

A Review Of 2010 Criminal Antitrust Enforcement

Law360, New York (February 4, 2011) -- In 2009, U.S. authorities led the way in international cartel enforcement with more investigations, pleas, fines and prison sentences than any other jurisdiction. In 2010, however, while U.S. antitrust enforcement remained strong, much of the significant action occurred outside the United States, particularly in the European Union. This shift not only underscores the increased and coordinated global enforcement of antitrust laws, but also reinforces that no place remains to hide from aggressive global antitrust enforcement.

This article provides an overview of criminal antitrust enforcement in 2010 and a discussion of the key trends we see from that activity that are likely to continue into the next year and beyond. Among the most notable developments from 2010 are the following:

- In contrast to FY 2009, the pace of obtaining huge criminal fines by the U.S. Department of Justice, Antitrust Division slowed — at least temporarily — marking a reduction from more than \$1 billion in FY 2009 to \$555 million in FY 2010;
- However, jail time for individual criminal antitrust defendants increased over the previous two years, reaching an average jail term of 30 months — the second highest ever; and
- Public antitrust enforcement by jurisdictions outside the United States (particularly in Europe) ended the year on a strong note, with the European Commission imposing total fines in excess of €3 billion (\$3.96 billion).

Enforcement by the Numbers

In Fiscal Year 2010,[1] the Antitrust Division filed 60 criminal cases and obtained \$555 million in criminal fines for illegal conduct. In these cases, 21 corporations and 63 individuals were charged.

Though the first quarter of FY 2010 got off to a fast start with almost a quarter billion dollars in fines obtained, the remainder of the year tapered off — particularly when compared to the last three years. The \$555 million in fines imposed in FY 2010 represents a 44.5 percent decline from FY 2009, and 2010 was the first year since 2005 in which total fines did not increase from the prior year.

This decline most likely reflects the simple ebb and flow of large grand jury investigations. Indeed, Christine Varney, the Assistant Attorney General for the Antitrust Division, recently reaffirmed that "international cartel work remains a top Department priority." [2]

Moreover, this year's \$555 million in fines is significant by historical comparison — it ranks among the top five highest fine years in the history of U.S. criminal antitrust enforcement. Still, as the chart below shows, this year did mark a change from the previous four consecutive years of steadily increasing fine totals.

Trends In Criminal Antitrust Fines

The FY 2010 fines and the first quarter of FY 2011 fines all exceed \$10 million. The majority of the fines imposed in 2010 related to the DOJ's ongoing investigation into the air cargo industry but came after the end of FY 2010. The largest fine during this period, however, was the \$220 million fine imposed on Chi Mei Optoelectronics Corp. in the TFT-LCD investigation early in FY 2010.

Though aggregate fines have trended upward in recent years, large fines are not new to the criminal antitrust arena. The DOJ recently published a table on its website summarizing all historical Sherman Act violations yielding a corporate fine of \$10 million or more.[4] As of Nov. 15, 2010, there were 78 instances of corporate fines exceeding \$10 million.

Increasing fines in the international arena also reduced the significance of any relative ebb of fines assessed in the United States. A significant year for international antitrust fines, 2010 reversed what appeared to be a downward trend.

The European Commission, which in recent years has levied the largest such fines, announced fines against 10 airlines totaling €799 million (\$1.1 billion) as part of its investigation into the coordination of airline surcharges for fuel and security and a total of €649 million (\$858 million) in fines against Chimei InnoLux Corp. (formerly known as Chi Mei Optoelectronics Corp.), LG Display Co. Ltd., and three other makers of LCD panels in its investigation into an alleged cartel in the market for such panels.

The commission also obtained fines totaling €518 million (\$631.1 million) against 17 producers of prestressing steel (metal wires used in concrete construction) earlier this year in its investigation of an alleged price-fixing conspiracy in that industry. In all, the European Commission imposed fines in excess of €3 billion (\$3.96 billion) in 2010, an 88 percent increase from 2009 and the second highest total since 2003.

