

January 9, 2014

## **2013 YEAR-END CRIMINAL ANTITRUST AND COMPETITION LAW UPDATE**

To Our Clients and Friends:

The hallmarks of modern cartel enforcement—globalization of investigations, higher monetary penalties, and a growing utilization of individual penalties—remained the core trends in 2013. In addition, new or expanded anti-cartel regimes continue to spring up, and new milestones were reached in enforcement in numerous jurisdictions. At the same time, the investigation and prosecution of domestic collusion remains central to enforcement around the world.

The globalization of the prosecution of international cartels is the dominant 2013 trend. From the London Interbank Offered Rate (LIBOR), to the auto parts industry, to various segments of international shipping, prosecution of competition violations is increasingly conducted on a worldwide basis. When collusion is suspected with respect to products sold worldwide, it is no longer surprising to see investigations and possible fines in a dozen or more countries. In the auto parts investigation, cooperating authorities include the United States Department of Justice, Japanese Fair Trade Commission, European Commission, Canadian Competition Bureau, Korean Fair Trade Commission, Mexican Federal Economic Competition Commission, South Africa Competition Commission, Brazilian Administrative Council for Economic Defense, Competition Commission of Singapore, and Australian Competition and Consumer Commission. Authorities in more than ten different countries are believed to be conducting or have concluded investigations related to LIBOR and related benchmarks.

The globalized, and sometimes duplicative, nature of these investigations correspondingly has resulted in higher cumulative penalties. For example, in the LIBOR matter, which is considered to be far from complete, the penalties to date total more than \$2.7 billion in just two jurisdictions, including the European Commission's largest fine ever of €1.71 billion (\$2.3 billion). Similarly, almost \$3 billion in total fines have been imposed in the TFT LCD investigations alone—and further investigation (Brazil) into that conduct was launched just this year. And in the massive auto parts investigation, fines already exceed \$2.366 billion, of which nearly \$1 billion has been imposed for just one part—wire harnesses—with many more fines expected. Indeed, on the date of this alert, EU Competition Commissioner Almunia confirmed that more fines will follow in 2014.

Domestic enforcement also continues apace across the globe. In the United States, the DOJ's investigation into collusion in mortgage foreclosure auctions and tax lien auctions continues to expand—over 70 individuals have been caught in these investigations, which are expected to continue in 2014. Canada's investigation into local gasoline price fixing has netted over 40 corporate and individual pleas. Brazil has investigated collusion in its domestic gasoline sector, imposing fines on 20

companies and individuals. In Germany, significant sanctions were imposed in connection with agreements not to compete among flour mills, as well as for information exchanges in the pharmaceutical and confectionary industries. And in Spain, more than 15 companies were sanctioned over €44 million (\$58.5 million) for a market allocation conspiracy among envelope manufacturers lasting more than 30 years. Turkey also imposed record domestic fines this year. In March, Turkey's Competition Authority issued fines of 1.1 billion Turkish lira (\$620 million) against 12 of the country's banks for colluding over interest rates. One bank received a 213 million lira (\$102 million) penalty—the largest fine ever imposed on a single entity in Turkey. And South Africa likewise imposed its largest ever collective fine—approximately \$140 million—against 15 construction companies charged with bid rigging in connection with the 2010 World Cup.

Pursuit of individuals also remains an enforcement priority. Belgium and Denmark adopted enhanced penalties for individuals involved in collusion, and the UK adopted legislation designed to remove certain difficulties with prosecuting individuals. In South Korea, 22 individuals were indicted in a single bid rigging investigation. And in the United States, the Antitrust Division secured its longest ever sentence for a Sherman Act violation, as Frank Peake was sentenced to serve five years (60 months) for price fixing in connection with water transportation of freight to and from Puerto Rico.

Finally, 2013 involved significant appellate scrutiny of individual convictions. The Second Circuit reversed the convictions of three executives in the Municipal Bonds investigation because the indictment failed to allege a conspiratorial act within the statute of limitations. The Ninth Circuit is reviewing the convictions of two companies and three individuals in the LCD investigation. After oral argument, the Court released all three executives on bail, which suggests the convictions may not be sustained.

For the perspective of Gibson Dunn's newest Antitrust Partner, former Deputy Assistant Attorney General Scott Hammond, on how these trends played out in 2013 and what to expect in 2014, see the attached.

## [CLICK HERE TO VIEW A Q&A WITH SCOTT HAMMOND](#)

What do you think is the most important development in U.S. cartel enforcement in the last year?

The globalization of cartel enforcement continues to be the most significant development in U.S. cartel enforcement and antitrust compliance. Readers of GDC's 2013 Criminal Antitrust Update will undoubtedly be struck by the breadth and magnitude of the developments in cartel enforcement taking place around the world. Everywhere you turn it seems there is news of another jurisdiction adopting new legislation, introducing criminal sanctions, expanding its investigative powers, or obtaining record sanctions. The impact of these developments abroad on companies around the world is two-fold. First, companies that might once have sought to avoid U.S. enforcement by operating in safe harbors now find their risk of prosecution



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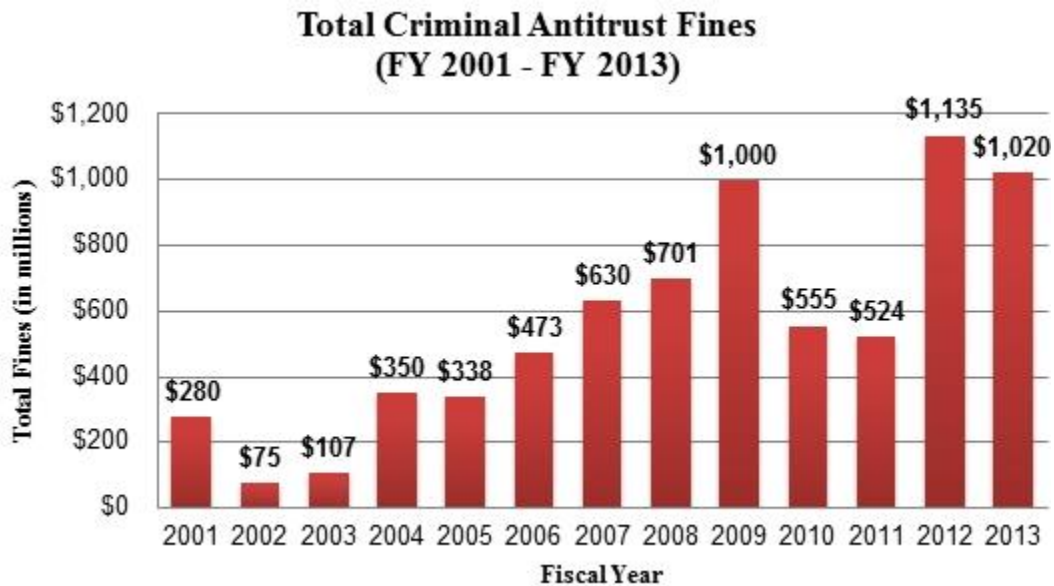
## I. THE AMERICAS

### A. United States

#### 1. Overview of U.S. Enforcement Trends

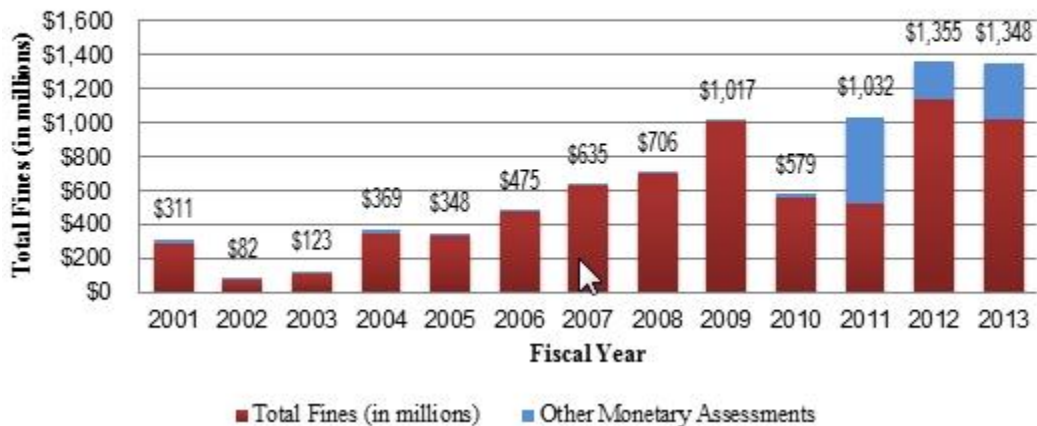
##### a. Criminal Fines & Other Monetary Assessments

The United States Department of Justice Antitrust Division secured approximately \$1.02 billion in criminal fines during FY 2013, surpassing one billion dollars in total recoveries for the second year in a row, and just the third time ever (1999).[1] Over 80% of that total resulted from the \$790 million in fines paid by auto parts manufacturers in the Division's ongoing investigation into collusion in the auto parts industry, discussed in more detail below.[2]



In an increase from FY 2012, the DOJ also obtained approximately \$328 million in restitution, penalties, and disgorgement paid to state and federal agencies.[3] Nearly all (over 99%) resulted from a \$325 million civil penalty paid by the Royal Bank of Scotland to the United States Commodity Futures Trading Commission as a result of an Antitrust and Criminal Division joint investigation into the alleged manipulation of LIBOR by certain banks and financial institutions.

**Total Criminal Fines & Other Monetary Assessments  
from Antitrust Division Investigations  
(FY 2001 - FY 2013)**



These non-fine payments reflect an increase year-on-year from FY 2012, but are lower than the record-setting non-fine recoveries obtained in connection with antitrust prosecutions in FY 2011. Nevertheless, we believe non-fine monetary relief will play an enhanced role in the DOJ’s criminal enforcement efforts on an ongoing basis, particularly in cases involving regulated markets.<sup>[4]</sup> We therefore intend to continue monitoring the Antitrust Division’s portfolio of penalties by considering all monetary sanctions, including criminal fines, restitution, disgorgement, and penalties paid to other federal or state agencies as a result of DOJ investigations. As the DOJ utilizes additional prosecutorial tools, such as non-prosecution agreements and deferred prosecution agreements (“DPAs”), and as multi-agency investigations continue to be more common, we believe this combined data offers an important metric for gauging both the Division’s achievements and the scope of criminal exposure faced by companies that violate U.S. antitrust laws.

## **i. Criminal Fines**

Seventeen companies agreed to pay a criminal fine of more than \$1 million in FY 2013. The largest number of fines, as well as the highest fines, resulted from the DOJ’s ongoing investigation of the auto parts industry.

<b>Criminal Fines of More than \$1 Million Imposed or Agreed to During FY 2013 (October 2012–September 2013)</b>		
<b>Company</b>	<b>Investigation</b>	<b>Criminal Fine</b>
Hitachi Automotive Systems Ltd.	Automotive Parts (starter motors, alternators, air flow meters, valve timing control devices, fuel injection systems, electronic throttle bodies, ignition coils, inverters, and motor generators)	\$195,000,000
Mitsubishi Electric Corp.	Automotive Parts (starter motors, alternators, and ignition coils)	\$190,000,000
Royal Bank of Scotland plc	LIBOR	\$150,000,000
Mitsuba Corp.	Automotive Parts (starter motors, wiper systems, washer systems, power window motors, and fan motors)	\$135,000,000
JTEKT Corp.	Automotive Parts (bearings and steering assemblies)	\$103,270,000
NSK Ltd.	Automotive Parts (bearings)	\$68,200,000
Panasonic Corp.	Automotive Parts (switches, sensors, high intensity and discharge ballasts)	\$45,800,000
Diamond Electric Mfg. Co. Ltd.	Automotive Parts (ignition coils)	\$19,000,000
Tokai Rika Co., Ltd.	Automotive Parts (heater control panels)	\$17,700,000
Yusen Logistics Co. Ltd.	Air Freight Forwarding	\$15,428,207

<b>Criminal Fines of More than \$1 Million Imposed or Agreed to During FY 2013 (October 2012–September 2013)</b>		
<b>Company</b>	<b>Investigation</b>	<b>Criminal Fine</b>
Mitsubishi Heavy Industries Ltd.	Automotive Parts (compressors and condensers)	\$14,500,000
T.RAD CO. Ltd.	Automotive Parts (radiators)	\$13,750,000
Valeo Japan Co. Ltd.	Automotive Parts (air conditioning systems)	\$13,600,000
Yamashita Rubber Co. Ltd.	Automotive Parts (anti-vibration rubber products)	\$11,000,000
SANYO Electric Co. Ltd.	Battery cells	\$10,731,000
Eagle Eyes Traffic Industrial Co., Ltd.	Automotive Parts (aftermarket auto lights)	\$5,000,000
“K” Line Logistics, Ltd.	Air Freight Forwarding	\$3,507,246
LG Chem Ltd.	Battery cells	\$1,056,000

The Antitrust Division announced four corporate plea agreements for FY 2014, which collectively resulted in more than \$517 million in criminal fines.

<b>Criminal Fines of More than \$1 Million for Sherman Act Violations Imposed or Agreed to During FY 2014 (October 2013–Present)</b>		
<b>Company</b>	<b>Investigation</b>	<b>Criminal Fine</b>
Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank)	LIBOR	\$325,000,000
Toyo Tire & Rubber Co., Ltd.	Automotive Parts (anti-vibration rubber and driveshaft products)	\$120,000,000
Takata Corp.	Automotive Parts (seat belts)	\$71,300,000
Stanley Electric Co., Ltd.	Automotive Parts (lamp ballasts)	\$1,440,000

## ii. Other Monetary Assessments (Restitution, Disgorgement, and Penalties)

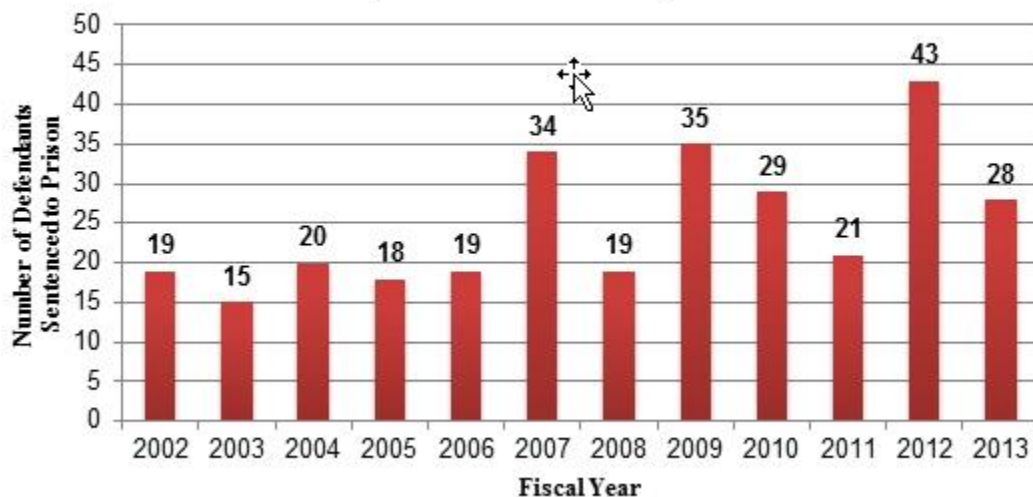
As in FY 2011 and FY 2012, the Antitrust Division continued to secure monetary assessments, but only one exceeded \$1 million.

