Developments / Développements

# CRIMINAL COMPETITION LAW DEVELOPMENTS IN 2011

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L'application des sanctions contre les cartels est demeurée une priorité pour le Bureau de la concurrence du Canada et les autorités de la concurrence mondiales en 2011. Bien qu'il continue à y avoir peu d'enquêtes multinationales coordonnées, les autorités de la concurrence ont continué leurs interventions dans des affaires nationales de fixation des prix et de truquage d'offres, marquées par des amendes plus élevées, et, aux États-Unis, des peines d'emprisonnement plus élevées pour les individus.

Cet article collige les développements majeurs dans ce secteur important et examine les tendances en matière d'activités d'application de la loi.

The enforcement of sanctions against antitrust cartels remained at the forefront of both Canada's Competition Bureau and global antitrust regulators in 2011. While there continue to be only a small number of multinational coordinated investigations, regulators continued their enforcement efforts in domestic price fixing and bid-rigging cases with a pattern of escalating fines and, in the U.S., increased terms of imprisonment for individuals.

This article attempts to assemble the major developments in this important enforcement area and examine trends in enforcement activity. We commence with an examination of the Canadian scene.

## Bureau Case Resolutions

Canada's Competition Bureau announced several resolutions of both international and domestic cartel and bid-rigging probes in 2011.

### Cartel Cases

- **Kason Industries Inc.** pleaded guilty on March 8, 2011, to a customer allocation conspiracy for the sale of refrigeration and food service equipment components in Canada and the U.S. The Bureau determined that Kason had approximately 40% of the overall sales of food service equipment components in Canada and the U.S., to a value of $3.16 million to the allocated

Canadian customers. The Company was fined $250,000. Based on the announced figures, this amounts to a proportional fine of approximately 8%; as well, the Company's fine was payable over five years with a $50,000 initial instalment. (Kason had previously pleaded guilty in the U.S. and paid a US$3.3 million fine.)

- The Bureau's continuing **Inquiry into Price Fixing in Certain Retail Gasoline Markets in Quebec** resulted in additional pleas of guilty for three individuals. On May 30, an owner of a service station in Magog pleaded guilty and was sentenced to a fine of $20,000 and on June 10, two additional individuals pleaded guilty and paid fines of $10,000 and $15,000 in relation to a conspiracy to fix the price of retail gasoline in the Thetford Mines region of Québec. (These penalties continue the Bureau's trend of imposing either fines or conditional-sentence (house arrest) imprisonment for individuals in this probe).

### Bid-Rigging Cases

- On July 19, **Les Entreprises Promécanic Ltée.** pleaded guilty to three counts of bid-rigging and was fined $420,000 for its role in an agreement to rig bids for private sector ventilation contracts in residential highrise buildings in Montreal. While no individual charges were laid, an employee of the Company who was involved in estimations was subject to a prohibition order (together with the Company) for a period of 10 years. The prohibition order also specified that the Company and individual were required to cooperate with the prosecution of the remaining accused in this case. Thus, it is likely that the Company and individual took advantage of the Bureau's leniency program in the resolution of this matter.
- On November 22, the Bureau announced that it had laid bid-rigging charges against six companies and five individuals alleged to be involved in a specialized sewer service cartel relating to municipal tendering processes in the years 2008/2009 with a total value of $3.3 million. One Company, **MSC Réhabilitation Inc.**, pleaded guilty in relation to 12 calls for tenders and was fined $75,000. Once more, the Bureau appears to have benefited from its *leniency program* in obtaining the cooperation of certain corporations and individuals in the investigation and eventual prosecution of the case.

### Deceptive Marketing Practices and Related Cases

- On August 30, five individuals associated with **Ambus Registry Inc.** were sentenced for involvement in a cross-border deceptive telemarketing operation in relation to business directories. The individuals were convicted both of deceptive telemarketing under section 52.1 of the *Competition Act* and also of the offence of fraud under section 380 of the *Criminal Code*. The

two co-founders of the Company were sentenced to a collective term of two years in a federal penitentiary, while two managers received 16 month terms, with the first eight months to be served under conditional sentencing (house arrest) and the remaining eight months on probation. Another manager was given a suspended sentence and placed on two years' probation. In 2007, an individual associated with the Company pleaded guilty and received a $15,000 fine. The Bureau's investigation indicated that over $3.75 million in victim losses arose from the operation of the business directory scheme.