Significant Sentences of Imprisonment Continue Through 2010

Jail sentences in the United States reached the second highest average level ever imposed — 30 months — and an increase of 25 percent over the prior year. In FY 2010, 29 individuals received jail sentences that totaled more than 26,000 jail days. Seventy-six percent of sentenced defendants received jail sentences in 2010 as compared to only 37 percent in the 1990s.

This dramatic upward trend reflects the Antitrust Division's continued focus on obtaining jail time against the vast majority of individuals it prosecutes. These sentences came in a wide variety of industries, including air transportation services, LCD panels and financial services.[5]

Despite the additional challenges of such prosecutions, the Antitrust Division also continues aggressively to seek the incarceration of foreign citizens who have participated in cartels to the detriment of the United States and its consumers.[6] Not only is the Antitrust Division seeking to incarcerate greater numbers of foreign nationals, it is obtaining longer sentences against them, although still not nearly as long as the sentences imposed on U.S. citizens. In FY 2010, foreign nationals were sentenced to an average of 10 months in prison.[7]

Gibson Dunn expects this trend of high jail terms and significant fines to continue given the number of pending grand jury investigations. As in past years, these investigations are international in scope, with competition authorities from multiple jurisdictions across the globe pursuing simultaneous investigations. In turn, this trend is in line with the Antitrust Division's objective of "efficiently coordinating [its] enforcement with other competition enforcers in matters spanning multiple jurisdictions." [8]

Significant Antitrust Investigations in 2010

Gibson Dunn highlights below developments from what the firm views as the most significant cartel investigations over the past year.

Thin Film Transistor-Liquid Crystal Display ("TFT-LCD") Investigation

In FY 2010 and FY 2011, several additional guilty pleas were entered and significant fines were handed down as a result of the DOJ's investigation into price-fixing in the TFT-LCD industry. TFT-LCD panels are the principal component in LCD televisions and computer monitors, and are also used in other consumer electronics products. Since 2007, a total of 20 executives and eight companies have been charged in the ongoing investigation, and the DOJ has obtained more than \$890 million in criminal fines.[9]

As reported in the Gibson Dunn 2010 Mid-Year Criminal Antitrust Update, AU Optronics Corp. (and its American subsidiary, AU Optronics America) ("AUO") and six AUO executives were indicted in June. The AUO trial is scheduled to begin in late 2011 and could signal a departure from the well-settled pattern of multinational corporations resolving criminal exposure through negotiated plea agreements.

Additionally, four executives of the Taiwanese LCD panel maker Chi Mei Optoelectronics Corp. pled guilty and were sentenced to prison time ranging from nine to 14 months and received criminal fines ranging from \$25,000 to \$50,000. Another former Chi Mei executive, Hsin-Tsung Wang, was indicted in the U.S. District Court for the Northern District of California for participating in the conspiracy. Chi Mei itself pled guilty in December 2009 and agreed to pay a \$220 million criminal fine.

Also in connection with the TFT-LCD investigation, in October, former HannStar Display Corp. executive Jui Hung Wu agreed to plead guilty, serve seven months in prison, and pay a \$20,000 criminal fine.

Outside the United States, the European Commission announced a total of €649 million (\$858 million) in fines against Chimei InnoLux Corp., LG Display Co. Ltd., and three other makers of LCD panels. The companies were charged with operating a cartel in the market for televisions, computer monitors and other LCD products between October 2001 and February 2006.

The largest portion of the fine, €300 million, was imposed on Chimei InnoLux. LG Display was fined €215 million, while AUO was fined €116.8 million. Chunghwa and HannStar Display Corp. were fined €9 million and €8.1 million, respectively. Samsung Electronics Co. received full immunity from fines for cooperating with the commission. The commission launched its investigation into the cartel in 2006 alongside the DOJ's investigation.