Other Monetary Assessments of More than \$1 Million from Antitrust Division Investigations During FY 2013 (October 2012 – September 2013)		
Company	Investigation	Total Monetary Assessments
Royal Bank of Scotland plc	LIBOR	\$325,000,000

## b. Prison Sentences

The Antitrust Division shows no sign that it intends to change course in its pursuit of longer prison sentences. As in FY 2012, the length of the average prison sentence secured by the Antitrust Division in FY 2013 was 26 months.<sup>[5]</sup> As William J. Baer, Assistant Attorney General and head of the Antitrust Division, confirmed in recent Congressional testimony, twenty-eight individuals were sentenced to prison for antitrust violations in FY 2013.<sup>[6]</sup>

**Number of Defendants Sentenced to Prison  
(FY 2002 - FY 2013)**



While that is considerably fewer than in FY 2012, it remains above average for the decade, and much of the dip below 2012 can likely be explained by a few key factors. First, the Antitrust Division has deferred sentencing of the majority of the individual defendants in several of its large domestic investigations, including those related to the New Jersey Tax Lien Auctions and the Northern

California, Eastern California, Alabama and Georgia Mortgage Foreclosure Auctions. That accounts for more than 40 individuals who have pleaded guilty and await sentencing. Second, as reported in our 2013 Mid-Year Criminal Antitrust Update, the resolution of investigations as to corporations was effectively put on hold for several months while the Antitrust Division considered important changes to its practices with respect to corporate plea agreements. Partly as a result of that stay in activity, after a drought in corporate plea agreements for several months, in the last week of FY 2013, the DOJ announced agreements by nine different auto parts makers to plead guilty. Two more agreed to plead guilty in FY 2014. Although more than 30 individuals were excluded from the protections of these corporate plea agreements, no plea agreements by any of the individual employees of those companies have yet been announced. We expect that a number of individuals employed by those companies will plead guilty or be indicted in FY 2014. These facts suggest that little should be read into this year's likely temporary dip in individuals sentenced.

## **2. Developments in International Investigations**

### **a. Auto Parts**

The Antitrust Division continued its wide-ranging probe into the auto parts industry in 2013, dedicating significant resources to “the largest criminal investigation the Antitrust Division has ever pursued”[7] and obtaining plea agreements with significant fines and lengthy prison sentences.[8] The Division's National Criminal Enforcement Section and every Field Office are reportedly participating in this massive investigation.

Most notably, in September, nine Japan-based companies agreed to plead guilty and to pay a total of more than \$740 million in criminal fines for their roles in separate price-fixing conspiracies.[9] In addition, Tetsuya Kunida, a Japanese citizen, agreed to serve a sentence of 12 months and one day, and Gary Walker, a U.S. citizen, agreed to serve a 14-month sentence. According to the DOJ, the companies, executives, and co-conspirators arranged to rig bids, set prices and allocate the supply of auto parts sold to car manufactures through meetings and telephone conversations in the U.S. and Japan. The charged conduct involved numerous separately charged conspiracies related to more than 30 different auto parts, including starter motors, alternators, ignition coils, fuel injection systems, air flow meters, and anti-vibration rubber products.

Also in September, four Japanese nationals, including two executives from Fujikura Ltd., one executive from G.S. Electech Inc., and one from Panasonic, were indicted for their roles in bid rigging and price fixing for automobile parts installed in cars sold in the U.S.[10] These indictments were obtained several months after the executives' respective companies had already pleaded guilty to antitrust violations. As noted above, we expect more individuals will be charged in 2014 for conduct addressed in company plea agreements. Indeed, in announcing these indictments, the DOJ again confirmed its policy that “[h]olding individuals accountable for their actions is the surest way to deter executives from choosing to collude rather than to compete for business.”[11]

In October, Takata Corp. entered into a plea agreement with the DOJ for its role in a conspiracy to fix prices of seatbelts sold to car manufactures and agreed to pay a \$71.3 million fine.[12] One month



later, three Takata Corp. executives agreed to plead guilty for their roles in the global price fixing conspiracy.<sup>[13]</sup> The executives agreed to serve prison sentences ranging from 14 to 19 months. In November, two more companies agreed to plead guilty to price fixing conspiracies. Toyo Tire & Rubber Co. Ltd. agreed to pay a \$120 million fine as a part of a plea agreement for its role in two separate conspiracies to fix the prices of anti-vibration rubber and driveshaft parts.<sup>[14]</sup> Stanley Electric Co. Ltd. agreed to pay a \$1.44 million fine for its role in a conspiracy to fix prices of lamp ballasts.<sup>[15]</sup> In addition, two Japanese nationals believed to have been previously employed by Toyo Tire & Rubber Co., Ltd were indicted for their role in fixing prices of anti-vibration rubber parts sold to Toyota.<sup>[16]</sup>

These developments are part of significant activity in the auto parts investigation throughout 2013. As reported in our 2013 Mid-Year Criminal Antitrust Update, executives Yuji Suzuki and Hiroshi Watanabe of DENSO Corporation—which agreed to pay a \$78 million corporate fine in March 2012—agreed to plead guilty in May to participating in an international conspiracy to fix prices and rig bids for automotive components sold to Toyota.<sup>[17]</sup> Suzuki agreed to serve 16 months in prison and Watanabe agreed to serve 15 months. Four DENSO executives have agreed to plead guilty to date.

And in July, the DOJ announced its first plea agreement in the auto parts matter in connection with parts sold directly to an automobile manufacturer headquartered in the U.S.<sup>[18]</sup> Japan-based Diamond Electric Mfg. Co. Ltd. agreed to plead guilty and to pay a \$19 million criminal fine for engaging in a conspiracy to fix prices of ignition coils sold to a number of automobile companies, including Ford Motor Co.

To date, 23 companies and 26 executives have been charged as a part of the auto parts investigation. All 23 companies have either pleaded guilty or have agreed to plead guilty and have collectively agreed to pay more than \$1.8 billion in criminal fines. Of the 26 executives, 20 have been sentenced to serve time in U.S. prisons or have entered into plea agreements that include significant prison sentences.<sup>[19]</sup> We do not believe this marks the end of the auto parts matter, and expect the DOJ will announce additional pleas and indictments in 2014.

## **b. LIBOR and Other Global Benchmark Rates**

The Antitrust and Criminal Divisions of the DOJ continue to investigate potential manipulation of global benchmark interest rates, including LIBOR, EURIBOR, and others. In 2013, for the first time in its history, the Antitrust Division entered into two Deferred Prosecutions Agreements (“DPAs”).

The first came in February, when the Division announced that it had entered into a DPA with the Royal Bank of Scotland plc (“RBS”) for its role in an alleged conspiracy to manipulate Yen LIBOR and Swiss Franc LIBOR. In the DPA, RBS agreed to pay a \$100 million fine and to admit to its role in the misconduct.<sup>[20]</sup> As a condition of the DPA, RBS’s Japanese subsidiary (RBS Securities Japan Ltd.) agreed to plead guilty to a single count of wire fraud and to pay a \$50 million criminal fine. On January 6, 2014, RBS Securities Japan, Ltd. was sentenced according to that agreement. This was the first imposition of a fine by the Division in the ongoing LIBOR investigation.

The second came in October, when the Division announced it had entered into a DPA with the Dutch bank Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank). In this DPA, Rabobank agreed to pay a fine of \$325 million and admit its role in the misconduct.[22] The DOJ alleges that from 2005 through November 2010, Rabobank derivatives traders requested the submission of LIBOR and EURIBOR contributions that would be favorable to the traders' positions. In addition, submitters made agreements with traders at other banks to make submissions that benefitted Rabobank's trading positions.

The potential implications of the Antitrust Division's use of DPAs is discussed in our 2013 Mid-Year Criminal Antitrust Update.

The DOJ also filed criminal price-fixing charges against Thomas Hayes, a former trader at UBS A.G. and Citibank.[23] And as part of the investigation, the DOJ filed non-antitrust criminal charges against two former derivatives brokers and a former cash broker employed by ICAP, a London-based brokerage firm.[24] Darrell Read, Daniel Wilkinson and Colin Goodman were charged with wire fraud and conspiracy to commit wire fraud as part of an effort to manipulate LIBOR rates to benefit their clients. According to a DOJ press release, "[t]hese three men are accused of repeatedly and deliberately spreading false information to banks and investors around the world in order to fraudulently move the market and help their client fleece his counterparties." Read and Wilkinson are also accused of directly contacting interest rate derivatives traders to encourage them to make misleading LIBOR submissions.

The DOJ's investigation of LIBOR and other benchmark interest rates is sure to continue. In announcing the DOJ's settlement with Rabobank, Acting Assistant Attorney General Mythili Raman of the Criminal Division warned, "[O]ther banks should pay attention: our investigation is far from over."

### **c. Municipal Bonds**

In 2013, the Municipal Bond investigation neared completion, with mixed results.

After being convicted (of non-antitrust charges) following a five-week jury trial in 2012, former UBS AG executives Peter Ghavami, Gary Heinz and Michael Welty were sentenced in July for fraud in the bidding process for municipal bonds.[25] The Court sentenced Ghavami to serve 18 months in prison and to pay a \$1 million criminal fine; Heinz to serve 27 months in prison and to pay a \$400,000 criminal fine; and Welty to serve 16 months in prison and to pay a \$300,000 criminal fine.

In a setback for the government, on December 9, 2013, the Second Circuit reversed the convictions of three former General Electric Co. executives, on the ground that their indictment was barred by the applicable statute of limitations.[26] The indictment did not allege that the defendants committed specific conspiratorial acts within the applicable limitations period.[27] Instead, it alleged that the defendants' *employers* made continuous below-market interest payments within the limitations period. The trial court held the interest payments brought the defendants' conduct within the limitations period[28] and, following a guilty verdict, sentenced two executives to serve 36 months in

prison and to pay \$50,000 in criminal fines, and a third executive to serve 48 months in prison and to pay a \$90,000 criminal fine.[29]

The Second Circuit reversed. It held that the employers' continuous payment of interest "does not raise the underlying concern of concerted action, and therefore is not a continuous action that prolongs the life of the conspiracy." [30] Therefore, the government failed to allege the defendants committed overt acts of conspiracy within the limitations period. [31] The Court reversed the judgments of conviction and remanded the matter to the district court for dismissal of the indictment. [32] On December 20, 2013, the Second Circuit granted the DOJ's motion to extend by 30 days the time to petition for panel rehearing and/or rehearing en banc to January 22, 2014. The DOJ sought the additional time because "[t]he Government is in the process of conferring internally and with the Office of the Solicitor General concerning the issue of petitioning for panel rehearing and/or rehearing en banc." [33]

The implications of this decision are not limited to the municipal bonds investigation. To the extent that the Antitrust Division has sought to extend the statute of limitations in other investigations based on further sales or corporate conduct implementing a conspiratorial price, it may be limited in continuing to do so.

#### **d. Thin-Film Transistor Liquid Crystal Display (TFT-LCD) Panels**

As noted in our previous updates, the TFT-LCD investigation has been a hallmark prosecution for the Division. Eight companies have been sentenced to pay criminal fines totaling \$1.39 billion and 13 executives were sentenced to serve prison terms ranging from 6 to 36 months. [34]

This year saw two developments in the DOJ's case against Taiwan-based AU Optronics Corporation, its U.S. subsidiary AU Optronics Corporation America, and certain employees. The companies were only the second corporate defendants in an international cartel case to go to trial in more than a decade and were ultimately convicted, along with three executives. On October 11, after a two-and-a-half week trial, a jury acquitted AU Optronics employee Borlong ("Richard") Bai, who was in charge of the company's notebook sales division, of charges that he had participated in a conspiracy to set the prices of certain TFT-LCD panels used in monitors, notebooks, and televisions. [35] Mr. Bai is the third AU Optronics executive to be acquitted.

On October 18, the Ninth Circuit heard argument in the consolidated appeal of AU Optronics Corporation, AU Optronics Corporation America, and two senior executives, Hsuan Bin Chen, AU Optronics' former president and current vice-chairman, and Hui Hsiung, a former AU Optronics executive vice-president.

As discussed in more detail in our 2013 Mid-Year Criminal Antitrust Update, the appeal raises a number of distinct challenges to the DOJ's prosecution. The core of the appeal involves issues related to what the AU Optronics defendants argue is the essentially foreign nature of the TFT-LCD conduct—an assertion that the DOJ hotly contested. Accordingly, the defendants argued that the convictions should be reversed because the government failed to prove a rule of reason case (rather than a per se case), contending that the foreign nature of the conduct makes the per se rule

inapplicable. The defendants also argue that the indictment was deficient because it failed to plead the requirements of the Foreign Trade Antitrust Improvement Act (“FTAIA”)—an issue that was the focus of questioning of all parties at the Ninth Circuit argument. Defendants further argue that the government failed to prove the elements of the FTAIA and that the jury was not properly instructed as to the intent element of an antitrust violation under the FTAIA. Finally, the defendants argued that the DOJ failed to prove venue in the Northern District of California.[36]

In addition, the Ninth Circuit may address an issue of first impression concerning the application of the alternative fines statute, which authorizes a fine of twice the gains resulting from the charged offense where “any person derives pecuniary gain from the offense.”[37] At trial, the jury agreed with the government’s theory that gains should be determined based on the collective gain of all members in the price-fixing conspiracy. AU Optronics argued on appeal, as it did in the district court, that gains should be calculated based only on those gains attributable to the individual defendant.[38]

The Ninth Circuit has not yet issued a decision, but shortly after the argument, the Court granted a request by Chen and Hsiung for bail pending the outcome. As discussed in our 2013 Mid-Year Criminal Antitrust Update, a third AU Optronics Executive, Steven Leung, was also convicted and sentenced to serve a 24-month sentence. The Ninth Circuit granted his motion for bail pending appeal, staying his prison sentence.[39]

### **3. Developments in Domestic Investigations**

#### **a. Coastal Water Freight Transportation**

The DOJ’s investigation of collusive conduct with respect to coastal water freight transportation between the continental United States and Puerto Rico continued as to certain senior executives of companies that pleaded guilty to or were convicted of price fixing.

In January, a federal jury in Puerto Rico convicted Frank Peake, former president of Sea Star Line LLC, for conspiring to fix rates and surcharges for water transportation of freight between Puerto Rico and the United States.[40] A federal judge subsequently sentenced him to serve five years in prison and pay a \$25,000 fine for participation in the charged conspiracy.[41] According to prosecutors, this was the longest sentence ever imposed against an individual solely for a criminal antitrust violation.[42] In March, a grand jury in Puerto Rico indicted a former executive of Crowley Liner Services, Inc., Thomas Farmer, for conspiring to fix prices for freight services between Puerto Rico and the United States at collusive and noncompetitive rates and surcharges pursuant to agreements reached with co-conspirators.[43]

#### **b. Real Estate Auctions**

The Antitrust Division continued its aggressive push to root out bid rigging in public auctions for real estate foreclosures, tacking on more prosecutions following those discussed in our 2013 Mid-Year Criminal Antitrust Update.

Since the mid-year update, Daniel Rosenbledt, Chuokee “Joseph” Bo, Kuo Hsuan “Chuck” Chang, Rudolph Silva, Thomas Bishop, and Leslie Gee have agreed to plead guilty to conspiring to rig bids and commit mail fraud at public real estate foreclosure auctions in several counties across Northern California.[44] Anthony B. Joachim of Stockton similarly pleaded guilty to rig bids and commit mail fraud at public real estate foreclosure auctions in San Joaquin County.[45] Joachim had been indicted in December 2011, and was the subject of a superseding indictment in May 2013, along with five other individuals. Joachim is the second of those five to plead guilty; the remaining three are set to begin trial against the DOJ on January 28, 2014. This brings the total number of plea agreements in the Northern District of California to 43, and the number in the Eastern District of California to 11.[46]

In Georgia, Seth D. Lynn and his company, Penguin Properties LLC, each pleaded guilty to conspiring to rig bids and commit mail fraud at public foreclosure auctions. Prosecutors said the purpose of the conspiracy was to suppress and restrain competition and to conceal payoffs in order to buy select real estate sold in Fulton and DeKalb County public foreclosure auctions at non-competitive prices. Lynn and his company are the first in the state to plead guilty to charges stemming from the DOJ’s investigation into bid rigging at public foreclosure auctions in Georgia.[47] Subsequently in December, prosecutors charged Amy James with conspiring to rig bids and commit mail fraud at public foreclosure auctions in DeKalb County.[48] James is expected to plead guilty in late January 2014.[49]

In Alabama, Ali Forouzan pleaded guilty to making materially false and fictitious statements to an FBI agent and a DOJ prosecutor during a 2012 investigation of bid-rigging operations in the state. The false statements regarded Forouzan’s knowledge of and participation in bid rigging schemes in Alabama real estate foreclosure auctions. Forouzan could face up to five years in prison, plus three years of supervised release and a \$250,000 fine.[50] Including Forouzan, nine individuals and two companies have pleaded guilty in the Alabama real estate investigation.

