

## Expert Analysis

### 2013 Criminal Antitrust Update

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Looking only at the announcement of plea agreements and fines in criminal antitrust investigations in 2013, one could perhaps conclude that enforcement has slowed. That would be a mistake. The U.S. Department of Justice's Antitrust Division's pipelines are full of pending prosecutions, but finalizing those prosecutions has been slowed both by the complications of managing a large number of interrelated cases and by a significant change in the Antitrust Division's policy on corporate plea agreements. The Antitrust Division announced a new policy in April concerning the criteria for identifying in corporate plea agreements those employees who might face prosecution, and it was widely, if informally, understood that the division had put plea negotiations with corporations "on hold" while its previous policy was under review. Now that the new policy is in effect, all indications are that announcements of plea agreements, investigations and prosecutions will soon revert to recent levels.

The U.S. is not alone. Price-fixing, bid-rigging and other cartel enforcement remains robust around the world. The European Commission, individual European member states, and Korea, Brazil, China and others continue to engage in robust enforcement. The level of fines imposed by the EC so far in 2013 exceeds last year's record pace. Several raids and other inspections have been disclosed, promising continued investigations and high levels of activity in the years to come.

This commentary focuses on developments in the U.S. and Europe.

#### U.S. ENFORCEMENT TRENDS

##### *Criminal fines and other monetary assessments*

The Antitrust Division has secured payments totaling almost \$196 million stemming from its criminal investigations in FY 2013. Although this marks a substantial drop from prior years, we expect the trend to reverse in upcoming months due to pending investigations likely to yield large fines.

We assess the Antitrust Division's performance by considering all of its available monetary sanctions, including criminal fines, restitution, disgorgement and penalties. As the division continues to embrace tools such as non-prosecution agreements and multi-agency investigations, we believe this combined metric offers a more accurate gauge of its achievements (see Figure 1).

As of July 31, defendants in Antitrust Division investigations have been sentenced or have agreed to pay more than \$271 million in criminal fines (see Figure 2).

Figure 1

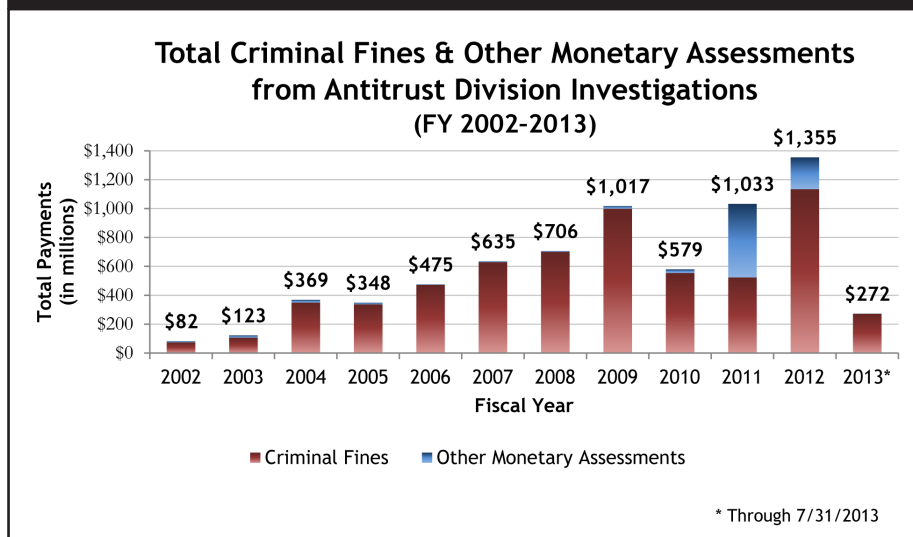
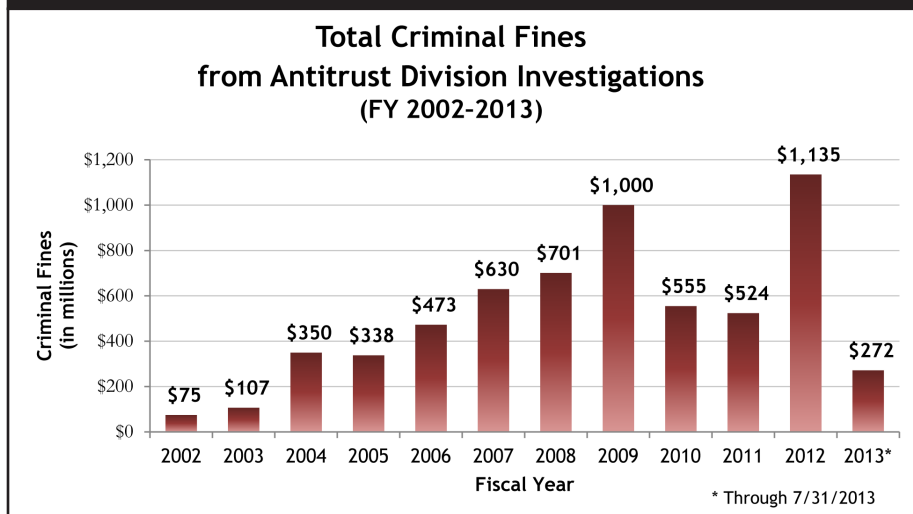


