

Criminal antitrust enforcement in 2008

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A race to higher fines and longer jail terms: David Burns, Joshua Hess and Geoffrey Weien at Gibson Dunn & Crutcher LLP review last year's antitrust enforcement record

The past several years in criminal antitrust enforcement have been marked by an ever-increasing amount of fines imposed by the US Department of Justice's Antitrust Division and the world's other leading antitrust enforcement authorities. Last year was no exception. In November 2008 the DoJ extracted fines totalling \$585 million from LG Display, Sharp and Chunghwa Picture Tubes in the thin film transistor-liquid crystal display (TFT-LCD) investigation. The \$400 million fine paid by LG Display was the second-largest criminal fine ever imposed by the Antitrust Division.

At the same time, individual foreign defendants are submitting to US jurisdiction and receiving the longest criminal antitrust prison sentences in history, joining the significant upward trend of prison terms imposed on all criminal antitrust defendants. From 2000 to 2008, the average jail sentence for a foreign defendant increased over 600 per cent from a little more than two months to approximately 15 months. The increase in average jail sentences for foreign defendants follows the overall trend of increased prison terms for all defendants over the same time period. The average prison term for all antitrust defendants in 2008 was 25 months, compared with only 10 months in 2000.

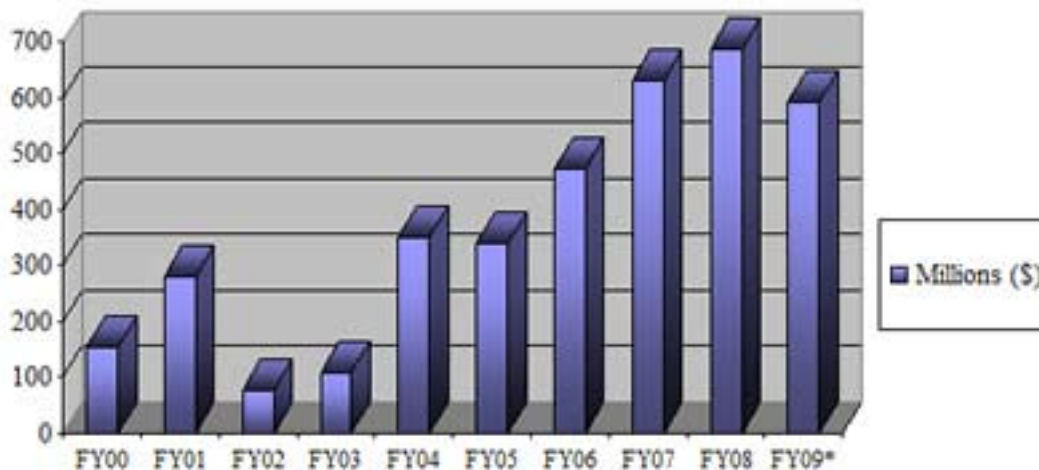
Unless otherwise indicated, all US statistics are based on the DoJ's fiscal year, which runs from October 1 to September 30.

ENFORCEMENT BY THE NUMBERS

Dramatic increases in fines continue

The statistics for 2008 demonstrate the dramatic increase in the sanctions being imposed as a result of criminal enforcement actions brought by the DoJ. First, criminal antitrust fines continued to increase throughout 2008 with the promise of a staggering total amount of fines in 2009. In 2007, DoJ antitrust criminal enforcement resulted in approximately \$630 million in fines imposed. In 2008, the amount of criminal antitrust fines rose to approximately \$686 million. This year promises to be another record-setter. As the chart below illustrates, for just the first quarter of this fiscal year (October to December 2008), the DoJ has already imposed criminal antitrust fines of approximately \$592 million-86 per cent of the fines imposed over the course of the previous year. And this amount does not include the more than \$124 million in fines that LAN Cargo, Aerolinhas Brasileiras and El Al Israel Airlines have agreed to pay pursuant to plea agreements announced by the DoJ in January 2009 in the air cargo investigation. The number for FY 2009 is for the first quarter (October to December 2008) only.