### **c. Tax Lien Auctions**

In New Jersey, the DOJ indicted six investors for their role in a conspiracy to rig bids at municipal tax lien auctions. Four individuals, Joseph Wolfson, Gregg Gehring, James Jeffers, Jr., and Robert Jeffrey, and two entities, Betty Simon Trustee LLC and Richard Simon Trustee, were accused of showing a “blatant disregard for the competitive process” by deciding who would purchase tax liens by “flipping a coin, drawing numbers out of a hat or drawing from a deck of cards” from as early as 1998 to 2009.[51] The DOJ tax auctions investigation has yielded 14 plea agreements and six charged defendants.

## **4. Developments in the Antitrust Division**

### **a. Appointment of Brent Snyder as Deputy Assistant Attorney General**

On November 25, 2013, the DOJ announced that Brent Snyder will serve as the Antitrust Division’s new Deputy Assistant Attorney General for Criminal Enforcement. Snyder was previously a criminal trial attorney with the Antitrust Division in both San Francisco and Washington. Prior to his service at

the DOJ, Snyder was a partner at a major law firm in Seattle. In 2013, California Lawyer magazine named Snyder as a lawyer of the year.[52]

Snyder's predecessor, former Deputy Assistant Attorney General Scott D. Hammond, has joined Gibson, Dunn & Crutcher LLP. Hammond served in the Antitrust Division for 25 years, with the last eight as Deputy Assistant Attorney General responsible for criminal enforcement.[53] Hammond was one of the founding figures of the leniency program. During his tenure, the Antitrust Division greatly expanded its cooperation with foreign competition authorities and achieved new milestones in nearly every category by which enforcers are measured.

## **b. Appointments of Field Office Chiefs**

This past fall, the DOJ appointed Jeffrey Martino to be the new Chief of the New York field office.[54] Martino was previously the Chief of the Financial Crimes and Public Integrity Section, U.S. Attorney's Office, District of Arizona (Tucson), and from September 2002 to February 2011, he was a trial attorney in the Antitrust Division's New York field office.

The DOJ appointed Marc Siegel to be the new Chief of the San Francisco field office. Siegel had been serving as Chief Counsel for Criminal Litigation, and until December 2010 served as the Director of Criminal Enforcement. Siegel was awarded the 2009 Assistant Attorney General's Individual Achievement Award.

Finally, in early fall, the DOJ appointed Frank Vondrak to lead the Chicago field office. Vondrak previously served as Assistant Chief and as a trial attorney in the Chicago office.

## **c. Changes to the Treatment of Individuals**

In our 2013 Mid-Year Criminal Antitrust Update, we reported on two significant changes to the Antitrust Division's policy with respect to the treatment of individuals in investigations involving corporate entities. Typically, the Antitrust Division's plea agreements with corporations included a broad commitment not to prosecute the corporation's employees, but also included a list of the names of individuals who were "carved-out" of the non-prosecution commitment. Under its new policy, the Division will no longer carve out an employee for a reason unrelated to culpability. In other words, going forward, only those employees who are believed to have been involved in criminal wrongdoing and who are potential targets of the investigation will be carved out of the plea agreement. Additionally, the Division will no longer list the names of the individuals in the main text of the plea agreement. Rather, the Division will list the individuals' names in an appendix, which the Division will seek leave of the court to file under seal.[55]

The DOJ has publicly announced several plea agreements finalized under this new practice. As expected, courts have so far permitted the DOJ to file under seal the names of the carved out individuals. Our review of recent plea agreements indicates that the number of individuals carved out has thus far held steady, with recent agreements carving out between two and six individuals.[56] We will continue to monitor whether the adoption of the new policy will significantly affect the number of individuals who are carved out.

## **d. International Cooperation**

### **i. Bilateral and Multilateral Relationships**

Collaboration with foreign competition authorities remains a key principal feature of international cartel prosecutions. In testimony before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights on November 14, 2013, Assistant Attorney General William J. Baer emphasized the importance of international cooperation to the Division's criminal enforcement program and credited the Division's engagement "bilaterally and multilaterally with competition authorities around the world" as a principal reason for the Division's increasing success. Baer cited the current investigation into the auto parts industry as a model of international collaboration. The competition authorities the Division has worked with on the auto parts investigation include the Japan Fair Trade Commission, the European Commission, Canadian Competition Bureau, Korea Fair Trade Commission, Mexican Federal Economic Competition Commission, and Australian Competition and Consumer Commission.<sup>[57]</sup> Baer also noted that during the investigation, the FBI, working closely with other competition authorities, executed search warrants simultaneously with different enforcement authorities throughout the world.<sup>[58]</sup>

### **ii. International Organizations**

The Antitrust Division remains active in the Organization for Economic Cooperation and Development ("OECD") and the International Competition Network ("ICN"), as well as other international organizations designed to facilitate cooperation and deepen relationships among international competition authorities. In his testimony before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights on November 15, 2013, AAG Baer specifically highlighted the Division's participation in these programs.<sup>[59]</sup>

The ICN held its annual Cartel Workshop from October 16 – 18, 2013 in South Africa. At the workshop, former Deputy Assistant Attorney General Scott Hammond gave a special presentation on effective cartel enforcement programs.<sup>[60]</sup> The Cartel Workshop also included work on an Anti-Cartel Enforcement Manual, which is to be a reference tool for antitrust agencies around the globe.<sup>[61]</sup>

## **5. Legislative Developments**

Whistleblower protection in connection with criminal antitrust investigations took a notable step forward in 2013. On November 4, 2013, the U.S. Senate unanimously passed the Criminal Antitrust Anti-Retaliation Act ("CAARA"), a bipartisan bill co-authored by U.S. Senators – and Sarbanes-Oxley whistleblower protection collaborators - Patrick Leahy (D-Vt.) and Chuck Grassley (R-Iowa).<sup>[62]</sup> The bill was approved just days after the Judiciary Committee unanimously reported it to the full Senate. CAARA is based on a 2011 Government Accountability Office report that suggested amending the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") by adding civil whistleblower retaliation protections. Notably, CAARA stops short of providing the kind of *qui tam* and bounty incentives offered to whistleblowers by the False Claims and Dodd-Frank Acts. CAARA was received in the House of Representatives on November 12, 2013 and is currently awaiting consideration.

## B. Canada

Canada continues to take a strong stance against collusion by competitors. In September, the Canadian Competition Bureau (“CCB”) announced it had signed a Memorandum of Understanding (“MOU”) with another government agency, Public Works and Government Services Canada (“PWGSC”). As a team, the CCB and PWGSC will benefit from increased information sharing and greater capacity to promote and enforce competition laws.[63]

In October, the CCB reissued its Immunity Program and Leniency Program Frequently Asked Questions (“FAQs”). The new FAQs include three key changes from previous versions. First, the new FAQs make clear that the CCB expects to receive detailed information about the affected volume of commerce (“VOC”) in Canada, including the “data and sources” used by leniency applicants to calculate the VOC, at the outset of an investigation (i.e., at the proffer stage). The CCB is expected to require this from not only the immunity applicant, but from all leniency applicants. This is a departure from past practice, when such information was typically provided during the cooperation stage after a party’s marker was confirmed. Second, the FAQs explain that in cases of bid rigging, the CCB may take into account “cover” or high bids by a party when determining its fine. Traditionally, such bids were not captured in the fining calculations, as the high bidder normally does not win a request for quotation, and therefore does not have any commerce attributable to that business. Third, the CCB confirmed that it is a cooperating party’s responsibility to perfect its Immunity or Leniency status within the marker period. No extensions will be given unless the party requests them in advance of the deadline. The CCB will not be responsible for keeping track of these timings and will not send reminders to a party. It is the party’s responsibility to keep the marker alive. However, if the CCB seeks to cancel an Immunity or Leniency marker for failure to meet requirements of the programs, it will give the applicant at least 14 days’ notice of the proposed cancellation.[64]

The CCB continued its active prosecutions as well. Hershey Canada Inc. reached the end of a price-fixing investigation of major players in the chocolate confectionary industry. As we reported in our 2013 Mid-Year Criminal Antitrust Update, the CCB had brought criminal charges against Nestle Canada Inc., Mars Canada Inc., and ITWAL Limited, as well as three individuals. Hershey has now pleaded guilty to criminal price fixing, and received a fine of CAD four million (\$3.8 million).[65]

In the airline sector, Cathay Pacific Airways Limited and LATAM Airlines Group S.A. both entered guilty pleas for conspiring to fix fuel surcharges on certain international air cargo transit routes. The companies were fined CAD 975,000 (\$918,000) and CAD 1.5 million (\$1.4 million), respectively.[66]

The CCB also pressed on in its scrutiny of auto parts companies. In April, the CCB imposed fines on Yazaki Corp. CAD 30 million (\$29 million) and Furukawa CAD 5 million (\$4.8 million) for rigging bids in connection with wire harnesses and electrical boxes.[67] In July, the CCB fined JTEKT Corporation CAD 5 million (\$4.7 million) after it pleaded guilty to rigging bids for the supply of bearings. JTEKT received a reduced fine for participating in the CCB’s Leniency Program.[68]

In August, the Quebec Superior Court sentenced three more individuals and an Ontario company for their participation in a conspiracy to fix gasoline prices in local provincial markets. Since the CCB



first announced its investigation of this scheme in 2008, 33 individuals and seven companies have pleaded or been found guilty. Fines have topped CAD 3 million (\$2.8 million).[69]

Finally, in early January 2014, the CCB announced it was ceasing its investigation of alleged collusive conduct in the setting of Yen LIBOR rates “because the evidence collected was insufficient to justify prosecution under the former criminal conspiracy provision in section 45 of the [Competition Act]” which required proof of significant anticompetitive economic effects.[70]

## **C. Mexico**

This past year brought significant changes to the Mexican competition law landscape. In June, the Mexican government ushered in a landmark change, amending Article 28 of the Mexican Constitution to address competition within the Mexican telecommunications sector.[71] While telecommunications law served as the impetus for the amendments, they will end up having an impact across all business sectors.

The constitutional amendment dissolved the country’s Federal Competition Commission (“CFC”) and replaced it with two new constitutionally autonomous agencies: the Federal Economic Competition Commission (“CFCE”) and the Federal Telecommunications Institute (“Ifetel”). The CFCE serves as the sole competition regulator for all sectors of the Mexican economy, except for telecommunications. The creation of the CFCE means that the country’s main competition enforcement agency is no longer subordinate to the nation’s Ministry of Economy and the Executive Branch. The CFCE’s seven commissioners, selected by the President, must be ratified by the Senate, and the only avenue to appeal a final decision of the CFCE will be to file an extraordinary constitutional appeal, also known as an *amparo* or “constitutional protection lawsuit.” An *amparo* may be used, among other things, to review the legality of judicial decisions or to strike down unconstitutional laws.[72]

Ifetel, the specialized telecommunications regulator, will also be independent, and is expected to be aggressive in enforcing competition laws, including those prohibiting cartel conduct. One of the government’s aims in creating Ifetel was to restrain the power of the longstanding quasi-monopolies in the Mexican telephone and media markets. Ifetel has the power to declare a company to be “dominant” in its industry if it has greater than a 50 percent market share, allowing Ifetel to regulate the company more tightly or force the sale of assets.[73]

## **D. Brazil**

As covered in our 2013 Mid-Year Criminal Antitrust Update, Brazil’s National Competition Authority targeted a number of matters involving overseas conduct in 2013, including investigations related to air cargo, marine hose, TFT-LCD and Cathode Ray Tubes (“CRTs”). Brazilian authorities also applied new settlement procedures for the first time.[74]

In the second half of 2013, Brazil’s Administrative Council for Economic Defense (“CADE”) imposed multi-million dollar fines in connection with four investigations. CADE also announced that it had opened three new criminal investigations.

In the largest of these matters, after a six-year investigation, CADE imposed fines totaling BRL 293 million (\$123 million) on four airlines—American Airlines, Alitalia, and Brazil’s Absa and Varig Logistica—for participating in price fixing of air cargo.<sup>[75]</sup> CADE’s fine follows sanctions levied in air cargo-related investigations by the U.S., E.U., Canadian, Japanese, Korean, and Australian authorities. The Brazilian authorities began investigating this matter in 2006 with information obtained from the leniency applications of Lufthansa and Swiss International Airlines. As discussed in our 2013 Mid-Year Criminal Antitrust Update, Air France and KLM signed cease-and-desist agreements accompanied with payments of BRL 14 million (\$6.5 million). American Airlines has announced its intention to appeal the decision, stating that the company is “committed to complying with all antitrust and competition laws.”

In October, CADE sanctioned members of a nationwide domestic fuel cartel, imposing BRL 11 million (\$4.6 million) in fines on 12 gas stations and eight individuals accused of setting prices and coordinating price hikes.<sup>[76]</sup> CADE began investigating the cartel in 2007 and imposed fines of BRL 120 million (\$50 million) on 19 gas stations in March of this year, as reported in our 2013 Mid-Year Criminal Antitrust Update.

Also in October, CADE reached a fifth settlement in its investigation of collusion with respect to marine hoses. The Brazilian authorities charged manufacturers of marine hoses with using a price list to allocate global market share. The latest participant to settle, Parker ITR, agreed to pay BRL 5.1 million (\$2.1 million).

CADE applied its new settlement guidelines for the first time in December, reaching a BRL 1.5 million (\$637,000) deal with Swiss robotics conglomerate ABB Ltd. after the company admitted to participating in a power cable cartel.<sup>[77]</sup> Under the new procedures adopted in March, ABB had to admit to wrongdoing and facilitate CADE’s investigation in order to obtain a lower settlement.

CADE also announced several new investigations in the latter half of the year. The first, announced in September, targets an alleged 20-year cartel of companies that produce over 80% of Brazil’s sea salt.<sup>[78]</sup> The investigation began after evidence emerged that the companies had agreed to limit the production of sea salt following a drop in the commodity’s value.

In October CADE opened a formal investigation of two food and beverage companies, Nestlé and Unilever Brazil, for alleged use of anticompetitive agreements in the ice cream market.<sup>[79]</sup> The companies are accused of entering into exclusivity contracts with retailers, forbidding retailers from storing rival products in freezers provided by Nestle or Unilever, and imposing minimum sales targets.

In December, CADE announced investigations of alleged price fixing of large-sized TFT-LCD panels and of CRTs. This investigation follows on similar investigations in the U.S., the E.U., Japan, Korea, and elsewhere.

## **E. Chile**

September was a historic month for Chile’s four-year-old leniency program, when the nation’s Supreme Court affirmed the first successful prosecution resulting from a leniency application. Chile’s

Competition Tribunal (“TDLC”) had ruled against a subsidiary of Whirlpool for its alleged involvement in collusion related to refrigerant compressor manufacturers.[80] The Supreme Court affirmed the TDLC’s judgment, but cut the fine in half, from 10.5 million annual Chilean tax units (\$10.5 million) to 5 million annual Chilean tax units (\$4.9 million). The FNE began investigating the matter after Tecumseh applied for leniency and supplied evidence of competitor communications.[81]

The Supreme Court’s decision clarified that Chile’s Competition Act (Decree Law No. 211) can reach anticompetitive acts that take place beyond the nation’s borders if they directly affect the national market.[82] Although the case involved foreign companies operating in Brazil, the Supreme Court affirmed the jurisdiction of Chilean courts because the acts affected customers in Chile.

## **F. Colombia**

The Superintendence of Industry and Commerce (“SIC”) imposed a record fine of COP 30 billion (\$16 million) on six people and three companies for colluding to win government contracts.[83] Members of the Colombian conglomerate Nule Group allegedly simulated competition and manipulated selection criteria in order to win public contracts from the Colombian Institute of Family Welfare. The SIC applied identical penalties of COP 5.2 billion (\$2.8 million) to two companies as well as three company executives—cousins Manuel, Miguel, and Guido Nule. This marks the first time the authority has fined natural persons as market actors, which allowed the SIC to apply fines double what would otherwise be the maximum penalty for individuals.

The SIC also opened an investigation of five cement manufacturers and 14 of their employees over allegations of price fixing and market division.[84] Targeted companies include Mexico-based Cemex and Cementos Argos, one of the largest cement producers in South America. Should the investigation result in charges, the companies could face fines up to COP 59 billion (\$30 million).