Cathode Ray Tubes ("CRT") and Color Display Tube ("CDT") Investigation

In the CRT industry investigation, the Czech Office for the Protection of Competition fined Toshiba Corp., Panasonic Corp., Technicolor SA, Chunghwa Picture Tubes, and MT Picture Display Co. Ltd. a combined 51.8 million koruna (\$2.7 million) for their alleged involvement in a cartel that ran from 1998 to 2004. The companies were alleged by authorities to have taken part in meetings across Asia and Europe over several years to set pricing for CRTs. Samsung SDI Co. Ltd. was granted full immunity because it assisted investigators.

To date, six individuals have been indicted in the United States in connection with the CDT price-fixing investigation. In November 2010, three South Korean former executives from two unnamed CDT manufacturing companies were indicted in the U.S. District Court for the Northern District of California. These executives are charged with participating in an international conspiracy with other CDT makers to fix prices on CDTs used in computer monitors by deliberately shutting down production lines and manipulating market shares.

International Air Cargo Investigation

To date, in the United States, a total of 21 airlines and 19 executives have been charged in the ongoing investigation into price-fixing in the air cargo industry. In addition, more than \$1.7 billion in criminal fines have been imposed. Four executives have been sentenced to serve prison time, and charges are pending against the remaining 15 executives. Companies pleading guilty in the United States in 2010 (and their criminal fines) were:

- All Nippon Airways Co. Ltd. (\$73 million)
- Singapore Airlines Cargo Pte Ltd. (\$48 million)
- China Airlines Ltd. (\$40 million)
- Northwest Airlines, LLC (\$38 million)
- Polar Air Cargo, LLC (\$17.4 million)

In addition, Florida West International Airways, Inc., was indicted in December 2010. Former and current executives from the following companies were also indicted in FY 2010: Asiana Airlines, Martinair Holland N.V., Cargolux Airlines, Florida West International Airways Inc., Nippon Cargo Airlines Co. Ltd., Japan Airlines International Co. Ltd., an unnamed Miami-based air cargo carrier and an unnamed Peruvian air cargo carrier.

In Europe, the European Commission announced fines against 10 airlines totaling €799 million (\$1.1 billion) as part of its investigation into the coordination of surcharges for fuel and security between late 1999 to early 2006.

The airlines fined were Air France-KLM-Martinair (€340 million), British Airways (€104 million), Cargolux Airlines (€79.9 million), Singapore Airlines (€74.8 million), SAS (€70.2 million), Cathay Pacific (€57.12 million), Japan Airlines (€35.7 million), Air Canada (€21 million), Qantas (€8.9 million), and LAN Chile (€8.2 million). The commission also found Lufthansa to have participated in the infringement, but the company received immunity from punishment given its status as the initial leniency applicant.

In Canada, Cargolux Airlines pled guilty in federal court to conspiring to fix surcharges on air cargo services from Canada, and was fined CA \$2.5 million (U.S. \$2.4 million). And in South Africa, the Competition Commission has recommended to the Competition Tribunal that several airlines, including British Airways PLC and Air France-KLM, be fined for allegedly participating in a cartel to fix the price of fuel surcharges on cargo shipments with a penalty of 10 percent of annual turnover. The Competition Commission has also recommended that three of the airlines face charges for fixing cargo rates.

Freight-Forwarding Investigation

This year saw significant developments in the DOJ investigation into anticompetitive conduct in the air freight-forwarding industry. The investigation has been ongoing since at least the fall of 2007, when E.U. and U.S. regulators conducted surprise raids at the offices of many freight-forwarding companies.

In September 2010, the DOJ announced that six international freight forwarders, EGL Inc., a Houston-based company; Kühne + Nagel International AG, based in Schindellegi, Switzerland; Geologistics International Management (Bermuda) Limited, based in Hamilton, Bermuda; Panalpina World Transport (Holding) Ltd., based in Basel, Switzerland; Schenker AG, based in Essen, Germany; and BAX Global Inc., based in the United States, had agreed to plead guilty and pay criminal fines totaling \$50.27 million for their roles in several conspiracies to fix a variety of fees and charges in connection with the provision of freight-forwarding services for international air cargo shipments. These pleas are the result of the first charges brought in the DOJ investigation.