Figure 2



In contrast to the prior two fiscal years, the Antitrust Division has collected few monetary assessments from offenders for restitution, disgorgement and various penalties so far in FY 2013 (see Figure 3).

Ninety-nine percent of the Antitrust Division's criminal fines announced thus far in FY 2013 are from 10 corporate agreements arising from five investigations. The Royal Bank of Scotland fine is the result of a deferred prosecution agreement with both the Antitrust and Criminal Divisions that includes both antitrust and non-antitrust offenses (see Figure 4).

The Antitrust Division is on pace to match the record-setting prison sentences it obtained last year. The DOJ's average prison sentence so far in FY 2013 is just over 25 months.<sup>1</sup> As we reported at the end of 2012, the gap between sentences obtained for foreign nationals and U.S. citizens seemed to be closing as the DOJ has been securing longer sentences for foreign nationals.<sup>2</sup> That said, the sentences imposed

Figure 3

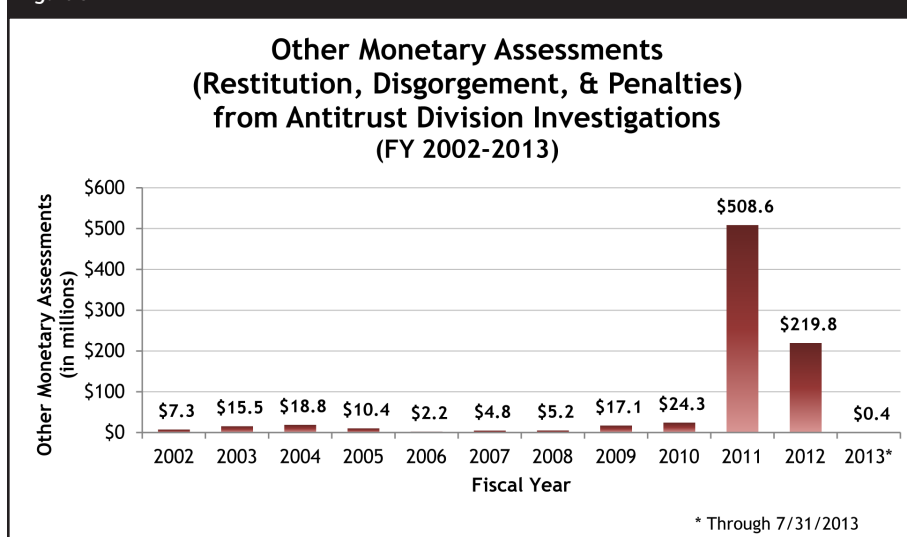


Figure 4

<b>Criminal Fines of More than \$1 Million for Sherman Act Violations Imposed or Agreed to During FY 2013 (October 2012–July 2013)</b>		
<b>Company</b>	<b>Investigations</b>	<b>Criminal Fine</b>
Royal Bank of Scotland plc	LIBOR	\$150,000,000
Panasonic Corp.	Auto Parts (Various parts )	\$45,800,000
Diamond Electric Mfg. Co. Ltd.	Auto Parts (Ignition Coils)	\$19,000,000
Tokai Rika Co., Ltd.	Auto Parts (Heater Control Panels)	\$17,700,000
Yusen Logistics Co., Ltd.	Freight Forwarding	\$15,428,207
SANYO Electric Co. Ltd.	Battery cells	\$10,731,000
Eagle Eyes Traffic Industrial Co., Ltd.	Auto Parts (Aftermarket Auto Lights)	\$5,000,000
“K” Line Logistics, Ltd.	Freight Forwarding	\$3,507,246
Crusader Servicing Corp.	Municipal Tax Liens	\$2,000,000
LG Chem Ltd.	Battery cells	\$1,056,000

*The scam involved overstating the sales price of five residential properties to lenders and then siphoning off the difference between the inflated mortgage loan and the real price paid to sellers.*

on or negotiated by U.S. citizens in 2013 have been, on average, about three times longer than those for foreign nationals<sup>3</sup> (see Figure 5).

This year, 16 individuals have been sentenced to serve prison sentences. Several more will likely be sentenced before year-end as there are a number of pending plea agreements and trial verdicts (see Figure 6).

In sum, while the pace of plea announcements and scheduling of sentencing hearings has slowed, the force of the DOJ's enforcement efforts has not. Significant fines and meaningful prison sentences remain central to the DOJ's criminal antitrust enforcement.

