

GCR

GLOBAL COMPETITION REVIEW

A photograph of the Golden Gate Bridge in San Francisco, California, viewed from a low angle over the ocean. The bridge's iconic orange-red towers and suspension cables are prominent against a clear sky. The foreground shows dark, jagged rocks in the water with white foam from the waves crashing against them.

THE FRONT LINE

CARTEL BUSTING IN SAN FRANCISCO

2009 year-end criminal antitrust review

Partner **David Burns** and associates **Joshua Hess**, **Geoffrey Weien** and **Russell Gold** of Gibson Dunn & Crutcher LLP review last year's antitrust enforcement record

The most prolific decade in criminal antitrust enforcement history came to a dramatic conclusion in 2009, with breathtaking fines and other sanctions imposed by the US Department of Justice and the world's other leading antitrust enforcement authorities. The Department of Justice antitrust division imposed over \$1 billion in fines for its fiscal year (FY) ending 30 September 2009 – the second-highest fine level ever imposed. And DoJ's FY 2010 had a strong start, including the imposition of a fine of \$220 million in December 2009 in the TFT-LCD investigation, bringing the total fines collected in that investigation to an eye-popping \$862 million to date. Additionally, individual criminal antitrust defendants, including foreign nationals, continued to receive substantial, multi-year prison terms in the United States. What's more, criminal antitrust enforcement by jurisdictions outside the United States (particularly in Australia and Japan) expanded dramatically in 2009, with the DoJ attempting to take a leading role in the convergence of international enforcement standards.

Enforcement by the numbers

Dramatic fines continue through FY 2009 (and beyond)

In FY 2009, the DoJ imposed criminal antitrust fines on corporations and individuals of over \$1 billion. As the chart below shows, this was the fourth consecutive year in which

the DoJ exceeded the fines imposed in the prior year. This year's total was a staggering 48 per cent increase from last year's.

The main drivers of the FY 2009 and FY 2010 fines are illustrated in the table above, which lists all fines exceeding \$10 million.

The majority of these fines were front-loaded in the FY 2009 calendar, marked perhaps most notably by fines of \$400 million, \$120 million, and \$65 million

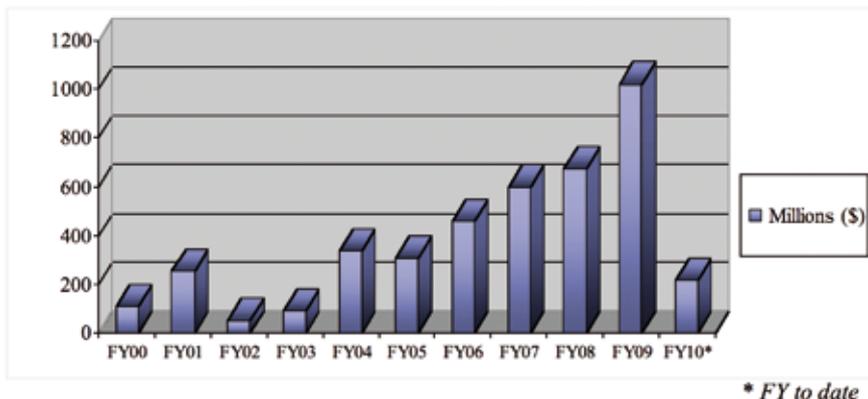
imposed by the DoJ in November 2008 on LG Display, Sharp and Chunghwa Picture Tubes, respectively, in its investigation of price fixing in the TFT-LCD flat panel industry. There were few fines imposed in the latter months of FY 2009. Indeed, the last three months of the fiscal year (July, August and September) saw only \$28 million in fines, although this is probably explained solely by the ebb and flow of large investigations. But FY 2010 opened strongly with \$220 million in fines imposed on Chi Mei Optoelectronics in the TFT-LCD investigation. With numerous targets remaining under investigation, criminal fines in FY 2010 might meet or exceed the fines imposed in FY 2009.

The last fiscal year was also significant for international antitrust fines: international enforcers imposed over \$3.6 billion (€2.5 billion) in antitrust cartel fines. The European Commission, which traditionally levies the largest fines, presents a representative picture of international antitrust fines, as depicted in the following chart.