The European Commission also announced that it had sent statements of objection to several companies in 2010 in connection with its investigation of the industry. In New Zealand, the Commerce Commission filed proceedings against several shipping logistics companies, including units of the Deutsche Bahn Group, accusing them of agreeing to fix surcharges and other fees for air freight-forwarding services. The Commerce Commission has reached settlements with two of the defendants. In addition, competition authorities in Italy and Brazil are reportedly investigating freight-forwarding companies.

Refrigerant Compressor Industry Investigation

This year also saw the DOJ's first charges in an ongoing investigation into the global refrigerant compressor market.

Panasonic Corp., a Japanese corporation, and Embraco North America Inc., a Whirlpool SA subsidiary based in Delaware, agreed to plead guilty to participating in a price-fixing conspiracy involving refrigerant compressors. Embraco will pay a \$91.8 million criminal fine, and Panasonic will pay \$49.1 million. The two companies were charged with conspiring to fix the prices of compressors sold in the United States and elsewhere from at least as early as Oct. 14, 2004, until about Dec. 31, 2007.

Embraco also pled guilty in Canada to fixing the prices of refrigeration compressors it sold to W.C. Wood Corporation, located in Guelph, Ontario. The hermetic refrigeration compressors that are the subject of the guilty plea are mainly purchased by manufacturers of household refrigerators and freezers. Embraco agreed to pay a CA \$1.5 million fine. The European Commission has also recently begun its own investigation into the industry.

Other Significant U.S. Domestic Prosecutions

Municipal Bonds

To date, the DOJ's ongoing investigation into anti-competitive conduct in the municipal bond derivatives market has resulted in charges against seven executives and one corporate entity, as well as guilty pleas by eight other executives, for antitrust and related federal crimes. The investigation is a joint effort by the Antitrust Division's New York Field Office, the FBI, and the IRS Criminal Investigation unit. The DOJ is also coordinating its investigation with other federal agencies, including the U.S. Securities and Exchange Commission, the Office of the Comptroller of Currency, and the Federal Reserve Bank of New York.

In December 2010, Bank of America agreed to pay \$137.3 million in restitution to federal and state agencies for its participation in a conspiracy to rig bids in the municipal bond derivative market and as a condition of its admission into the DOJ's Antitrust Corporate Leniency Program. According to the agreements, the bank's employees engaged in illegal conduct, including bid-rigging and other deceptive practices, in connection with the marketing and sale of tax-exempt municipal bond derivative contracts. The bank came forward and reported its wrongdoing to the DOJ.

Among the executives indicted as a result of the investigation in FY 2010 were former financial services executives Dominick P. Carollo, Steven E. Goldberg and Peter S. Grimm. The former executives were indicted in the U.S. District Court in the Southern District of New York for participating in wire fraud schemes and separate fraud conspiracies between 1999 and 2006. The indictment charges that the three conspired to manipulate the bidding for investment contracts and misrepresented that the bidding process was in compliance with U.S. Treasury regulations.

Further, a former employee of a major financial institution, Peter Ghavami, a Belgian national, was arrested after arriving on an international flight that landed at John F. Kennedy International Airport in New York and arraigned in the Southern District of New York on one count of wire fraud for allegedly taking part in a price-fixing scheme in the municipal bond and derivative markets. According to the charges, he and his company acted as a broker of investment agreements and other municipal finance contracts to public entities.

Ghavami was also indicted in a separate case in the Southern District of New York, along with two other former financial service executives, Gary Heinz and Michael Welty, for fraudulent conduct affecting contracts related to municipal bonds. According to the indictment, Ghavami, Heinz and Welty conspired with employees of various financial institutions to manipulate the contract bidding process and falsely certified that the bidding process was in compliance with U.S. Treasury regulations.

Other Notable Foreign Investigations

European Union

The European Commission obtained fines totaling nearly €176 million (\$227 million) against five chemical manufacturing groups for allegedly fixing the prices of animal feed phosphates.