US criminal antitrust fines (2000-2009)



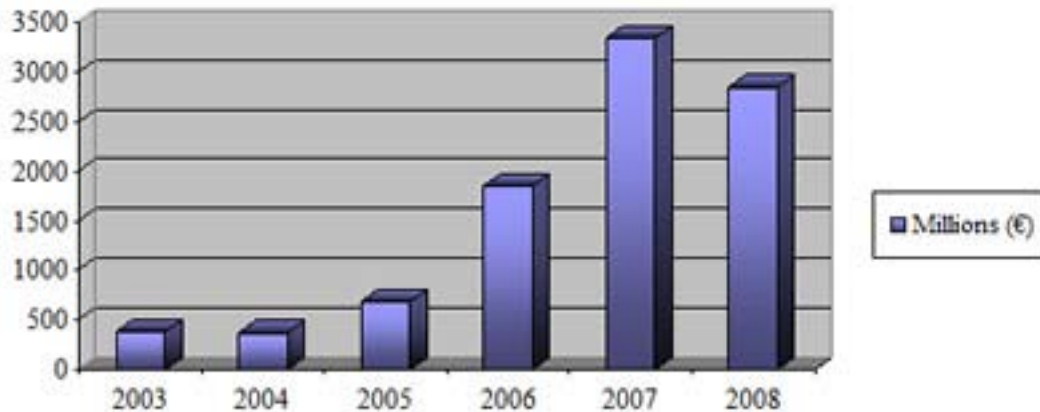
Although these aggregate numbers present a striking illustration of the DoJ's increased enforcement of the criminal antitrust statutes, they do not adequately reflect the enormity of each fine imposed. The chart below lists the criminal fines imposed by the DoJ in FY 2008/2009 that exceeded \$10 million. Notably, five of the fines imposed in this period exceeded \$100 million, including the second and third-largest criminal antitrust fines imposed by the DoJ in history (the LG and Air France-KLM fines, respectively).

US fines of \$10 million or more in FY 2008/2009

Amount	Company	Investigation
\$400 million	LG Display/LG Display USA	TFT-LCD
\$350 million	Air France-KLM	Air Cargo
\$120 million	Sharp	TFT-LCD
\$110 million	Japan Airlines	Air Cargo
\$109 million	LAN Cargo/Aerolinhas Brasileiras	Air Cargo
\$65 million	Chunghwa Picture Tubes	TFT-LCD
\$61 million	Qantas	Air Cargo
\$60 million	Cathay Pacific	Air Cargo
\$52 million	SAS Cargo	Air Cargo
\$42 million	Martinair Holland	Air Cargo
\$15.7 million	El Al	Air Cargo

The levels of and increases in fines levied by the European Commission are even more staggering. In 2007, the commission collected more than €3.3 billion in cartel fines – an 80 per cent increase over the €1.8 billion imposed in 2006 and an incredible 388 per cent increase over the € 683 million imposed in 2005. In 2008, there was a decline from 2007 with fines of approximately € 2.3 billion, down € 1 billion, but still a dramatic increase in penalties from just three years ago.

European Commission cartel fines (2003-2008)

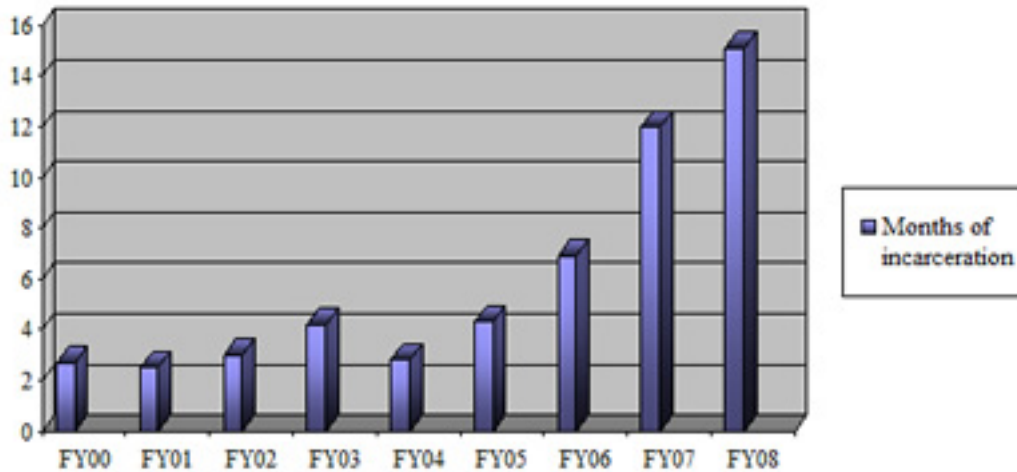


The fines from 2008 include the largest penalties ever imposed by the commission: € 1.4 billion against participants in an information exchange conspiracy in the automobile glass industry, with one participant alone fined €96 million.