## U.S. ENFORCEMENT DEVELOPMENTS

### *Changes in the treatment of individuals*

In April the Antitrust Division announced two significant changes to its policy on the treatment of individuals in investigations involving corporate entities. The Antitrust Division's plea agreements with corporations have typically included a broad commitment not to prosecute the corporation's employees and a list of individuals "carved out" of the non-prosecution commitment. Before the policy change, an employee could be "carved out" for three reasons:

- Because the employee was believed to be culpable.
- Because the employee refused to cooperate with the investigation.
- Because the employee was believed to have potentially relevant information but could not be located.

Now the Division will not carve out an employee for a reason unrelated to culpability. Only individuals believed to have been involved in criminal wrongdoing and who are potential targets of the investigation may be carved out. The division will continue, however, to demand full cooperation from those who seek to benefit from the non-prosecution protection of a corporate plea or leniency agreement.

The second change concerns the Division's prior practice of including the names of carved-out employees in publicly filed corporate plea agreements. Now the division will list those names in an appendix, which it will seek to file under seal. The division's stated reason for this new practice is that "it is ordinarily not appropriate to publicly identify uncharged third-party wrongdoers."<sup>4</sup> This brings the Antitrust Division's policy and practice in line with that of other DOJ units, which have adopted similar policies.<sup>5</sup>

On Aug. 5 the Division made public the first plea agreement known to be executed under this new policy.<sup>6</sup> As anticipated, the plea agreement did not name those individuals carved out of the plea agreement protections and instead provided "protections from prosecution for relevant offenses granted in this paragraph shall not apply to the four individuals listed in Attachment A (filed under seal)." The Division sought (and obtained) leave of the court to file an appendix containing the names of carved-out employees under seal.

It remains to be seen whether the adoption of the new policy will significantly affect the number of individuals who are carved out. It also remains to be seen whether courts will grant the DOJ's requests for leave to file under seal the carved-out employees' names, although we expect that most courts will do so.

### *Changes to plea agreements*

The U.S. Supreme Court's recent decision in *Peugh v. United States*, 133 S. Ct. 592 (2013), likely will result in changes to the Antitrust Division's model plea agreement.

