

Mini Plenary 6: Private enforcement developments and challenges

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ICN Cartel Workshop

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GIBSON DUNN

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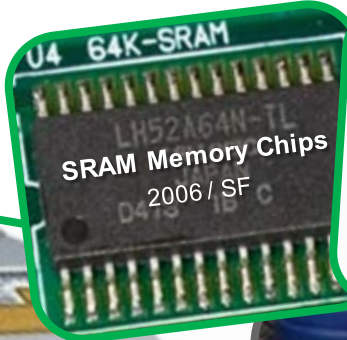
Notable Cartel-Related Civil Litigation



Vitamins and
Methionine
1999 / TX



Hydrogen
Peroxide
2003 / SF



U4 64K-SRAM
LH52A64N-TL
SRAM Memory Chips
2006 / SF



LCD-TFT Flat Panels
2006 / SF



Marine Rubber Hoses
2007 / TX



ORGANIC PEROXIDE
Organic Peroxide
2001 / SF



Plastic Additives
2003 / SF




Optical Disk Drives
2009 / SF




Urethanes
2003 / SF



Graphics Processing
Units
2006 / SF



Rubber Chemicals
2002 / SF



Maritime Transport
2003 / FL



Chocolate
2007



Cathode Ray Tubes
(CRT)
2007 / SF



NAND FLASH Memory
2006 / SF




DRAM Memory Chips
2002 / SF



EPDM
2002 / SF



Auto Parts
2010 / DC

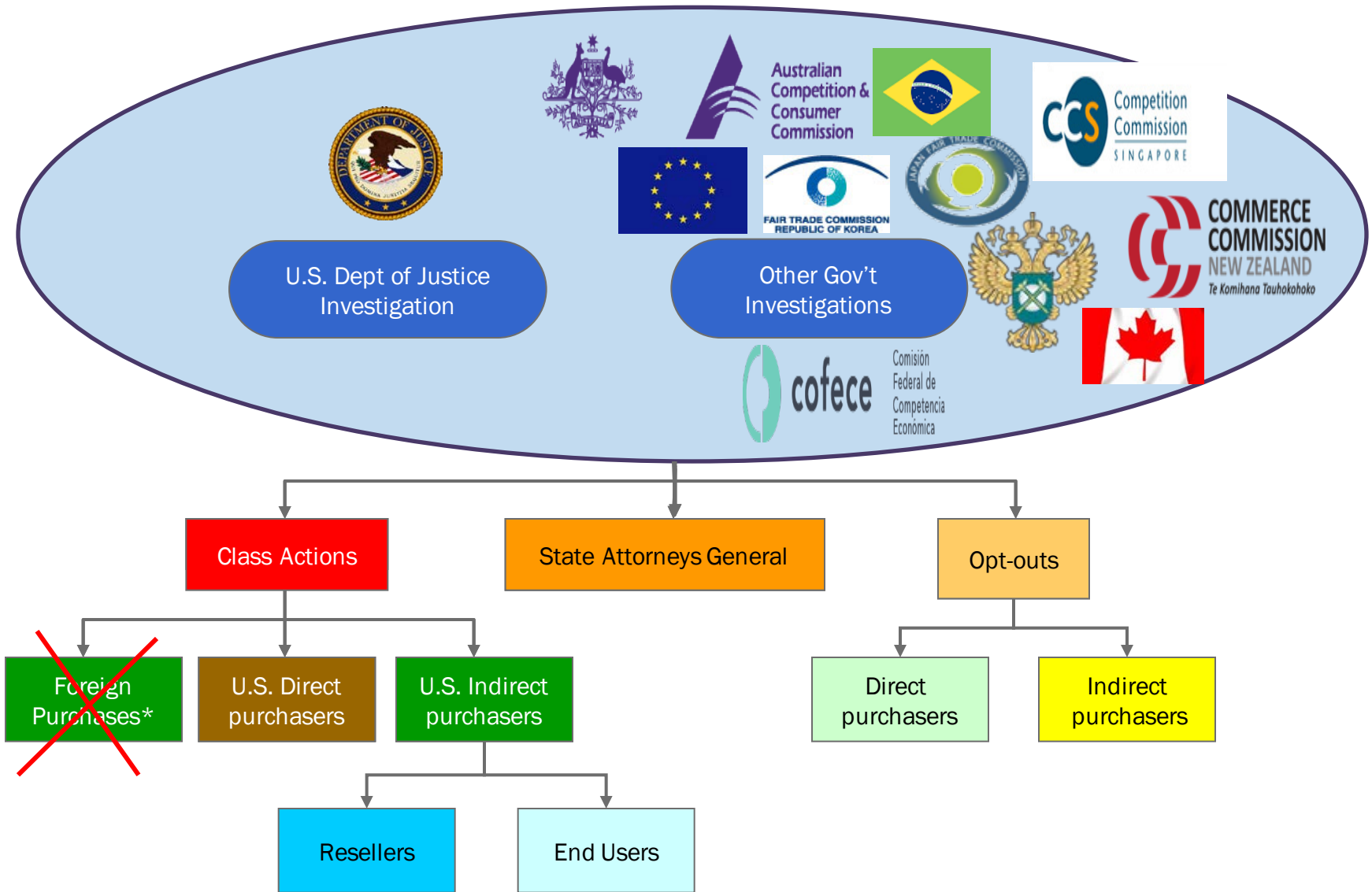


NBR
2003 / SF



Air Cargo and Air
Passenger Service
2006 / DC

U.S. PRIVATE ENFORCEMENT



*But see FTAIA

Extraterritorial Reach – Foreign Trade Antitrust Improvements Act (FTAIA)

- The FTAIA places limits on the jurisdiction of U.S. courts to apply U.S. antitrust law to foreign conduct
- The FTAIA provides that U.S. courts do not have jurisdiction to apply U.S. antitrust laws to foreign trade or commerce unless:
 - the conduct “involves” U.S. import trade or commerce, or
 - the conduct has a direct, substantial, and reasonably foreseeable effect on U.S. commerce and such effect gives rise to an antitrust claim

Cartel-Related Civil Litigation in the U.S.

- Civil litigation in the U.S. filed by several types of claimants:
 - Class actions
 - “Opt out” cases by large customers
 - State Attorneys General
- Upon announcement of investigation:
 - Immediate filing of class actions in the U.S.
 - Automatic response of sophisticated plaintiffs’ attorneys

U.S. Class Action Litigation