## **G. El Salvador**

The Salvadoran legislature is currently considering significant reforms to its competition laws that would allow regulators to address a wider variety of anticompetitive conduct. Notable among the proposed reforms is the conferral of criminal law enforcement power to competition regulators. Currently, regulators may levy only civil penalties.[85]

## **II. EUROPE**

### **A. European Commission**

#### **1. European Commission Enforcement and Fines**

The European Commission (“EC” or “Commission”) has followed its bumper 2012 year (2012 *Criminal Antitrust Update*) with another year of vigorous antitrust enforcement. 2013 has seen the Commission impose fines amounting to over €2.1 billion (\$2.8 billion) in seven separate cases covering a wide range of industries.

As discussed in our 2013 Mid-Year Criminal Antitrust Update,<sup>2</sup> through early July, the Commission had amassed a total of €367 million (\$488 million) in cartel fines in three industries, Iberian telecommunications,<sup>[86]</sup> pharmaceuticals,<sup>[87]</sup> and wire harnesses.<sup>[88]</sup> Also, in March, the Commission issued a second Statement of Objections to ENI S.p.A. and Polimeri Europa S.p.A (now Versalis S.p.A.) noting that it intended to re-impose a 50% fine enhancement on two parties for recidivism in the synthetic rubber cartel. This came after the General Court of the EU (“General Court”) nullified an earlier fine uplift for recidivism on the ground that the Commission had not relied on sufficient evidence to support its finding.<sup>[89]</sup>

**Fines Levied by the European Commission  
(in millions) (2008-2013)\***

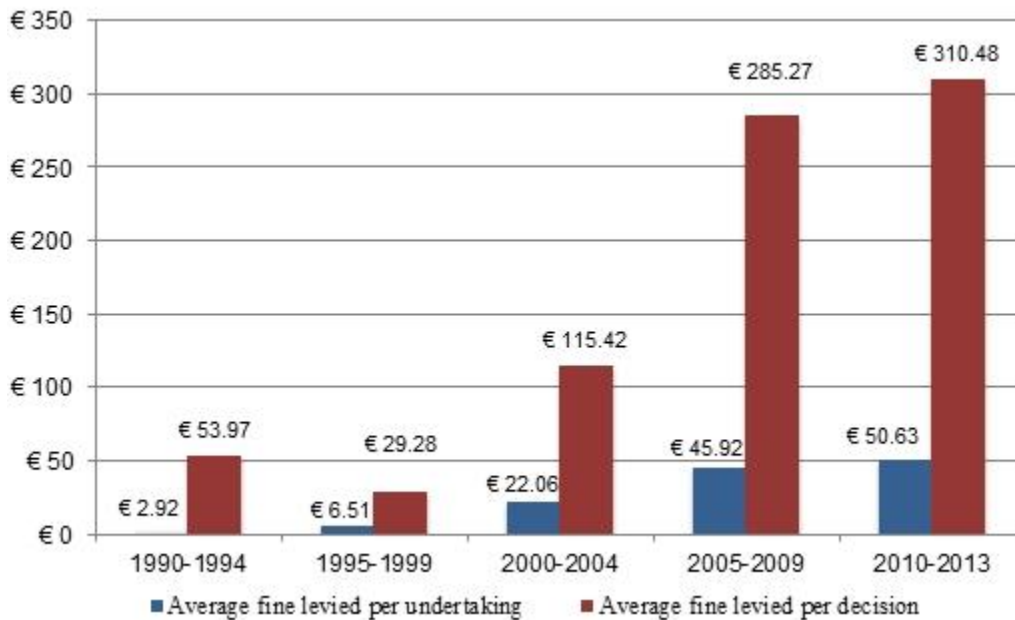


*\*\* For the purposes of calculating the Total Fines Levied, a decision includes any investigation conducted under Article 101 TFEU that resulted in a fine. As per the methodology used by the Commission, such figures do not take into account subsequent Court of Justice judgments adjusting imposed fines.*

The Commission followed these enforcement efforts with a very active second half of the year, which saw four more decisions, including the imposition of fines totaling €1.71 billion in the LIBOR investigation.<sup>[90]</sup> With additional fines in the shrimping industry<sup>[91]</sup> and a second decision in the pharmaceutical sector,<sup>[92]</sup> 2013 has proved to be one of the most far-reaching and impactful years in the history of EU antitrust enforcement.

Thus, 2013 continues both the recent trend of higher total fines and the longer-term trend of increased average fines per matter and per company fined.

## Average Fines Levied by the European Commission



\* For the purposes of calculating the Average Fines Levied per matter and per undertaking, an average for each year within a period was taken for both figures, from which the overall average was calculated (in order to ensure no one year biases the overall average for a given period). In calculating the individual averages for each year, the overall fine imposed was divided by the number of decisions and the number of undertakings (including any immunity applicants) in that year respectively.

Furthermore, throughout 2013 the EC has continued to use the negotiated settlement procedure introduced in 2008, reaching its seventh, eighth, and ninth settlements—wire harnesses, EURIBOR, and Yen LIBOR, respectively.

The fines imposed by the EC during the second half of 2013 are as follows:

### a. LIBOR AND OTHER BENCHMARK RATES

In December, the Commission issued the largest fine in the Commission’s history amounting to €1.71 billion (\$2.3 billion) against eight international financial institutions in connection with manipulation of interest rate benchmarks.<sup>[93]</sup> According to the Commission, the financial institutions colluded to manipulate the LIBOR and EURIBOR benchmarks by which the value of interest rate derivatives (e.g., forward rate agreements, swaps, futures, options) are calculated. Four of these institutions participated in conduct relating to interest rate derivatives denominated in euro. Six of them participated in one or more bilateral arrangements relating to interest rate derivatives denominated in Japanese

yen. Commission Vice-President Almunia said that the fines imposed would send a clear message that the Commission is determined to fight and sanction collusion in the financial sector.[94]

Both decisions were adopted under the Commission’s settlement procedure (the eighth and ninth settlement decisions since the introduction of the settlement procedure in 2008). Almunia, in announcing the fines, stated that these are two of the swiftest settlements that the Commission has concluded since the introduction of the settlement procedure in 2008. Four of the parties involved in the investigation of these matters (Credit Agricole, HSBC, JP Morgan Chase and ICAP) did not settle and the Commission’s investigation will continue against these companies.[95] The move has led some commentators to question the efficiency of the so-called ‘hybrid-settlement’ process—in which some, but not all, suspects settle.[96] Nonetheless, the Commissioner has indicated that the Commission is “determined to pursue all those who may have been involved” in these matters and to ensure that they “receive the adequate sanction.”[97]

The LIBOR fines were set on the basis of the 2006 Fining Guidelines and adjusted to take into account the bank’s value of sales within the European Economic Area (“EEA”), the serious nature of the infringements, their geographic scope and respective durations. In addition to the reductions granted under the Commission’s Leniency Programme (as specified in the tables below), the companies received a 10% reduction in fines for agreeing to settle the case. The fines imposed were as follows:[98]

## Euro Interest Rate Derivatives

Participants	Duration of Participation	Reduction under the Leniency Notice	Fine (€)
Barclays	32 months	100%	0
Deutsche Bank	32 months	30%	465,861,000
Société Générale	26 months	5%	445,884,000
RBS	8 months	50%	131,004,000
<b>Total</b>			<b>1,042,749,000</b>

Barclays received full immunity as the leniency applicant, and thereby avoided a fine of around €690 million (\$937 million). The Commission has opened proceedings against HSBC, Credit Agricole, and JPMorgan.

## Yen Interest Rate Derivatives

Participants	Duration of Participation	Reduction under the Leniency Notice	Fine (€)
UBS (5 infringements)	1 month, 8 months, 5 months, 10 months, 1 month	100% for all infringements	0
RBS (3 infringements)	8 months, 5 months, 3 months	25% for one infringement	260,056,000
Deutsche Bank (2 infringements)	10 months, 2 months	35%, 30%	259,499,000
JPMorgan (1 infringement)	1 month	0	79,897,000
Citigroup (3 infringements)	1 month, 2 months, 3 months	35%, 100%, 40%	70,020,000
RP Martin (1 infringement)	1 month	25%	247,000
<b>Total</b>			<b>669,719,000</b>

UBS received full immunity for reporting its conduct thereby avoiding a fine of approximately €2.5 billion (\$3.3 billion). Citigroup received immunity for one of the infringements, thereby avoiding a fine of approximately €55 million (\$74.7 million). The Commission has opened proceedings against the broker, ICAP.

### b. Shrimp

In November, the EC imposed fines amounting to €28.7 million (\$39 million) on four European North Sea shrimp traders for operating a cartel to fix prices and share sales volumes of North Sea shrimp in Belgium, France, Germany, and the Netherlands.<sup>[99]</sup> The EC observed that the purpose of the collusion was to freeze the market by stabilizing the suppliers' market shares in order to facilitate price increases. This took the form of a range of informal bilateral contacts during which various aspects of the parties' businesses were discussed. Commission Vice-President Almunia said it was astonishing that the shrimp traders frequently discussed detailed commercially sensitive information, despite having recently been warned via a previous conviction by the Dutch Competition Authority.

The Leniency Notice was invoked with respect to only one trader, Klaas Puul, who received a 100% reduction for being the immunity applicant. For most of the parties, North Sea shrimp constituted a large fraction of their turnover and so (absent any reductions) the fines for all parties would have hit the 10% total turnover cap, the legal maximum provided for under EU antitrust rules. Therefore, in a rare move, the Commission exercised its discretion under the fining guidelines to depart from the

standard methodology and reduced the fines for two parties to take into account the characteristics of the companies and their differing participation in the infringement. As a result, the fines on two of the companies were significantly below the legal maximum.[100]

### **c. ‘Pay-for-delay’ in the Pharmaceutical sector**

2013 has seen further fruits from the Commission’s intensive scrutiny of the pharmaceutical sector following its 2009 sector inquiry into delayed market entry of cheaper generic drugs.[101] In 2013, the Commission made two separate decisions fining pharmaceutical manufacturers for engaging in pay-for-delay tactics to prevent or delay generic market entrants.

As reported in our 2013 Mid-Year Criminal Antitrust Update, the EC imposed fines of €93.8 million (\$124.8 million) on Danish pharmaceutical company Lundbeck and a further €52.2 million (\$69.4 million) on several generic producers, for agreeing to delay the entry of Lundbeck’s branded antidepressant drug Citalopram. More recently in December, the EC concluded its investigation into U.S. pharmaceutical company Johnson & Johnson (J&J) and Swiss generic producer Novartis, fining the parties €10.8 million (\$14.4 million) and €5.5 million (\$7.3 million), respectively, for delaying the entry of J&J’s patented cancer drug Fentanyl in the Netherlands.[102]

These fines can be viewed as a crackdown by the EC on deals between drugmakers and a clear signal that the Commission will continue to take a tough stance against pay-for-delay tactics.[103] As Vice-President Almunia stated, the fines are intended to send a strong message that it is unacceptable for a company to pay off its competitors to stay out of its market. The EC has two further ongoing investigations involving Teva and its subsidiary Cephalon,[104] and privately owned French drug maker Servier.[105]

## **2. The Courts’ Views on the Commission’s Fines**

During 2013, the General Court or Court of Justice of the EU (“Court of Justice”) upheld a number of significant fines, including those in relation to high-profile EC decisions, such as Removals Services,[106] Elevators and Escalators,[107] Bitumen,[108] and Gas Insulated Switchgear.[109] However, the Court of Justice upheld the General Court’s previous annulment of the EC’s fine on Aalberts for collusion with respect to copper fittings.[110]

In these cases, the courts in 2013 confirmed a number of important principles with regard to enforcement, including confirming that the EU competition procedures conform with the protections of the European Convention of Human Rights, addressing the standards for parental liability, and considering the scope of rights and protections applicable to a dawn raid.

In July, in *Commission v. Aalberts Industries NV & Others*, the Court of Justice delivered one of its most important rulings in recent years. That appeal concerned a 2011 ruling by the General Court regarding the Dutch company Aalberts. In 2011, the General Court had annulled the fine imposed on Aalberts for allegedly fixing prices, exchanging commercial information, and allocating markets in the sector for copper fittings between June 2003 and April 2004 on the grounds that, although the company’s subsidiaries participated in meetings during which other companies colluded to restrict



competition, there was not enough information on the file to justify the imposition of a fine on the parent company on a theory of imputed liability. The Court of Justice upheld the ruling by the General Court in its entirety.[111] The decision is therefore noteworthy as because it reduces the ability of the European Commission to impose fines on parent companies for actions undertaken by their subsidiaries.

In the *Dow Chemical* case, the Court again spoke on the scope of parental liability.[112] Specifically, the Court of Justice upheld the General Court's ruling that Dow Chemical and El DuPont were jointly liable for the conduct of their 50/50 owned subsidiary, DDE, in the rubber cartel of 2007. (The General Court's ruling was discussed in our 2012 Year-End Criminal Antitrust Update). This case marks the first time the EC applied the rules on parental liability to owners of a fully functioning joint venture. In another Court of Justice judgment in July 2013, Dow Chemical lost its appeal arising out of the Commission's butadiene rubber decision, again on the basis of parental liability.[113] In its judgment, the Court of Justice agreed with the General Court that the EC could have decided to absolve Dow Chemical only if there were objective reasons for departing from the well-settled principles of imputed liability and if such a departure would not have led to preferential treatment for Dow Chemical as compared with the other parent companies involved in the infringement. The Court of Justice held that this condition was not met and that the fact that Dow Chemical faced the possibility of civil action in the U.S. was irrelevant to this question.

2013 also saw the Court of Justice address the compatibility of EU competition enforcement procedures with "fundamental rights" under the European Convention on Human Rights ("ECHR"). In *Schindler Holding v. Commission*, Schindler Holding Ltd. and several of its group companies appealed a Commission decision finding that several national subsidiaries participated in an infringement on the market for the sales, installation, maintenance and modernization of elevators and escalators.[114] Schindler raised a number of arguments regarding breach of fundamental rights, including that the procedures infringed the principle of separation of powers applicable to criminal proceedings under Article 6 of the ECHR. The Court of Justice rejected every one of those arguments. The ruling thus effectively ends the debate as to whether the roles of prosecutor and enforcer in competition law can both be vested in the Commission simultaneously. The Court of Justice confirmed that the principle of effective judicial protection was upheld through the unlimited jurisdiction of the EU Courts. In this latter respect, the Court emphasized that the EU Courts "cannot use the Commission's margin of discretion ... as a basis for dispensing with the conduct of an in-depth review of the law and of the facts." The *Schindler* case may therefore have potentially sweeping consequences as regards the deference traditionally accorded by the European Courts to assessments by the Commission "of an economic nature" in the context of a decision.

The EC also received a boost to its antitrust enforcement capabilities with the General Court upholding its crucial ability to inspect corporate premises in *Deutsche Bahn AG & Others*. Rail operator Deutsche Bahn had challenged raids carried out in relation to abusive pricing in the locomotive electricity sector, arguing that the EC should obtain prior judicial authorization before conducting an inspection. Deutsche Bahn further argued that the Commission had gone beyond the limits of its search powers in obtaining documents beyond the scope of its investigation. The General Court

affirmed the EC's position that inspections do not require prior judicial authorization and that inspectors are entitled to conduct a wide and thorough search for evidence.[115]

Finally, as discussed in our 2013 Mid-Year Criminal Antitrust Update, in *Fluorsid SpA & Minmet Financial Co. v. Commission*, the General Court upheld the Commission's 2008 decision to impose a €4.97 million fine (\$6.39 million) on members of an aluminum-fluoride cartel. In so doing, the Court addressed the sufficiency of evidence underlying that decision. Ultimately, the General Court dismissed Fluorsid & Minmet's appeal in its entirety and held that the Commission had met the legal standard to prove the existence of the cartel by relying on a report of a meeting where the alleged cartelists agreed to increase prices by 20%.[116]

### **3. Legislative Developments at the EU level**

Legislative developments in 2013 concerning cartel enforcement have focused on the hotly debated draft Directive on Antitrust Damages Actions to facilitate private actions at a national level against infringers of EU competition law.[117] The legislation aims at harmonizing national regimes and, if adopted, will remove obstacles created by divergences between national laws and make it easier to bring private claims against antitrust infringers in EU Member State courts. Further, and to avoid undermining the EC's Leniency Programme, the draft Directive proposes safeguards to protect leniency applications and settling parties against the disclosure of key submissions made to antitrust authorities.[118] In particular, the draft Directive provides that leniency statements and settlement submissions cannot be subject to an order for disclosure. It also provides various safeguards limiting disclosure of other documents in the Commission's file. For more details on the Commission's proposal, see our [European Commission Takes First Steps Towards EU Antitrust Damages Claims Client Alert](#).