- On September 22, the Bureau announced that charges had been laid in the Bureau's **IT Data Direct** case against five individuals and four Montreal-based companies in relation to allegations of fraudulent telemarketing that generated over $172 million in gross sales. The scheme marketed directories, subscriptions to online directories, office supplies and medical kits at inflated prices and promoted these to businesses across Canada, the U.S., Europe and Central America.

### Contested Cases

- On April 12, the Ontario Divisional Court dismissed Toshiba of Canada Limited's application for leave to appeal from the decision of the Ontario Superior Court dismissing its preliminary application for disclosure of Bureau documents and to cross-examine a Bureau affiant as interlocutory proceedings in Toshiba's main motion which challenged the Commissioner's ability to obtain foreign-source documents under subsection 11(2) of the Competition Act in relation to an inquiry into an alleged cartel for cathode ray tubes (CRTs). In complex reasons, Wilson-Siegel, J. held that the proceedings brought by the Commissioner for the Section 11 Order were properly characterized as criminal proceedings to which the Criminal Proceedings Rules applied and thus, on jurisdictional grounds, no appeal was permitted from the initial decision. Interestingly, the Bureau took the position that its inquiry commenced under section 10 of the Competition Act was a criminal proceeding to which the Criminal Proceedings Rules applied. In alternative, Wilson-Siegel, J. determined that the Superior Court's decision refusing production of the Competition Bureau documents was correct in that Toshiba's argument in support of production was based upon mere speculation; however, the Court held that, on a close examination of the underlying materials, there was a basis to doubt the correctness of the ruling by the Superior Court that Toshiba should not be permitted a right to cross-examine the affiant. The Court also concluded that the grounds raised by Toshiba on its challenge to subsection 11(2) of the Act were substantial. On December 8, the Supreme Court of Canada dismissed an application for leave to appeal from the decision of the Ontario Divisional Court.

## Bureau Case Resolutions - Update

The Bureau resolved several additional criminal matters so far in 2012, as follows.

### Cartel Cases

- On January 6, **Domfoam International Inc. and Valle Foam Industries (1995) Inc.** pleaded guilty to participating in a price-fixing cartel for polyurethane foam and were fined a total of $12.5 million dollars. Because the conspiracy spanned a multi-year period (commencing January 1, 1999) prior to the 2010 amendments to section 45, the indictment was split so as to recognize different elements of the offence for each time period. The indictment also stipulated separate conspiracies in relation to carpet cushion foam and slab foam. Agreements in this case were provable based upon a pattern of inter-competitor communications aimed at co-ordinating the timing and amount of price increases. The Bureau press release indicated that the investigation had been assisted by participation by parties in both the immunity and leniency programs. Representing a substantial milestone for the Bureau, this case marked the first guilty plea under (at least in part) the amended conspiracy provisions.
- The Bureau's continuing **Inquiry into Price Fixing in Certain Retail Gasoline Markets in Quebec** netted additional pleas of guilty by several individuals and corporations. On January 27, **seven individuals** entered pleas of guilty and were sentenced to pay fines varying from $3,000.00 to $5,000.00. The market involved was Thetford Mines. **Another individual** pleaded guilty in November of 2011 and was sentenced on January 9 to pay a fine of $10,000.00, relating to his activities in the conspiracy in relation to the Sherbrooke, Quebec market. On March 8, **another individual** was sentenced to a fine of $7,500.00 in relation to his activities in price-fixing in the market of Thetford Mines. Most recently, on April 13, **5 individuals and 1 corporation** pleaded guilty and were sentenced to pay various fines for their activities in gasoline price-fixing in the Victoriaville, Quebec market. The largest fine was ordered against **Société Coopérative Agricole des Bois-Francs**, which was ordered to pay $124,000.00. Fines on the respective individuals ranged from $5,000.00 to $10,000.00.

  These guilty pleas and penalties follow an established trend in relation to the Quebec Gasoline Enquiry, with fines now becoming the rule for punishments of individuals. The Bureau has likely been able to achieve these resolutions through joint sentencing submissions which would not involve imposition of jail time; indeed, attempting to impose incarceration on individuals at this stage of the inquiry would have been difficult, given that the Bureau had already concluded many individual pleas with recommendations of a conditional sentence (house arrest) or fines being imposed to date.