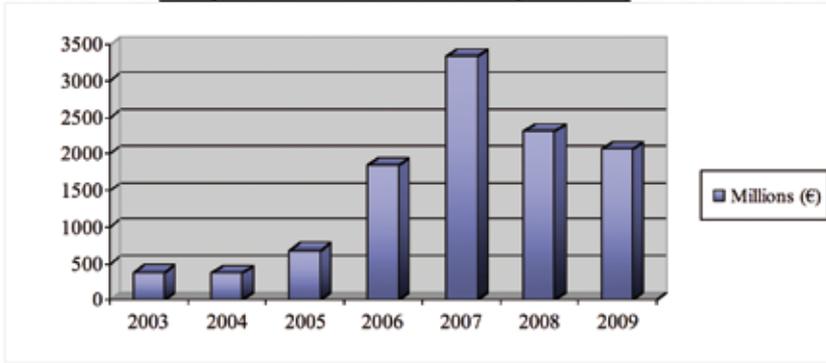
United States fines of \$10 million or more in FY 2009/2010

Amount	Company	Investigation
\$400 million	LG Display	TFT-LCD
\$220 million (FY 2010)	Chi Mei Optoelectronics	TFT-LCD
\$120 million	Sharp	TFT-LCD
\$119 million	Cargolux Airlines	Air Cargo
\$109 million	LAN Cargo & Aerolinhas Brasileiras	Air Cargo
\$65 million	Chunghwa Picture Tubes	TFT-LCD
\$50 million	Asiana Airlines	Air Cargo
\$45 million	Nippon Cargo Airlines	Air Cargo
\$31 million	Hitachi Displays	TFT-LCD
\$26 million	Epson Imaging Devices	TFT-LCD
\$15.7 million	El Al Israel Airlines	Air Cargo

Total antitrust fines imposed by DoJ



European Commission cartel fines (2003-2009)



Significant prison sentences continue through 2009

In addition to these fines, the recent trend of lengthy prison sentences continued in FY 2009, as the chart below demonstrates. Although the average sentence of 24 months is slightly below the average of the past two years, it remains high compared to the early part of the decade. This trend toward lengthier sentences was exemplified by the longest prison sentence ever imposed for a single antitrust conviction. Peter Baci was sentenced to 48 months in prison for agreeing to allocate customers, rig bids, and fix prices and fees in the market for coastal water freight transportation services between the United States and Puerto Rico.

Moreover, we can expect more stiff jail sentences and large fines to come. At the end of FY 2009, the antitrust division had 144 pending grand jury investigations, the largest number since 1992.

Significant antitrust investigations in 2009

International air cargo investigation
Several additional guilty pleas were entered and fines levied as a result of the global investigation of price fixing in the air cargo industry. In addition to more than \$300 million in fines in the United States, competition authorities in Japan, Australia and Canada have also levied fines in the past year. Guilty pleas began in late 2007 and have continued through 2009.

Companies pleading guilty in the United States in FY 2009 (and their criminal fines) were:

- LAN Cargo SA and Aerolinhas Brasileiras SA (\$109 million jointly);
- El Al Israel Airlines (\$15.7 million);
- Cargolux Airlines International S.A. (\$119 million);
- Nippon Cargo Airlines Co Ltd (\$45 million); and
- Asiana Airlines Inc (\$50 million).

The combined \$339 million in new fines bring the total fines for the air cargo investigation to more than \$1.6 billion, the largest total for a single criminal antitrust investigation in the United States. Fifteen airlines have now pleaded guilty to criminal violations of United States antitrust laws.

Additionally, Jan Lillieborg, former vice president of global sales for SAS Cargo, was indicted in August in the US District Court for the District of New Jersey on charges of conspiracy to restrain trade, conspiracy to obstruct justice and obstruction of justice arising out of the air cargo investigation. Those charges remain pending.

In April, Franciscus Johannes de Jong, an employee of Martinair Holland NV, pleaded guilty to violating section 1 of the Sherman Act. De Jong was sentenced to eight months in jail, fined \$20,000 and has agreed to cooperate with the antitrust division. De Jong is the fourth airline executive who has

Further, the Australian Competition and Consumer Commission (ACCC) imposed fines on Martinair (\$5 million), Cargolux (\$5 million), and Air France-KLM (\$6 million). In Canada, Martinair, Air France and KLM pleaded guilty and were fined a total of \$10 million.

