors - agreements not to compete are always illegal**
 - **DO NOT** agree on prices
 - **DO NOT** allocate customers, product segments, or territories
 - **DO NOT** agree to boycott a competitor or supplier
 - **DO NOT** agree on margins, discounts, credit terms, or other material terms of sale



Do's and Don'ts: Practical Tips

- **DO NOT** rig bids
- **DO NOT** agree to reduce or control production
- **DO NOT** agree to not compete
- **DO NOT** exchange pricing information with competitors without approval



Do's and Don'ts: Practical Tips

- **Best Practices**

- **DO NOT** discuss prices with competitors (current or future)
- **DO NOT** exchange information about customers
- **DO NOT** discuss capacity or output with competitors
- **DO NOT** discuss discounts, rebates, or list prices
- **DO NOT** interact with competitors in ways that may be perceived as suspicious

Dos and Don'ts: Practical Tips

- **Tips for Trade Meetings and Industry Events**
 - Attend only if important for business and avoid discussing non-public information
 - Before, make sure there is an agenda
 - No informal meetings
 - Leave if rules are violated



Recap

- Cases can spread widely and quickly, and are very costly and disruptive of business
- There are substantial risks
- Even where conduct appears benign, there may be risks (information exchanges in collaborative ventures)
- Risk of investigation based on single communication with competitor
- Do what you can to manage the risk!



Contact Information

- › Managing Counsel for Defendant in Taiwanese Aftermarket Autolights Price Fixing Litigation (Civil and Criminal)
- › Managing Counsel for Defendant in Taiwanese Aftermarket Sheet Metal Antitrust Price Fixing Litigation
- › Counsel for various defendants in TFT-LCD Price Fixing Opt Out Litigation matters

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