- The Bureau also achieved successful resolutions of cases involved in other retail gasoline price-fixing probes. On March 20, **Pioneer Energy LP**, **Canadian Tire Corporation**, and **Mr. Gas** entered pleas of guilty to section 45 offences in the period May-November 2007 relating to the Kingston and Brockville, Ontario markets. The total imposed fines were $2 million and each corporation was made subject to a section 34(1) prohibition order for the usual 10-year period. The conduct apparently involved telephone conduct among the participants and agreements relating to proposed price changes for retail gasoline.
- On April 13, **Suncor Energy Products Inc. (Sunoco)** entered a plea of guilty to retail gasoline price-fixing in the May-November 2007 period relating to the Belleville, Ontario market. The corporation was ordered to pay a fine of $500,000.00.

These cases signify that the Bureau will continue to look at retail gasoline markets and seek evidence of potential agreements among competitors to fix, control, or maintain prices pursuant to the newly amended section 45. Although these cases were decided under the former conspiracy provisions, the relative ease of proof now available to the Bureau under the amended section 45 will likely prove fruitful in investigating and resolving future cases of this nature.

### Bid-Rigging Cases

- On February 17, 2 Quebec companies, **Construction G.T.R.L. (1990) Inc., Acoustique JCG Inc., and Entreprises de Construction OPC Inc.** pleaded guilty before the Quebec Superior Court in relation to agreements to rig bids on the expansion of the Chicoutimi Hospital in 2003. Construction G.T.R.L. was ordered to pay $50,000.00 and the other corporations to pay $25,000.00; each was subject to the usual prohibition order for a 10-year period. The resolution of this case followed the announcement of charges in relation to the inquiry in November of 2008. Bureau materials indicated that parties had applied for both immunity and leniency which assisted the investigation and case resolution. The Bureau also noted that the investigation and resolution of this case was pursuant to the pre-amended Act which did not involve the subsequently amended provision prohibiting withdrawal of bids (and increased individual penalties). No individuals were apparently charged in relation to this investigation.

### Deceptive Marketing Practices Cases

- Although not a criminal case, the Bureau was successful in obtaining a total of $9,000,000.00 in administrative monetary penalties on March 2 in relation to a deceptive marketing scheme in which participants used deceptive

solicitations to customers that bore close resemblance to the trademark of the Yellow Pages Group. The companies and individuals were also ordered to pay full restitution to victims, as well as publishing corrective notices on websites and sending letters to all Canadian businesses, individuals and organizations targeted in the operation. The Bureau materials suggested that it worked closely with the U.S. FTC, noting that both Australia and the UK had also been involved.

### Criminal Law Cases with Competition Law Implications

2011 featured a number of criminal law decisions that may have impact on Canadian criminal competition cases, as follows:

- *R v. Nixon* 2011 SCC 34 (June 24, 2011): This Supreme Court of Canada case dealt with the issue of whether the prosecution can repudiate a plea agreement reached with defence counsel. The accused was charged with the offence of dangerous driving causing death (the accused had driven her motor home through an intersection, striking another vehicle, with the result that a husband and wife were both killed and their young son seriously injured). Initially, Crown Counsel entered into a plea agreement for a plea of guilty to an offence of careless driving and recommendation of a $1,800 fine. On review by senior Justice managers, the proposed arrangement was repudiated as being contrary to the interests of justice and that it would bring the administration of justice into disrepute. The Crown accordingly withdrew the plea agreement and proceeded to trial. The accused brought an application under Section 7 of the *Charter* alleging abuse of process and seeking a stay of proceedings. The trial Judge allowed the application, but the Alberta Court of Appeal disagreed, holding that repudiating a plea agreement is not reviewable by the courts. The Supreme Court dismissed the further appeal, holding that resiling from a plea agreement was a "core" discretionary function of the Crown and could be reviewed only by a finding of abuse of process. Since, in this case, there was no evidence of prosecutorial misconduct, improper motive or bad faith and the accused was not prejudiced as she was merely returned to the same position she was in initially, there was no abuse of process and, accordingly, the Crown was correct in rejecting the plea agreement.

  Why this case is important for criminal competition law: The Supreme Court indicates that there are only very narrow circumstances where the Crown could properly repudiate a plea agreement and if there is substantial prejudice to an accused, a court may determine that repudiation was not justified. Because most criminal antitrust cases in Canada are resolved through plea agreements, this case provides additional comfort for parties entering into plea agreements that any repudiation of such agreements by

justice officials will be very carefully scrutinized, thus limiting the ability for the Crown to resile from such arrangements.