Figure 5

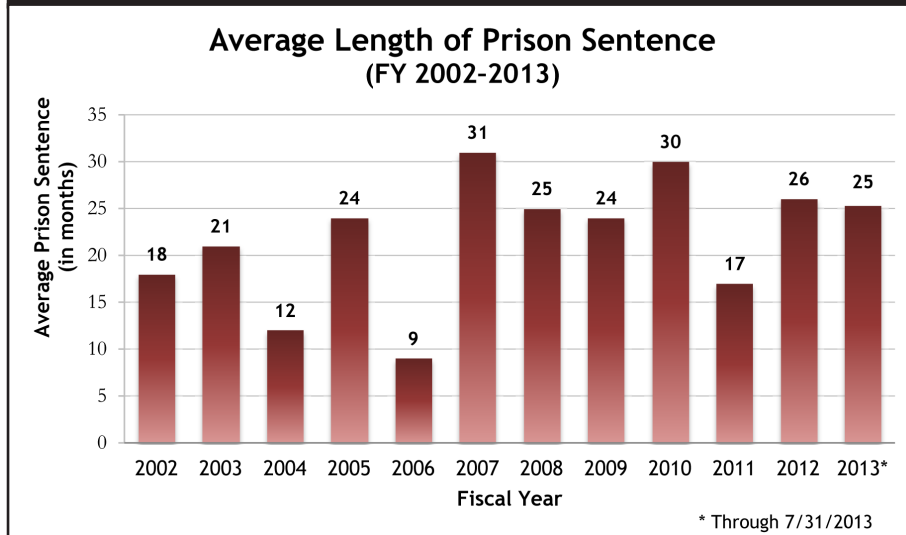
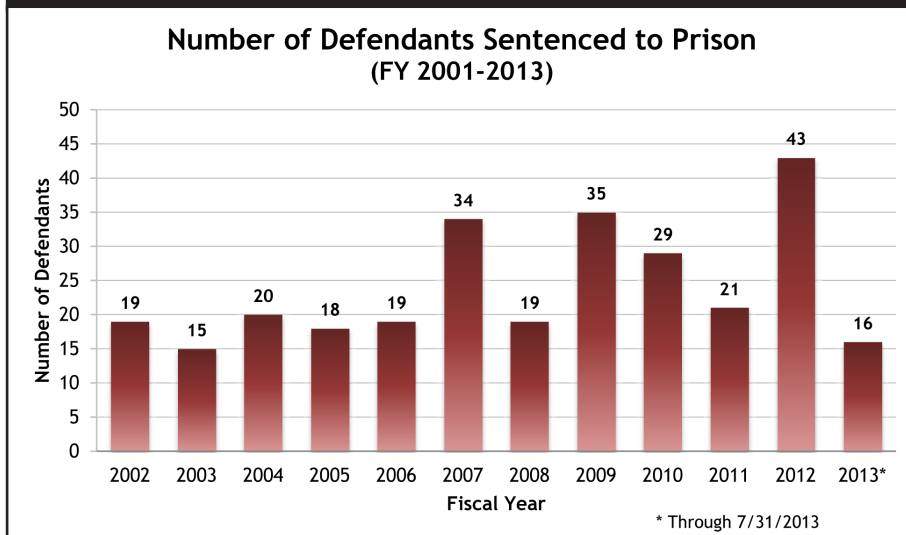


Figure 6



In *Peugh*, the court held that the Constitution's *Ex Post Facto* clause prohibits a federal court from sentencing a defendant based on U.S. sentencing guidelines promulgated after the commission of a crime where the new advisory sentencing range is more punitive (recommends a longer guideline range for the prison term or a higher fine range) than the range under the sentencing guidelines in effect at the time of the offense. Before this decision, the division's standard plea agreement stated that while the sentencing guidelines were not mandatory, "the court must consider the guidelines *in effect on the day of sentencing*, along with the other factors set forth in 18 U.S.C. § 3553(a), in determining and imposing sentence."<sup>7</sup>

As of the date of this writing, the publicly filed division plea agreements do not address this development. That may be accounted for the fact that applicable guideline ranges were the same under either the guidelines in effect at the time of offense and on the day of sentencing for those please publicly announced.<sup>8</sup>

There have been other changes this year as well. Plea agreements filed in 2013 also now provide that “[p]ursuant to U.S.S.G. § 1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this plea agreement will not be used to increase the volume of affected commerce or loss attributable to the defendant or in determining the defendant’s applicable guidelines range, except to the extent provided in U.S.S.G. § 1B1.8(b).”<sup>9</sup>

#### ***Departure of Deputy Assistant Attorney General Scott D. Hammond***

On July 3 Deputy Assistant Attorney General Scott D. Hammond announced he will step down from government service in early October. Hammond has served over 20 years in the Antitrust Division — the last eight in his current role. Lauded by his colleagues as “the international leader of anti-cartel enforcement,” Hammond is a founding figure of the leniency program.<sup>10</sup> During his tenure, the DOJ set records in nearly every category by which enforcers are measured, including the fine amount, number of defendants and foreign-located defendants, number and duration of prison sentences, and more.