The draft Directive faced some initial difficulties, as various committees tussled over their role in the legislative process.[119] However, in early December the Council of the European Union adopted its general approach on the Commission's proposal, following the compromise proposal put forward by the European Parliament. The proposal is broadly the same as the draft proposed by the Commission, with two main differences highlighted by the Council. First, the compromise proposal is less prescriptive as to the methods for Member States to secure protection against disclosure of documents that have been obtained through access to the file. Importantly, the compromise proposal retains absolute protection from disclosure for leniency statements and settlement submissions. Second, and potentially even more significant, the compromise proposal amends the EC's proposed protections for immunity applicants.

The Commission's proposal protects immunity applicants in subsequent litigation in two important ways. First, companies who have sought and obtained immunity from the Commission would not face joint and several liability for damages; rather they would be liable only to their own direct or indirect customers (although they may face liability from other injured parties if full compensation cannot be obtained from other conspirators). Second, companies benefiting from immunity would generally be liable only for the harm caused by their share of sales and not for the harm caused by their co-conspirators. Under the compromise proposal, while the exclusion from the application of joint and

several liability is retained for immunity applicants, the cap proposed by the Commission (namely the amount of contribution of an immunity applicant at the harm it caused to its own direct or indirect purchasers or providers) has been removed.

The revised proposal now appears to be on track for agreement in the first reading early in 2014.

#### **4. EC Raids and On-Going Investigations**

The Commission has also been active in pursuing new investigations, with several unannounced inspections taking place during the year. In addition to inspections conducted in the first half of the year at companies' premises in the sugar,[120] oil,[121] biofuel,[122] cargo train transport,[123] and telecommunication sectors,[124] the Commission has conducted further raids in relation to possible online sales restrictions in consumer electronic products. The most recent inspection was carried out by the Commission in December at the premises of a number of companies active in the manufacture, distribution, and retail sale of consumer electronic products and small domestic appliances. The Commission is concerned that these companies may have colluded to restrict the online sales of these products.[125]

In 2013, the Commission issued Statements of Objections or opened formal antitrust proceedings in relation to smart card chips,[126] container liner shipping,[127] and the financial sector.[128] In April, the EC informed a number of suppliers of smart card chips of its intent to investigate whether certain chip suppliers may have coordinated in order to keep prices artificially high. After initially agreeing to explore the possibility of a settlement with the companies involved, the Commission discontinued talks due to lack of progress.[129]

The Commission followed this in November with the issuance of a further Statement of Objections into whether several container liner shipping companies engaged in a concerted practice to fix prices. According to its press release, the Commission is particularly concerned that companies' practices of making regular public announcements of their price increases are being used to signal future price intentions to each other in contradiction of EU antitrust rules.[130]

As discussed in our 2013 Mid-Year Criminal Antitrust Update, the EC continues its scrutiny of the financial sector with its investigation into the Credit Default Swaps ("CDS") market and the International Swaps and Derivatives Association ("ISDA"), an association of financial institutions involved in over-the-counter trading of derivatives. In July the EC issued a Statement of Objections to 13 of the world's largest investment banks including Bank of America, Merrill Lynch, Barclays, BNP Paribas, Bear Stearns, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan, Morgan Stanley, Royal Bank of Scotland, and UBS, as well as ISDA and data service provider Markit.[131] Additionally, in October Competition Commission Vice-President Almunia announced that the EC was looking into alleged manipulation in the €5 trillion-a-day (approximately \$8.2 trillion-a-day) foreign exchange market.[132]

## 5. International Cooperation

In 2013, the EU signed two bilateral cooperation agreements; one with Switzerland and one with India. The EU and Switzerland Agreement, signed in May 2013, strengthens cooperation between the EC and the Swiss Competition Commission. The Agreement allows the two competition agencies to coordinate and cooperate in enforcement policies and activities. Further, unlike other cooperation agreements, it allows them to exchange information and evidence gathered during their investigations, subject to strict conditions protecting business secrets and personal data. Under the agreement, the EU and Switzerland may request the other party to start enforcement actions against anticompetitive behavior carried out in the territory of the other party and both sides have to take into account the important interests of the other party.[133]

The EU and India Agreement, signed in November 2013, allows the two competition agencies to engage in discussions on competition legislation, share non-confidential information on legislation, enforcement, multilateral competition initiatives and advocacy, and engage in technical cooperation regarding competition legislation and enforcement. It also provides that one agency may request the other to carry out enforcement activities, if one believes that anticompetitive actions are being carried out in the territory of the other, and provides a mechanism to avoid enforcement conflicts.[134] This follows the recent agreement between the United States and India, discussed in our 2012 Year-End Criminal Antitrust and Competition Law Update.

### B. EU Member States

#### 1. Legislative Developments

As mentioned in our 2013 Mid-Year Criminal Antitrust Update the European financial crisis has continued to affect national competition law enforcement, with many jurisdictions tightening the purse strings and making resource savings where possible.[135] Several countries, including Austria, Belgium, the Czech Republic, Finland, Germany, Greece, the Netherlands, Spain, and the UK have recently reformed, or are in the process of reforming, their antitrust/competition law agencies to expedite procedures, reduce costs, and increase effectiveness with the aim of optimizing resource allocation.

Additionally, changes enacted at the national level in areas such as leniency, *de minimis* thresholds, and information gathering, have further bolstered the effectiveness of the European Competition Network (“ECN”). In December 2013, the ECN itself published a set of ECN Recommendations on key investigative and decision-making powers for competition authorities in the Network, ranging from inspection powers, requests for information, priority setting, and interim measures to commitments and structural remedies.[136] During 2013, new or revised guidance on leniency or penalties was published by Malta (draft leniency guidance),[137] Germany (penalties guidance),[138] Portugal (penalties guidance),[139] Hungary (leniency guidance),[140] and the UK (leniency guidance).[141]

## a. Austria

The amended Austrian Competition Act entered into force on March 1, 2013, and aims to enhance the efficiency and effectiveness of competition law enforcement. To a large extent the reform aims at harmonizing Austrian antitrust enforcement with the European framework. One particular element of this approach concerns new *de minimis* exemption thresholds for antitrust infringements—these have been matched with the EU *de minimis* antitrust notice (10% combined market share for horizontal and 15% combined market share for vertical arrangements). Also, the rules for fine calculation have been adapted to bring domestic law more in line with the EU fining guidelines. In particular, they now contain more detailed provisions concerning aggravating and mitigating circumstances.

Another key element of the reform is the provision of extended investigation powers for the Federal Competition Authority (“FCA”). For instance, the FCA may now issue formal information requests and impose fines for non-compliance of up to €75,000 (\$100,000). The rules governing the search of premises have also been extended in scope and give the FCA the power to demand explanations of facts and documents which are subject to the investigation as well as to demand access to electronic documents. Additionally, the FCA received an express right to seal rooms during the course of investigations. Finally, the Austrian leniency program has been adapted and drafted more closely to the ECN model leniency program. Parallel leniency applications that include Austria are thereby made easier for potential applicants.<sup>[142]</sup>

## b. Belgium

The amended Belgian Competition Law was adopted in April 2013 and reformed the Belgian Competition Authority (“BCA”) into a fully independent single enforcement body with three regulatory organs and an independent budget. The new BCA commenced operations in late August and in November submitted its first draft decision in a case involving restrictive practices on the part of Electrabel (GDF Suez) in the electricity sector.<sup>[143]</sup> All procedures are now designed to be significantly shortened—the investigatory phase is limited to two years and the decision-making phase to one year. In addition, the BCA will have more powers, including the power to negotiate and accept settlements during the investigatory phase.<sup>[144]</sup>

The new Belgian Competition Law also introduced penalties against “natural persons.” Individuals who participate in “hardcore” cartel infringements may be liable for an administrative fine of €100 to €10,000 (\$128 to \$2,800).<sup>[145]</sup>

## c. Denmark

Denmark’s revised Competition Act provides for expanded criminal sanctions against individuals for cartel activities from March 2013. An individual may be imprisoned for up to 18 months for cartel participation if the infringement was intentional and is of a serious nature. In addition, the level of fines has been increased to DKK 4 million (\$708,500) for a minor offense and DKK 20 million (\$3.45 million) and upwards for a “very serious infringement.”<sup>[146]</sup>

## **d. Finland**

On January 1, 2013, the Finnish Competition Authority and the Finnish Consumer Agency merged into one super-regulator, the Finnish Competition and Consumer Authority (“FCCA”). It is hoped the reform will significantly increase the administrative efficiency of competition enforcement in Finland.[147]

## **e. Germany**

The German Act against Restraints of Competition (“ARC”) was significantly amended in June 2013 when its 8th amendment came into force. Besides several changes concerning the areas of merger control and unilateral conduct, the reform also has a significant influence on antitrust law enforcement in Germany. Cartel infringers are now obliged to report their turnover to the Federal Cartel Office (“FCO”) for fine calculation purposes. Previously, the FCO lacked the power to issue information requests for this purpose and, therefore, frequently had to launch dawn raids in order to obtain relevant data. Additionally, under the revised ARC, where companies undergo at least partial succession in law, the FCO may impose a fine on the successor of the antitrust infringer. The fine may, however, not exceed the amount of the original fine imposed prior to the succession in law.

As reported in the 2013 Mid-Year Criminal Antitrust Update, in June 2013, the FCO also published new fining guidelines.[148] These guidelines followed a judgment of the Bundesgerichtshof (Federal Court of Justice) that the 10%-of-turnover limit for cartel fines should not be regarded as a capping threshold, but as the maximum value for the possible range of fines.[149] The 10%-of-turnover limit is now applied as a sanction for the worst possible antitrust infringement. Key factors for calculating fines according to the new guidelines are the company’s group turnover and the turnover that was achieved in the market in which the anticompetitive practice took place for the duration of the infringement. In comparison to the old regime, the new guidelines focus on the size of the company. As a consequence, it can be expected that large conglomerate companies may face significantly higher fines in the future, while fines for smaller single-product companies are likely to decrease.

## **g. Netherlands**

The Dutch Competition Authority (“NMa”), the Independent Post and Telecommunications Authority, and the Dutch Consumer Authority merged on April 1, 2013, creating a new “super-regulator” called the Authority for Consumers and Markets (“ACM”). The merger of the three authorities into a single independent authority is aimed at significantly increasing the effectiveness and efficiency of market supervision in the Netherlands. In terms of its organizational structure, the ACM puts a strong emphasis on sector specialization. To carry out its regulatory tasks, the ACM will have one specialized department for energy markets and another for telecommunications, transport, and postal services. Antitrust enforcement can, however, be expected to be carried out mainly by the general Competition and Legal Departments.

The ACM also published a strategy document setting out its key priorities for the next years.[150] Notably, the ACM said that it intends to take long-term effects on consumer welfare into

account. This may suggest that the ACM will be more open to considering effects on innovation, product choice, and market structure than if it focused only on short-term effects on consumer welfare (most importantly prices). The strategy document also says that public interests such as environmental protection will be part of the ACM's analysis. This may leave room for more flexible arguments when parties seek to justify horizontal cooperation.

## **h. Spain**

After more than a year of debate and criticism from different sources, including the European Commission, the Spanish parliament created a new “super-regulator,” the National Commission for Markets and Competition (“CNMC”).<sup>[151]</sup> The CNMC, which started functioning on October 7, 2013, brings together the Spanish National Competition Authority (“CNC”) and seven sectoral regulators (including, among others, those responsible for stock exchanges, telecommunications and energy sectors) into one new institution led by a Board of 10 members. The CNMC has four sector-specific investigatory teams: Competition, Telecommunications and Audiovisual, Energy, and Transport and Post. The new Authority will be obliged to publish all decisions and orders once notified, with its decisions being subject to appeal before the Chamber for Contentious Administrative Proceedings of the National High Court (“Audiencia Nacional”). The formation of the CNMC is expected to bring annual savings of €28 million (\$37 million), as well as better oversight and supervision.

The CNC also issued a new Communication regarding its Leniency Program<sup>[152]</sup> replacing the one provided at the beginning of 2009; while the new Communication pre-dated the creation of the CNMC, it will be applicable to the CNMC (although as a Communication, it is not binding on the regulator). This new Communication is intended to enhance the transparency and predictability of its actions in cartel investigations by clarifying the steps that applicants must take to receive leniency.

## **i. UK**

2013 saw the UK's competition enforcement regime undergo a significant structural overhaul by virtue of the Enterprise and Regulatory Reform Act 2013 (“ERRA”), which merges the current Competition Commission and Office of Fair Trading (“OFT”) to create a new single Competition and Markets Authority (“CMA”). The CMA will be responsible for merger control, market studies, market investigations, administrative investigations into cartels and other breaches of the Competition Act, and for prosecutions of the criminal cartel offence. The CMA will function fully starting on April 1, 2014, and will remain independent of Ministerial control. In the areas of cartel enforcement and competition investigations, the CMA will have increased investigative powers compared to the OFT, including compulsory interview powers for current and former employees of companies under investigation and the ability to impose financial penalties for failure to comply with investigative steps.

The ERRA makes a number of changes designed to remove current difficulties with prosecuting individuals under the criminal cartel offence. The key change is elimination of the requirement to prove that the individual acted “dishonestly.” To alleviate concerns that this change would criminalize legitimate conduct, the Act provides for a number of specific defenses and excludes from the scope of

the offence arrangements that are notified to customers or published in the prescribed way. Prosecutorial guidance will be published and subject to consultation before the changes become effective.

In July 2013, the OFT published its revised leniency guidance, which provides greater clarification on the rights and obligations of applicants under the UK leniency program.<sup>[153]</sup> Significantly, following concerns raised during the consultation on the revisions to the guidance, the OFT confirmed that it will not require waivers of legal professional privilege as a condition of leniency in either civil or criminal investigations. However, the OFT will require a review by independent counsel of material over which privilege is claimed unless the position is clear and uncontroversial. The OFT will select, instruct, and fund the independent counsel on a case-by-case basis. The OFT may also inquire whether an immunity applicant may be prepared to waive privilege voluntarily during the course of a possible criminal cartel prosecution but will treat any response neutrally (i.e., without either adverse consequences or additional advantage being tied to the waiver decision).

More broadly on the legislative front, the UK Government's reform of the private actions regime continued in 2013, with the publication in June of a draft Consumer Rights Bill that includes provisions on private actions in competition law. Key aspects of the Bill are the extension of the jurisdiction of the Competition Appeal Tribunal ("CAT") to hear standalone claims and the creation of a limited opt-out regime for collective claims (with safeguards, including a prohibition on exemplary or treble damages-type collective claims). The Government decided to create a limited opt-out regime because the previous opt-in regime had not been successful. In this respect, the UK goes significantly further than the EC proposed Directive. The Bill is currently going through the parliamentary process.

June also saw the UK Government launch a consultation on streamlining regulatory and competition appeals. This consultation raised the possibility of significant changes to the competition appeals regime, including potentially moving the review standard from "full merits" review to judicial review and limiting the grounds of appeal or circumstances in which new evidence can be admitted on appeal. Other possible changes include the introduction of target timescales for appeals and methods to keep oral hearings to a minimum. The consultation has provoked a lively debate, with the CAT submitting a response to the consultation document strenuously objecting to any changes to the standard of review.<sup>[154]</sup> A Government response is expected to be published in early 2014.

## **2. Enforcement Highlights in EU Member States and Switzerland**

### **a. Belgium**

On August 30, 2013 (prior to the establishment of the new Belgian Competition Authority), the Belgian Competition Council found that all three large Belgian cement producers, their trade association, and the National Centre for Technical and Scientific Research for the Cement Industry had infringed Article 101 TFEU and the national equivalent by conspiring to delay the adoption of an industry standard regarding the use of a particular ingredient in ready-mix concrete.<sup>[155]</sup> The Council imposed a fine of €14.7 million (\$20 million), its third largest fine.