In a related development, **Alimentation Couche-Tard Inc.** is seeking a stay of proceedings against it in the Bureau's continuing **Inquiry into Price Fixing in Certain Retail Gasoline Markets in Québec** in relation to a repudiation of a January 2010 arrangement for payment of an amount of $3.25 million to the Receiver General coupled with an undertaking to stay proceedings against the Company that had been entered into by a Crown Prosecutor. As at this writing, the parties are proceeding through interlocutory steps and a date for argument on the merits has not yet been set.

- *R v. Henry* 2011 ONCA 289 (April 12, 2011): The accused in this case moved to set aside his guilty plea on the basis that it was uninformed and involuntary. The court allowed the appeal and set aside the guilty plea, determining that the plea was not sufficiently informed in order to enable the accused to make a properly informed decision about it. The Court held that there were disclosure duties on the prosecutor to ensure that any decision made by an accused about his/her case is made with the full knowledge of the relevant facts (at paragraph [26]). However, where an accused wished to set aside a guilty plea on the basis of non-disclosure, he or she must demonstrate a reasonable possibility that undisclosed material would have influenced the decision to plead guilty.

  Why this case is important for criminal competition law: This case is important for procedure on guilty plea resolutions in antitrust cases because it indicates that the prosecution is required to make adequate disclosure to an accused party before any decision to enter a plea of guilty. However, there is a high bar for a party to meet when alleging that a plea of guilty was not properly informed and made.

- *R v. Jones* 2011 ONCA 632 (October 11, 2011): This case involved allegations of an improper computer search on a charge of the possession of child pornography. On an appeal by the Crown from an acquittal entered at trial on the basis that police had improperly searched the contents of a personal computer, the Court of Appeal set aside the acquittal and ordered a new trial. In so doing, the Court observed that authorities are not entitled to treat a computer as a single entity and that warrants to search must be capable of specifying particular types of evidence sought. While the Court observed that there was no reason in principle why the state should be entitled to roam through the contents of a personal computer in an indiscriminate fashion than to do so in a personal residence, it was also held that authorities are permitted to conduct a 'cursory' examination of files or folders to determine if the material conforms to the items sought. The Court also

held that, while police had proper authority under warrant to conduct an initial search of the computer, the finding of additional material not specifically covered under the warrant was not necessarily justified under the "plain view" doctrine in Section 489 of *Criminal Code*. Thus, in the case of video files which could only be observed by a further exploratory search of the computer, this material could not be properly seized under the *plain view* doctrine and required the police to obtain a separate, new warrant. The Court, however, reversed the decision of the trial judge to exclude the video files on the basis of the balancing tests under subsection 24(2) of the *Charter* outlined in the Supreme Court's decision in *R v. Grant.*

Why this case is important for criminal competition law: The reasons in this decision provide important guidance to authorities on e-searches of computers and other electronic devices, and could restrict Bureau authorities' ability to seize files or folders that are not specifically described in the warrant to search under sections 15 and 16 of the *Competition Act.* The case also indicates that the Bureau must be very discriminating in the drafting of search warrants so as to enable a proper search of electronic media.

- *R v. Kelsy* 2011 ONCA 605 (September 22, 2011): In this case, the Court of Appeal dismissed an appeal from conviction on several charges arising from possession of a loaded prohibited firearm and a quantity of heroin. At trial, the accused brought an application to exclude the firearm and heroin as evidence at trial on the basis that the warrantless search of a knapsack was justified under the "exigent circumstances" search doctrine. The court reviewed the existing jurisprudence under exigent circumstances and determined that the doctrine should be reserved primarily for cases involving imminent destruction of evidence or contrabrand and had largely been codified. While there is a second branch of exigent circumstances based on police and officer safety, this doctrine has been largely replaced by the test in *R v. Waterfield* to the effect that any interference with liberty must be necessary for the carrying out of a particular police duty and be reasonable having regard to the nature of the liberty interfered with and the importance of the public purpose.