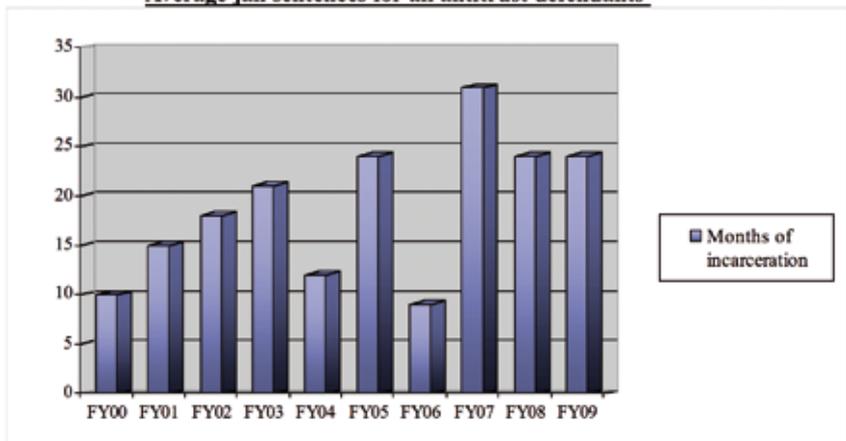
Marine hose investigation

The continuing investigation of cartel activity in the marine hose industry produced two more corporate guilty pleas and \$11 million more in fines in the United States. Two subsidiaries of Trelleborg AB, Virginia Harbor Services Inc and Trelleborg Industrie SAS, agreed to fines of \$7.5 million and \$3.5 million respectively. These guilty pleas bring the total for the investigation to nine individuals and three corporations.

The European Commission Directorate General of Competition (DG Comp) imposed even higher fines in its marine hose investigation. This past year, five companies were fined a total of \$173 million: Bridgestone Corporation (\$76.8 million), Parker ITR SRL (\$33.5 million), Trelleborg Industrie SAS (\$32.1 million), Dunlop Oil & Marine Ltd (\$23.6 million) and Manuli Rubber Industries SPA (\$6.4 million). Yokohama Rubber Co was not fined because it was the first to reveal the cartel activity to competition authorities.

Korea's Fair Trade Commission (KFTC) also issued several fines: Bridgestone (\$256,600), Dunlop (\$117,400), Trelleborg (\$40,200) and Parker (\$33,700). This was the KFTC's first penalty for an international

Average jail sentences for all antitrust defendants



pleaded guilty and been sentenced to jail time in the United States as a result of the air cargo investigation. And the Department of Justice has signalled that more fines and jail sentences may be yet to come.

Outside the United States, the Japanese Fair Trade Commission (JFTC) ordered 11 companies to pay a total of \$92.4 million for cartel activity in the air cargo market.

bid-rigging cartel. Further, in August, the ACCC began investigating cartel activity in the marine hose industry. That investigation remains pending.

Thin film transistor-liquid crystal display (TFT-LCD)
Significant fallout from the investigation of price fixing in the TFT-LCD industry that

began in late 2006 continued in 2009. To date, a total of six companies have entered guilty pleas and collectively paid \$862 million in fines. Pleading guilty this fiscal year were Hitachi Displays Ltd (\$31 million) and Epson Imaging Devices Corp (\$26 million). These fines and guilty pleas followed on the heels of several pleas from late in the 2008 calendar year that resulted in a total of \$585 million in fines to LG Display Co Ltd (\$400 million), Sharp Corp (\$120 million) and Chunghwa Picture Tubes Ltd (\$65 million). And in December 2009, Chi Mei Optoelectronics pleaded guilty and agreed to pay a \$220 million criminal fine.

Several foreign executives also pleaded guilty in the United States and received prison sentences this fiscal year as a result of the TFT-LCD investigation. Chang Suk Chung of LG was sentenced to seven months' imprisonment and fined \$25,000. Bock Kwon, also of LG, was sentenced to a year in prison and fined \$30,000. Executives of Chunghwa were sentenced to six, seven, and nine-month terms and were fined \$20,000, \$30,000 and \$50,000, respectively.

Several other executives have been indicted in the US District Court for the Northern District of California on charges that remain pending: Cheng Yuan Lin and Wen Jun Cheng of Chunghwa, Duk Mo Koo of LG, and Sakae Someya of Hitachi. Several other competitors in the TFT-LCD industry remain uncharged, and the December 2009 fine of Chi Mei probably indicates there are more charges to come in 2010, as numerous known targets of the investigation have not yet been charged or agreed to plead guilty.

Cathode ray tubes (CRT) investigation

In the related CRT industry investigation that began in November 2007, this year brought the first indictments in the United States, statements of objections from DG Comp, and cease-and-desist letters from the JFTC.