## b. France

The French Autorité de la concurrence (“Autorité”) remained very active in 2013 and imposed significant fines.

On February 13, 2013, following a complaint from pig farmers and the opening of *ex officio* proceedings, the Autorité imposed fines totaling €4.57 million (\$6.2 million) for several anticompetitive practices implemented in the pork slaughtering and commercialization sector.[156] Some of these practices were brought to light after several dawn raids of companies and professional organizations were carried out by the Autorité’s investigation services.

In April 2013, following *ex officio* proceedings, the Autorité fined four companies of the Eiffage Group and Vilmor Construction a total of €965,000 (\$1.3 million) for entering into an anticompetitive agreement within the framework of a public procurement. An investigation demonstrated that the companies had exchanged information before submitting their individual bids in order to make one company’s bid look more attractive. The fine imposed on the Eiffage Group was increased by 30% for recidivism; the Autorité granted Vilmor Construction a reduction in its fine in light of the fact that the company was experiencing financial difficulties.[157]

In May 2013, the Autorité fined the four major distributors of commodity chemicals operating in France (Brenntag, Caldic Est, Univar and Solvadis), a total of €79 million (\$107 million) for allocating customers among the parties and coordinating prices. Solvadis, which was the first to report the violation to the Autorité and had applied for leniency, was granted immunity from fine; Brenntag and Univar, the second and third applicants for leniency, had their penalties reduced by 25% and 20% respectively under the leniency procedure.[158]

In addition to its anti-cartel enforcement, the Autorité also adopted a number of opinions regarding the functioning of several markets, including the press, mobile virtual network operators, the pooling of mobile networks, the wholesale market for leased lines, natural gas, the online sale of medicinal products, social electricity and gas prices, wholesale voice call (fixed and mobile) and SMS termination markets and the interregional coach transport sector.[159] Opinions such as these usually mark the beginning of more comprehensive investigations into the referenced sectors.

Finally, in two decisions rendered on November 27, 2013, the French Supreme Court (*Cour de cassation*) referring to the European decision (CJCE 17 October 1989, *Dow Chemical Ibérica*), ruled that attorneys representing an entity which is subject to a dawn raid by the Autorité shall have the right to access the inspected premises, to make comments or respond to questions and to review the documents before they are copied or seized.[160]

## c. Germany

2013 saw very high fines imposed by Germany’s Federal Cartel Office (“FCO”), with antitrust enforcement fines totaling approximately €240 million (\$314 million). The FCO’s activity in 2013 concentrated on confectionary production, flour production, consumer goods, and railways.

In January 2013, the FCO imposed fines of approximately €60 million (\$79.8 million) on 11 confectionary manufacturers and their distributors for several infringements.<sup>[161]</sup> The infringements mainly concerned price-fixing agreements and information exchange for chocolate products following price increases for raw materials such as milk and cacao. Mars GmbH received full immunity from fines under the FCO's leniency program, and the majority of the others involved in the infringements settled.

In February, the FCO concluded its investigation into a flour mill cartel and imposed a total fine of more than €41 million (\$55 million) against 22 companies, a trade association and their respective representatives.<sup>[162]</sup> An additional €24 million in fines (\$32 million) had already been imposed in 2012. The cartel involved price fixing, customer allocation and capacity constraints. In calculating the fines, the FCO took into account the companies' economic viability in light of heavy fines already imposed by the French and Dutch Competition Authorities for similar practices in their respective jurisdictions.<sup>[163]</sup>

In March, the FCO sanctioned two different anticompetitive information exchanges. The first case concerned an information exchange on prices, rebates and negotiations with customers between six manufacturers of branded drugstore products that took place in the context of trademark association meetings. The manufacturers, the trademark association, and their representatives were fined a total of €39 million (\$51.9 million). Furthermore, the FCO imposed a fine of €20 million (\$26.6 million) on Nestlé Deutschland AG for exchanging confidential and competitive business information in the consumer goods market.<sup>[164]</sup>

In July, the FCO imposed fines on rail manufacturers in two separate cases.<sup>[165]</sup> The first fine of €10 million (\$13.3 million) concerned the company Moravia Steel and marked the end of the procedure against several rail manufacturers which were engaged in bid rigging processes concerning supplies to Germany's main railroad operator Deutsche Bahn. In total, participants in the bid rigging were fined €134.5 million (\$178.9 million). The procedure against Moravia Steel was concluded by way of a settlement agreement. Just two weeks later, the FCO fined eight rail manufacturers an aggregate amount of €97.6 million (\$129.9 million) for bid rigging concerning rails for regional, local and industrial transportation railways. The investigation into the rail manufacturing sector in Germany was triggered by a leniency application by the Austrian company Voestalpine AG.

The last of the fines imposed by the FCO in 2013 was a fine of €900,000 (\$1.2 million) imposed on two manufacturers of household porcelain, an industry association and two individuals for price fixing arrangements that included joint price increases in response to a VAT increase in Germany.<sup>[166]</sup> The relatively moderate fine took into account the fragile state of the companies involved; two members were not fined at all because they had gone bankrupt before the investigation was completed.

In terms of new investigations, the FCO reported dawn raids in the steel manufacturing, sanitary ware wholesalers, and potato growers industries.<sup>[167]</sup> The FCO also conducted searches at the private properties of individuals suspected of involvement.

The German courts also have been active in 2013. In February, the Bundesgerichtshof (Federal Court of Justice) confirmed a fine imposed on 12 cement companies and their representatives for participating in market allocation.<sup>[168]</sup> The original fine of €660 million (\$878 million) marked a new record in terms of the FCO's fining policy, although it was reduced by the Court of Appeals in the first instance to €278.6 million (\$370.1 million). The fine was further decreased by 5% due to the long duration of the court proceedings. The Federal Court of Justice confirmed that the fining provisions which allow for a fine of up to 10% of the annual worldwide turnover do not breach the German constitution. It found that the 10%-of-turnover limit should not be regarded as a capping threshold, but as the maximum value of the possible range of fines.

In April, the Court of Appeals in Düsseldorf actually *increased* a fine imposed by the FCO on five members of a liquefied gas cartel from €180 million (\$237.7 million) to €244 million (\$324.5 million).<sup>[169]</sup> The fines were increased because additional facts concerning the duration and gravity of the infringement were discovered during the court proceedings. The participating companies operated a system of customer allocation agreements for the sale of liquefied petroleum gas. When customers were looking to switch a supplier, the companies either did not provide competing offers at all or quoted rigged prices for the purpose of deterring the potential customer from switching.

On the private enforcement side, efforts to bring “class action style” claims for damages in Germany suffered a setback due to a December judgment delivered by the Higher Regional Court in Düsseldorf.<sup>[170]</sup> The Court dismissed a claim worth €131 million (\$174 million) brought by the Cartel Claim Damages (“CDC”) company against six members of an alleged cement cartel. Before launching the action for damages, CDC acquired individual claims from more than two dozen cement purchasers. Although the Court held the claim to be admissible in a 2009 interim judgment, it dismissed the action in December. The court held that the assignment of claims for a contingency fee while still retaining a right to a percentage of the damages was invalid under German law.<sup>[171]</sup> Additionally, the Court found that the assignment was contrary to public policy as the CDC, a corporate vehicle established for the purpose of pursuing this action, did not have sufficient funds to compensate the defendants' statutory legal fees in case the action was dismissed and therefore provided an inappropriate and unjustified risk for the defendants and inappropriate shield for the original purchasers. However, because the Court's focus was on the nature of the corporate vehicle bringing the claims, the possibility for future collective actions in Germany is not yet extinguished.

#### **d. Greece**

Greece continued to address domestic acts of collusion in 2013. The Hellenic Competition Commission (“HCC”) imposed a number of fines in the concrete production market<sup>[172]</sup> and in the driving school market.<sup>[173]</sup> Further, in September 2013, the HCC imposed a fine of €18.4 million (\$24.5 million) on the Greek Construction Association for limitation of construction in the area of Attiki through its decisions/recommendations to its members from 2002 to 2009, and therefore for indirect price fixing.<sup>[174]</sup> Finally, in October 2013, the HCC issued infringement decisions against professional associations of foreign language school owners for price fixing and other restrictions in the exercise of professional activities of their members.<sup>[175]</sup> According to the decisions, the associations sought to fix the fees charged to students by their members and/or to coordinate other

important parameters of their members' commercial activity. For those infringements, the HCC imposed fines totaling €850,000 (\$1.1 million).

## **e. Netherlands**

Before integrating into the ACM in April 2013, the Dutch Competition Authority (“NMa”) concluded one of the most extensive investigations in the history of Dutch competition enforcement by imposing a second round of fines on a notorious real estate cartel.<sup>[176]</sup> The fines totaled €6.4 million (\$8.5 million) and were imposed on 65 real estate agents. The NMa had already imposed an aggregate fine of €6.3 million (\$8.4 million) in December 2011 on the 14 most active members, which was later reduced to €4 million (\$5.3 million). The cartel allegedly manipulated property foreclosure auctions between 2000 and 2009 by auctioning the real estate for a second time in an “after auction” procedure for a higher price.

The NMa also fined producers of onion bulbs a total of €4 million (\$5.3 million) for exchanging sensitive information and deliberately reducing output in order to achieve higher market prices.<sup>[177]</sup> The participants collectively accounted for 80% of the supply of first-year onion bulbs grown by Dutch undertakings. Finally, the NMa sanctioned three taxi companies and six of their executives for engaging in bid rigging activities and regional market sharing in the greater Rotterdam area.<sup>[178]</sup> The companies rigged bids concerning transportation services for students, disabled, elderly and sick persons. The three taxi companies were fined more than €8.5 million (\$11.3 million). The six executives each received a fine of up to €120,000 (\$159,600).

Despite dropping an investigation into the construction industry,<sup>[179]</sup> the newly formed ACM imposed its first fines on magazine-pack suppliers for market sharing activities.<sup>[180]</sup> Thirteen undertakings were found to have entered into territorial and customer allocation arrangements as well as anticompetitive information exchanges and were fined in total more than €6 million (\$8 million). Finally, the ACM also concluded an investigation into possible unlawful activities in the mobile operator sector.<sup>[181]</sup> The ACM did not find direct evidence of illegal behavior. However, it found that the common practice of public statements concerning, for example, future price increases or other supply conditions that are not yet finalized, may constitute collusive behavior. Therefore, the three major Dutch mobile operators gave commitments to refrain from making such statements in public.

## **f. Spain**

In 2013, the CNC (during the first half of the year) and the CNMC (during the second half of the year), substantially increased the enforcement of Spanish competition rules.<sup>[182]</sup> During the first half of 2013, as mentioned in our 2013 Mid-Year Criminal Antitrust Update, the CNC adopted fining decisions totaling more than \$100 million. As reported in the 2013 Mid-Year Criminal Antitrust Update, the largest set of fines, which totaled more than €44 million (\$58.5 million), were imposed against an alleged cartel of envelope manufacturers. In its decision, the CNC found that 15 companies fixed prices and shared the market for more than 30 years. The largest single fine imposed amounted

to more than €20 million (\$26.6 million). Payment of this fine was, however, allowed to lapse because the infringer was the first to disclose the violation.

During the second half of 2013, the CNMC imposed a fine of more than €43 million (\$58 million) on several associations involved in container transport in the Port of Valencia for fixing prices and market allocation.<sup>[183]</sup> Another important fine, amounting to more than €35 million (\$47 million), was levied on 17 rental car companies and two trading associations as a result of fixing prices and agreeing on trading conditions.<sup>[184]</sup> Fines were also imposed on three companies for restricting the distribution and production of oranges (€5 million or \$6.7 million), eight bakery companies for fixing retail prices (€2 million or \$2.7 million), manufacturers of elastomeric foam for fixing prices (€8 million or \$10.6 million), and four lift manufacturers for falsely representing their competitors in a negative light (€4.8 million or \$6.4 million).

In terms of new investigations, the CNMC continued to focus on anticompetitive practices by opening a formal investigation into car dealerships for fixing prices and exchanging sensitive information.<sup>[185]</sup> Dawn raids were conducted in the sectors of modular construction, waste management and nougat production. In addition, the CNMC conducted its second dawn raid in the corrugated cardboard investigation. The CNMC has also opened formal investigations regarding the agreements between Telefónica and Yoigo for the use and commercialization of mobile networks.<sup>[186]</sup>

## **g. Switzerland**

2013 was a particularly active year in Swiss antitrust enforcement. The Swiss Competition Commission (“WEKO”) opened several investigations in industries ranging from tunnel cleaning companies,<sup>[187]</sup> road construction and civil engineering (which was extended in scope during the course of 2013),<sup>[188]</sup> car retailing,<sup>[189]</sup> string instruments,<sup>[190]</sup> to currency exchange rates.<sup>[191]</sup> Additionally, WEKO imposed fines of CHF 16.5 million (\$16.9 million) on book distributors for limiting the distribution of books written in French.<sup>[192]</sup> Several wholesalers operated a network of exclusivity agreements that made parallel imports of French books nearly impossible between 2005 and 2011. In June, WEKO imposed fines of CHF 500,000 (\$513,000) against 12 construction companies for bid rigging activities in approximately 30 tender procedures in the Zurich region.<sup>[193]</sup> The procedure was triggered by means of dawn raids, and one organization was able to avoid a fine even after the dawn raids had taken place due to its cooperation and admission of infringement. Finally, in December 2013, WEKO dropped an investigation in the food manufacturing and food retailing industries.<sup>[194]</sup> The alleged behavior concerned agreements not to pass on price advantages due to currency exchange fluctuations downstream in the distribution chain. The investigation did not, however, reveal sufficient evidence of horizontal or vertical anticompetitive agreements in that regard.

## **h. UK**

2013 was a good year for the UK agencies in terms of antitrust enforcement, with the Office of Fair Trading (“OFT”) issuing eight infringement decisions—its highest number of such decisions in a

single year (although given the nature and size of the cases, the fines imposed were not high in comparison to other years). In March, the OFT reached settlements with a major automaker and four of its commercial vehicle dealers (Northside, Cicely, Road Range, and Enza), and issued five infringement decisions regarding collusive practices in breach of competition law. The companies admitted to having colluded to allocate markets, coordinate prices, and exchange commercially sensitive information, and agreed to pay a total of £2.8 million (\$4.6 million) in fines.[195]

In keeping with the OFT's commitment to ensuring that vulnerable consumers are not harmed by anticompetitive practices, the OFT took enforcement action against cartel arrangements that targeted the sick and elderly. In August, the OFT found that a manufacturer of mobility scooters and seven of its online retailers, breached competition law by entering into arrangements that prevented online sales and online price advertising. However, because of their low turnover, the undertakings qualified for immunity from penalties under the "small agreements" provision of the Competition Act 1998.[196] In September, the OFT issued a statement of objections against a second mobility scooter manufacturer and a number of its retailers for similar agreements, allegedly preventing the retailers from advertising online prices below the manufacturer's Recommended Retail Price (RRP) for certain models of mobility scooter.[197] In December, the OFT imposed fines on a number of suppliers of access control and alarm systems to retirement properties for collusive tendering arrangements with another pharmaceutical supplier. The company that brought the infringements to the attention of the OFT received immunity from fines because of protections offered in the OFT's leniency policy.[198] A fine was also imposed on a pharmaceutical group for engaging in market sharing arrangements in relation to the supply of prescription medicines to care homes.[199]

The UK's Competition Commission ("CC") also took significant action in the antitrust area in 2013. As mentioned in our 2013 Mid-Year Criminal Antitrust Update, in May, the CC issued its provisional findings and possible remedies following its in-depth investigation into the aggregates, cement, and ready-mix concrete markets. Having provisionally found significant restrictions of competition on the cement markets, including evidence of price coordination between the top three cement producers, the CC proposed the imposition of divestiture remedies on some or all of the top three producers. In October, following consultation on the possible remedies, the CC issued its provisional decision on remedies. The CC has provisionally decided on a package of remedies that comprises three main elements: (a) the divestiture by the largest cement producer of a cement plant; (b) restrictions on the publication of cement market data and prohibition on the issuing of generic price announcement letters; and (c) divestiture of two production facilities by two leading producers, each in the neighboring blast furnace slag market.[200] Assuming the remedies package is adopted in the CC's final decision (scheduled for January 2014), this will be only the second time that divestiture remedies have been ordered in a market investigation. Two of the companies involved subsequently applied for expedited arguments before the Competition Appeals Tribunal ("CAT") to challenge aspects of the CC's report. However, their arguments for expedition were rejected by the CAT, and the CC's investigation will continue along the statutory timetable.[201]

## III. ASIA AND THE PACIFIC

### A. Australia

Australia's Competition and Consumer Commission (the "ACCC") pursued a number of anti-cartel enforcement proceedings. The markets covered by the proceedings included energy services, travel, and ball bearings.[202]

In October 2013, the Court fined Koyo Australia ("Koyo") AUD 2 million (\$1.5 million) after Koyo admitted to participating in collusive conduct regarding ball and roller bearings. Koyo's Japanese parent company, JTEKT, has also acknowledged its participation and has been fined in the U.S. (\$103 million) and Canada.[203] The ACCC also commenced proceedings against NSK Australia Pty Ltd. ("NSK") for its involvement. NSK has admitted to a violation, and the ACCC announced an intention to seek pecuniary penalties against the company.[204] NSK was also fined in the U.S. approximately \$68 million.