  Why this case is important for criminal competition law: For search cases in which the Bureau may attempt to seize records or other evidence not covered by a warrant to search through reliance on the doctrine of exigent circumstances, this case indicates that the Bureau's ability to do so will be limited only to cases where there is a risk of imminent destruction of evidence (and secondarily, to circumstances where it can be established that the seizing officers in question were performing a particular legally-authorized duty). This suggests a more stringent test than that outlined in section 15 of the *Competition Act*, namely that of "...loss or destruction of evidence".

- *R v. Mahmood, R v. Sheikh,* and *R v. Fundi* 2011 ONCA 693 (November 9, 2011): In this case, involving the admissibility of evidence of cell phone records, the Court reviewed and affirmed the principles of analysis for exclusion of evidence under subsection 24(2) of the *Charter*, affirming that courts are to assess and balance the effect of admitting the evidence on society's confidence in the justice system taking into account the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and society's interest in the adjudication of the case on its merits.

  Why this case is important for criminal competition law: This case reaffirms the analysis on the strength of arguments that may be raised to exclude evidence that may not have been properly seized pursuant to a warrant or where other constitutional violations may be alleged in the course of a Bureau investigation.

- *R v. J.F.* 2011 ONCA 220 (April 6, 2011): In this case, the Ontario Court of Appeal determined whether a party alleged to be aiding or abetting a conspiracy must direct his/her/or its acts or omissions *to the formation* of the conspiracy. After reviewing the conflicting jurisprudence in Alberta and Quebec, the Ontario Court of Appeal held that it was not required in Ontario that, for a party to be convicted of aiding and abetting a conspiracy, their acts and/or omissions be directed at the formation of the agreement or conspiracy.

  Why this case is important for criminal competition law: This case highlights that, depending upon the jurisdiction where the facts supporting an antitrust conspiracy charge may arise, there will be differing analyses as to whether the particular acts/omissions of the party can properly fall within criminal liability as "aiding or abetting" a conspiracy, and thus enable defences to such charges. Note that leave to appeal to the Supreme Court of Canada was granted on November 15, 2011.

- *R v. Nedelcu* 2011 ONCA 143 (February 24, 2011): In this case, the Ontario Court of Appeal reversed a decision at trial that a transcript of evidence given by an accused on an examination for discovery in a related civil case could be put to him in cross-examination at his criminal trial. In the Court's analysis, since an accused is compelled to testify on an examination for discovery, he was not merely giving evidence to further his own private interests in a civil action against him. Thus, the court held that section 13 of the *Charter* applied so as to treat the evidence as inadmissible in evidence against the accused even for purposes of challenging credibility.
  Note that leave to appeal from this decision to the Supreme Court of Canada was granted and the case heard on March 16, 2012. Reasons are currently pending.

Why this case is important for criminal competition law: If the Supreme Court reverses the decision of the Ontario Court of Appeal, it would provide regulatory authorities such as the Bureau with opportunities (subject to protective orders) to utilize transcripts of proceedings given on discovery or trial in civil cases as cross-examination material in criminal proceedings.

- *R v. X.Y* 2011 ONCA 259 (April 4, 2011): In this case, the Ontario Court of Appeal held that there had been a breach of informer privilege on the part of police and stayed proceedings against the accused. Briefly, police had recorded an interview with a person who was properly characterized as a police informant and then provided that material as disclosure to defence counsel, thereby disclosing the identity of the informant. In its decision, the Court reaffirmed the principles of informer privilege, holding that the general protection afforded by the rule applies to all informers, both past and present, and that once the privilege is lost, it cannot practically be restored to its original vitality. The Court stated that informer privilege is absolute and is not triggered by the disclosure rights as a component of Section 7 of the *Charter*. The court stated that the privilege is not a rule of evidence but, rather, an "amalgam of an evidentiary rule and a principle of immunity and secrecy."

  Why this case is important for criminal competition law: This case serves to illustrate the primacy of informer privilege, for cases where there may be a true informer to a regulatory agency such as the Bureau (which could arise in "whistleblower" cases).

