

2011 YEAR-END CRIMINAL ANTITRUST UPDATE

To Our Clients and Friends:

The Department of Justice obtained **more than \$1 billion** in FY 2011¹ from criminal antitrust offenders, the second-highest amount in its history. The total payments consist of an estimated \$523 million in criminal fines and more than \$500 million in restitution, penalties, and disgorgement paid to state and federal agencies. This staggering amount represents an increase of more than 78% from FY 2010 and sends a clear message to the corporate world that DOJ's zealous pursuit of large fines for collusive conduct continues unabated.

Another important measure of success for the Department of Justice, Antitrust Division ("DOJ" or "Antitrust Division") also significantly advanced in FY 2011; the number of criminal cases filed increased 50% to 90 cases, which included 27 corporations and 82 individuals--each category significantly higher than in FY 2010.

Despite these achievements for the Antitrust Division, other metrics revealed significant year-over-year declines in FY 2011. Most notably, several statistics relating to incarceration of antitrust defendants reached multi-year lows: the number of individuals sentenced to prison decreased 28% to just 21 defendants, the length of the average prison sentence fell 44% to 17 months, and the total prison time imposed on defendants dropped 60% to 10,544 days. We explore potential reasons for these declines below.

Given the Antitrust Division's numerous ongoing investigations--a number of which involve large, complex, international cartel matters that have not yet been announced publicly--we expect 2012 to be another banner year in criminal antitrust enforcement.

International competition authorities also actively investigated and penalized cartel behavior across the globe. In 2011, we continued to note the trend toward large, multi-jurisdiction cartel cases among regulators, such as the ongoing investigations in the TFT-LCD, CRT, air cargo, and refrigerant compressor industries. Additionally, separate investigations by the European Commission and France into the powder laundry-detergent industry resulted in stunning fines, which cumulatively exceeded €676 million (\$886 million). The European Commission's success in 2011 was tempered, though, by a €2.2 billion year-over-year decline in total fines levied. We discuss this significant reduction later in this Update, along with a recap of the investigations and policy changes undertaken by international competition authorities.

¹ DOJ's fiscal year runs from October 1 through September 30.

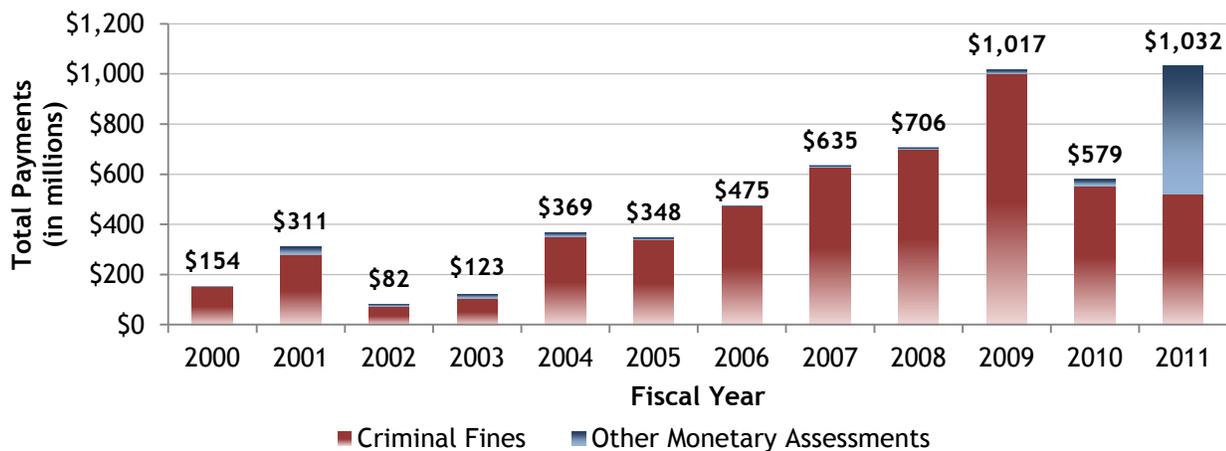
1) Overview of U.S. Enforcement Trends in 2011

a) Criminal Fines & Other Monetary Assessments

In total, the Antitrust Division secured payments totaling more than \$1 billion stemming from its criminal investigations in FY 2011. This is only the third year in which the Antitrust Division has surpassed the \$1 billion mark and is the second-highest amount in its history. These payments represent a combination of criminal fines and other monetary assessments derived from the Antitrust Division's criminal investigations.

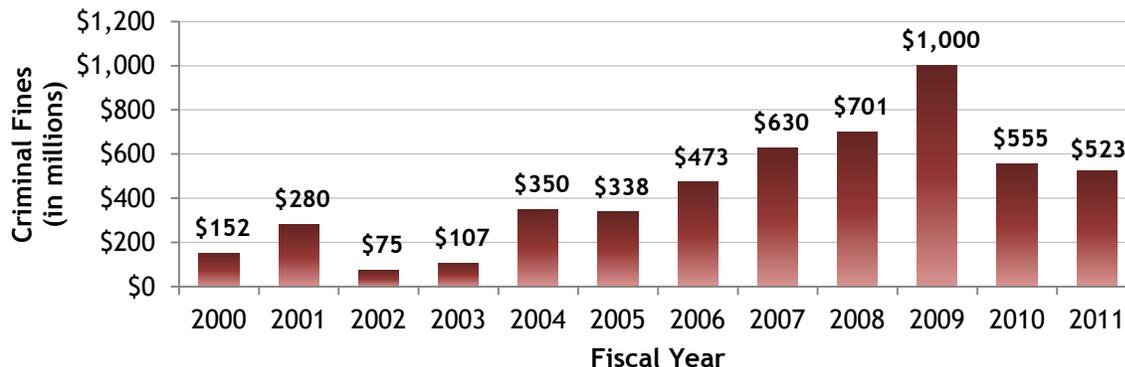
In past years, the vast majority of payments secured by the Antitrust Division came in the form of criminal fines. For the first time this past year, this historic pattern has changed due to the number of recent non-prosecution agreements and the growing trend toward multi-agency investigations. As a result, we believe the true impact of the Antitrust Division's work is not reflected accurately without consideration of these other monetary assessments stemming from its investigations.

Total Criminal Fines & Other Monetary Assessments from Antitrust Division Investigations (FY 2000-2011)



The total criminal fines obtained or agreed upon by the Antitrust Division in FY 2011 decreased from the prior fiscal year by slightly more than \$30 million, to \$523 million.²

Total Criminal Fines Resulting from Antitrust Division Investigations (FY 2000-2011)



² The total criminal fines for FY 2011 is an estimate based on our review of plea agreements announced by the Antitrust Division and other court-imposed criminal fines during the fiscal year. Although the Antitrust Division has not yet released its final statistics for the fiscal year, our estimate is supported by Acting Assistant Attorney General Sharis Pozen's testimony before Congress in December 2011 in which she stated that the Antitrust Division "obtained over \$520 million in criminal fines" during FY 2011. Sharis A. Pozen, U.S. Dep't of Justice, Antitrust Div., Oversight Hearing on the Federal Trade Commission's Bureau of Competition and the U.S. Department of Justice's Antitrust Division 14 (Dec. 7, 2011) [hereinafter Pozen Testimony].

However, the amount of monetary assessments secured from offenders for restitution, disgorgement, and various penalties exploded in FY 2011 to more than \$500 million--driven by settlements in the municipal bond bid-rigging cartel cases discussed below.³

Other Monetary Assessments (Restitution, Disgorgement, and Penalties) Resulting from Antitrust Division Investigations (FY 2000-2011)



i) CRIMINAL FINES

More than 99% of the Antitrust Division's total criminal fines in FY 2011 came from 16 corporate plea agreements that included fines of more than \$1 million.

³ The chart reflects court-imposed restitution, disgorgement, and penalties during the respective fiscal year stemming from an Antitrust Division investigation. The amounts reflected for FY 2000–2010 reflect only court-imposed restitution reported by the Antitrust Division, insofar as we are unaware of any disgorgement and penalties resulting from an Antitrust Division criminal investigation prior to the municipal bond settlements in FY 2011. See U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION WORKLOAD STATISTICS, FY 2001 – 2010 [hereinafter FY 2001–2010 WORKLOAD STATISTICS], available at <http://www.justice.gov/atr/public/workload-statistics.pdf>; U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION WORKLOAD STATISTICS, FY 2000 – 2009 [hereinafter FY 2000–2009 WORKLOAD STATISTICS].

Criminal Fines of More than \$1 Million for Sherman Act Violations Imposed or Agreed to During FY 2011 (October 2010–September 2011)		
Company	Investigation	Criminal Fine
Furukawa Electric Co. Ltd	Automotive Wire Harnesses	\$ 200,000,000
All Nippon Airways Co. Ltd.	Air Cargo	\$ 73,000,000
Singapore Airlines Cargo Pte Ltd.	Air Cargo	\$ 48,000,000
Maxzone Vehicle Lighting Corp.	After-Market Auto Lights	\$ 43,000,000
Samsung SDI Company Ltd.	Cathode Ray Tubes	\$ 32,000,000
Bridgestone Corporation	Marine Hose	\$ 28,000,000
Hitachi-LG Data Storage Inc.	Optical Disk Drives	\$ 21,200,000
Nippon Express Co. Ltd.	Freight Forwarding	\$ 21,115,396
Horizon Lines LLC	Coastal Water Freight Transportation	\$ 15,000,000
EVA Airways Corporation	Air Cargo	\$ 13,200,000
Kintetsu World Express Inc.	Freight Forwarding	\$ 10,465,677
Nishi-Nippon Railroad Co. Ltd.	Freight Forwarding	\$ 4,673,114
Hankyu Hanshin Express Co. Ltd	Freight Forwarding	\$ 4,522,065
Vantec Corporation	Freight Forwarding	\$ 3,339,648
Nissin Corporation	Freight Forwarding	\$ 2,644,779
MOL Logistics (Japan) Co. Ltd.	Freight Forwarding	\$ 1,840,000

The Antitrust Division also has already entered into two plea agreements providing for more than \$17 million in criminal fines during the first three months of FY 2012.

Criminal Fines of More than \$1 Million for Sherman Act Violations Agreed to During FY 2012 (October 2011–December 2011)		
Company	Investigation	Criminal Fine
Sea Star Line LLC	Coastal Water Freight Transportation	\$ 14,200,000
Danfoss Flensburg GmbH (formerly Danfoss Compressors GmbH)	Refrigerant Compressors	\$ 3,000,000

ii) OTHER MONETARY ASSESSMENTS (RESTITUTION, DISGORGEMENT, AND PENALTIES)

The monetary assessments resulting from the Antitrust Division's investigations in FY 2011 stemmed entirely from its ongoing investigation into bid rigging within the municipal bond industry.

Monetary Assessments of More than \$1 Million Stemming from Antitrust Division Investigations During FY 2011 (October 2010–September 2011)			
Company	Country	Investigation	Total Monetary Assessments
JPMorgan Chase	United States	Municipal Bonds	\$ 211,000,000 ⁴
UBS AG	Switzerland	Municipal Bonds	\$ 160,300,000
Bank of America	United States	Municipal Bonds	\$ 137,300,000

We expect this new trend to continue in FY 2012 because the Antitrust Division has already announced monetary assessments totaling \$218 million during the first three months of the fiscal year.

Monetary Assessments of More than \$1 Million Stemming from Antitrust Division Investigations During FY 2012 (October 2011–December 2011)			
Company	Country	Investigation	Total Monetary Assessments
Wells Fargo Bank	United States	Municipal Bonds	\$ 148,000,000
GE Funding Capital Market Services Inc.	United States	Municipal Bonds	\$ 70,000,000

b) New Criminal Cases

The Antitrust Division filed 90 new criminal cases in FY 2011⁵--the largest number of new cases since 1987.⁶ These new cases involved charges against 27 corporations and 82 individuals. More than

⁴ The Antitrust Division claims that the settlement agreements between JPMorgan Chase and various state and federal agencies require payments totaling \$228 million. See Press Release, U.S. Dep't of Justice, Antitrust Div., JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$228 Million to Federal and State Agencies (July 7, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/272815.htm. However, JPMorgan Chase claims that this amount double counts certain payments and the actual total is \$211 million. See David Henry, JPMorgan Settles Muni Bid-Rigging Case for \$211 Million, REUTERS (July 7, 2011, 2:14 PM), <http://www.reuters.com/article/2011/07/07/us-jpmorgan-settlement-idUSTRE76641220110707> (quoting a JPMorgan Chase representative as saying the government's \$228 million "figure double-counts \$17 million which is being distributed to various regulators, municipalities and not-for-profits"). We rely on this lower calculation, as have many media outlets in their subsequent reporting. See *id.*

⁵ See Pozen Testimony, *supra* note 2, at 14.

⁶ See FY 2000–2009 WORKLOAD STATISTICS 4, *supra* note 3; FY 2001–2010 WORKLOAD STATISTICS 4, *supra* note 3; U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION WORKLOAD STATISTICS, FY 1990–1999,

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20 of the new cases are attributable to individuals charged during FY 2011 as part of the Antitrust Division's ongoing investigation into bid rigging at real estate foreclosure auctions across the nation. Interestingly, for each of the past three fiscal years, the Antitrust Division's filed cases have been comprised of 25% corporate and 75% individual defendants.