- Two Types of Antitrust Class Actions:
 1. Direct Purchaser Class Action
 - Lawsuit is on behalf of customers of alleged cartelists/defendants
 2. Indirect Purchaser Class Action
 - Lawsuit is on behalf of purchasers who are not direct customers of the cartelists/defendants
 - “End-users”: Customers who purchased from retailers
 - “Resellers”: Retailers who purchased from wholesalers
- Opt Outs
 - Class members (usually large customers) can exclude themselves (“opt out”) from the class
 - Opt-out settlements sometimes exceed class settlement

Collective/Class Actions in U.S.

- Class actions are common
- Requirements for class action
 - Class members are numerous
 - Claims of class are common
 - Class representative's claim is typical
 - Class representative is adequate representative
 - Attorneys representing class are competent
 - Class action is superior to individual cases

Civil Exposure in U.S.

- Damages typically = amount of overcharge
 - Both sides present expert economic opinions on damages
- Pass-on of overcharge
 - Direct purchasers' damages normally not reduced for pass-on
 - Indirect purchasers' damages possibly reduced for pass-on
- Damages are automatically tripled
- Joint and several liability
- No right of contribution from other defendants
- Attorneys' fees and costs
- Costs of defense


Effect of Public Enforcement in U.S.

- Action by government enforcer is not necessary to bring private lawsuit
- Admission of wrongdoing may be used against cartelists/defendant by private claimant
- Immunity from fines + cooperation to private claimants = reduced damages (ACPERA)

The Leniency Decision – A Balance of Public/Private Exposure



U.S. Civil Exposure Can Be Greater Than Fines



Incentivizing Leniency – Reducing Private Exposure for Leniency Applicants

- Oral Submissions
- Protection from Disclosure of Self-incriminating Statements
- Strict Confidentiality Protections
- Limiting Private Damages