- *321665 Alberta Ltd. v. ExxonMobile Canada Ltd.* 2011 ABQB 292: While not a criminal case, this is a significant decision by the Alberta Court of Queen's Bench, which determined that the sole-sourcing of a contract by operators of a joint venture constituted a violation of section 45 of the *Competition Act*. The plaintiff, which operated a fluid-hauling business, commenced an action for damages when Husky Oil Operations Ltd. and ExxonMobile Canada Ltd. jointly determined to sole-source a fluid-hauling contract in relation to properties in the Rainbow Lake area of Alberta. The plaintiff alleged that the decision prevented or lessened competition in the supply of fluid-hauling to the oilfield and that the conduct was therefore contrary to Section 45 of the *Competition Act*. The trial Judge rejected the position of the defendants that they should be considered as a single entity for the competition law analysis, thus incapable of conspiring with each other (not unlike the U.S. Supreme Court 's analysis in *Texaco Inc. v. Dagher* 369F. 3d 1108). However, the trial Judge rejected this position based on an analysis of the terms of a tenancy-in-common arrangement. The Court otherwise ruled

that the conduct of the defendants was such as to constitute the prevention or limiting of competition. The decision is currently under appeal to the Alberta Court of Appeal.

Why this case is important for criminal competition law: This case is an example of the potential reach of criminal competition law doctrines when used in the context of civil disputes. While the decision is grounded in the pre-amended *Competition Act*, and is arguably erroneous, it could nonetheless have implications for parties involved in joint venture or other similar arrangements that may predate the effective operation of the newly amended conspiracy provisions of the *Competition Act* (March 12, 2010). The decision is also notable because of the application of the analysis to purchasing parties.

## Statutory Developments

In the fall of 2011, the Government of Canada introduced Bill C-10, the *Safe Streets and Communities Act*, which has certain implications for the application of the criminal provisions of the *Competition Act*. One major impact of this proposed legislation for criminal competition cases would be to remove the ability of courts to order a conditional sentence ("house arrest") under sections 742 to 742.7 of the *Criminal Code* for convictions under the conspiracy section of the *Competition Act*. This arises because of amendments to the *Competition Act* as of March 12, 2010 that raised potential terms of imprisonment to 14 years, a term for which the conditional sentencing regime would be unavailable. Thus, for a number of case resolutions for individuals (most notably under the Bureau's continuing inquiry into retail gasoline price fixing in the Province of Québec), sentences of this nature could no longer be applied.

However, convicted individuals could be subject to the suspended sentence and probation provisions under subsection 731(1) of the *Criminal Code* for the *Act's* conspiracy and bid-rigging offences. Bureau officials however have recently indicated that, in line with a stepped-up enforcement policy in relation to individuals, the use of such non-jail sanctions for infractions by individuals will be rare.

A second effect relates to the period of time under which an individual must wait until making application for a pardon (now called a "record suspension") following conviction for a conspiracy or other offence under Part VI of the *Competition Act*. Individuals sentenced to imprisonment for more than two years would now be required to apply after a period of 10 years following the conviction, instead of the prior 5 year wait period. As well, additional limiting criteria have been set out on the consideration of whether a suspension should be issued.

The various provisions of Bill C-10 are now proclaimed and effective.

## Policy Developments

There were no alterations to any of the Bureau's criminal policy documents in 2011.

## Other Judicial Developments

Although not reflected in a court decision, the filing of the Commissioner of Competition in the matter of *Treat America Ltd. v. Robert G. Leonidas* on a motion brought by Robert G. Leonidas to limit a letter of request brought by U.S. plaintiffs to obtain his deposition evidence in Canada in relation to an action pending before the U.S. District Court in Pennsylvania sets out several important observations relative to Bureau investigations. The Commissioner was invited to participate in the proceedings and filed a factum in order to "protect the integrity of (her) investigations into allegations of anti-competitive conduct in the chocolate confectionery industry in Canada."

Among the points taken by the Commissioner in her filing on this motion were:

- An acknowledgement that, in relation to persons under investigation, the nature of the Commissioner's duty is "to conduct her investigation without violating any of [his] constitutional rights";
- A note that the Bureau's timing of the public release of an ITO arises from the *McIntyre* SCC case, namely "once the warrant has been executed, exclusion thereafter of members of the public cannot normally be countenanced";
- An acknowledgement that the ability of government authorities to obtain a sealing order on an information to obtain a warrant (ITO) is severely restricted by the SCC decisions in *Mentuck* and *Dagenais* which indicate that the risk to the administration of justice be serious, or "real and substantial" before a sealing order can be obtained; further, this principle applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Moreover, even concerns about potential economic harm to an applicant when combined with the "protection of the innocent exception" would still not override public accessibility;
- An assertion that an immunity applicant is not, in law, a confidential informer in the sense of the long-established SCC jurisprudence and that, unlike a confidential informer, an immunity applicant to the Bureau is informed in advance that his/her/its identity will become public when the Commissioner has a need to disclose it for one of several possible reasons set out in the immunity bulletin;
- An assertion that a right to reveal the identity of an immunity or leniency applicant resides with the Commissioner (as purportedly indicated in the