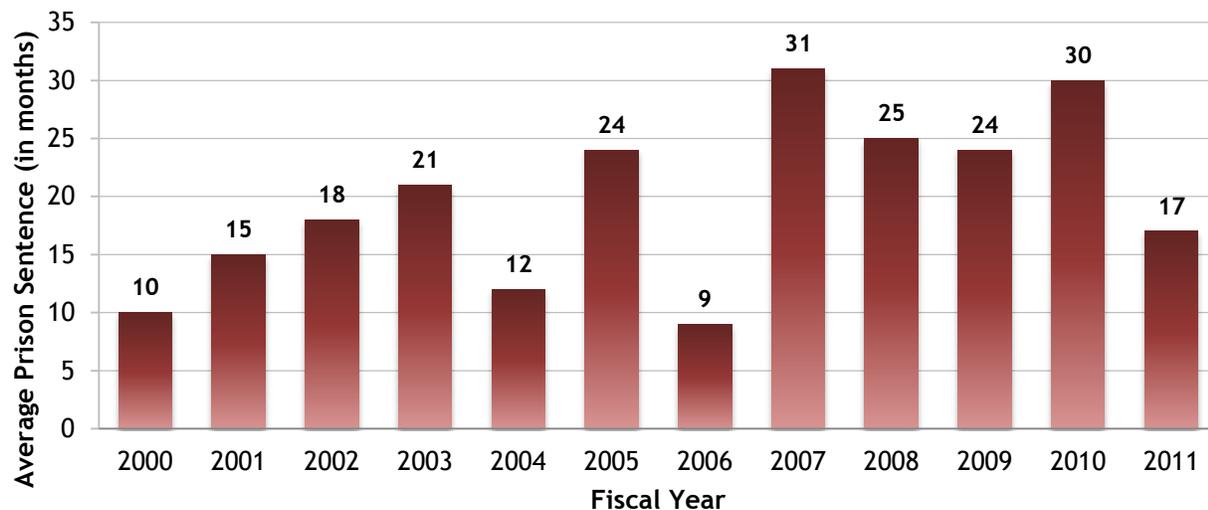
We expect the rapid pace of new filings will continue in FY 2012 because the Antitrust Division has already charged an additional 14 individuals between October and December 2011 for their roles in bid rigging at foreclosure auctions. We also believe that, given the volume of new charges against individuals, there will be substantially more criminal antitrust trials in the coming years.

at 4 [hereinafter FY 1990–1999 WORKLOAD STATISTICS], *available at* <http://www.justice.gov/atr/public/246419.pdf>; U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION WORKLOAD STATISTICS, FY 1980 – 1989, at 6 [hereinafter FY 1980–1989 WORKLOAD STATISTICS], *available at* <http://www.justice.gov/atr/public/215423.pdf>.

c) Prison Sentences

The number and length of prison sentences secured by the Antitrust Division dropped dramatically in FY 2011. The sharp drop-off in the average prison sentence to 17 months represents the lowest level since 2006, and a 43% reduction from the near-record levels observed in FY 2010.⁷ Possible explanations for this phenomenon, based on a review of recent sentencing data, include (i) this year the Antitrust Division pursued fewer mixed Title 15 and Title 18 charges--such as wire and mail fraud--which historically receive harsher prison sentences than are routinely observed in Sherman Act-only charges; (ii) this year a higher percentage of the sentences involved foreign nationals who typically are able to negotiate shorter periods of incarceration for guilty pleas; or (iii) a combination of these factors.

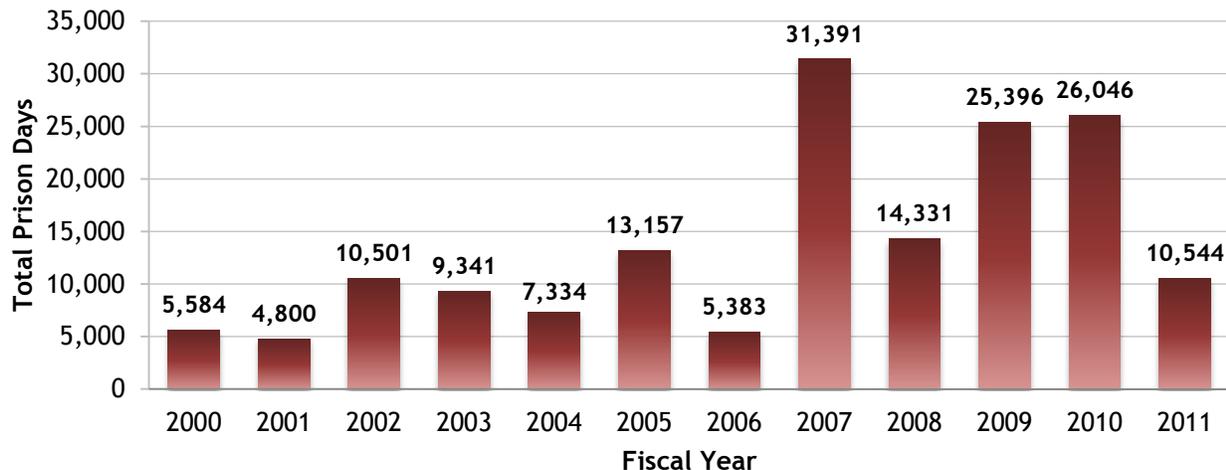
**Average Length of Prison Sentence
(FY 2000-2011)**



⁷ We tabulated the average prison sentence using publicly available data reflecting the total prison days sentenced and total number of defendants receiving prison sentences during each fiscal year. The underlying data can be found at FY 2000–2009 WORKLOAD STATISTICS, *supra* note 3, FY 2001–2010 WORKLOAD STATISTICS, *supra* note 3, and Pozen Testimony, *supra* note 2, at 14.

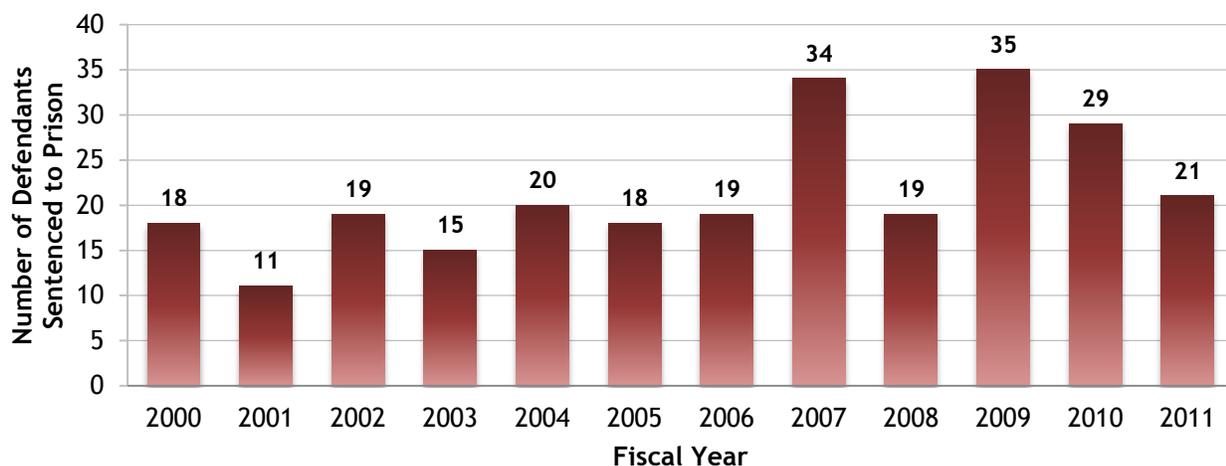
The data for aggregate prison time for all individuals sentenced in antitrust cases fell even more dramatically, recording a 60% reduction from FY 2010.⁸

Total Prison Days Sentenced (FY 2000-2011)



A third metric that showed further year-over-year decline is the number of defendants sentenced to incarceration in FY 2011. With just 21 defendants receiving prison sentences, the Antitrust Division continued a three-year trend of increasingly fewer prison sentences.⁹

Number of Defendants Sentenced to Prison (FY 2000-2011)



⁸ See FY 2000–2009 WORKLOAD STATISTICS, *supra* note 3; FY 2001–2010 WORKLOAD STATISTICS, *supra* note 3; Pozen Testimony, *supra* note 2, at 14.

⁹ See FY 2000–2009 WORKLOAD STATISTICS, *supra* note 3; FY 2001–2010 WORKLOAD STATISTICS, *supra* note 3; Pozen Testimony, *supra* note 2, at 14.

2) International Cooperation

A consistent theme in our semi-annual Criminal Antitrust Updates has been the global nature of modern antitrust investigations. The discovery of an international cartel will spawn multiple investigations among the 117 competition authorities operating in 103 jurisdictions worldwide.¹⁰

The Antitrust Division has concentrated its resources on these global investigations for more than a decade. This effort is reflected by the fact that 96% of the \$6.1 billion in criminal fines obtained between FY 1997 and FY 2010 stemmed from prosecutions of international cartels.¹¹ Additionally, 48 foreign defendants from France, Germany, Japan, South Korea, Taiwan, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom have served, or have been sentenced to serve, prison sentences in the United States.¹²

Nevertheless, international investigations operate most effectively when the participating competition authorities coordinate their efforts and pool their limited resources. The Antitrust Division recently discussed, in a report to Congress, the difficulties that these investigations entail:

In our enforcement efforts we find parties, potential evidence, and impacts abroad, all of which add complexity, and ultimately cost, to the pursuit of matters. Whether that complexity and cost results from having to collect evidence overseas or from having to undertake extensive inter-governmental negotiations in order to depose a foreign national, it makes for a very different, and generally more difficult investigatory process than would be the case if our efforts were restricted to conduct and individuals in the U.S. . . . Consequently, the Division must spend more for translators and translation software, interpreters, and communications, and Division staff must travel greater distances to reach the people and information required to conduct an investigation effectively and expend more resources to coordinate our international enforcement efforts with other countries and international organizations.¹³

DOJ's response to these challenges has been aggressively to seek greater international cooperation. In a November 2011 publication, DOJ noted that it is "working hard to establish 'pick-up-the-phone' relationships with an increasing number of agencies around the world, which have an interest in investigating . . . cartel activity along with us."¹⁴ The most notable of these efforts has been DOJ's role in helping to found the International Competition Network ("ICN") in October 2001, which has served for over a decade as an increasingly active forum for competition authorities from around the globe. On March 29, 2011, DOJ co-hosted the first ICN Roundtable on



¹⁰ News Release, International Competition Network Sets out Vision for Second Decade (May 20, 2011), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc761.pdf>.

¹¹ U.S. DEP'T OF JUSTICE, ANTITRUST DIV., CONGRESSIONAL SUBMISSION, FY 2012 PERFORMANCE BUDGET 4, available at <http://www.justice.gov/jmd/2012justification/pdf/fy12-atr-justification.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ DEP'T OF JUSTICE, ANTITRUST DIV., THE ANTITRUST DIVISION'S INTERNATIONAL PROGRAM 2 (NOV. 2011), available at <http://www.justice.gov/atr/public/international/program.pdf>.

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Enforcement Cooperation in Washington, D.C., to discuss how agencies can overcome hurdles to broader cooperation--just one recent example of the ICN's expanding role.

The Antitrust Division also established the Visiting International Enforcer Program to deepen its relationships with foreign regulators.¹⁵ The program will invite mid- and senior-level officials from foreign competition authorities to come to the Antitrust Division's Washington, D.C. headquarters, while the Antitrust Division will send its own attorneys abroad. The first exchange occurred in November 2011 when a Division Assistant Chief spent two weeks with the European Commission's Directorate-General for Competition ("DG COMP") in Brussels. In exchange, the Antitrust Division planned to host a DG COMP attorney at its offices in December 2011.

DOJ's efforts also have yielded significant benefits in recent years in the form of formal cooperation agreements with new jurisdictions. While these agreements contain general, non-binding commitments, they signal the desire for greater coordination and mirror the agreements that successfully launched the Antitrust Division's extensive cooperation with its European counterparts more than two decades ago. In just the past two years, DOJ has executed formal cooperation agreements with three new countries in key emerging markets:

 Russia	Memorandum of Understanding on Antitrust Cooperation with the Russian Federal Anti-Monopoly Service (November 10, 2009)
 Chile	Agreement on Antitrust Cooperation with the Fiscalía Nacional Económica of Chile (March 31, 2011)
 China	Memorandum of Understanding on Antitrust and Antimonopoly Cooperation with the Chinese National Development and Reform Commission, Ministry of Commerce, and State Administration for Industry and Commerce (July 27, 2011)

The Antitrust Division also has publicly stated that it is actively negotiating a similar pact with the Competition Commission of India that it expects to sign in 2012.¹⁶

3) Developments in the Antitrust Division

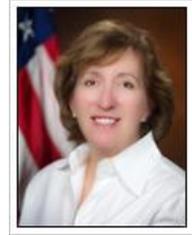
a) New Acting Assistant Attorney General

¹⁵ *Id.* at 11.