Substantial increase in prison terms for foreign defendants

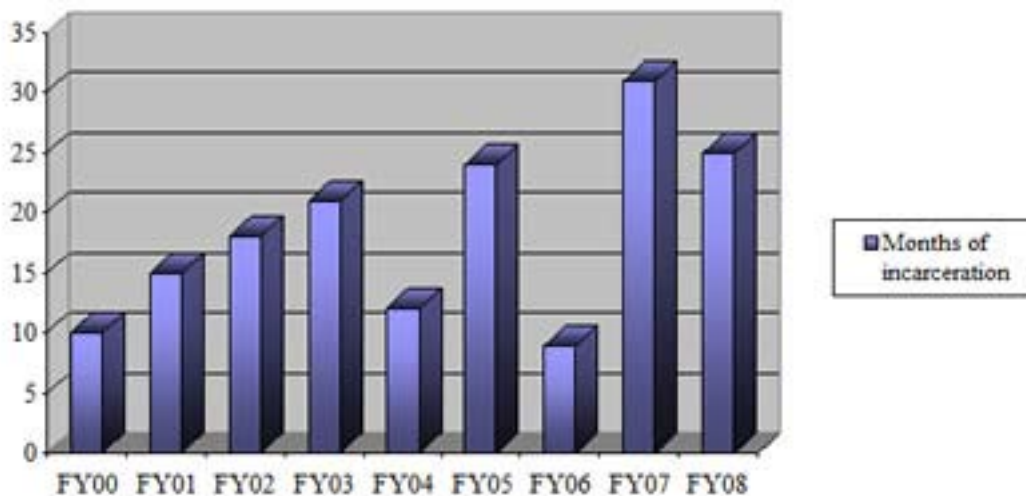
One of the more notable recent developments of criminal antitrust enforcement is the length of prison sentences that the DoJ is requiring for individual foreign defendants who wish to enter into plea agreements. As the chart below illustrates, in 2000, the average jail sentence for a foreign defendant was a little more than two months. In 2008, the average prison term was approximately 15 months - an increase in excess of 600 per cent.

Average jail sentence for foreign defendants in international cartel cases



This increase in average jail sentences for foreign defendants is in line with the overall trend of increased prison terms for all antitrust defendants over the last eight years. In 2008, the average prison term for all antitrust defendants was 25 months, down from a high of 31 months the previous year. In 2009, however, the DoJ already has obtained lengthy prison sentences against numerous other individuals, including four years for a defendant in an investigation of collusion in the coastal shipping industry – the longest prison term ever imposed for one antitrust charge.

Average jail sentence for all antitrust defendants



SIGNIFICANT ANTITRUST INVESTIGATIONS IN 2008

The substantial fines and lengthy prison sentences are the result of numerous major international cartel investigations conducted by the Antitrust Division and its counterparts around the world. Some of the most significant cartel investigations that were active in 2008 are highlighted below.

Thin film transistor-liquid crystal display panels

In December 2006, producers of TFT-LCD panels around the world received subpoenas or were the subject of raids by the DoJ and enforcement authorities in Europe, Canada, Japan and Korea. Among those who have acknowledged receiving subpoenas are: Samsung, LG Philips (now LG Display), Sanyo Epson, Sharp, Toshiba Matsushita, Hannstar, NEC, Chi Mei Optoelectronics, AU Optronics and Chunghwa Picture Tubes.

In November 2008, the DoJ announced that LG and Chunghwa had entered into plea agreements to plead guilty and pay substantial fines for conspiring with their competitors to fix the prices of TFT-LCD panels at regular “crystal meetings” that occurred from 2001 to 2006. Sharp agreed to plead guilty to separate conspiracies to fix prices to Dell (for monitors and laptops), Motorola (for screens for RAZR cellular phones), and Apple (for displays for its iPod music players).

Combined, these defendants agreed to pay fines of \$585 million: LG agreed to pay \$400 million—the second-largest criminal fine ever imposed by the Antitrust Division—while Sharp and Chunghwa agreed to pay \$120 million and \$65 million, respectively. These pleas, and the DoJ’s statements in connection with them, indicate that 2009 will bring both additional pleas by and indictments of other companies and individuals who were party to these conspiracies with further very large fines, as well as numerous significant prison sentences. Indeed, four executives from LG and Chunghwa have agreed to plead guilty and two executives from the same company have been indicted.