#### ***Use of deferred prosecution agreement***

In 2013 the Antitrust Division entered into its first ever deferred prosecution agreement, although it has previously negotiated and entered into non-prosecution agreements. Notwithstanding speculation that this recent use of NPAs and DPAs indicates a policy shift, the Antitrust Division continues to say that it “disfavors the use of [non-prosecution] agreements and DPAs.”<sup>11</sup> Hammond has explained that there is no general “exception for financial institutions permitting the use of NPAs or DPAs.”<sup>12</sup>

### **TRENDS IN EUROPEAN ENFORCEMENT**

#### ***European commission***

Following a record year in 2013, the EC remains on track for another year of noteworthy enforcement.<sup>13</sup> To date, the EC has sanctioned members of three cartels in 2013 and levied €367 million (nearly \$480 million) in fines, which exceeds the four fines totaling over €268 (\$333.4 million) imposed during the first half of 2012. Substantial fines are expected to be imposed during the second half of the year (see Figures 7 and 8).

In January the EC fined Telefónica and Portugal Telecom €79 million (\$104.75 million) for agreeing not to compete in their respective home markets of Spain and Portugal. At issue were non-compete clauses in the agreements governing Telefónica’s acquisition of Vivo (a Brazilian mobile operator) from Portugal Telecom. The EC considers such clauses one of the most serious violations of EU competition law.

In March the EC issued a second “statement of objections” in its synthetic rubber cartel investigation to ENI S.p.A. and Polimeri Europa S.p.A (now Versalis S.p.A.), noting that it intended to reimpose a 50 percent fine enhancement for recidivism, representing €90.75 million (\$119.8 million), which the General Court of the EU had previously nullified. The EC imposed the aggravated fine based on the finding that the companies had previously participated in the polypropylene and PVC II cartels.

In July the EC imposed fines of over €141 million (\$182 million) on Yazaki Corp., Furukawa Electric Co., S-Y Systems Technologies Europe (GmbH) and Leoni AG for bid rigging in connection with the sale of wire harnesses to Toyota, Honda, Nissan and Renault. The fines resulted from negotiated settlements with the EC. Each company received both leniency credit and an additional 10 percent reduction for agreeing to the settlements procedure. The EC named Sumitomo Electric Industries as the immunity applicant and said that absent immunity, Sumitomo would have faced fines of over €290 million (\$378 million).