¹⁶ Sharis A. Pozen, Acting Assistant Attorney General, U.S. Dep't of Justice, Antitrust Div., Developments at the Antitrust Division & the 2010 Horizontal Merger Guidelines--One Year Later 15 (Nov. 17, 2011), *available at* <http://www.justice.gov/atr/public/speeches/277488.pdf>.

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The former Assistant Attorney General ("AAG") for the Antitrust Division departed on August 5, 2011. Attorney General Eric Holder appointed Sharis Pozen to serve as the Acting Assistant Attorney General. Pozen joined the Antitrust Division in February 2009 and has served as Chief of Staff to the AAG. We anticipate that Pozen's appointment will ensure a strong degree of continuity in the operation of the office.



b) Proposed Closure of Four Antitrust Division Field Offices

DOJ recently proposed closing four of the Antitrust Division's seven field offices: Atlanta, Cleveland, Dallas, and Philadelphia.¹⁷ These offices would be consolidated into the remaining offices in Chicago, New York, and San Francisco, as well as the division's Washington, D.C.-based section. There are 94 positions in the targeted field offices that will be reassigned to the remaining field offices and the Washington, D.C.-based section to provide additional staffing resources for larger investigations. Employees who are unable to relocate will receive up to one year of severance pay and benefits. The Antitrust Division expects that the consolidation would save nearly \$8 million. However, Ms. Pozen recently emphasized that the "primary purpose of the reorganization is to realign the Antitrust Division's field office structure to meet . . . its evolving workload," rather than simply cost cutting. The proposal has engendered both controversy and opposition in some quarters.¹⁸

c) GAO Report on Antitrust Criminal Penalty Enhancement and Reform Act of 2004

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004¹⁹ ("ACPERA") seeks to increase self-reporting of anticompetitive behavior by (i) increasing the maximum fines and sentences available for Sherman Act violations and (ii) protecting individuals and companies from treble damages and joint-and-several liability in private lawsuits when they self-report criminal antitrust violations to DOJ. In 2010, Congress extended ACPERA for an additional ten years and directed the Government Accountability Office ("GAO") to analyze the effectiveness of ACPERA and the appropriateness of allowing *qui tam* proceedings or adding whistleblower protections for antitrust violations.²⁰

¹⁷ See Press Release, U.S. Dep't of Justice, Justice Department Announces More Than \$130 Million in Cost Saving and Efficiency Measures to Utilize Resources More Effectively (Oct. 5, 2011), available at <http://www.justice.gov/opa/pr/2011/October/11-ag-1320.html>.

¹⁸ See Andrew Lapin, *Justice Employees Fight Proposed Office Closings*, GOV'T EXEC, Oct. 24, 2011, available at <http://www.govexec.com/dailyfed/1011/102411a11.htm> (noting the opposition of an Antitrust Division attorney and the "strong opposition" of a member of Congress); Ed O'Keefe, *Justice Department Lawyers Irked by Plans to Close Offices*, THE WASHINGTON POST (Oct. 18, 2011 6:00 AM), http://www.washingtonpost.com/blogs/federal-eye/post/justice-department-lawyers-irked-by-plans-to-close-offices/2011/10/17/gIQAzZ7EsL_blog.html.

¹⁹ Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 665.

²⁰ See Act of June 9, 2010, Pub. L. No. 111-190, §§ 1, 5, 124 Stat. 1275-76; see also Joel S. Sanders et al., *U.S. Congress Renews Civil Leniency for Companies That Self-Report Sherman Act Criminal Violations*, GIBSON DUNN--PUBLICATIONS (June 4, 2010), <http://www.gibsondunn.com/publications/pages/USCongressRenewsCivilLeniencyForCompaniesThatSelf-ReportShermanActCriminalViolations.aspx>.

In July 2011, the GAO released its analysis of ACPERA's effectiveness. The report concludes that the number of leniency applicants did not increase following the adoption of ACPERA, but that leniency applicants did report more conduct than was previously known to DOJ and that penalties increased in criminal cartel cases.²¹ Interestingly, the Antitrust Division disputed that ACPERA was the primary cause of these latter two occurrences.²²

The GAO report also conducted a detailed review of two whistleblower proposals. As an initial matter, the GAO dismissed the idea of allowing *qui tam* proceeding after DOJ and numerous stakeholders noted that such proceedings are not compatible with the criminal nature of antitrust violations.²³ Instead, the report considered the creation of a whistleblower reward program that paid a "bounty" for information that led to criminal cartel convictions. However, DOJ and other stakeholders recommended against such a program because it could undermine the credibility of witnesses at trial or increase the number of non-credible or fraudulent claims.²⁴ These concerns caused the GAO to conclude that it is "difficult to determine whether the benefits of a whistleblower reward provision in the antitrust setting would outweigh the disadvantages."²⁵ On the other hand, the GAO was supportive of new anti-retaliation provisions to protect whistleblowers who report criminal antitrust violations. The creation of such protections enjoyed the unanimous support of the interviewed stakeholders, although senior Antitrust Division officials refused to take a position on the proposal.²⁶ We will monitor Congress's response to the GAO's whistleblower protection recommendations and provide updates on key developments in 2012.

4) Developments in Significant Cartel Investigations

a) Municipal Bonds

DOJ's success in obtaining monetary assessments in its municipal bonds investigation, in our view, has been its crowning achievement during 2011. In the Gibson Dunn 2010 Year-End Criminal Antitrust Update, we discussed the December 2010 announcement that Bank of America had been admitted to the Corporate Leniency Program for reporting its participation in manipulation of the bidding process within the municipal bond derivatives market. Although Bank of America received immunity from prosecution by the Antitrust Division, it agreed to pay \$137 million in restitution to various federal and state agencies.²⁷ Additionally, in November and December 2010, DOJ

²¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-619, CRIMINAL CARTEL ENFORCEMENT: STAKEHOLDER VIEWS ON IMPACT OF 2004 ANTITRUST REFORM ARE MIXED, BUT SUPPORT WHISTLEBLOWER PROTECTION 15 (2011).

²² *Id.*

²³ *Id.* at 37–38.

²⁴ *Id.* at 38–45.

²⁵ *Id.* at 45.

²⁶ *Id.* at 45–50.

²⁷ Press Release, U.S. Dep't of Justice, Antitrust Div., Bank of America Agrees to Pay \$137.3 Million in Restitution to Federal and State Agencies as a Condition of the Justice Department's Antitrust Corporate Leniency Program (Dec. 7, 2010), *available at* <http://www.justice.gov/opa/pr/2010/December/10-at-1400.html>.

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announced the indictments of²⁸ or plea agreements with²⁹ four individuals employed by UBS and JPMorgan Chase for their alleged participation in the municipal bond conspiracy.

The first public sign of further progress in the municipal bond investigation came on March 30, 2011, when DOJ announced that an employee of an unnamed Charlotte, North Carolina-based bank, agreed to plead guilty to falsifying bank records to facilitate the payment of kickbacks to brokers in the municipal bond market.³⁰

During the following nine months, DOJ announced a succession of non-prosecution agreements ("NPAs") with four major financial institutions in which they admitted to participating in the municipal bond conspiracy and agreed to pay restitution, disgorgement, and penalties totaling nearly \$600 million to various federal and state agencies. On May 4, 2011, UBS AG entered into the first NPA with DOJ and agreed to pay restitution, penalties, and disgorgement totaling \$160 million.³¹ On July 7, 2011, JPMorgan Chase entered into a similar NPA and agreed to pay \$211 million.³² On December 8, 2011, Wells Fargo Bank entered a non-prosecution agreement and agreed to pay \$148 million in restitution, disgorgement, and penalties for Wachovia Bank's³³ role in the municipal bonds bid-rigging cartel.³⁴ Most recently, on December 23, 2011, GE Funding Capital Market Services Inc. entered into its own NPA relating to the municipal bond cartel and agreed to pay \$70 million.³⁵ This explosion in the use of NPAs is discussed in more detail in the [Gibson Dunn 2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements](#).

In the 12-month period beginning with the initial settlement agreements reached between Bank of America and various state and federal agencies, the Antitrust Division's investigation has resulted in the payment of \$727 million in restitution, penalties, and disgorgement from the five financial institutions.

²⁸ Press Release, U.S. Dep't of Justice, Antitrust Div., Three Former Financial Services Executives Indicted for Fraudulent Conduct Affecting Contracts Related to Municipal Bonds (Dec. 9, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/264952.htm.

²⁹ Press Release, U.S. Dep't of Justice, Antitrust Div., Former Employee of a Financial Institution Subsidiary Pleads Guilty for Role in Bid-Rigging and Fraud Conspiracies Involving Municipal Bonds (Nov. 30, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/264637.htm.

³⁰ Press Release, U.S. Dep't of Justice, Antitrust Div., Former Employee of Charlotte, North Carolina-Based Bank Pleads Guilty for His Role in Falsifying Bank Records Involving Proceeds of Municipal Bonds (Mar. 30, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/269153.htm.

³¹ Press Release, U.S. Dep't of Justice, Antitrust Div., UBS AG Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$160 Million to Federal and State Agencies (May 4, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/270720.htm.

³² Press Release, U.S. Dep't of Justice, *supra* note 4.

³³ Wells Fargo acquired Wachovia Bank on December 31, 2008. News Release, Wells Fargo Bank, Wells Fargo and Wachovia Merger Completed (Jan. 1, 2009), *available at* https://www.wellsfargo.com/press/2009/20090101_Wachovia_Merger.

³⁴ Press Release, Department of Justice, Wachovia Bank N.A. Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$148 Million to Federal and State Agencies (Dec. 8, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/278076.htm.

³⁵ Press Release, Department of Justice, GE Funding Capital Market Services Inc. Admits to Anticompetitive Conduct by Former Traders in the Municipal Bond Investments Market and Agrees to Pay \$70 Million to Federal and State Agencies (Dec. 23, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/278581.htm.

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Since the onset of the municipal bonds investigation, DOJ also has filed criminal charges against one corporation and 18 former executives of financial services companies; the corporation and ten of the 18 executives pleaded guilty by the end of 2011.³⁶ Rubin/Chambers, Dunhill Insurance Services (also known as CDR Financial Products) was the first entity charged in the municipal bond investigation in October 2009 and the sole corporate defendant charged to date. Public entities hired CDR Financial Products to assist in the issuance of municipal bonds and DOJ alleged that it conspired with several financial institutions to rig the competitive bidding process for those financial instruments. On December 30, 2011, CDR Financial Products and its founder, David Rubin, agreed to plead guilty shortly before trial. The trials of two other CDR Financial Products executives began on January 3, 2012.³⁷

It is interesting to note that the Antitrust Division relied on corporate NPAs in this investigation despite their rare usage previously. In each of the press releases announcing the NPAs, DOJ articulated four specific reasons for utilizing the agreements:³⁸

1. Admission of conduct;
2. Cooperation with the Department of Justice and other enforcement and regulatory agencies;
3. Monetary and non-monetary commitments to other state and federal enforcement authorities; and
4. Remedial efforts to address the anticompetitive conduct.

As we discussed in prior updates, it is not clear whether the Antitrust Division's use of NPAs in the municipal bonds investigation signals a broader policy change or how it will impact the Corporate Leniency Program.

b) Air Cargo

The multi-year, worldwide efforts to investigate and prosecute the fixing of fuel surcharges in the international air cargo industry continued into 2011. Since first publicly acknowledging the existence of its investigation in February 2006, DOJ has charged 22 airlines and 21 individuals relating to this investigation. These cases have resulted in more than \$1.8 billion in criminal fines, and six executives have been sentenced or have agreed to serve prison time.

During 2011, only one additional airline was implicated. EVA Airways Corporation, a Taiwan-based airline, agreed in May 2011 to plead guilty and pay a \$13.2 million criminal fine for participating in a conspiracy to fix fees charged for certain international air shipments.³⁹ Additionally, two executives

³⁶ Press Release, Department of Justice, CDR Financial Products and Its Owner Plead Guilty to Bid-Rigging and Fraud Conspiracies Related to Municipal Bond Investments (Dec. 30, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/278750.htm.

³⁷ *See* United States v. Wolmark, No. 1:09-cr-01058-VM-3 (S.D.N.Y. Jan. 3, 2011); United States v. Zarefsky, No. 1:09-cr-01058-VM-4 (S.D.N.Y. Jan. 3, 2011).

³⁸ *See, e.g.*, Press Release, U.S. Dep't of Justice, *supra* note 4.

³⁹ Press Release, U.S. Dep't of Justice, Eva Airways Corporation Agrees to Plead Guilty and to Pay \$13.2 Million Fine for Price Fixing on Air Cargo Shipments (May 27, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/271857.htm.

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of Air France, Jean Charles Foucault and Marc Boudier, were indicted by a federal grand jury in April 2011.⁴⁰ Both defendants are foreign nationals and bench warrants have been issued for their arrest.