In the United States, two former executives of Chunghwa, Cheng Yuan Lin and Wen Jun Cheng (indicted separately in the TFT-LCD investigation, noted above), were also indicted in the US District Court for the Northern District of California in February and August, respectively, on charges related to the CRT investigation.

DG Comp also sent statements of objections to "a number of companies active in the [CRT] industry". Although DG Comp did not disclose who received the statements of objections, news reports confirmed that Philips and Panasonic were among those targeted.

The JFTC sent cease-and-desist letters to MT Picture Display Co and Samsung SDI Co Ltd regarding their activities in the CRT market.

Optical disk drives investigation

This year also saw the beginning of a new DoJ investigation of the optical disk drive industry. Optical disk drives are used to read from and write to disks in formats such as CD, DVD and blu-ray. Sony Corp, Toshiba Corp, and Hitachi Ltd have each reportedly been subpoenaed. Hitachi-LG Data Storage, a joint venture of Hitachi and LG, also received a subpoena from the antitrust division and is under investigation by DG Comp and Singapore authorities. Toshiba Samsung Storage Technology Corp, a joint venture of Samsung and Toshiba, is also under investigation by the DoJ and other authorities.

Other notable prosecutions

European Union

Fines from DG Comp totalled more than \$2 billion in 2009. DG Comp fined German utility E.ON AG and French natural gas provider GDF Suez \$768 million each for agreeing not to compete in each other's home natural gas markets. DG Comp issued another \$100 million in total fines to six power transformer producers for cartel activity: Toshiba Corp, Hitachi Ltd, Fuji Electric, ABB Ltd, Areva T&D SA and Alstom SA. In November, DG Comp raided the offices of Czech power company ČEZ AS.

Twenty-four companies that produce chemicals used as plastic additives received fines totalling \$259 million in 2009 for cartel activity. The largest fines were issued to Ciba AG (\$102 million), Akzo Nobel NV (\$60.5 million), Arkema France SA (\$42.6 million) and Elementis PLC (\$48.4 million). Several of the fines reflected credit for cooperation with the commission's investigation. Arkema's fine, however, reflected an increase of 90 per cent because it had participated in similar cartel activity previously.

Europe's highest court, the European Court of Justice, upheld previously imposed fines for fixing prices and fees on Le Carbone Lorraine SA, SGL Carbon AG and four Austrian banks totalling \$253 million. Fines totalling \$124 million were reinstated on Alfa Acciai, Ferriere Nord, Feralpi, IRO, Leali, Lucchini, Riva Fire and Valsabbia for cartel activity in the concrete reinforcing bar industry.

In November, DG Comp sent a statement of objections to Standard & Poor's Financial Services LLC regarding licensing fees for its securities identification numbers, the first public action in an investigation that began

in January 2009. Around the same time, Thomson Reuters received a statement of objections regarding real-time market datafeeds. DG Comp also initiated other investigations of the Spanish cement industry and several pharmaceutical companies in the past year.

Japan

In addition to the fines in the air cargo investigation discussed above, the JFTC fined Sekisui Chemical Co and Mitsubishi Plastics Inc a total of \$125 million for price fixing in the vinyl chloride pipe industry. The \$85 million Sekisui fine was the largest the JFTC has ever imposed. In June, the JFTC fined three steel makers \$110 million for price fixing in the steel plating and coated flat steel markets.

The United Kingdom

The Office of Fair Trading fined construction companies more than \$211.6 million for bid rigging in one of the agency's largest ever competition-law investigations.

South Africa

Sasol Chemical Industries Ltd agreed to a fine of \$29.8 million for price fixing in the fertiliser industry. The South African Competition Commission is also seeking fines against steelmaker ArcelorMittal SA for price fixing.

Russia

An arbitration court overturned a \$163 million fine against oil company Gazprom for price fixing, but competition authorities continue to target the company. Russian antitrust authorities also fined Lukoil \$225.7 million for abusing its dominant market position by removing its products from circulation.

Conclusion

Last year was a fitting end to a decade marked by ever-increasing fines and jail terms in criminal antitrust enforcement. Guilty pleas, criminal fines and prison sentences were front-loaded in the fiscal year. But the \$229 million in fines imposed in the first three months of FY 2010 show that the DoJ's intense enforcement pace is not slowing down. And international antitrust enforcement has been just as active, with numerous prosecutions and criminal fines.

FY 2010 promises to be another busy – if not record-setting – year for criminal antitrust enforcement. We are likely to see continued developments in, among other areas, the TFT-LCD investigation, the related CRT investigation and the optical disk drive market. ■