Bureau's immunity and leniency program bulletins); under these programs, it is asserted that the Commissioner retains the right to make an applicant's identity public at some stage in the progress of the case; the timing of this is (at the latest) the point at which charges are laid against other parties and disclosure obligations arise;

- An assertion that the Commissioner has power to subject individuals to the compelled testimony order under Section 11 of the *Competition Act*;
- An observation that individuals deposed in Canada will be able to take advantage of *Charter* section 13 in respect of any deposition evidence, thus providing the individual with Canadian use immunity in respect of any testimony given;
- With respect to foreign prosecutions (i.e., whether a U.S. citizen being deposed in the U.S. can claim fifth amendment protection in relation to foreign cases) it was noted that the U.S. Supreme Court stated that "concern with a foreign prosecution is beyond the scope of the self-incrimination clause";
- An observation that individuals deposed in Canada in relation to testimony taken in Canada cannot avail themselves of 5th Amendment protection to protect against potential use by U.S. authorities, notwithstanding that the individual might thereby incriminate him/herself in relation to a U.S. investigation; and
- An observation that the Commissioner does not presently intend to obtain transcripts of depositions of targets of her investigations, but noting that a potential Supreme Court overruling of the Ontario Court of Appeal decision in *Nedelcu* (discussed above) may enable the Commissioner to do so.

## U.S. Antitrust Division

As in prior years, the U.S. Antitrust Division maintained a very active enforcement profile in criminal antitrust matters. For the Division's fiscal period ending September 30, 2011, Division statistics indicate that 90 criminal cases were filed (a 50% increase over 2010) with the imposition of $520 million in criminal fines, indictments against 27 corporations and 82 individuals and the imposition of 21 separate jail terms totaling 10,544 days of jail time. The Division's enforcement efforts touched a broad range of industries such as real estate, optical disk drives, auto parts, air cargo and financial services. Notable among the cases brought by the Division in the year were the following:

- The Division continued its probe into allegations of Thin-Film Transistor Liquid Crystal Display (TFT-LCD) panel price fixing, with the January 13 announcement of indictments against two additional individuals ( former executives of **HannStar Display Corporation**) for conspiracy to fix prices

in relation to TFT-LCD panels. The individuals participated in meetings and information exchanges to effect the conspiracy. The investigation has produced more than $890 million in criminal fines, with the indictment of 22 executives and eight companies thus far in the probe.

- On February 24, **Horizon Lines LLC** pleaded guilty and paid a fine of $45 million for its role in a conspiracy to fix prices in coastal water freight transportation in relation to the fixing of rates and surcharges for water transportation of freight between the continental U.S. and Puerto Rico from May 2002 until April 2008. The investigation also has produced guilty pleas on the part of three former Horizon Lines LLC executives, and other individuals.
- On March 18, **Samsung SDI Company Ltd.** pleaded guilty and paid a fine of $32 million for its role in a global conspiracy to fix prices, reduce production, and allocate markets in relation to colour display tubes (CDTs), a type of cathode ray tube used in computer monitors and other specialized applications. The indictment indicated that Korea-based Samsung SDI participated in the conspiracy from January 1997 until at least March 2006. The Company agreed to cooperate with the Division's ongoing investigation. The probe has also produced indictments against six individuals in relation to their participation in this conspiracy.

  In a notable development, in a ruling on April 20, a federal Judge refused to approve the plea agreement that had been arranged between Samsung SDI and the Division, requiring that full pre-sentence report be prepared. In its ruling, the Court posed the following questions:

  - Why should so many possible co-conspirator employees, officers, and directors receive the benefit of an agreement not to prosecute?
  - Why shouldn't the fine be the maximum?
  - What is needed for expedition versus the normal pre-sentence process?
- On May 17, the Court finally accepted **Samsung**'s guilty plea and payment of a $32 million fine in relation to the above antitrust conspiracies.
- On April 26, two former executives of **Air France** were indicted by a Chicago Grand Jury for their participation in a conspiracy to fix and coordinate surcharges on air cargo shipments to and from the U.S. and elsewhere. The individuals are alleged to have fixed and coordinated rates on shipments, participating in the conspiracy from as early as August 2004 until at least February 2006. As at the date of these charges, 21 airlines and 21 executives had been indicted in the Division's ongoing investigation into price fixing in the air transportation industry, with more than $1.8 billion in fines imposed, and four individuals sentenced to jail terms.