DOJ also secured its first guilty pleas against an executive since September 2009 when five individuals, all of whom were indicted in 2010, agreed to plead guilty. In September and November 2011, three of these executives--George Gonzalez, Guillermo "Willy" Cabeza, and Luis Juan Soto--accepted plea agreements that deferred the determination of their sentences to the court's discretion based on the Sentencing Guideline's range.⁴¹ Two other executives from Cargolux Airlines, Ulrich Ogiermann and Robert Van de Weg, agreed in December 2011 to plead guilty and each serve 13 months in prison and pay a \$20,000 criminal fine.⁴² It is notable that these agreed-upon sentences are considerably longer than the six- or eight-month sentences DOJ has agreed to in all four of its prior plea agreements with airline executives in 2008 and 2009, but were still well short of the 17-month average prison sentence for defendants sentenced in FY 2011.

In another development, Rodrigo Hidalgo, an executive indicted in the air cargo investigation, recently secured the dismissal of the indictment against him in the District Court for the Southern District of Florida. In January 2009, DOJ and LAN Cargo entered into a plea agreement for antitrust violations that immunized LAN Cargo's employees and subsidiaries. Hidalgo successfully argued that he was, in part, an employee of LAN Cargo during the period covered by the plea agreement.⁴³ Another corporate defendant, Florida Air, relied on a similar argument, but failed to secure the dismissal of its indictment. The court held that, because LAN Cargo only owned 25% of Florida Air, it was not a "subsidiary" of LAN Cargo and, therefore, not covered by the plea agreement.⁴⁴ The court's opinion suggested that a majority share of voting control is necessary to be considered a subsidiary under a plea agreement.⁴⁵

c) Freight Forwarding

For the second consecutive year, the Antitrust Division announced plea agreements with numerous companies in the freight forwarding industry. On September 28, 2011, six Japanese corporations agreed to plead guilty and pay criminal fines for their participation in a conspiracy to fix certain fees

⁴⁰ Press Release, U.S. Dep't of Justice, Former Air France Cargo Executives Indicted in Conspiracy to Fix Rates and Surcharges on Air Cargo Shipments (Apr. 26, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/270321.htm.

⁴¹ Plea Agreement, United States v. Gonzalez, No. 1:10-cr-20790-UU-2 (S.D. Fla. Nov. 30, 2011); Plea Agreement, United States v. Soto, No. 1:10-cr-20790-UU-4 (S.D. Fla. Sept. 20, 2011); Plea Agreement, United States v. Cabeza, No. 1:10-cr-20790-UU-1 (S.D. Fla. Sept. 20, 2011); *see also* Press Release, U.S. Dep't of Justice, Former Executive of Peruvian Airline Pleads Guilty to Fixing Fuel Surcharge Rates on Air Cargo Shipments Following Hurricanes Katrina and Rita (Nov. 30, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/277862.htm.

⁴² Press Release, U.S. Dep't of Justice, Cargolux Airlines International Executives Plead Guilty for Fixing Surcharge Rates on Air Cargo Shipments (Dec. 8, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/278133.htm.

⁴³ United States v. Fla. W. Int'l Airways, Inc., No. 1:10-cr-20864-RNS, slip op. at 33-39 (S.D. Fla. Dec. 9, 2011).

⁴⁴ *Id.* at 50.

⁴⁵ *Id.* at 47.

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for freight forwarding services for air cargo shipments from Japan to the United States.⁴⁶ On September 30, 2011, one additional corporation also agreed to plead guilty.⁴⁷ The seven combined companies agreed to pay more than \$46 million in criminal fines.

These agreements follow a similar series of plea agreements reached with six other international freight-forwarding companies in September 2010, which resulted in total criminal fines exceeding \$50 million.

d) Coastal Water Freight Transportation

The Antitrust Division's ongoing investigation into collusive conduct in the coastal water freight transportation industry resulted in its first charges against corporations in 2011. Five executives from Horizon Lines LLC and Sea Star Line LLC, freight shippers serving the Puerto Rico to continental United States route, agreed to plead guilty in 2008 for market allocation, bid rigging, and price fixing activities. Collectively, the five executives were sentenced to more than eleven years in prison, including a 48-month sentence for Peter Baci, which was the longest jail sentence ever imposed for a single antitrust charge.⁴⁸

In November 2011, Sea Star Line agreed to plead guilty and pay a \$14.2 million criminal fine for its role in the conspiracy.⁴⁹ At the same time, the Antitrust Division indicted Frank Peake, Sea Star's former president, for his participation; he pleaded not guilty on December 15, 2011.

As discussed in the [Gibson Dunn 2011 Mid-Year Criminal Antitrust Update](#), the Antitrust Division entered into a plea agreement with Horizon Lines in February 2011 requiring payment of a \$45 million criminal fine. The District Court for the District of Puerto Rico accepted the plea agreement and sentenced Horizon Lines accordingly on March 24, 2011. Surprisingly, however, the plea agreement created a series of unexpected consequences over the subsequent four weeks that left Horizon Lines facing potential insolvency. The terms of Horizon Lines's outstanding debt deemed any judgment against the company in excess of \$15 million to be a "default" that could trigger acceleration of the entire debt and a demand for immediate repayment. Both the government and Horizon Lines erroneously expected that the lenders would waive this default provision under the circumstances. The subsequent issuance of a 10-K filing with the Securities and Exchange Commission about the potential acceleration of Horizon Line's debt had "a very negative impact"

⁴⁶ Press Release, U.S. Dep't of Justice, Six Japanese Freight Forwarding Companies Agree to Plead Guilty to Criminal Price-Fixing Charges (Sept. 28, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/275452.htm.

⁴⁷ Press Release, U.S. Dep't of Justice, Japanese Freight Forwarding Company Agrees to Plead Guilty to Criminal Price-Fixing Charge (Sept. 30, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/275742.htm.

⁴⁸ See Press Release, Fed. Bureau of Investigation, Former Shipping Executive Sentenced to 48 Months in Jail for His Role in Antitrust Conspiracy (Jan. 30, 2009), *available at* <http://www.fbi.gov/jacksonville/press-releases/2009/ja013009.htm>.

⁴⁹ Press Release, U.S. Dep't of Justice, Florida-Based Sea Star Line LLC Agrees to Plead Guilty and its Former President is Indicted for Price Fixing on Coastal Freight Services Between the Continental United States and Puerto Rico (Nov. 17, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/277501.htm.

on Horizon Line's business.⁵⁰ Consequently, on April 26, 2011, the Antitrust Division filed a motion, which the court soon approved, to reduce Horizon Line's sentence by two-thirds to \$15 million to avoid activation of the debt's default provisions.

e) Thin Film Transistor-Liquid Crystal Displays ("TFT-LCD")

The Antitrust Division's ongoing investigation into price fixing in the TFT-LCD industry progressed with minimal fanfare during 2011. As we reported in the Gibson Dunn 2010 Mid-Year Criminal Antitrust Update, the sole expansion of the investigation during the year occurred in January 2011 with the indictment of Ding Hui Joe, the President of HannStar Display Corporation at the time of the indictment.

The government's case against AU Optronics, the sole corporation to be indicted to date in the TFT-LCD investigation, and seven of the AU Optronics executives appears to be headed toward trial, with jury selection set to begin on January 9, 2012. The U.S. District Court for the District of Northern California cleared the way for trial earlier in 2011 when it ruled in favor of DOJ on a series of pre-trial motions in which the defendants sought dismissal of the charges due to the extra-territorial nature of the alleged offenses.

The upcoming AU Optronics case also presented District Court Judge Susan Illston with several challenging issues with respect to sentencing considerations. In an initial ruling, Judge Illston tackled the difficult issue of how the Supreme Court's *Apprendi* decision affects the alternative sentencing provision available for Sherman Act violations. Federal law provides that a defendant can be liable for twice the pecuniary gain or loss suffered from its collusive conduct, even if that amount exceeds the \$100 million maximum fine otherwise authorized by the Sherman Act.⁵¹ *Apprendi* requires that facts, which can increase certain penalties beyond statutory maximums, be submitted to a jury and proven beyond a reasonable doubt.⁵² On July 18, 2011, Judge Illston held that *Apprendi* requires a jury determination of the total gain or loss suffered from the defendant's conduct before a criminal fine in excess of \$100 million can be obtained by the government for a Sherman Act violation.⁵³ This decision is believed to be the first to apply *Apprendi* in the antitrust context and we will continue to monitor how other courts approach the issue in future updates.

In a subsequent ruling on December 23, 2011, Judge Illston adopted an inclusive approach to determining the pecuniary gain used in applying the alternative sentencing guidelines.⁵⁴ While the court limited the "gross gain" calculation to the portions of the conspiracy with an effect on the United States, it ordered that the "gross gain" should include the gain not only from the sales of the TFT-LCD panels, but also from *the finished products* containing those panels. The court also agreed with the government's position that the total "gross gain" should include the gain flowing to all

⁵⁰ Motion for Modification of Fine Pursuant to 18 U.S.C. § 3573 at 2, United States v. Horizon Lines, LLC, No. 3:11-cr-00071-DRD (D.P.R. Apr. 26, 2011).

⁵¹ See 18 U.S.C. § 3571(d). The Sherman Act authorizes fines up to \$100 million against corporations and \$1 million against individuals. 15 U.S.C. § 1.

⁵² See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

⁵³ United States v. AU Optronics Corp., No. 3:09-cr-00110-SI, slip op. at 5–6 (N.D. Cal. July 18, 2011).

⁵⁴ United States v. AU Optronics Corp., No. 3:09-cr-00110-SI (N.D. Cal. Dec. 23, 2011).

conspirators jointly, rather than solely the defendant's own gain. Judge Illston's ruling has the potential to increase significantly defendants' exposure under the alternative sentencing provisions in criminal antitrust cases. We will continue to monitor the AU Optronics trial closely in 2012 and provide additional details of its progress in future updates.

Since beginning its TFT-LCD investigation in late 2006, DOJ has charged 22 executives and eight companies with participating in the conspiracy; four of the companies have pleaded guilty and agreed to pay more than \$890 million in criminal fines and ten of the executives have agreed to plead guilty and serve prison sentences ranging from 6 to 14 months.

Foreign regulators advanced their own investigations into the TFT-LCD industry as well. In November, the KFTC fined ten TFT-LCD manufacturers, including LG and Samsung, approximately KRW 194 billion (\$175 million) for fixing prices and reducing output.⁵⁵ The fines follow on the heels of last year's crackdown by the European Commission, which imposed fines of approximately €648 million (\$922 million).

f) Cathode Ray Tubes ("CRTs")

During 2011, the Antitrust Division secured its first corporate guilty plea and criminal fine as part of its investigation into price fixing in the CRT industry. CRTs were widely used in televisions and computer monitors before the widespread adoption of LCD and other flat panel technology. In March 2011, Samsung SDI Company Ltd. agreed to plead guilty and pay a \$32 million criminal fine for its participation in the CRT conspiracy.⁵⁶ Initially, the Antitrust Division encountered some difficulty in convincing Judge William Alsup from the District Court for the Northern District of California to accept the plea agreement. The court questioned, among other issues, the absence of restitution in the plea agreement and the use of a binding "C" plea agreement in light of the defendant's cooperation obligations.⁵⁷ Judge Alsup ultimately agreed with the Antitrust Division's argument that restitution was too complex an issue in this particular case for imposition in a criminal case, and would be better deferred to a civil proceeding. The court appeared far less convinced with the Antitrust Division's position that it "has a practice of negotiating these 11(c)(1)(c) deals."⁵⁸ Judge Alsup noted his belief that there have "maybe" been ten "C" agreements with cooperation provisions in the entire United States and, while he was willing to approve this one, he explicitly stated that he would not accept such an agreement again in the future.⁵⁹

In addition to the Samsung guilty plea, the Antitrust Division indicted six executives in 2009 and 2010 for their roles in the CRT conspiracy, including the former Chairman and Chief Executive

⁵⁵ Press Release, Korea Fair Trade Commission, KFTC Fines 10 LCD Producers 194 Billion Won for TFT-LCD International Cartel (Nov. 1, 2011).

⁵⁶ Press Release, U.S. Dep't of Justice, Samsung SDI Agrees to Plead Guilty in Color Display Tube Price-Fixing Conspiracy (Mar. 18, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/268592.htm.

⁵⁷ Transcript of Record at 7–10, *United States v. Samsung SDI Co., Ltd.*, No. 3:11-cr-00162-WHA (N.D. Cal. Aug. 25, 2011).

⁵⁸ *Id.* at 8.

⁵⁹ *Id.* at 8–9.

Officer of Chunghwa Picture Tubes, Ltd. None of the defendants--all of whom are residents of Taiwan or Korea--has yet made an appearance.

g) CRT Glass

The European Commission and South Korea concluded their joint investigation into the CRT glass industry during 2011. The agencies launched the investigation as a spin-off from the CRT investigation in March 2009. In October, this investigation culminated in the assessment of €128.7 million (\$167.9 million) in fines by the European Commission against four producers of CRT glass, as reflected in the chart below:⁶⁰

CRT Glass Industry Fines Assessed by the European Commission⁶¹			
Company	Reduction under the Leniency Notice	Reduction under the Settlement Notice	Fine
Samsung Corning Precision Materials Co., Ltd	100%	10%	€0
Nippon Electric Glass Co., Ltd.	50%	10%	€43,200,000
Schott AG	0%	10%	€40,401,000
Asahi Glass Co. Ltd.	0%	10%	€45,135,000

The European Commission granted full immunity to Samsung Corning Precision Materials of Korea for being the first to give information about the cartel. The cartel lasted nearly five years and spanned the entire European Economic Area.