2013 also saw the ACCC suffer a setback in its decade-long investigation into allegations of price fixing between Australian and New Zealand Banking Group Limited ("ANZ") and Mortgage Refunds Ltd. ("Mortgage Refunds"). On November 18, 2013, the Federal Court dismissed a complaint filed by the ACCC in 2007 that alleged ANZ and Mortgage Refunds engaged in price fixing. The allegations in the complaint date back to a 2004 agreement that permitted Mortgage Refunds to arrange ANZ home loans if they limited customer refunds to AUD 600 (\$538). After nearly 10 years of investigation, the Federal Court concluded that ANZ was not a participant in the home loan arrangement market, and thus was not competing for home loan customers with Mortgage Refunds. As the two entities were not competitors in the market, the Court found that ANZ's conduct did not rise to the level of price fixing. The ACCC is considering whether to appeal the judgment.[205]

Overall, the Federal Courts have now awarded penalties of over AUD 1 million (\$897,400) in 10 cases brought under the Australian Consumer Law, demonstrating the Court's willingness to apply significant penalties for serious breaches of the antitrust laws.[206]

### B. China

China's State Administration for Industry and Commerce ("SAIC") and National Development and Reform Commission ("NDRC") initiate most criminal antitrust enforcement actions.

As reported in our 2013 Mid-Year Criminal Antitrust Update, in early 2013, the NDRC fined six companies a total of CNY 353 million (\$56.7 million) for colluding to fix prices of liquid crystal displays (TFT-LCDs) sold in China over a five-year period. These fines constituted the NDRC's first action for extraterritorial conduct and set a record for antitrust penalties in China. In addition to the fines, the penalized companies promised to strictly observe Chinese laws, committed to fairly supply Chinese TV markets with new technologies, and agreed to extend LCD warranties in China from 18 months to 36 months.[207]

China also continued to ramp up its enforcement against domestic anticompetitive conduct. The SAIC fined the Sichuan Yibin City Association of Roof Tile Producers and seven major members of the association a total of CNY 2 million (\$329,000) for entering into a cartel restricting the production of roof tiles.[208] The SAIC fined travel agencies in the Yunnan province a total of CNY 80,000 (\$13,000) for organizing market players in the industry to participate in monopolistic activities.[209] The NDRC fined jewelers and a trade association a total of CNY 10.6 million (\$1.74 million) for coordinating on prices via pricing guidelines.[210] The NDRC also fined 39 companies in the tourism industry a total of CNY 18 million (\$2.96 million) for artificial price-setting, price fixing and illegal market allocation, and below-cost pricing as “bait” to lure tourists.[211]

## **C. Hong Kong**

In July, the Hong Kong government announced the appointments of Godfrey Lam Wan-ho and Queeny Au-Yeung Kwai-yue as the President and Deputy President, respectively, of the newly formed Competition Tribunal.[212] This announcement follows the appointment of Anna Wu Hung-yuk as the first chairperson of Hong Kong’s Competition Commission in April.[213] These appointments signify further steps towards the establishment of an antitrust regime in the territory following the enactment of the Competition Ordinance in 2012 (as reported in our 2012 Year-End Criminal Antitrust Update).

## **D. India**

The Competition Commission of India (“CCI”) remained active in cartel investigations in 2013, fining a group of 11 shoe manufacturers a total of approximately Rs 62.543 million (\$1.01 million) for bid rigging in connection with a government procurement contract.[214] Furthermore, an investigation involving parts distribution by auto manufacturers reportedly neared conclusion at the end of 2013. The CCI also initiated new investigations in response to complaints of potential collusive activities in the pricing of gasoline and ethanol.

The CCI’s zealous investigation and prosecution efforts did not go unnoticed by the courts in 2013. Indeed, the Competition Appellate Tribunal (“CAT”) significantly reduced fines assessed by the CCI in two separate instances. In October 2013, the CAT reduced the fines assessed by the CCI against three manufacturers of aluminum phosphide tablets by 90% to approximately Rs 100 million (\$1.62 million), holding that the CCI generally should base penalties on the “relevant turnover” of the affected product rather than on the total sales of the company.[215] The CAT in April 2013 similarly reduced by more than 90% the fines assessed by the CCI against a group of explosives manufacturers in India for bid rigging.[216] These decisions have increased speculation that the pending appeal to the CAT by 11 cement manufacturers and the Cement Manufacturers’ Association from a record fine of approximately Rs 6,307 billion (\$1.1 billion) in 2012 may also result in a substantial reduction of the penalty imposed by the CCI.



## **E. Indonesia**

In July, Indonesia's Commission for the Supervision of Business Competition ("KPPU") fined three construction companies over Rp 15 billion (\$1.25 million) for conspiring among themselves and with the construction selection committee to rig bids for a major construction project.[217]

In August, the KPPU launched an investigation into allegations that several beef importers had conspired to push beef prices to record highs.[218] The Commission launched a similar investigation in September into price hikes in the soybean industry.[219] These moves came after the Indonesian government in February recommended that the KPPU investigate alleged price fixing in the trade of key food commodities.[220]

## **F. Japan**

2013 saw two significant changes in Japan's anti-cartel enforcement framework. First, in March, the Japan Fair Trade Commission ("JFTC") welcomed a new Chairman, Kazuyuki Sugimoto, former Administrative Vice Minister of Finance.[221] Mr. Sugimoto promised to follow in the aggressive footsteps of his predecessor, Kazuhiko Takeshima. Second, in December, the Japanese Diet enacted legislation amending the procedures to appeal JFTC orders. The new act abolishes the JFTC's hearing procedure for administrative appeals and introduces a new system in which any appeal against a JFTC order will be subject to the exclusive jurisdiction of the Tokyo District Court. The new act will take effect no later than June 13, 2015, one and a half years after the date of promulgation.[222]

This was a banner year for JFTC fines and sanctions. The JFTC collected fines from participants in price-fixing investigations in three separate industries. In March, the JFTC fined three ball bearing manufacturers, NTN Corp., NSK Ltd., and Nachi-Fujikoshi Corp., a total of ¥13.4 billion (\$132 million).[223] The ball bearings matter was the first international cartel referred for criminal prosecutions in Japan. In June, the JFTC fined 10 sugar syrup manufacturers a total of ¥2.5 billion (\$24.8 million).[224] And in July, the JFTC fined seven manufacturers of starch adhesives a total of ¥255 million (\$2.5 million).[225]

The JFTC also collected fines from participants in bid-rigging schemes in two separate industries. In March, the JFTC fined two automotive lamp manufacturers a total of ¥4.7 billion (\$46.5 million),[226] and in December, the JFTC fined 36 six engineering companies a total of ¥746 million (\$7.1 million).[227]

In total, through a variety of high-impact investigations, the JFTC collected surcharges totaling ¥22 billion (\$211 million), matching the significant fine level reached in 2012.[228]

## **G. Malaysia**

This was a seminal year in Malaysian enforcement. In September, Malaysia's Competition Commission issued its first ever financial penalties for antitrust violations when it fined Malaysia Airlines, whose majority shareholder is the Malaysian government, and AirAsia 10 million ringgit

(\$3.13 million) apiece for entering into a prohibited market-sharing agreement in the Malaysian air transport market.[229] Both airlines have since challenged this ruling.[230]

In September, the Commission issued an interim order preventing a lorry owner's association and 40 lorry companies from implementing an agreement to raise lorry prices and from engaging in further price fixing. The Commission's authority to impose such an order stems from the 2010 Competition Act, which permits the use of interim measures "as a matter of urgency" to prevent anticompetitive harm or to protect the public interest.[231]

## **H. New Zealand**

After a lengthy investigation into the airline industry, the New Zealand High Court in April 2013 imposed fines totaling 9.6 million NZD (\$7.8 million) against Cathay Pacific, Thai Airways, and MASKargo System Berhad for colluding to impose fuel and security surcharges.[232] In June, the High Court approved a 7.5 million NZD (\$6.1 million) penalty against Air New Zealand for the airline's participation in the same price-fixing scheme.[233] In total, the investigation has resulted in more than 42.5 million NZD (\$35 million) in fines against 11 different airlines. In August, the High Court ordered packaging company Visy Board and its former senior executive to pay more than 3.6 million NZD (\$2.9 million) for improperly agreeing to divide certain corrugated fiberboard packaging customers between Visy Board and a competitor.

Also in 2013, the New Zealand Commerce Commission ("NZCC") recommended for adoption the Commerce (Cartels and Other Matters) Amendment Bill, which was first introduced in 2010 in an effort to increase cartel enforcement. The bill, which is expected to become law in early 2014, would enable the NZCC to increase cooperation with overseas competition authorities. In October, the NZCC released draft Competitor Collaboration Guidelines (the "Guidelines") to amend certain provisions of the 1986 Commerce Act. In particular, the Guidelines introduce the NZCC's approach to preparing for changes in the Commerce (Cartel and Other Matters) Amendment Bill, which includes a clearance regime for collaborative activities, provides exemptions for vertical supply contracts, joint buying arrangements, and collaborative activities, and imposes criminal sanctions for cartel conduct. Although no date has been set for the release of the final Guidelines, additional comments from the NZCC as to how the Guidelines will operate in practice are expected in early 2014.

## **I. Pakistan**

The Competition Commission of Pakistan ("CCP") is currently reorganizing. In August 2013, Prime Minister Nawaz Sharif appointed Joseph Wilson as the CCP's Chairman on an acting basis.[234] Wilson has since initiated a restructuring program to enhance the powers of the Commission's other members and balance them with the powers of the chairperson.[235] In addition, the CCP has revised its Leniency Regulations to ensure the confidentiality of the applicant providing evidence in a CCP inquiry.

As covered in our 2013 Mid-Year Criminal Antitrust Update, the CCP imposed penalties against a group of long distance and international telecommunications operators for price fixing and illegal market allocation. [236] Those penalties are stayed as the carriers appeal the decision to the Lahore

High Court.[237] In the meantime, the country’s telecommunications regulator has installed monitoring equipment and imposed other policies to try and curb the group’s VoIP setups, referred to by the regulators as “grey traffic.” [238] Also in the first half of 2013, the CCP issued fines against the Institute of Chartered Accountants of Pakistan (“ICAP”) for recommending that its members prohibit the offering of training opportunities to non-ICAP accountancy students.

## **J. Singapore**

In October, the chief executive officer of the Competition Commission of Singapore (“CC”), Yena Lim, stepped down after three years and was replaced by her assistant chief executive, Toh Han Li, who became the first legally trained chief executive of the Competition Commission.[239]

In April, the CC fined 12 motor vehicle traders a total of S\$179,000 (\$143,040) for colluding and rigging bids at motor vehicle auctions.[240]

In November, the CC closed its investigation regarding a non-compete agreement between two rival breweries, Heineken and Fraser & Neave. Although the Commission did not find either company guilty of infringement, it forced the companies to remove the non-compete agreement.[241]

## **K. South Korea**

After assessing a record-breaking KRW 916.2 billion (\$855 million) in total fines during 2012, the Korea Fair Trade Commission (“KFTC”) continued its aggressive enforcement efforts under newly-appointed Chairman Noh Dae-Lae.[242]

In early 2013, as covered in our 2013 Mid-Year Criminal Antitrust Update, the KFTC imposed large penalties in the glass and insurance industries. In July, the KFTC assessed a collective fine of KRW 116 billion (\$104.3 million) against six auto manufacturers—Hyundai Motor Co., Tata Daewoo Commercial Vehicle Co., Daimler Trucks Korea Ltd., Scania Korea Ltd., and MAN Truck & Bus Korea Ltd.—for fixing prices of trucks, tractors, and commercial vehicles.[243] The companies allegedly exchanged information regularly from 2002 to 2011 in order to manipulate prices. Hyundai was assessed the largest fine, KRW 71.1 billion (\$67 million), while Scania was hit with the second largest penalty of KRW 17.6 billion (\$16.1 million).

In September, the KFTC imposed fines totaling KRW 111.5 billion (\$105 million) against construction companies including the engineering branches of Samsung, Hyundai, and Daewoo for bid-rigging related to a 2008-2009 government river engineering project. At the same time, 22 indictments were issued for 22 individuals employed by those companies through the Seoul Central District Prosecutor’s office. Among those charged were the CEOs of Hyundai Engineering & Construction and Daewoo Engineering & Construction. The collusion, which allegedly involved prearranging the winners of contracts for the project, is said to have increased construction costs by KRW 3.8 trillion (\$3.6 billion).[244]

In October, after a brief two-month investigation, the KFTC imposed a KRW 6.35 billion (\$6 million) fine against eight companies for arranging the winners of contracts to supply electricity cables to

nuclear power plants in 2004-2005, 2008, and 2010. In addition, the KFTC referred six of the companies to prosecutors for potential indictment.[245]

In late December, the KFTC announced its first fines in the global auto parts investigations, imposing fines totaling KRW 114.6 billion (\$108 million) against Denso Corporation, Bosch, and Continental AG for the price fixing of instrument panels and wipers sold to Hyundai and its affiliate Kia Motors. In announcing the fines, Shin Dong-kwon, Head of the Cartel Investigation Bureau at the KFTC, confirmed the close global coordination that is at the core of the auto parts matters, “*We collaborated with antitrust regulators from the US and the EU to crack down on price collusion among auto parts makers. And we will closely monitor international cartels targeting the Korean market in the future.*”[246]

In early January 2014, the KFTC imposed its largest ever fine for construction-related bid rigging. The fines, which totaled KRW 132 billion (\$123 million) against 21 companies address bid-rigging for construction of the new Incheon Sunway Line 2. The KFTC is expected to continue to focus on rooting out what is viewed as a long-established practice of collusion in South Korea’s construction industry.[247]

## **L. Taiwan**

In November, the Taiwan Fair Trade Commission reduced the record fines it had levied against nine power companies for their coordinated refusal to negotiate lower rates for the power they sold to the Taiwan Power Company over a four-year period. In March, the power companies had been fined a record NT \$6.32 billion (\$213 million). Two of the companies appealed the ruling.[248] In a November decision, the total fines were reduced to NT \$6.02 billion (\$203 million).[249]

## **IV. MIDDLE EAST**

### **A. Egypt**

In September 2013, the Egyptian Competition Authority (“ECA”) announced the completion of draft amendments to Egypt’s Competition Law, and, in October and November, held a national dialogue with a variety of stakeholders on the potential changes.[250] The revised law would adopt a policy goal of “social justice” by means of endorsing small and medium-sized businesses. The specific proposed amendments aim to increase the ECA’s independence and efficiency by the following measures: introducing a merger control system; granting the ECA board the right to settle cases or refer them to the public prosecutor; reorganizing the composition of the board; reviewing the prescribed penalties and proportionality of fines imposed; introducing a full leniency program to bring the Competition Law in line with international best practices; increasing the penalties for non-cooperation with the ECA; and revising the minimum and maximum limits of settlement amounts.