Marine hose investigation

This investigation became public in May 2007 with the simultaneous arrests in Houston and San Francisco of eight executives of Dunlop Oil & Marine, Trelleborg Industrie, Bridgestone, Parker and PW Consulting for conspiring to rig bids, fix prices and allocate markets of marine hose. The investigation was active throughout 2008 and will no doubt continue well into 2009.

To date, nine individuals have agreed to plead guilty for their participation in the cartel. In what may prove to be a harbinger of future coordination between the Antitrust Division and DoJ’s fraud section unit responsible for enforcing the Foreign Corrupt Practices Act (FCPA), in December 2008 Misao Hioki, a Japanese national and former Bridgestone executive, pleaded guilty for his role in the marine hose cartel as well as his role in a conspiracy to pay bribes to government officials in Latin America and elsewhere in violation of the FCPA. He was sentenced to serve 24 months in prison and pay a fine of \$80,000. Other sentences imposed in this investigation have ranged from as low as a \$20,000 fine and six months of house arrest for Giovanni Scodiggio, an Italian citizen and Parker executive, to as high as 30 months of imprisonment for Peter Whittle, a former Dunlop executive and now the proprietor of PW Consulting (Oil & Marine) Ltd. Two former Manuli managers, Robert Furness and Charles Gillespie, pleaded guilty and have agreed to serve prison terms of 14 months and 12 months respectively. Whittle, together with Bryan Allison and David Brammar of Dunlop, UK citizens who pleaded guilty and were sentenced in the US

for their roles in the marine hose cartel, were also arrested and criminally charged with cartel offences by UK competition authorities. In addition to the convictions of individuals, in December 2008, Manuli pleaded guilty and was ordered to pay a fine of \$2 million, and Dunlop agreed to plead guilty and pay a fine of \$4.54 million.

Not all of those charged with participating in the cartel have agreed to plead guilty. Indeed, in November 2008 Francesco Scaglia and Val Northcutt, two sales managers from Manuli's Oil & Marine Division, were acquitted of marine hose cartel charges after a four-week jury trial in Houston. Ewe Bangert, a German national and former executive of Dunlop, has pleaded not guilty to charges that he was involved in the cartel.

In January 2009, the European Commission fined Bridgestone, Trelleborg, Dunlop, Parker and Manuli \$173 million for their participation in the cartel. Japan's Fair Trade Commission, DG Competition, and CADE in Brazil are also investigating the marine hose industry.

International air cargo investigation

The DoJ's investigation of air cargo transportation price fixing, which had its first guilty pleas in late 2007, reached a climax in 2008. The Antitrust Division obtained several jail sentences for corporate executives and the largest criminal fines against corporations ever obtained in a single investigation.

The conspiracies alleged by the DoJ involved items such as fuel surcharges and post-September 11 security charges imposed by several major international airlines. The initial wave of guilty pleas began in late 2007, when British Airways and Korean Air pleaded guilty and paid \$300 million each. (A portion of the British Airways criminal fine was for fixing passenger fuel surcharges.)

Additional corporate guilty pleas started in January 2008 and continued through June. Companies pleading guilty (and their criminal fines) were:

- Air France-KLM Royal Dutch Airlines (\$350 million);
- Japan Airlines (\$110 million);
- Qantas (\$61 million);
- Cathay Pacific Airways (\$60 million);
- SAS Cargo Group (\$52 million); and
- Martinair Holland (\$42 million).

According to associate attorney general Kevin O'Connor, this brought the total fines in the air cargo investigation to \$1.2 billion, the highest fines ever imposed in a single criminal antitrust investigation. The total fines in this investigation will increase by more than \$124 million when the payments agreed to by LAN Cargo, Aerolinhas Brasileiras, and El Al are collected.

Several of the airlines' executives also separately agreed to plead guilty and serve jail sentences. These were Bruce McCaffrey of Qantas (eight months plus a \$20,000 criminal

fine); Timothy Pfeil of SAS Cargo Group (six months); and Keith Packer of British Airways (eight months plus a \$20,000 criminal fine).

Internationally, Qantas and British Airways each agreed to pay additional criminal fines in Australia (A\$20 million and A\$5 million, respectively (US\$13 million and US\$3 million)). In December, New Zealand's Commerce Commission announced an investigation of these and other airlines (13 in all) plus a total of seven executives. Airlines reportedly involved in the New Zealand investigation include United, Lufthansa and El Al. The European Commission continues its investigation of the air cargo sector.