In December, the Korea Fair Trade Commission assessed its own fines against four CRT glass manufacturers totaling KRW 54.5 billion (\$48 million) for price fixing over an eight-year period.⁶²

h) Optical Disk Drives

Another new cartel in the high-tech industry came to light with the Antitrust Division's charges against Hitachi-LG Data Storage, a joint venture of Hitachi Ltd. and LG Electronics Inc., and three of its executives for price fixing and big rigging in the optical disk drive market. The conspiracy sought to rig bids or fix prices offered to Dell, HP, and Microsoft for various types of optical disk drives, such as CD-ROM, CD-RW (Rewriteable), DVD-ROM and DVD-RW (Rewriteable) computer drives. In September 2011, Hitachi-LG agreed to plead guilty and pay a criminal fine of

⁶⁰ Press Release, European Comm'n, Antitrust: Commission Fines Producers of CRT Glass €128 Million in Fourth Cartel Settlement (Oct. 19, 2011), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1214&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁶¹ Press Release, European Comm'n, Antitrust: Commission Fines Producers of CRT Glass €128 million in Fourth Cartel Settlement (Oct. 19, 2011), *available at* <http://europa.eu/rapid/searchAction.do>.

⁶² Press Release, Korea Fair Trade Commission, KFTC Fines 4 CRT Glass Producers 54.5 Billion Won for CRT Glass International Cartel (Dec. 12, 2011), *available at* http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=52&pageId=0201.

\$21.2 million.⁶³ Three executives from Hitachi-LG subsequently agreed in December 2011 to plead guilty and to serve prison sentences ranging from seven to eight months.⁶⁴

i) Auto Parts

In what is believed to be one of the largest antitrust investigations ever conducted, numerous competition authorities--including DOJ, the European Commission, and the Japan Fair Trade Commission ("JFTC")--reportedly are conducting investigations in multiple jurisdictions regarding collusion among auto parts suppliers to fix prices on sales to auto manufacturers. There are reports that DOJ launched the investigation in February 2010 and since then, with the assistance of the Federal Bureau of Investigation, has carried out searches of 20 suppliers across multiple auto industry sectors. It is anticipated that these investigations will yield many prosecutions of companies and individuals in 2012 and beyond. In 2011, the Antitrust Division obtained guilty pleas from companies and individuals in the automotive wire harness and after-market auto lights sectors.

i) AUTOMOTIVE WIRE HARNESSES

On September 29, 2011, the Antitrust Division announced that Furukawa Electric Co. Ltd and three of its foreign-national executives had agreed to plead guilty in connection with a price-fixing and bid-rigging conspiracy involving the sale of automotive wire harnesses to automobile manufacturers.⁶⁵ The executives--Junichi Funo, Hirotsugu Nagata and Tetsuya Ukai--agreed to prison sentences of 12 months, 15 months, and 18 months, respectively. Furukawa agreed to pay a criminal fine totaling \$200 million, resulting in the single largest criminal fine secured by the Antitrust Division in FY 2011, one of the ten largest criminal fines in Antitrust Division history, and the largest fine against a Japanese defendant.

ii) AFTER-MARKET AUTO LIGHTS

Two corporations in the after-market auto lights sector and their respective executives pleaded guilty during 2011. Polo Shu-Sheng Hsu, the President and CEO of Maxzone Vehicle Lighting Corporation ("Maxzone"), agreed in February 2011 to plead guilty and serve a 180-day prison sentence.⁶⁶ In September 2011, Maxzone agreed to enter its own guilty plea and pay a \$43 million

⁶³ Press Release, U.S. Dep't of Justice, Hitachi-LG Data Storage Inc. Agrees to Plead Guilty to Participating in Bid-Rigging and Price-Fixing Conspiracies Involving Optical Disk Drives (Sept. 30, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/275738.htm.

⁶⁴ Press Release, U.S. Dep't of Justice, Three Hitachi-LG Data Storage Executives Agree to Plead Guilty for Participating in Bid-Rigging and Price-Fixing Conspiracies Involving Optical Disk Drives (Dec. 13, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/278224.htm.

⁶⁵ Press Release, U.S. Dep't of Justice, Furukawa Electric Co. Ltd. and Three Executives Agree to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracy (Sept. 29, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/275503.htm.

⁶⁶ Press Release, U.S. Dep't of Justice, Executive of California Aftermarket Auto Lights Distributor Agrees to Plead Guilty in Price-Fixing Conspiracy (Feb. 8, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/266991.htm.

criminal fine.⁶⁷ In June 2011, Chien Chung Chen, an Executive Vice President of Sabry Lee (U.S.A.) Inc., entered into a plea agreement recommending no more than a 12-month sentence.⁶⁸ Sabry Lee also pleaded guilty in August 2011 and agreed to pay a \$200,000 criminal fine.⁶⁹

The Antitrust Division pursued charges against a third corporation and its executives in dramatic fashion with the arrest of an executive at Los Angeles International Airport ("LAX"). Homy Hong-Ming Hsu, the Vice Chairman of Eagle Eyes Traffic Industrial Co. Ltd. ("Eagle Eyes"), was intercepted at LAX on July 12, 2011, and indicted one week later.⁷⁰ Hsu pleaded not guilty on December 20, 2011, and has a tentative trial date in June 2012. In November 2011, the Antitrust Division secured a superseding indictment adding charges against Eagle Eyes, E-Lite Automotive Inc. (Eagle Eyes's US-based subsidiary), and Yu-Chu Lin, the Chairman of Eagle Eyes.⁷¹ Both Eagle Eyes and its subsidiary pleaded not guilty on December 20, 2011, and have a tentative trial date in June 2012. Lin has not yet made an appearance.

j) Ready-Mix Concrete

During 2010, the Antitrust Division secured guilty pleas from three executives involved in a conspiracy to fix prices and rig bids for ready-mix concrete in northwest Iowa--an increasingly rare investigation into any entirely domestic cartel. In 2011, the Antitrust Division shifted its focus to the corporate entities and secured guilty pleas from four ready-mix companies: VS Holding Co. (f/d/b/a Alliance Concrete Inc.), Tri-State Ready Mix Inc., GCC Alliance Concrete Inc., and Great Lakes Concrete Inc.⁷² All four entities are currently awaiting sentencing.

Judge Mark Bennett in the District Court for the Northern District of Iowa departed significantly from the Antitrust Division's sentencing recommendations or agreements in two of the ready-mix concrete cases against individuals this year.

i) VANDEBRAKE SENTENCING

First, as we discussed in our 2011 Mid-Year Criminal Antitrust Update, the government encountered surprise difficulties when it presented its plea agreement with Steven VandeBrake to Judge Bennett.

⁶⁷ Press Release, U.S. Dep't of Justice, Second California Aftermarket Auto Lights Distributor Agrees to Plead Guilty in Price-Fixing Conspiracy (Sept. 12, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/274881.htm.

⁶⁸ Plea Agreement, United States v. Chen, No. e3:11-cr-00166-RS (N.D. Cal June 7, 2011).

⁶⁹ Press Release, U.S. Dep't of Justice, California Aftermarket Auto Lights Distributor Agrees to Plead Guilty in Price-Fixing Conspiracy (Aug. 30, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/274588.htm.

⁷⁰ Press Release, U.S. Dep't of Justice, Executive of Taiwan Aftermarket Auto Lights Manufacturer Arrested and Indicted for Participation in Price-Fixing Conspiracy (July 19, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/273135.htm.

⁷¹ Press Release, U.S. Dep't of Justice, Taiwan Aftermarket Auto Lights Manufacturer and its Chairman Indicted for Participating in Price-Fixing Conspiracy (Nov. 30, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/277860.htm.

⁷² United States v. GCC Alliance Concrete, Inc., No. 5:11-cr-04071-MWB-1 (N.D. Iowa May 20, 2011); United States v. Great Lakes Concrete, Inc., No. 5:11-cr-04109-MWB-1 (N.D. Iowa Aug. 24, 2011); United States v. Tri-State Ready Mix, Inc., No. 5:11-cr-04073-MWB-1 (N.D. Iowa June 20, 2011); United States v. VS Holding Co., No. 5:11-cr-04091-MWB-1 (N.D. Iowa July 8, 2011).

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The original "C" plea agreement recommended a 19-month sentence and a \$100,000 criminal fine. When the judge indicated that he was likely to reject such an agreement, the defendant chose to convert to a non-binding "B" plea agreement.

Judge Bennett took advantage of that change and rejected the recommended sentence in a 108-page memorandum. The court found that the proposed sentence and fine were inadequate for numerous reasons, including the defendant's considerable personal wealth and lack of public service and the inexplicably "more lenient treatment of antitrust offenses than fraud crimes" under the Sentencing Guidelines. The court also made clear that it was unwilling to defer to the sentence recommended by a government prosecutor who "lacks the [court]'s breadth of experience" garnered in "presiding over more than 2,600 sentencings . . . in over sixteen years on the federal bench."⁷³ Judge Bennett sentenced VandeBrake to a 48-month prison term and criminal fine of \$829,715.

VandeBrake appealed his sentence to the Eight Circuit, which heard oral arguments in the matter on November 17, 2011.⁷⁴ DOJ aggressively defended Judge Bennett's ruling on appeal and asserted its right to abandon the terms of its plea agreement.

The developments in the VandeBrake case must be disconcerting to the four ready-mix companies that pleaded guilty this year, as all of them are scheduled to appear before Judge Bennett for sentencing on February 2, 2012. We will provide a report on the outcome of the VandeBrake appeal and the sentencing of the corporations in a future 2012 update.

ii) VAN ZEE SENTENCING

Judge Bennett also disregarded the government's recommended 8-month sentence made pursuant to a 5K1.1 motion in the Van Zee case, although with a more pleasant outcome for the defendant. After a lengthy sentencing hearing, Judge Bennett took note of numerous factors that convinced him that only a 45-day sentence was appropriate: the defendant's long history of community service and the strong showing of support from the community at the sentencing hearing; the defendant's willingness to settle the civil case for \$1.2 million in an effort to accept responsibility; the defendant's humble lifestyle; and the defendant's cooperation with the government in the later phases of its investigation.⁷⁵ Despite his unwillingness to accept the government's recommendation, he commented that the Antitrust Division's lawyers "performed terrifically" in the ready-mix concrete cases and had "done an outstanding job."⁷⁶

k) Marine Hose

The Antitrust Division obtained another corporate guilty plea in its long-running investigation into the marine hose industry, which produces a specialized hose used to transfer oil to tankers. In September 2011, the Bridgestone Corporation agreed to plead guilty to violations of the Sherman

⁷³ United States v. VandeBrake, No. 5:10-cr-04025-MWB, slip op. at 5–6, 35–36, 74 (N.D. Iowa Feb. 11, 2011).

⁷⁴ United States v. VandeBrake, No. 11-1390 (8th Cir. filed Feb 18, 2011).

⁷⁵ Transcript of Sentencing at 144–58, United States v. Van Zee, No. 5:10-cr-04108-MWB (N.D. Iowa June 21, 2011).

⁷⁶ *Id.* at 158–59.

Act and Foreign Corrupt Practices Act ("FCPA") and pay a \$28 million criminal fine for its role in conspiring to rig bids, fix prices, and allocate market share in the marine hose market in the United States and abroad, as well as making corrupt payments to government officials in various Latin American countries to obtain and retain business.⁷⁷ Since the initial arrests made in March 2007, the marine hose investigation has resulted in convictions of five corporations and nine executives.

Bridgestone is the first successful joint FCPA-antitrust case brought by DOJ against a corporate entity and required unprecedented cooperation between DOJ's Antitrust and Criminal Divisions.⁷⁸ Despite its apparent novelty, these types of joint prosecutions were anticipated more than a decade ago in a speech by then-Deputy Assistant Attorney General of the Antitrust Division (and now Gibson Dunn partner) Gary Spratling.⁷⁹ During his speech at an FCPA conference in December 1999, Spratling argued that there is a "recurring intersection of conduct that violates both the Sherman Antitrust Act and the Foreign Corrupt Practices Act."⁸⁰ As one example of this overlap, he noted that "[c]orrupt payments to foreign government officials are often made to facilitate international bid-rigging conspiracies."⁸¹ With a successful model for cooperation now in place, we expect to see more of these joint investigations in the future.

l) Real Estate Auctions

The Antitrust Division's ongoing investigation into bid rigging at real estate foreclosure auctions expanded exponentially in 2011. The investigation now includes conspiracies in multiple geographic areas, including Northern California, the San Joaquin area in Central California, New Jersey, and Alabama. The government alleges that the co-conspirators in each of the geographic areas agreed not to bid against each other to secure foreclosed properties at favorable prices and split the proceeds from subsequent market-rate resales. Prior to the end of FY 2011, the Antitrust Division secured guilty pleas from 21 individuals; in the first three months of FY 2012, the Antitrust Division secured guilty pleas from an additional nine individuals and indicted five others.⁸² The real estate auction defendants represented more than 25% of the individuals charged by the Antitrust Division during FY 2011. None of the defendants to plead guilty in the recent real estate auction cases have been sentenced, and we will continue to monitor the progress of these cases in future updates.