Meanwhile, enforcement continues under the current law. On December 8, 2013, the ECA announced that it had referred Egypt’s three largest mobile services operators to the public prosecutor over an alleged price-fixing agreement.[251] According to the ECA, the mobile operators colluded to raise prices by simultaneously adding the cost of a Stamp Tax to prepaid recharge cards. Although

including the Stamp Tax in the price of the cards is not illegal in and of itself, the ECA concluded that the agreement to collectively impose the tax had cost consumers more than 500 million Egyptian pounds (\$72.6 million) annually.

## **B. Israel**

Anti-cartel enforcement in Israel remains strong. In September 2013, the director general of the Israeli Antitrust Authority (IAA) announced that several international companies were members of a cartel that fixed prices and rigged bids to sell gas-insulated switchgear to Israel's main electricity supplier, among others.<sup>[252]</sup> The IAA has yet to impose any fines, but its declaration can be used as prima facie evidence in any subsequent court action. The IAA is also currently investigating several leading Israeli coffee chains, which are suspected of possible price collusion; on November 4, 2013, investigators raided the offices of one chain, searching its owner's office and computers.<sup>[253]</sup>

## **C. Saudi Arabia**

Saudi Arabia is expected to adopt significant changes to its competition law in 2014. In anticipation of those changes, the country's antitrust enforcement authority announced in July 2013 that it would change its name and become a separate legal entity with an independent budget, rather than a government department.<sup>[254]</sup> Potential changes to the law could include increased fines for anticompetitive conduct. Under the current law, a violator may be fined no more than SAR 5 million (\$1.3 million).

In September 2013, under the existing legal regime, the Council of Competition Protection ("CCP") announced fines totaling SAR 24 million (\$6.4 million) against several companies for price fixing and resale price maintenance; however, the CCP did not reveal the companies' identities or even the relevant industry beyond referring to the defendants as manufacturers of "basic commodities."<sup>[255]</sup>

## **D. Turkey**

On March 8, 2013, Turkey's Competition Authority ("CA") issued record fines of TRY 1.1 billion (\$620 million) against 12 of the country's banks for colluding over interest rates.<sup>[256]</sup> After opening an investigation in November 2011, the CA found that the banks agreed on maximum deposit rates, increases in credit card interest rates, and commissions and fees for credit card services. One bank, Garanti Bankasi, received a TRY 213 million (\$102 million) penalty—the largest fine ever imposed on a single entity in Turkey. However, the CA did not accuse the banks of operating a cartel, and the actual fines were therefore less than the TRY 4.4 billion (\$2 billion) total that some industry officials had predicted.<sup>[257]</sup>

In recent months, the CA has opened several new investigations. On September 23, 2013, it announced that it was investigating 45 bakeries for price fixing, after the cost of bread increased substantially.<sup>[258]</sup> Unusually, the CA took action on its own initiative; its investigations typically stem from third-party complaints.

## **E. United Arab Emirates**

As reported in our 2013 Mid-Year Criminal Antitrust Update, the Federal Competition Law of the UAE, which was enacted on October 23, 2012, came into force on February 23, 2013.<sup>[259]</sup> The Law lays down rules on cartels, abuse of dominance, and merger control, while it excludes a number of sectors from its scope of application (e.g., financial, telecommunications, petroleum and gas, and pharmaceutical). These sectors, however, may be subject to parallel enforcement rules. The grace period for complying with the Law ended on August 23, 2013, although there have not yet been any enforcement or implementation measures fleshing out its provisions. The Ministry of Economy is expected to be the institution supervising the enforcement of competition rules, supported by the Competition Regulation Committee.

## **V. AFRICA**

### **A. Malawi**

The Malawi Competition and Fair Trade Commission (“MCFTC”) concluded an investigation this fall of the Bankers Association of Malawi (“BAM”), following a complaint from Credit Data, one of the country’s two licensed credit reference services.<sup>[260]</sup> Credit Data claimed that, by agreement, BAM provided consumer data exclusively to CRB Africa, the country’s other licensed credit reference service, preventing Credit Data’s entry into the market. Though the MCFTC found that the agreement between BAM and CRB Africa was anticompetitive, the Commission acknowledged that the conduct could “be justified on the basis of confidentiality concerns and the absence of an appropriate legal framework to safeguard credit data holders from liability of breach of consumer confidentiality rights.” As a result, MFTC could not take any action to resolve the matter.

### **B. South Africa**

In the first half of 2013, the South Africa Competition Commission (“SACC”) assessed administrative penalties for collusion in the glass manufacturing and distribution industry, as well as for collusion by Sasol Chemical Industries Ltd., as reported in our 2013 Mid-Year Criminal Antitrust Update.

In June, the SACC reached settlements with 15 construction companies following allegations that they colluded to rig bids for construction projects related to the 2010 World Cup by, among other things, submitting sham bids.<sup>[261]</sup> The fines, totaling 1.46 billion rand (\$140 million), are the highest ever imposed by the SACC in a single investigation. The settlements were a product of the SACC’s fast-track settlement process, which is designed to encourage companies facing investigations to disclose illegal activity in exchange for lower penalties. The SACC began its investigation while construction of the 2010 World Cup Stadium was still in progress; 21 firms elected to participate in the fast-track process, though not all ultimately negotiated settlement agreements. Industry leaders Avenge Ltd., Murray & Roberts Holdings Ltd, Wilson Bayly Holmes-Ovcon Ltd., and Stefanutti Stocks Holdings Ltd. agreed to fines of about 300 million rand (\$30 million) each. Stefanutti reached a separate agreement in July to pay an additional 56 million rand (\$5.6 million) to settle claims not covered by the initial agreement.

In October, the SACC suffered a setback when Shan Ramburuth, who served as head of the Commission since 2005, was forced to resign following an investigation into his spending on overseas mobile data usage in 2011. Thembinkosi Bonakele, former deputy commissioner at the SACC, will serve as acting commissioner for six months.<sup>[263]</sup> This transitional period will likely affect the pace and progress of the SACC's current pending investigations.

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[1] The total criminal fines for FY 2013 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. The underlying data for the years prior to FY 2013 can be found at U.S. Dep't of Justice, Antitrust Div., Workload Statistics, FY 2003-2012 [hereinafter FY 2003-2012 Workload Statistics], *available at* <http://www.justice.gov/atr/public/workload-statistics.html>.

[2] Press Release, U.S. Dep't of Justice, Nine Automobile Parts Manufacturers And Two Executives Agree To Plead Guilty To Fixing Prices On Automobile Parts Sold To U.S. Car Manufacturers And Installed In U.S. Cars (Sept. 26, 2013), *available at* [http://www.justice.gov/atr/public/press\\_releases/2013/300969.htm](http://www.justice.gov/atr/public/press_releases/2013/300969.htm).

[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 2001–2010 reflect only court-imposed restitution reported by the Antitrust Division, as we are unaware of any disgorgement or penalties resulting from an Antitrust Division criminal investigation prior to the municipal bond settlements in FY 2011. *See* FY 2003-2012 Workload Statistics, *supra* note 1; 2010 Year-End Criminal Antitrust Update.

[4] *See* our 2012 Year-End Criminal Antitrust and Competition Law Update.

[5] The following charts reflect estimates based upon sentencing information obtained using publicly available data reflecting the total prison days sentenced and total number of defendants receiving prison sentences during each fiscal year, and comparing that information against the FY 2010-2013 averages reported by the Antitrust Division, *see* U.S. Dep't of Justice, Criminal Enforcement, Fine and Jail Charts, *available at* <http://www.justice.gov/atr/public/criminal/264101.html> (last visited Dec. 16, 2013). The underlying data for the years prior to FY 2013 can be found at FY 2003-2012 Workload Statistics, *supra* note 1.

[6] *See* Statement of William J. Baer & Ronald T. Hosko, Subcommittee on Antitrust, Competition Policy & Consumer Rights, Committee on the Judiciary, United States Senate (Nov. 14, 2013), *available at* [http://www.justice.gov/atr/public/press\\_releases/2013/300969.htm](http://www.justice.gov/atr/public/press_releases/2013/300969.htm).

[7] U.S. Dep't of Justice, Antitrust Div., Division Update Spring 2012, *available at* <http://www.justice.gov/atr/public/division-update/2012/criminal-program.html>.

[8] U.S. Dep't of Justice, Antitrust Div., Division Update Spring 2013, *available at* <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.

[9] Press Release, U.S. Dep't of Justice, Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars (Sept. 26, 2013), *available at* <http://www.justice.gov/opa/pr/2013/September/13-at-1074.html>.

[10] Press Release, U.S. Dep't of Justice, Two Fujikura Ltd. Executives Indicted for Roles in Fixing Prices on Automobile Parts Sold to Subaru to be Installed in U.S. Cars (Sept. 19, 2013), *available at* <http://www.justice.gov/opa/pr/2013/September/13-at-1048.html>; Press Release, U.S. Dep't of Justice, G.S. Electech Inc. Executive Indicted for Role in Bid Rigging and Price Fixing on Automobile Parts Installed in U.S. Cars (Sept. 11, 2013), *available at* <http://www.justice.gov/opa/pr/2013/September/13-at-1013.html>; Press Release, U.S. Dep't of Justice, Panasonic Executive Indicted for Role in Fixing Prices on Automobile Parts Sold to Toyota to be Installed in U.S. Cars (Sept. 24, 2013), *available at* <http://www.justice.gov/opa/pr/2013/September/13-at-1060.html>.

[11] Press Release, U.S. Dep't of Justice, G.S. Electech Inc. Executive Indicted for Role in Bid Rigging and Price Fixing on Automobile Parts Installed in U.S. Cars (Sept. 11, 2013), *available at* <http://www.justice.gov/opa/pr/2013/September/13-at-1013.html>; see also Press Release, U.S. Dep't of Justice, Two Executives Indicted for Roles in Fixing Prices on Automobile Parts Sold to Toyota to be Installed in U.S. Cars (Nov. 21, 2013), *available at* <http://www.justice.gov/opa/pr/2013/November/13-at-1244.html> (“Today’s indictment reaffirms the Antitrust Division’s commitment to hold executives accountable for actions that corrupt the competitive landscape and harm consumers. . . The Antitrust Division continues to work closely with its fellow competition enforcers abroad to ensure that there are no safe harbors for executives who engage in international cartel crimes.”).

[12] Alex Lawson, *Takata Forks Over \$71M in DOJ Seat Belt Price-Fixing Probe*, Law360 (Oct. 10, 2013), *available here*.

[13] Press Release, U.S. Dep't of Justice, Three Takata Corp. Executives Agree to Plead Guilty to Participating in Global Seatbelt Price Fixing Conspiracy (Nov. 21, 2013), *available at* <http://www.justice.gov/opa/pr/2013/November/13-at-1242.html>.

[14] Press Release, U.S. Dep't of Justice, Toyo Tire & Rubber Co. Ltd. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars (Nov. 26, 2013), *available at* <http://www.justice.gov/opa/pr/2013/November/13-at-1261.html>.

[15] Press Release, U.S. Dep't of Justice, Stanley Electric Co. Ltd. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars (Nov. 27, 2013), *available at* <http://www.justice.gov/opa/pr/2013/November/13-at-1263.html>.

[16] Press Release, U.S. Dep't of Justice, Two Executives Indicted for Roles in Fixing Prices on Automobile Parts Sold to Toyota to Be Installed in U.S. Cars (Nov. 21, 2013), *available at* <http://www.justice.gov/opa/pr/2013/November/13-at-1244.html>.



[17] Press Release, U.S. Dep't of Justice, Two DENSO Corporation Executives Agree to Plead Guilty for Price Fixing and Bid Rigging on Auto Parts Installed in U.S. Cars (May 21, 2013), *available at* <http://www.justice.gov/opa/pr/2013/May/13-at-587.html>.

[18] Press Release, U.S. Dep't of Justice, Diamond Electric Mfg. Co. Ltd. and an Autoliv Inc. Executive Agree to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars (July 16, 2013), *available at* <http://www.justice.gov/opa/pr/2013/July/13-afp-789.html>.

[19] Press Release, *supra* note 17.

[20] Deferred Prosecution Agreement, United States v. The Royal Bank of Scotland plc, No. 3:13-cr-00074-MPS (D. Conn. Apr. 12, 2013), *available at* <http://www.justice.gov/iso/opa/resources/28201326133127414481.pdf>; Plea Agreement, United States v. RBS Securities Japan Limited, No. 3:13-cr-0073-MPS (D. Conn. Apr. 12, 2013), *available at* <http://www.justice.gov/iso/opa/resources/217201326133540747939.pdf>.

[22] Press Release, U.S. Dep't of Justice, Rabobank Admits Wrongdoing in LIBOR Investigation, Agrees to pay \$325 Million Criminal Penalty (Oct. 29, 2013), *available at* <http://www.justice.gov/opa/pr/2013/October/13-crm-1147.html>.

[23] Press Release, U.S. Dep't of Justice, UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-Running Manipulation of LIBOR Benchmark Interest Rates (Dec. 19, 2012), *available at* <http://www.justice.gov/opa/pr/2012/December/12-ag-1522.html>.

[24] Press Release, U.S. Dep't of Justice, ICAP Brokers Face Felony Charges for Alleged Long-Running Manipulation of LIBOR Interest Rates (Sept. 25, 2013), *available at* <http://www.justice.gov/opa/pr/2013/September/13-opa-1064.html>.

[25] Press Release, U.S. Dep't of Justice, Three Former UBS Executives Sentenced to Serve Time in Prison for Frauds Involving Contracts Related to the Investment of Municipal Bond Proceeds (July 24, 2013), *available at* <http://www.justice.gov/opa/pr/2013/July/13-at-839.html>.

[26] *United States v. Grimm, et al.*, No. 12-4310-cr, at 17 (2d Cir. Dec. 9, 2013).

[27] *Id.* at 9.

[28] *United States v. Carollo, et al.* No. 10-cr-654 (HB), ECF No. 285 at 11 (S.D.N.Y. Nov. 20, 2012).

[29] Press Release, U.S. Dep't of Justice, Three Former Financial Services Executives Sentenced To Serve Time in Prison for Roles in Conspiracies Involving Investment Contracts for the Proceeds of Municipal Bonds (Oct. 18, 2012), *available at* [http://www.justice.gov/atr/public/press\\_releases/2012/288099.htm](http://www.justice.gov/atr/public/press_releases/2012/288099.htm).

[30] *United States v. Grimm, et al.*, *supra* note 26, at 16.

[31] *Id.* at 17.

[32] *Id.*

[33] Appellee's Affirmation in Support of Motion to Extend Time to File for Panel Rehearing and Rehearing En Banc at ¶ 4, *United States v. Grimm, et al.*, *supra* note 26.

[34] Press Release, U.S. Dep't of Justice, AU Optronics Corporation Executive Sentenced for Role in LCD Price-Fixing Conspiracy (Apr. 29, 2013), *available at* [http://www.justice.gov/atr/public/press\\_releases/2013/296336.pdf](http://www.justice.gov/atr/public/press_releases/2013/296336.pdf).

[35] *United States v. Bai*, No. 3:09-cr-00110 (N.D. Cal. Oct. 10, 2013), ECF No. 1259.

[36] Brief for Defendant-Appellants Hsiung and Chen at 61-79, *United States v. AU Optronics Corp.*, Nos. 12-10500, 12-10514, 12-10558 (9th Cir. Feb. 4, 2013), ECF No. 18-1.

[37] 18 U.S.C. § 3571(d).

[38] Brief for Defendants-Appellants AU Optronics Corp. and AU Optronics Corp. America at 79-83, *United States v. AU Optronics Corp.*, Nos. 12-10500, 12-10514, 12-10558 (9th Cir. Feb. 4, 2013), ECF No. 19-1.

[39] Order, *United States v. Leung*, No. 13-10242 (9th Cir. Oct. 23, 2013), ECF No. 22.

[40] Press Release, U.S. Dep't of Justice, Former Executive Convicted for Role in Price-Fixing Conspiracy Involving Coastal Freight Services Between the Continental United States and Puerto Rico (Jan. 29, 2013), *available at* [http://www.justice.gov/atr/public/press\\_releases/2013/291962.htm](http://www.justice.gov/atr/public/press_releases/2013/291962.htm).

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[127] Press Release, European Commission, Antitrust: Commission opens proceedings against container liner shipping companies (Nov. 22, 2013), *available at* [http://europa.eu/rapid/press-release\\_IP-13-1144\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1144_en.htm).

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