DRAM Investigation

The DoJ's investigation of price fixing in the dynamic random access memory (DRAM) market, which began in 2002, has been among the most significant ever. The DRAM investigation has yielded criminal charges against 18 current and former executives from multiple companies, in addition to guilty pleas from those companies (including Samsung, Hynix and Elpida) that required them to pay fines that collectively exceeded \$730 million. Of particular note to illustrate the DoJ's increasingly aggressive position with respect to foreign defendants, one Samsung executive, Il Ung Kim, agreed to plead guilty, serve 14 months in prison and pay a \$250,000 fine.

The overall success of the DoJ's investigation and prosecution of price fixing in DRAM, however, suffered a notable setback in 2008. In February 2008, the Antitrust Division tried a Hynix executive, Gary Swanson, on a criminal charge of conspiring to fix DRAM prices. The Swanson trial was the only prosecution in the DRAM case that went to trial. After a nearly three-week trial, the jury deadlocked 10-2 in favour of acquittal and a mistrial was entered. The DoJ declined to re-try Swanson and there are no further prosecutions expected. Given the number of guilty pleas, the cooperation of an amnesty applicant, and the significant fines and prison sentences imposed, the Swanson mistrial represented a somewhat surprising and negative coda to the DRAM investigation, although the fines and jail sentences meted out should continue to make companies and their employees pause before engaging in potentially anti-competitive conduct.

E-Rate bid-rigging investigation

This year saw several jury convictions, guilty pleas, and sentences in the E-Rate bid-rigging investigation, which has resulted in convictions of seven companies and 13 individuals to date, plus over \$40 million in criminal fines and restitution. The E-Rate programme funds US primary and secondary schools' purchases of internet backbone equipment and is operated by the FCC.

Among the notable convictions, guilty pleas, and sentences entered in the E-Rate case this year are the following:

- Judy Green was convicted in 2007 by a jury in San Francisco of rigging bids and defrauding the programme, and was sentenced in early 2008 to seven and a half years in prison;

- Benjamin Rowner and Jay Soled pleaded guilty to conspiracy to defraud the programme from 1999 through 2003; they agreed to assist the investigation and apparently have not yet been sentenced;
- Howe Electric, a Californian electrical contractor, agreed to plead guilty to bid rigging and pay a total of \$3.3 million in restitution, criminal fines and civil settlement;
- a federal court in South Carolina sentenced a school district official, Cynthia Ayer, who was convicted of mail fraud, to two years in prison and ordered her to pay restitution of \$486,000; and
- in Atlanta, R Clay Harris was convicted by a jury of bribing E-Rate administrators to receive contracts for his company.

Domestic ocean shipping investigation

In October 2008, four US shipping company executives agreed to plead guilty and serve jail sentences for their roles in an alleged conspiracy to rig bids, fix prices and allocate market shares for customers transporting goods between the continental US and Puerto Rico by ocean vessel. Peter Baci, an executive with Sea Star, and Kevin Gill, Gregory Glova and Gabriel Sura (all executives from Horizon Lines) each agreed to serve a jail term and pay a \$20,000 criminal fine. In January 2009, a US district court judge in Florida sentenced Baci to four years' imprisonment, the longest prison term ever imposed for one antitrust charge. A one-count felony obstruction of justice charge was filed against a fifth shipping executive, Alexander Chisholm, also of Sea Star, who agreed to plead guilty and serve jail time, to be determined by the court.

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By any measure, 2008 was an active year for the Antitrust Division, as well as its counterparts around the globe. The year was marked with record criminal fines, lengthy prison sentences (including numerous significant sentences for foreign individuals), and myriad guilty pleas. In international cartel enforcement, the UK brought its first-ever criminal case against individuals in the marine hose investigation and imposed significant prison terms of its own, matching those agreed to in the US. Numerous other foreign enforcement authorities actively investigated and prosecuted both companies and individuals for antitrust violations.

And the large fines imposed late in 2008 and in January of this year ensure that 2009 will be another record-setting year in criminal antitrust enforcement. Indeed, the ongoing nature of the TFT-LCD investigation, as well as air cargo, marine hose, and other investigations, guarantees that the trend of increased criminal antitrust enforcement, larger fines and higher prison sentences defining the past several years will not end any time soon.