Figure 7

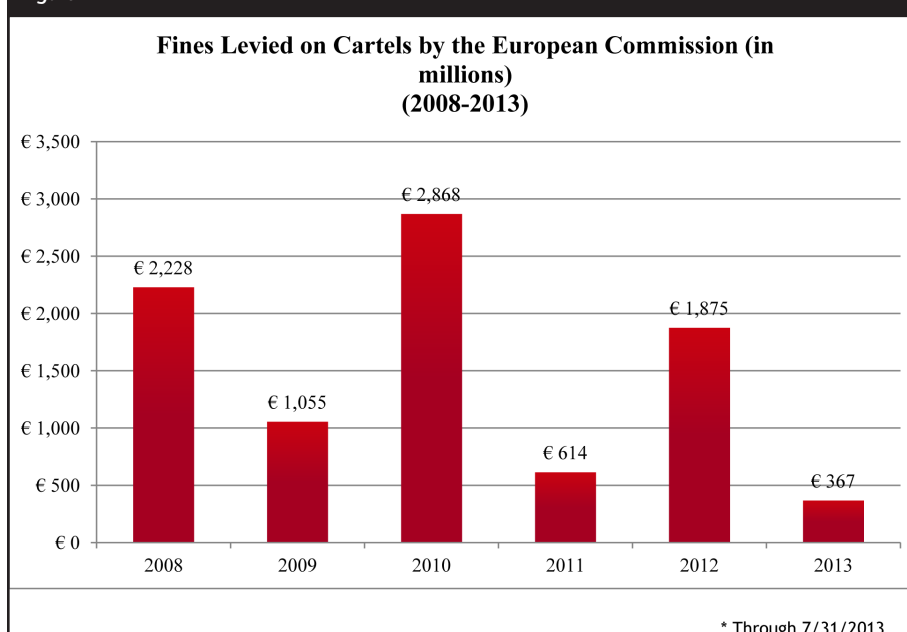
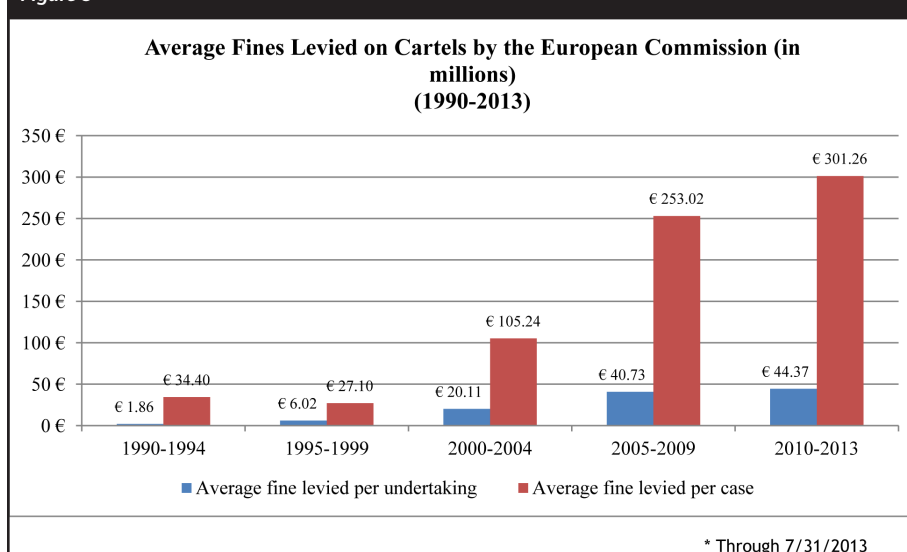


Figure 8



### Courts' views on the EC's fines

There have been three important judicial developments so far in 2013. First, in June, 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. 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.

Second, on July 4 the Court of Justice of the EU, Europe's highest court, delivered one of its most important rulings in years by confirming a 2011 ruling by the General Court in its entirety. In 2011 the General Court annulled an approximately €100 million fine (\$129.6 million) imposed on the Dutch company Aalberts for allegedly

fixing prices, exchanging commercial information, and allocating markets for copper fittings between June 2003 and April 2004. The General Court held that although the company's subsidiaries participated in meetings during which other companies colluded to restrict competition, there was not enough information to justify imposing a fine on the parent company. Given recent EC fines on parent companies in its investigations regarding cathode ray tubes, this decision is significant, although whether it will be limited to its facts remains to be seen.

Third, on July 19 the Court of Justice rejected an appeal of a €143 million fine (\$183 million) imposed on Schindler Holding and its subsidiaries for participation in an elevator and escalator cartel. Schindler argued that such substantial and punitive fines must be imposed by tribunals, not administrative authorities. The Court of Justice rejected 13 different arguments, including that the fines violated separation of powers and the companies' human rights.

### ***Raids and ongoing investigations***

The commission conducted at least five unannounced inspections at companies' premises in the sugar, oil, biofuel, cargo train transport and telecommunications sectors.

### ***Legislative developments***

The commission recently prepared a draft Directive on Antitrust Damages Actions. By harmonizing national regimes, the draft directive which, if passed, will have to be adopted by all 28 member states, aims to remove the obstacles created by divergences among national laws and to make it easier to bring private claims against antitrust infringers in EU member state courts. To avoid weakening the EC's anti-cartel enforcement through the expansion of private claims, the draft directive also proposes safeguards for leniency applicants and settling parties against the disclosure of key submissions made to antitrust authorities.