⁷⁷ Press Release, U.S. Dep't of Justice, Bridgestone Corporation Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Government Officials (Sept. 15, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/index.html.

⁷⁸ The 2008 conviction of a Bridgestone executive for similar violations of the Sherman Act and FCPA was the first joint FCPA-antitrust prosecution of an individual. *See* Gibson Dunn 2008 Year-End FCPA Update.

⁷⁹ Gary R. Spratling, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Antitrust Div., International Cartels: The Intersection Between FCPA Violations and Antitrust Violations (Dec. 9, 1999), *available at* <http://www.justice.gov/atr/public/speeches/3981.pdf>.

⁸⁰ *Id.* at 1.

⁸¹ *Id.* at 14.

⁸² Press Release, U.S. Dep't of Justice, Five Individuals Indicted for Bid Rigging and Fraud at Public Real Estate Foreclosure Auctions (Dec. 13, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/278232.htm.

m) Refrigerant Compressors

As we noted in the 2010 Year-End Criminal Antitrust Update, the United States and Canada reached the first plea agreements last year as part of a then-new investigation into the refrigerant compressor industry. In 2011, the investigation reached the European Union and further expanded in the United States.

In December 2011, the European Commission adopted a cartel settlement decision and fined four producers of household refrigeration compressors a total of €161.2 million (\$211.2 million). The cartel spanned the entire European Economic Area and lasted from April 2004 until October 2007. Tecumseh Products Company exposed the cartel's existence to authorities and consequently received full immunity. The remaining companies received reductions in their fines, in accordance with the Settlement Notice. One company received an additional reduction in its fine after proving its inability to pay. The Vice President in charge of competition policy, Joaquin Almunia, hoped the case would "send a message" that even during slow economic periods, it is important to "fight against cartels."⁸³

Refrigerant Compressor Industry Fines Assessed by the European Commission			
Company	Reduction under the Leniency Notice	Reduction under the Settlement Notice	Fine
Appliances Components Companies S.p.A (Italy) and Elettromeccanica S.p.A. (Italy)	25%	10%	€9,000,000
Danfoss A/S (Denmark) and Danfoss Fiensburg GmbH (Germany)	15%	10%	€90,000,000
Embraco Europe S.r.l (Italy) and Whirlpool S.A. (Brazil)	20%	10%	€54,530,000
Panasonic Corporation (Japan)	40%	10%	€7,668,000

In the United States, the Antitrust Division turned its attention to new cartel members and individual executives in 2011 after securing criminal fines of more than \$140 million against Panasonic Corporation and Embraco North America Inc. in late 2010. The earlier plea agreements revealed a conspiracy to coordinate a price increase among manufacturers of refrigerant compressors used in refrigerators and freezers. On September 27, 2011, the Antitrust Division

⁸³ Press Release, European Comm'n, Antitrust: Commission Fines Producers of Refrigeration Compressors €161 Million in Fifth Cartel Settlement (Dec. 7, 2011), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1511&format=HTML&aged=0&language=EN&guiLanguage=en>.

announced the indictment of three former senior executives who are alleged to have participated in the conspiracy.⁸⁴

- Ernesto Heinzemann, former President and Chief Executive Officer of Empresa Brasileira de Compressores S.A. (Embraco), a division of Whirlpool S.A.;
- Gerson Veríssimo, former President of Tecumseh do Brasil Ltda., a subsidiary of Tecumseh Products Company; and
- Naoki Adachi, General Manager of Global Sales & SE Group, Refrigeration Devices Division at Panasonic Corporation.

None of the individuals indicted has made an appearance to date. Additionally, the Antitrust Division entered into a plea agreement with Danfoss Flensburg GmbH (formerly Danfoss Compressors GmbH) in October 2011 that imposed a \$3 million criminal fine for its participation in the conspiracy.

5) European Union Developments

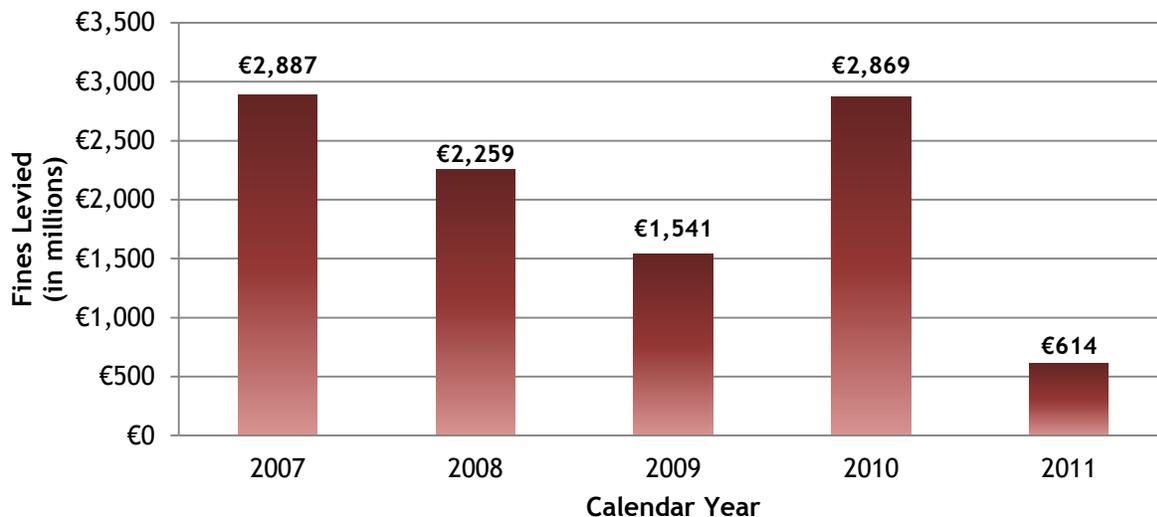
a) Fines

The total fines imposed for cartel behavior lessened in 2011. With the exception of 2010, the level of fines continued its gradual decrease from the record level of 2007. During 2011, fines levied by the European Commission in cartel matters totaled more than €600 million (\$787 million), down significantly from a near-record €2.8 billion (\$3.7 billion) in 2010.

⁸⁴ Press Release, U.S. Dep't of Justice, Former Executives from Panasonic Corp., Whirlpool Corp. Subsidiary and Tecumseh Products Co. Subsidiary Indicted in Compressor Price-Fixing Conspiracy (Sept. 27, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/275408.htm.

Even though Vice-President Almunia, the Commissioner responsible for Competition policy, has repeatedly said that the global financial crisis will not make the European Commission more lenient in its approach to cartels,⁸⁵ it is difficult to separate fully the decrease in the amount of fines against cartels from the unfavorable economic environment and the significant burden of work deriving from the high number of State aid cases in the financial sector and Phase II merger decisions.⁸⁶

Fines Levied on Cartels by the European Commission (2007–2011)

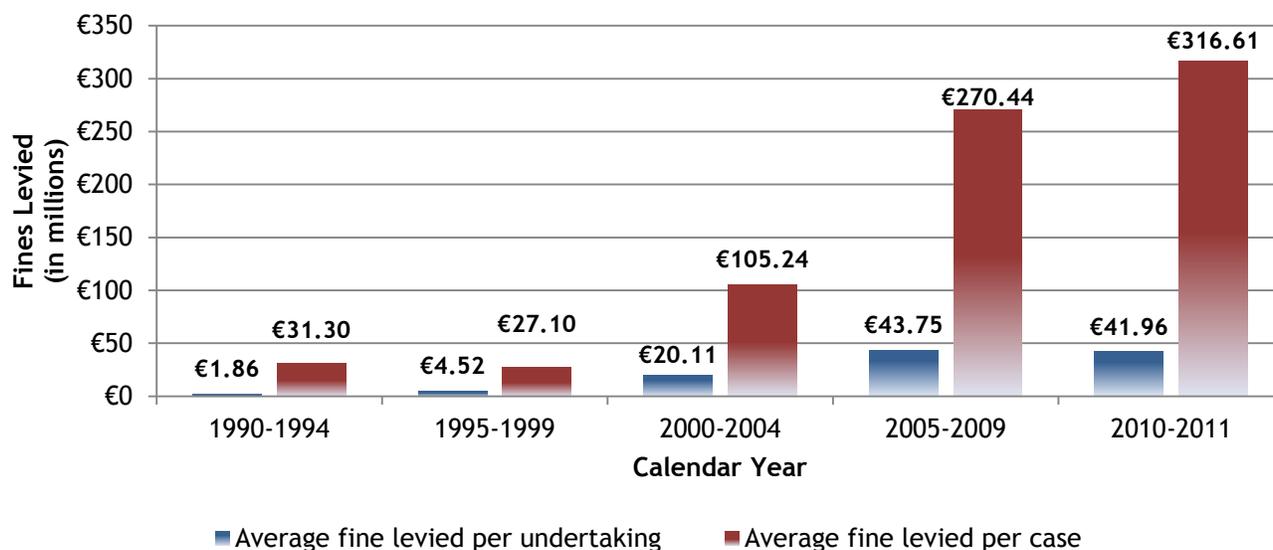


⁸⁵ See, e.g., Joaquín Almunia, Vice President, European Commission, Competition--What's in It for Consumers? (Nov. 24, 2011) ("I have heard some voices in the last couple of years say that in times of crisis we should be more lenient in our competition law enforcement, that we should close our eyes on certain anticompetitive practices, that we should allow more State aid to be granted, on more generous conditions. These opinions are simply wrong.").

⁸⁶ EUROPEAN COMM'N, CARTEL STATISTICS (Dec. 7, 2011), available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

A more complete enforcement picture, however, emerges from an historical examination of average fine levels. The average fine levied per case over the last two years continues to increase from previous historical periods, even while the average fine levied per undertaking remains relatively constant when compared to the mid-2000s.⁸⁷

Average Fines Levied on Cartels by the European Commission (1990-2011)



b) Major Enforcement Efforts

Although the total fine level may have declined, the European Commission still imposed significant penalties against individual companies in 2011, consistent with the historically high average fine level.

i) LAUNDRY POWDER

As noted in the 2011 Mid-Year Criminal Antitrust Update, a fine of €315.2 million (\$413.2 million) was levied against participants in a laundry powder cartel. The European Commission assessed a fine of more than €211 million (\$276.8 million) against Procter & Gamble and a fine of €104 million (\$136.4 million) against Unilever for coordinating prices over a three-year span.⁸⁸

⁸⁷ See *id.*

⁸⁸ Press Release, European Comm'n, Antitrust: Commission Fines Producers of Washing Powder €315.2 Million in Cartel Settlement Case (Apr. 13, 2011), *available at* <http://ec.europa.eu/rapid/pressReleasesAction.do?reference=IP/11/473&format=HTML&aged=0&language=EN&guiLanguage=en>.

ii) BANANAS

In October 2011, the European Commission imposed a fine of just over €8.9 million (\$11.7 million) against Pacific Fruit for price fixing in the banana industry in southern Europe from July 2004 to April 2005. Chiquita, the other member of the cartel, received immunity for assisting the European Commission. The investigation began with unannounced inspections in 2007.⁸⁹

c) Cases Challenging Fines

The second half of 2011 was notable not just for the fines levied, but for companies' appeals to courts challenging European Commission-imposed fines. In particular, the European courts addressed the extent to which a parent company is liable for the anticompetitive actions of a subsidiary.

The Court of Justice made clear that the European Commission must detail the reasons for holding a parent company liable for the conduct of its subsidiary. Even where a presumption exists that a parent exercises decisive influence over the conduct of a subsidiary--as with a wholly-owned subsidiary--the European Commission must still adequately explain the reasons why the facts or law do not rebut the presumption.⁹⁰

The General Court followed this approach in annulling a €31.6 million (\$41.5 million) cartel fine against the Dutch brewer, Grolsch. Grolsch argued that the European Commission should not have attributed liability to it, as the parent, when its wholly-owned subsidiary participated in a price-fixing scheme. The Court ruled that, even if a 100% ownership is enough to presume a decisive influence over the conduct of the subsidiary, the European Commission must still explain the reasons for its determination that Grolsch was liable for the actions of its subsidiary--i.e., the European Commission should have explicitly stated that parental liability was being presumed given the 100% ownership. As a result of the European Commission's failure to state the basis for liability, Grolsch was not afforded the opportunity to rebut the presumption of decisive influence. As such, the court annulled the fine.⁹¹

Alliance One tried to obtain a reduction for similar reasons when challenging the decision sanctioning an Italian raw tobacco cartel. The General Court, nevertheless, rejected its argument on the basis that a 100% ownership was sufficient to presume that the parent company exercised a decisive influence on the conduct of its subsidiary. Alliance One has appealed the General Court's judgment.