The companies fined were Slovakia-based Novacke chemicke zavody and 1.garantovana (€19.6 million), SKW Stahl-Metallurgie and its owner ARQUES Industries (€13.3 million), HSE (Slovenia) (€9.1 million), Ecka Granulate (€6.4 million) and Almamet (€3.04 million). The commission alleged that, for more than three decades, the cartel members divided the European market for animal feed additives, fixed prices throughout the E.U., allocated customers and set sales quotas.

The commission also fined France's national association of pharmacists €5 million (\$6.6 million) after it determined that French pharmacists colluded to restrict competition for biomedical tests. The commission found that the Ordre National des Pharmaciens — the professional body charged with ensuring that pharmacists in France comply with their professional duties — broke competition rules by imposing minimum prices on the French market for clinical laboratory tests and hindering the development of groups of laboratories in that market.

The commission also raided the offices of several manufacturers of flexible polyurethane foam as part of a new probe into alleged cartel activity. The unannounced inspections began on July 27.

The General Court of the European Union upheld earlier-imposed fines of €17.85 million (\$23 million) imposed by the commission against Trioplast Wittenheim SA for its alleged role in an industrial plastic bags cartel. The court, however, lowered the amount of the fine that Trioplast's current parent company, Trioplast Industrier AB, must pay to €2.73 million. The court found that Trioplast Industrier AB did not acquire Wittenheim until 1999, even though the alleged cartel spanned from 1982 to 2002.

This case stems from the commission's imposition of a €290.71 million total fine against Trioplast Wittenheim SA and 15 other companies for running a cartel for as long as 20 years in some cases to fix prices for the products in Germany, France, Spain, Belgium, Luxembourg and the Netherlands.

Other Significant Non-E.U. Foreign Prosecutions

- *Brazil:* Brazil's antitrust regulators levied the highest fine of any competition authority in 2010 in their investigation of an alleged industrial gas cartel. Five companies and seven executives were fined 2.9 billion Brazilian reais (\$1.66 billion) for allegedly forming the cartel. The fine was the largest ever assessed by Brazil's Administrative Council for Economic Defense. White Martins Gases Industriais was ordered to pay the largest portion of the fine, 2.2 billion reais (\$1.26 billion). Other companies fined were: Linde Gas SA, formerly known as AGA SA; Air Liquide Brazil Ltd.; and Air Products Brazil Ltd.
- *Canada:* July 2010 saw a second wave of criminal charges in the Quebec cartel probe into gasoline prices, the largest criminal probe in the history of Canada's Competition Bureau. The agency has accused 25 more individuals and 3 additional companies of fixing the price of gasoline sold at pumping stations. The case dates back to June 2008. To date, five companies have pled guilty, paying fines totaling over CA\$2.7 million. The agency had to split the charges into two groups due to the size of the case, which now totals 38 individuals and 14 companies.