In addition, successful immunity applicants will generally be liable only for the harm caused by their share of a cartel and not for the harm caused by their co-conspirators. This is similar to the U.S. approach, which shields the leniency applicant from joint and several liability. The draft directive also recognizes that a cartel member may invoke the "passing on defense" if it is legally possible for the person at the next level in the supply chain to bring a claim.<sup>14</sup>

## **OTHER SIGNIFICANT INTERNATIONAL INVESTIGATIONS AND DEVELOPMENTS**

### ***Antitrust reforms and super-regulators***

The European financial crisis has undeniably affected how countries address their competition law enforcement priorities. Several countries have recently reformed or are in the process of reforming their competition law agencies to expedite procedures, reduce costs, and increase effectiveness to optimize resource allocation.

**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 by:

- Introducing a new *de minimis* threshold for cartels.
- Introducing a new legal basis for damages actions.
- Enabling the Federal Competition Authority or Federal Cartel Prosecutor to make a finding that the immunity applicant participated in a cartel.

In addition, the FCA now has the power to:

- Request information through administrative decisions.
- Seal premises, ask questions and call for police assistance during inspections.
- Request information from criminal cases.

**Belgium:** The amended Belgian Competition Law was adopted in April 2013 and transformed the Belgian Competition Authority into a fully independent single body. It should be functional by late fall. All procedures will be significantly shortened and simplified. The investigatory phase will be limited to two years, and the decision-making phase to one year, while all procedures will be carried out under the “fast track” or summary proceedings under Belgian law. In addition, the BCA’s investigators will have more powers, including the power to negotiate and accept settlements during the investigatory phase.

**Germany:** The German Competition Act was significantly amended in June. While the amended legislation did not change the organizational structure of the Bundeskartellamt (the German Antitrust Authority), the changes aim at increasing its efficiency and enforcement powers, for example, by extending the power to request information required for the imposition of cartel fines. This builds on an anonymous electronic reporting tool for whistle-blowers who seek to report cartel activities, introduced in 2012. According to a June Bundeskartellamt report, more and more insiders are making use of this tool.

**Spain:** The Spanish parliament created a new “super-regulator,” the National Commission for Markets and Competition. The NCMC, which should be functioning before November, combines the National Competition Authority and seven sectoral regulators (including, among others, those responsible for stock exchanges, telecommunications, and energy sectors) into one institution led by a board of 10 members. The NCMC will have four sector-specific investigatory teams: competition, telecommunications and audiovisual, energy, and transport and post. The new authority must publish all decisions and orders once notified, with its decisions subject to appeal before the Chamber for Contentious Administrative Proceedings of the National High Court, or Audiencia Nacional. The CNMC is expected to bring annual savings of €28 million (\$37 million), and to provide a better oversight and supervisory function.

**U.K.:** The Enterprise and Regulatory Reform Act 2013 received royal assent April 25. The act merges the current Competition Commission and Office of Fair Trading into a single Competition and Markets Authority, which 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, which will function fully starting April 1, 2014, will remain independent of ministerial control. The CMA will have increased investigative powers regarding cartel enforcement and competition investigations compared with the OFT, including compulsory interview powers for current and former employees of companies under investigation and the ability to impose fines for failure to comply with investigative steps.

The Czech, Finnish and Dutch authorities similarly have implemented reforms or agency mergers in 2013 intended to increase administrative efficiency and reduce costs.

## PENALTIES FOR INDIVIDUALS

Penalties directed against individuals are becoming increasingly common, with several jurisdictions implementing new systems allowing sanctions against individuals, sometimes of a criminal nature.

For example, the new Belgian Competition Law 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 \$1,280).<sup>15</sup>

Denmark’s revised Competition Act also provides for expanded criminal sanctions against individuals for cartel activities. 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>16</sup>

With the Enterprise Act 2002, the U.K. became the European pioneer in introducing criminal sanctions against individuals who engaged in cartel conduct (defined narrowly as price-fixing, market-sharing, output limitation and bid-rigging).

The Enterprise and Regulatory Reform Act 2013 makes a number of changes designed to remove current difficulties encountered when attempting to prosecute individuals. The key change is to eliminate 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 offense 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.

During the first half of 2013, indictments against individuals were also issued in other jurisdictions, including Brazil, Canada and Israel.