In another appeal from the European Commission's decision fining an Italian raw tobacco cartel, the General Court upheld the fine imposed on Deltafina, the immunity applicant. The Court agreed with the European Commission that Deltafina had violated the immunity applicant's duty of

⁸⁹ Press Release, European Comm'n, Antitrust: Commission Imposes €8.9 Million Fine in Banana Cartel (Oct. 12, 2011), *available at* <http://ec.europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1186&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁹⁰ Case C-521/09 P, *Elf Aquitaine SA v. Comm'n*.

⁹¹ Case T-234/07, *Grolsch NV v. Comm'n*.

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confidentiality by deliberately and voluntarily disclosing to its competitors that it had applied for leniency. The fine on Romana Tabacchi, another participant in the cartel was reduced from €2.05 million (\$2.7 million) to €1 million (\$1.3 million) following the General Court's determination that the European Commission had improperly calculated the duration and importance of Tabacchi's participation in the cartel.⁹²

In a July 13, 2011 ruling, the General Court reduced the aggregate fine imposed by the European Commission on Thyssen, in the Elevators and Escalators cartel case, from approximately €480 million (\$629 million) to approximately €320 million (\$419 million). Although the General Court largely upheld the European Commission's findings, the Court found that an increase of 50% of Thyssen Group's fine for recidivism was not justified. The Court stated that the European Commission could not consider the parent company a recidivist given that the European Commission had never imposed a fine on the parent company—only on some of its subsidiaries. As a result, a finding of recidivism against the parent company could not be justified and the fine was reduced.⁹³

While parent companies had some success in reducing fines on appeal, companies attempting to reduce fines based on a lack of senior management involvement were not successful. This past fall, Lucite International attempted to reduce its 2006 fine on such a basis. The General Court rejected Lucite's argument that the fine should be reduced because shareholders and senior managers were not involved in the wrongdoing. Rather, the Court ruled that the antitrust laws do not require action or knowledge by the principal managers of the undertaking, only action by a person authorized to act on behalf of the undertaking. Lucite's argument that it had simply inherited a cartel during the course of a 1999 acquisition was therefore rejected, and the fine upheld.⁹⁴

Finally, the second half of 2011 also saw the European Commission partially revoke its decision in the Heat Stabilizers case because the ten-year limitation period had concluded by the time the European Commission adopted the decision.⁹⁵ In a March 29, 2011 judgment in the ArcelorMittal case, the Court of Justice issued an important ruling clarifying the legal rules regarding limitation periods for the imposition of antitrust fines by the European Commission. In that ruling, the Court held that a legal action brought against the European Commission during an antitrust investigation suspends the ten-year limitation period for that investigation only with respect to the party bringing the action.⁹⁶

⁹² Case T-11/06, *Romana Tabacchi v. Comm'n.*

⁹³ *ThyssenKrupp Liften Ascenseurs NV (T-144/07), ThyssenKrupp Aufzüge GmbH and ThyssenKrupp Fahrtreppen GmbH (T-147/07), ThyssenKrupp Ascenseurs Luxembourg Sàrl (T-148/07), ThyssenKrupp Elevator AG (T-149/07), ThyssenKrupp AG (T-150/07) and ThyssenKrupp Liften BV (T-154/07) v Comm'n*, at ¶¶ 298–323.

⁹⁴ Case T-216/06, *Lucite Int'l Ltd. v. Comm'n.*

⁹⁵ Press Release, European Comm'n, *Antitrust: Commission Repeals Heat Stabilisers Cartel Decision for Ciba/BASF and Elementis after EU Court Judgment (July 4, 2011)*, available at <http://europa.eu/rapid/searchAction.do>.

⁹⁶ Cases C-201/09, C-216/09, *ArcelorMittal Luxembourg SA v. Comm'n.*

d) Raids and Investigations

The European Commission continued to use unannounced inspections, or "dawn raids," as a major investigatory tool in several industries during the second half of 2011:

- **Natural Gas (September 2011):** The European Commission raided natural gas companies located in ten different countries, focusing on the upstream supply of natural gas to Central and Eastern European Member States.⁹⁷
- **Financial Derivatives (October 2011):** The European Commission raided banks offering financial derivatives linked to the Euro Interbank Offered Rate ("EURIBOR"). These raids followed the announcement of U.S., U.K., and Japanese investigations into a potential breach of the rules governing the London Interbank Offered Rate ("LIBOR").⁹⁸
- **Ball Bearings (November 2011):** The European Commission raided companies involved with ball bearings used for automotive and industrial purposes. Interestingly, these were joint raids undertaken with officials from other national competition authorities. The raids followed a similar investigation in July by the Japan Fair Trade Commission.⁹⁹
- **Car Components (November 2011):** The European Commission requested information from Visteon, a manufacturer of car components, in connection with an ongoing probe into potential illegal agreements. The Commission has already scrutinized other industry participants, including Delphi, Mitsubishi, and Valeo. This likely relates to the ongoing, worldwide investigation into various sectors of the auto parts market.
- **Airline Code-Share Agreements (December 2011):** Finally, in December, the European Commission conducted surprise inspections at the premises of Brussels Airlines and TAP Portugal in Belgium and Portugal. The inspections relate to an investigation opened into the companies' existing code-share agreement for the Brussels-Lisbon route.¹⁰⁰

e) European Commission Rule Changes

In October, the European Commission adopted measures to increase interactions between parties during antitrust proceedings and strengthen procedural rights. The stated goal is to increase transparency and fairness during competition proceedings. The changes include:

- informing parties in the Statement of Objections of the main parameters for the imposition of fines;

⁹⁷ Press Release, European Comm'n, Antitrust: Commission Confirms Unannounced Inspections in the Natural Gas Sector (Sept. 27, 2011), *available at* <http://europa.eu/rapid/searchAction.do>.

⁹⁸ Jean Eaglesham and David Enrich, EU Regulators Raid Banks in the Interest-Rate Probe, WALL ST. J., Oct. 19, 2011, at <http://online.wsj.com/article/SB10001424052970203658804576639484062369102.html>.

⁹⁹ Press Release, European Comm'n, Antitrust: Commission Confirms Unannounced Inspections in the Sector of Bearings for Automotive and Industrial Use (Nov. 8, 2011), *available at* <http://ec.europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/766&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹⁰⁰ Press Release, European Comm'n, Antitrust: Commission Confirms Unannounced Inspections in TAP-Brussels Airlines Cooperation Investigation (Dec. 19, 2011) *available at* <http://europa.eu/rapid/searchAction.do>.

- extending the state of play meetings to cartel cases and complainants, in specific circumstances;
- enhancing access to the "key submissions" of complainants or third parties, including economic studies, prior to the Statement of Objections; and
- publishing, in some form, the rejection of complaints.

The measures also strengthen and expand the Hearing Officer's role. Under the new measures, the Hearing Officer would be able to intervene during the investigatory phase of antitrust proceedings. This means the Hearing Officer could help resolve privilege issues or intervene where a company has not been informed of its procedural status. A company could also refer a matter to the Hearing Officer should they feel they were being compelled to admit to an infringement in reply to a request for information. The Hearing Officer could also intervene in disputes about deadline extensions during information requests.¹⁰¹

Another important landmark of the second half of 2011 was the publication of the "Compliance Guidelines" on November 24. Although the Guidelines do not provide new rules, they do provide companies with valuable guidance in an attempt to ensure compliance with the rules and create the much sought after "culture of Competition" in Europe.¹⁰²

f) The *Pfleiderer* Aftermath

Our mid-year update highlighted a June 2011 judgment by the European Court of Justice regarding a third party's right to obtain a leniency application when seeking damages in an independent civil proceeding. The Court held that European law did not preclude access to such files, but ultimately left the decision to the courts of the individual Member States.¹⁰³ The English High Court, in *National Grid Electricity Transmissions v. ABB Limited*, has now taken up the issue, as a third-party claimant is seeking European Commission documents in an effort to bolster its damages claims against cartel participants previously fined by the European Commission.¹⁰⁴ The European Commission, in a letter submitted to the High Court, argued that the relevance of the disputed documents should be balanced by the need to protect whistleblower programs.¹⁰⁵ The judgment is still pending.

In this same respect, in mid-December, U.S. Magistrate Judge Viktor Pohorelsky, of the Eastern District of New York, declined to order the disclosure of the confidential version of the European Commission's decision from the air cargo investigation. A number of plaintiffs were seeking access to the document in order to claim damages from the 11 air cargo carriers, which, in November 2010,

¹⁰¹ Press Release, European Comm'n, Commission Reforms Antitrust Procedures and Expands Role of Hearing Officer (Oct. 17, 2011), available at <http://europa.eu/rapid/searchAction.do>.

¹⁰² See EUROPEAN COMM'N, COMPLIANCE MATTERS: WHAT COMPANIES CAN DO BETTER TO RESPECT EU COMPETITION RULES (Nov. 2011), available at http://ec.europa.eu/competition/antitrust/compliance/compliance_matters_en.pdf.

¹⁰³ See Case C-360/09, *Pfleiderer AG v Bundeskartellamt*.

¹⁰⁴ *Nat'l Grid Elec. Transmission Plc v. ABB Ltd.* [2011] EWHC 1717 (Ch).

¹⁰⁵ See Letter from Nicholas Khan, Legal Serv. of the European Comm'n, to Justice Roth, High Court of Justice, Chancery Div. (Nov. 2011), available at http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf.

were fined almost €800 million by the European Commission. Judge Pohorelsky determined that such disclosure should be denied on "grounds of comity."¹⁰⁶

6) Other Significant International Investigations

a) Australia

The Australian Competition and Consumer Commission ("ACCC") continued its ongoing investigation into airline price fixing. In November, an Australian court fined Korean Airlines AUD 5.5 million (\$5.5 million), the eighth such airline penalized in the past few years by Australian authorities. In total, since 2008, the ACCC has imposed AUD 52 million (\$52 million) in fines, with proceedings pending against six additional airlines. The investigation concerns price fixing in relation to fuel surcharges, security surcharges, and custom fees over a three-year period.¹⁰⁷

b) Chile

In December, the Chilean competition authority (La Fiscalía Nacional Económica) initiated proceedings against the nation's three main poultry producers and the Poultry Producers Association of Chile. The Agency alleges that the producers executed an agreement limiting and allocating production quotas. The agency is seeking to impose the maximum fine possible under Chilean law, approximately \$26 million.¹⁰⁸

c) France

Following the European Commission's fines against a laundry detergent manufacturer earlier this year, the French competition authority (Autorité de la Concurrence) also fined members of the cartel €361.3 million (\$473.5 million). The case was brought against Unilever, Henkel, Proctor & Gamble, and Colgate, alleging that, over a seven-year period, the four laundry detergent manufacturers agreed to fix prices in order to "stabilize the market" and avoid a "price war." Importantly, this was the first leniency case in French history that concerned a mass-market product. The cartel was disclosed by Unilever through the leniency program.¹⁰⁹

A sector inquiry into the car maintenance market, as well as a public consultation on the draft guidelines on corporate compliance programs and antitrust settlement procedures, were also launched in France during the second half of 2011.

¹⁰⁶ See *In re Air Cargo Shipping Services Antitrust Litigation*, No. MD-06-1775 (E.D.N.Y. Dec. 19, 2011).

¹⁰⁷ News Release, Australian Competition & Consumer Comm'n, Korean Air Lines Penalized \$5.5 Million for Price Fixing Cartel (Nov. 17, 2011), available at <http://www.accc.gov.au/content/index.phtml/itemId/1018134/fromItemId/2332>.

¹⁰⁸ International Competition Network, The FNE Files a Complaint for Collusion on the Production and Commercialization of Poultry Meat in Chile, at <http://www.icnblog.org/?p=176> (last updated Dec. 2, 2011).

¹⁰⁹ Press Release, The *Autorite de la Concurrence* Fines a Cartel Between the Four Major Laundry Detergent Manufacturers a Global Amount of €361 million (Dec. 8, 2011).

d) Germany

The German competition authority (Bundeskartellamt) fined a British manufacturer €24 million (\$31.5 million) for fixing dishwasher detergent prices with German company Henkel. According to the charges, the two companies agreed to raise prices by five to eight percent and reduce certain package sizes without corresponding price decreases. Henkel avoided a fine by participating in the leniency program.¹¹⁰ Also, in December 2011, the Bundeskartellamt imposed fines totaling approximately €15.5 million (\$21.5 million) on six manufacturers and distributors of hydrants and other water pipe fittings, as well as on four individuals who were allegedly involved in illegal price agreements.

Furthermore, after a first order imposing fines in 2008 on BOMINFLOT Bunkergesellschaft für Mineralöle mbH & Co. KG, a trader of heavy fuel oil, the Bundeskartellamt concluded in November 2011 that a second company, BMT Bremer Mineralöltransportgesellschaft mbH & Co. KG, had also been involved in the infringement and, therefore, imposed fines amounting to more than €11 million (\$14 million) on both companies.