- *France:* France's L'Autorite de la concurrence levied fines totaling €385 million (\$504 million) against BNP Paribas SA, Credit Agricole SA, BPCE and eight other banks for allegedly fixing prices on check-clearing fees. The French authority also levied fines against Banque de France, Banque Postale, Confederation Nationale du Credit Mutuel, Credit du Nord, Credit Industriel et Commercial, Credit Lyonnais, HSBC and Societe Generale as part of this action.
- *Germany:* The German Federal Cartel Office fined a unit of power plant equipment supplier Alstom Power Systems and two former managing directors €91 million (\$117 million) for allegedly fixing prices on large steam generators. The alleged scheme, which began in the 1990s and continued to 2003, involved setting quotas and prices and distributing customers in the power plant supplier industry. The fine, which was calculated under Germany's Act Against Restraints of Competition, represents three times the profits Alstom and the suppliers earned from the alleged scheme. This is at least the second major fine Alstom has faced in the last year from European competition regulators. In October 2009, the European Commission fined Alstom and five other European and Japanese companies that produced power transformers a total of €67.6 million (\$100 million) for running a market-sharing cartel.
- *Russia:* As part of its continuing investigation of major Russian energy industry players, Russia's Federal Antimonopoly Service initiated an inquiry into OAO Severstal and Evraz Group SA — the country's largest steel makers — and coal producer OAO Raspadskaya with regard to alleged discriminatory pricing practices in the market for coking coal. The regulator continues to monitor activities related to the pricing of other steel companies.
- *South Africa:* Pioneer Foods (Pty) Ltd. will pay 500 million rand (\$72 million) to settle several antitrust cases with South Africa's Competition Commission, including claims that the food distribution company fixed prices for flour and maize. The settlement is multipronged — Pioneer will pay an administrative penalty, establish a fund to offer favorable financing to small and mid-size businesses in the food industry, adjust its prices, cooperate in seven related antitrust probes and institute a competition compliance program. The settlement stems from a February 2010 Competition Tribunal decision fining Pioneer 195 million rand for its alleged participation in a bread cartel, after which Pioneer approached the Competition Commission about reaching a blanket settlement for all outstanding cases against it. South Africa's Competition Tribunal approved a 5 million rand (\$714,000) settlement between Flo-Tek Pipes and Irrigation (Pty) Ltd. and the South African Competition Commission in a case against a plastic pipes cartel. The tribunal also approved a similar 7 million rand (U.S. \$1 million) settlement with Swan Plastics CC. Both companies admitted to violating South Africa's Competition Act and agreed to pay penalties representing 6 percent of their turnover for 2007. The commission brought the case against the two pipe manufacturers and five others in January 2009, accusing the companies of bid-rigging, price-fixing and market and customer allocation.
- *South Korea:* South Korea's Fair Trade Commission voted to impose 1.64 billion won (\$1.45 million) in fines and corrective orders on 25 scrap metal processors for allegedly agreeing to set prices for scrap metal products. From January 2006 through March 2009, according to the allegations, the companies agreed to share information and jointly raise or cut prices, by 10 to 100 won per kilogram.

--By David P. Burns and Rebecca Justice Lazarus, Gibson Dunn & Crutcher LLP

David Burns (dburns@gibsondunn.com) is a partner with Gibson Dunn in the firm's Washington, D.C., office and a former Assistant United States Attorney in the Southern District of New York. Rebecca Justice Lazarus (rjustice@gibsondunn.com) is an associate with the firm in the San Francisco office.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360.

[1] DOJ's fiscal year runs from Oct. 1 through Sept. 30.

[2] Christine A. Varney, "Department of Justice Introduction," Global Competition Review: The Antitrust Review of the Americas 2011.

[3] This information is taken from a table published on the DOJ website summarizing all historical Sherman Act violations yielding a corporate fine of \$10 million or more. The table is available online at www.justice.gov/atr/public/criminal/264101.html.

[4] Id.

[5] "Overview of 2010 Antitrust Enforcement," Remarks by Christine Varney, Assistant Attorney General of Department of Justice Antitrust Division, at the 7th Annual Institute on Corporate Securities and Related Aspects of Mergers and Acquisitions (Oct. 7, 2010).

[6] "Update from the Antitrust Division," Remarks by Carl Shapiro, Deputy Assistant Attorney General for Economics, Department of Justice Antitrust Division, at the ABA Section of Antitrust Law Fall Forum (Nov. 18, 2010).

[7] Id.

[8] Christine A. Varney, "Department of Justice Introduction," Global Competition Review: The Antitrust Review of the Americas 2011.

[9] DOJ Press Release, "Ninth Taiwan Executive Indicted For Participating In Global LCD Price-Fixing Conspiracy," available online at: www.justice.gov/atr/public/press_releases/2010/263173.htm (Oct. 14, 2010); "Overview of 2010 Antitrust Enforcement," Remarks by Christine Varney, Assistant Attorney General of Department of Justice Antitrust Division, at the 7th Annual Institute on Corporate Securities and Related Aspects of Mergers and Acquisitions (Oct. 7, 2010).