## NOTES

<sup>1</sup> We tabulated the average prison sentence using publicly available data reflecting the total prison days sentenced and total number of defendants receiving prison sentences during each fiscal year. For the underlying data for years prior to FY2012, see U.S. Dep’t of Justice, Antitrust Div., Antitrust Division Workload Statistics, FY 2003-2012, *available at* <http://www.justice.gov/atr/public/workload-statistics.pdf>; U.S. Dep’t of Justice, Antitrust Div., Antitrust Division Workload Statistics, FY 2002-2011; U.S. Dep’t of Justice, Antitrust Div., Antitrust Division Workload Statistics, FY 2001-2010; U.S. Dep’t of Justice, Antitrust Div., Antitrust Division Workload Statistics, FY 2000-2009.

<sup>2</sup> 2012 Year-End Criminal Antitrust & Competition Law Update (Jan. 7, 2013), *available at* <http://www.gibsondunn.com/publications/pages/2012YearEnd-Criminal-Antitrust-Competition-Update.aspx>.

<sup>3</sup> We tabulated the average prison sentence using publicly available data reflecting the total prison days sentenced, the total number of defendants receiving prison sentences during each fiscal year, and the citizenship of those pleading guilty.

<sup>4</sup> Press Release, U.S. Dep’t of Justice, Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division’s Carve-Out Practice Regarding Corporate Plea Agreements (Apr. 12, 2013), *available at* [http://www.justice.gov/atr/public/press\\_releases/2013/295747.htm](http://www.justice.gov/atr/public/press_releases/2013/295747.htm).

<sup>5</sup> United States Attorney’s Manual 9-27.760, *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcr.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcr.htm) (“In the context of public plea and sentencing proceedings, ... in the absence of some significant justification, it is not appropriate to identify ... a third-party wrongdoer unless that party has been officially charged with the misconduct at issue.”).

<sup>6</sup> See Plea Agreement, *United States v. Panasonic Corp.*, No. 2:13-cr-205401-GCS, Dkt. 9 (Aug. 5, 2013) at 16(b).

<sup>7</sup> See, e.g., Plea Agreement, *United States v. Rezaian*, No. 3:13-cr-002460CRB, Dkt. 5 (May 2, 2013).

<sup>8</sup> See Plea Agreement, *United States v. Panasonic Corp.*, at ¶16(c).

<sup>9</sup> *Id.*

- <sup>10</sup> Ron Knox, *Hammond to Depart DOJ*, GLOBAL COMPETITION REVIEW (July 3, 2013), available at <http://globalcompetitionreview.com/news/article/33746/hammond-depart-doj>.
- <sup>11</sup> *DOJ Not Wavering on Antitrust Guilty Pleas, Officials Say*, LAW360 (Apr. 10, 2013), available at <http://www.law360.com/articles/431781/doj-not-wavering-on-antitrust-guilty-pleas-official-says>.
- <sup>12</sup> GLOBAL COMPETITION REVIEW, Vol. 15, April/May 2012 (quoting Deputy Assistant Attorney General Scott Hammond answering a question regarding whether use of NPAs or DPAs would increase, "Do I anticipate seeing NPAs and DPAs in antitrust prosecutions in the future? The answer to that is no. We have a policy that disfavors the use of NPAs and DPAs for antitrust crimes, and that policy remains in effect."):
- <sup>13</sup> *Supra* note 2.
- <sup>14</sup> *European Commission Takes First Steps Toward EU Antitrust Damages Claims*, Gibson Dunn's Client Alert (June 14, 2013), available at <http://www.gibsondunn.com/publications/pages/ECTakesFirst%20Steps-Towards-EU-Antitrust-Damages-Claims.aspx>.
- <sup>15</sup> European Competition Network Brief 02/2013, European Union (June 2013), available at [http://ec.europa.eu/competition/ecn/brief/02\\_2013/be\\_new.pdf](http://ec.europa.eu/competition/ecn/brief/02_2013/be_new.pdf).
- <sup>16</sup> European Competition Network Brief 01/2013, European Union (Jan. 2013), available at: [http://ec.europa.eu/competition/ecn/brief/01\\_2013/dk\\_act.pdf](http://ec.europa.eu/competition/ecn/brief/01_2013/dk_act.pdf).



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