Instant cappuccino manufacturers and wood producers were also fined for different competition law infringements during the second half of 2011. Finally, on July 11, 2011, a new division fully dedicated to cartels was set up within the Bundeskartellamt under the direction of Dr. Carsten Becker.

e) Hungary

In November, Hungarian Competition Authority announced an investigation into a group of banks over suspicions of alleged cartel activity in the residential mortgage loan market. The announcement came two months after unannounced visits to bank offices. The enforcement agency's suspicion was raised following a 50 to 200 basis-point rise in mortgage-lending interest rates in September.¹¹¹

f) Italy

During the second half of 2011, the Italian competition authority (Autorità Garante della Concorrenza e del Mercato) was especially active in the healthcare sector. In October, the Competition Authority levied €13 million (approximately \$17 million) in fines for a competition-restricting agreement by three insurance companies and one multi-firm agency in the healthcare liability coverage sector in the region of Campania. The cartel manipulated tenders by exchanging information between the companies.¹¹² Two months before, a fine exceeding €5.5 million (\$7.2

¹¹⁰ Press Release, Bundeskartellamt, Fines Totalling Approximately €24 million on Account of Price Agreements for the Products "Calgonit" and "Somat" and for Anti-Competitive Exchange of Information (Nov. 23, 2011), *available at* http://www.bundeskartellamt.de/wEnglisch/News/press/2011_11_23.php.

¹¹¹ Press Release, Hungarian Competition Auth., Cartel Investigation in the Residential Mortgage Market (Nov. 23, 2011), *available at* http://www.gvh.hu/gvh/alpha?do=2&st=s&pg=133&m5_doc=7393.

¹¹² Press Release, Autorità Garante della Concorrenza e del Mercato, Insurance: 13+ Million in Antitrust Fines for Competition-Restricting Agreement by Three Companies and One Multi-Firm Agency (Oct. 3, 2011), *available at* <http://www.agcm.it/en/newsroom/press-releases/1967-i731-insurance-13-million-in-fines-for-competition-restricting-agreement-by-three-companies-and-one-multi-firm-agency.html>.

million) was imposed on four suppliers of magnetic resonance equipment for having coordinated their behavior in a tender with the goal of dividing sales.¹¹³

g) New Zealand

In October, Commerce Minister Simon Power introduced a bill creating criminal sanctions for hard-core cartel behavior, which it defined as price fixing, output restrictions, bid rigging, and market allocations. According to the Minister, the bill is part of an effort to move beyond fines, which some companies view as merely part of the cost of business. The bill would establish a maximum prison sentence of seven years.¹¹⁴

h) Poland

In November, Poland's Office of Competition and Consumer Protection fined four mobile phone operators PLN 113 million (\$33.6 million) for cartel behavior. The investigation resulted when the losing bidders in a competitive bid for mobile television frequencies coordinated their behavior to undermine the winning bid. The fines followed unannounced raids in December 2009. The European Commission consulted on the final ruling.¹¹⁵

i) Singapore

In November, the Competition Commission of Singapore ("CCS") fined ten modeling agencies for using a trade association as a cover to fix prices for modeling services over a nearly four-year period. The CCS assessed fines totaling SGD 361,596 (\$276,000) against the cartel's participants.¹¹⁶

j) South Africa

In November, the South African Competition Commission fined AfriSam ZAR 124.8 million (\$14.8 million) for its participation in a cement cartel. Four cement producers agreed to divide the market based upon the market share held by each of them prior to 1996, when a lawful cartel existed. The Competition Commission raided AfriSam's offices in 2009.¹¹⁷

The Competition Commission also fined Apollo Tyres more than ZAR 45 million (\$5.4 million) for its participation in a tire manufacturers cartel. The case was initiated following a complaint by a fleet

¹¹³ Press Release, Autorità Garante della Concorrenza e del Mercato, Healthcare: Antitrust, Over 5.5 Million in Fines for Competition-Distorting Agreement Among 4 Suppliers of Magnetic Resonance Equipment (Aug. 5, 2011), *available at* <http://www.agcm.it/en/newsroom/press-releases/1963-i729-healthcare-antitrust-over-55-million-in-fines-for-competition-distorting-agreement-among-4-suppliers-of-magnetic-resonance-equipment.html>.

¹¹⁴ Press Release, Simon Power, Bill Introduced to Deter Hard-Core Cartel Behavior (Oct. 13, 2011), *available at* <http://feeds.beehive.govt.nz/release/bill-introduced-deter-hard-core-cartel-behavior>.

¹¹⁵ Press Release, Office of Competition and Consumer Protection, UOKIK Decides – PLN 113 MLN for Cartel of Operators (Nov. 23, 2011), *available at* http://www.uokik.gov.pl/news.php?news_id=3086.

¹¹⁶ Press Release, Competition Commission Singapore, CCS Fines 10 Modelling Agencies for Price Fixing (Nov. 23, 2011), *available at* http://app.casebank.ccs.gov.sg/ID_AMIP_23Nov11.aspx.

¹¹⁷ Media Release, Commission Settles with AfriSam on Cement Cartel (Nov. 1, 2011).

owner who alleged that the tire manufacturers simultaneously adjusted prices. The Competition Commission raided the cartel participants' offices in 2008.¹¹⁸

k) South Korea

Our mid-year update noted the trend of aggressive antitrust enforcement in South Korea by the Korea Fair Trade Commission ("KFTC"). This trend continued in the second half of the year. As noted above, the KFTC assessed fines totaling more than KRW 248 billion (\$223 million) following investigations into the TFT-LCD and CRT glass industries. The KFTC also launched a high-profile raid on Google's Seoul office on September 6, 2011, reportedly as part of an investigation into the mobile search market.¹¹⁹

In July 2011, the KFTC announced revisions to its leniency program in an effort to enhance transparency and predictability. The revisions provide a list of reasons for the cancellation of leniency status, including the failure to provide full cooperation; the submission of false documents; failure to terminate involvement in the cartel; coercion of other members to participate in the cartel; or the submission of evidence that "is not considered to prove the concerned cartel behavior." The revisions also expand the scope of materials that can be submitted to prove cartel behavior, and extend the period of time to supplement submitted documents. Finally, the revisions enhance the Amnesty Plus program and allow a company that has already applied for leniency to report its involvement in another cartel and receive additional mitigation.¹²⁰

l) Spain

Spain concluded several ongoing investigations in 2011 and imposed fines totaling more than €97 million (\$127 million) on participants in at least four industries. In November, the Spanish competition authority (Comisión Nacional de la Competencia or "CNC") imposed fines totaling €16 million (\$21 million) on twelve undertakings for fixing prices in asphalt and related products. Proceedings opened following inspections into the corporate headquarters in 2009.¹²¹ The CNC also fined the Spanish Association of Fluid Pump Manufacturers (Asociación Española de Fabricantes de Bombas de Fluidos or "AEFBB"), along with 19 manufacturers and distributors of fluid pumps, a total of €18 million (\$23.6 million) for engaging in anti-competitive practices.¹²²

¹¹⁸ Media Release, Apollo Tyres Settles its Price Fixing Case with a R45 Million Fine (Nov. 10, 2011).

¹¹⁹ See Kyong-Ae Choi and Loretta Chao, *Google's Seoul Office Raided*, WALL ST. J., Sept. 8, 2011, at B5.

¹²⁰ Press Release, Korea Fair Trade Commission, KFTC Revised Notification on Cartel Leniency Benefits (July 22, 2011).

¹²¹ Press Release, CNC, The CNC Imposes Sanctions on the Undertakings in the Asphalt Cartel (Nov. 3, 2011) available at <http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=410953&Pag=2>.

¹²² Press Release, CNC, The CNC Fines the Undertakings Involved in the Fluid Pumps Cartel (June 28, 2011), available at <http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=350012&Pag=7>.

Also, in the second half of the year, the CNC imposed fines totaling €16.3 million (\$21.4 million) in the maritime transportation sector for price-fixing¹²³ and additional fines of €47 million (\$62 million) in the construction sector for bid rigging.¹²⁴

Further, the CNC imposed a fine of approximately €2 million (\$2.6 million) on Transmediterránea and its subsidiary, Europa Ferrys for obstructing a surprise inspection.¹²⁵ During the surprise inspection in May, the CNC alleged that the companies failed to make information and senior-level personnel readily available. The inspection was part of an investigation into potential price fixing by ferry operators on routes between Spain and Northern Africa. Additionally, on December 12, 2011, the CNC extended the scope of this investigation to include maritime cargo transport.¹²⁶

m) United Kingdom

For the U.K.'s Office of Fair Trading ("OFT"), the second half of the year was marked by the closing of criminal probes in the truck manufacturing and agricultural wrapping sectors. Both cases were dropped because of insufficient evidence.¹²⁷ Since entering into force in 2003, the OFT has had the power to pursue individuals criminally. So far, the OFT has successfully used this authority to prosecute three directors in the marine hose cartel.

The OFT also continued its civil sanctioning activity. The OFT imposed fines totaling £49.51 million (\$60 million) on four supermarkets and five dairy processors. The agency also issued a Statement of Objections to British Airways and Virgin Atlantic in its civil law investigation into alleged collusion over the pricing of passenger fuel surcharges for long-haul passenger flights to and from the U.K. At the same time, following the finding of "a number of features that, individually or in combination, prevent, restrict or distort competition in the £5 billion U.K. private healthcare market,"¹²⁸ the OFT provisionally referred the market for privately funded healthcare services in the U.K. to the Competition Commission for further investigation. The provision of audit services in the U.K. also was referred to the Competition Commission for further investigation.

¹²³ Press Release, CNC, The CNC Imposes Fines on the Shipping Companies Operating the Algeciras-Ceuta-Algeciras Passenger Transport line for Taking Part in a Cartel (Nov. 11, 2011), *available at* <http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=422504&Pag=2>.

¹²⁴ Press Release, CNC, CNC Fines 47 Construction Companies for Rigging Bids in Public Works Tenders (Oct. 24, 2011), *available at* <http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=404880&Pag=3>.

¹²⁵ Transmediterránea, SNC/0014/11, Resolución del Consejo (Comisión Nacional de la Competencia Sept. 21, 2011), *available at* http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=122453&Command=Core_Download&Method=attachment.

¹²⁶ Press Release, CNC, The CNC Continues the Investigation Against Shipping Companies Operating Between the Spanish Peninsula and Morocco, Extending that Investigation to the Maritime Cargo Transport Service (Dec. 12, 2011), *available at* <http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=434333&Pag=1>

¹²⁷ See Reuters, UK's OFT Drops Criminal Cartel Probe of Truck Makers (Dec. 22, 2011) (truck manufacturing); BBC, OFT Drops Farming Packaging Probe (Aug. 3, 2011) (agricultural wrapping).

¹²⁸ Press Release, Office of Fair Trading, OFT Provisionally Decides to Refer Private Healthcare Market to Competition Commission (Dec. 8, 2011).



Gibson, Dunn & Crutcher lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you work, any of the following, or any member of the firm's Antitrust and Trade Regulation Practice Group:

Washington, D.C.

F. Joseph Warin (202-887-3609, fwarin@gibsondunn.com)
D. Jarrett Arp (202-955-8678, jarp@gibsondunn.com)
David P. Burns (202-887-3786, dburns@gibsondunn.com)
John W.F. Chesley (202-887-3788, jchesley@gibsondunn.com)
Joshua Lipton (202-955-8226, jlipton@gibsondunn.com)
Cynthia Richman (202-955-8234, crichman@gibsondunn.com)
John Christopher Wood (202-955-8595, cwood@gibsondunn.com)

New York

Randy M. Mastro (212-351-3825, rmastro@gibsondunn.com)
James A. Walden (212-351-2300, jwalden@gibsondunn.com)
Peter Sullivan (212-351-5370, psullivan@gibsondunn.com)
John A. Herfort (212-351-3832, jherfort@gibsondunn.com)
Lawrence J. Zweifach (212-351-2625, lzweifach@gibsondunn.com)

Denver

Robert C. Blume (303-298-5758, rblume@gibsondunn.com)

Dallas

M. Sean Royall (214-698-3256, sroyall@gibsondunn.com)
Veronica S. Lewis (214-698-3320, vlewis@gibsondunn.com)
Brian Robison (214-698-3370, brobison@gibsondunn.com)
Robert C. Walters (214-698-3114, rwalters@gibsondunn.com)

San Francisco

Gary R. Spratling (415-393-8222, gspratling@gibsondunn.com)
Joel S. Sanders (415-393-8268, jsanders@gibsondunn.com)
Trey Nicoud (415-393-8308, tnicoud@gibsondunn.com)
Rachel S. Brass (415-393-8293, rbrass@gibsondunn.com)

Los Angeles

Daniel G. Swanson (213-229-7430, dswanson@gibsondunn.com)

Brussels

Peter Alexiadis (+32 2 554 7200, palexiadis@gibsondunn.com)
Andrés Font Galarza (+32 2 554 7230, afontgalarza@gibsondunn.com)
David Wood (+32 2 554 7210, dwood@gibsondunn.com)

GIBSON DUNN

London

James Ashe-Taylor (+44 20 7071 4221, jashetaylor@gibsondunn.com)

Patrick Doris (+44 20 7071 4276, pdoris@gibsondunn.com)

Philip Rocher (+44 20 7071 4202, procher@gibsondunn.com)

Charles Falconer (+44 20 7071 4270, cfalconer@gibsondunn.com)

Munich

Michael Walther (+49 89 189 33 180, mwalther@gibsondunn.com)

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