- On May 4, **UBS AG** entered into a civil non-prosecution agreement and agreed to pay $160 million in restitution, penalties and disgorgement to federal and state agencies arising from UBS's acceptance of responsibility for anticompetitive conduct by former employees. The conduct related to unlawful agreements to manipulate the bid process for municipal investment contracts that were used to invest the proceeds of, or manage risks associated with, bond issuances by municipalities and non-profit entities. The Division's investigation into this area resulted in indictments against 18 former executives of a number of financial services companies and one corporation. In December 2010, Bank of America agreed to pay $137.3 million in similar restitution to federal and state agencies for its participation in anti-competitive conduct in the municipal bond derivatives market. The imposition of such **non-prosecution arrangements** (in this probe for UBS AG and for other participants as detailed below) is a highly unusual development for the Division, which by policy has historically avoided such arrangements.

- On May 27, **EVA Airways Corporation** pleaded guilty and paid a $13.2 million fine for its participation in a conspiracy to fix prices relating to air cargo international shipments, including to and from the U.S., from at least January 2003 until February 14, 2006. The Company transported a variety of cargo shipments on scheduled flights within Taiwan and internationally. The indictment charged that EVA and other co-conspirators engaged in a conspiracy by agreeing during meetings, conversations, and other communications on particular cargo base rates or fees to be charged for certain shipments and levied cargo rates in accordance with those agreements, monitoring and enforcing adherence to them.

- On June 20, **Tri-State Ready Mix, Inc.**, an Iowa ready-mix concrete Company pleaded guilty to participating in a price fixing conspiracy in relation to ready-mix concrete sold in the northern district of Iowa. The investigation also produced pleas of guilty from another ready-mix concrete producer as well as certain individuals connected with those companies.

- On July 7, **JPMorgan Chase & Co.** entered into a civil non-prosecution agreement with the Division to resolve its role in anti-competitive activity in the municipal bond investments market and agreed to pay $228 million in restitution, penalties and disgorgement to federal and state agencies. JPMorgan Chase agreed to accept responsibility for anticompetitive conduct by former employees in the period 2001 through 2006 relating to unlawful agreements to manipulate the bid process on municipal investment and related contracts. The agreement was similar to that reached with **UBS AG** on May 4.

- On August 30, an after-market auto light distributor, **Sabry Lee (U.S.A.) Inc.** agreed to plead guilty on a charge of conspiring with others to eliminate competition by fixing prices of after-market auto lights. The unlawful conspiracy occurred from September 2003 until September 2005. The Company was ordered to pay a fine of $200,000 and to cooperate with the Division in its ongoing investigation. Sabry Lee was the first Company to be charged in the Division's investigation into after-market auto lighting. Three individuals were also indicted, with one agreeing to serve 180 days in prison and to pay a $25,000 criminal fine.

- On September 15, **Bridgestone Corporation** pleaded guilty on an indictment alleging conspiracies to rig bids and to make corrupt payments to foreign government officials in Latin America relating to the sale of marine hose and other industrial products manufactured by the Company. A combined fine of $28 million was imposed. The conspiracy involved the rigging of bids and fixing of prices, as well as allocation of market shares relating to the sales of marine hose in the U.S. and elsewhere, as well as the making of corrupt payments. Bridgestone and its co-conspirators agreed not to compete for one another's customers either by not submitting prices or bids, or by submitting intentionally high prices or bids to certain customers. The Division's investigation into the marine hose matter has to date resulted in indictments against five corporations and nine individuals, with a total of 4,557 days in prison being imposed. The plea agreement with Bridgestone recognized significant cooperation extended by Bridgestone in its relations with the Divisions. The cooperation included the Company's conducting a worldwide internal investigation, making employees available for interviews, and providing "voluminous evidence and information" to the Division. It was also acknowledged that the Company terminated many of its third party agents and took remedial actions with respect to employees responsible for many of the corrupt payments.

- On September 29, **Furukawa Electric Co. Ltd.**, a supplier of automotive wire harnesses and related products, agreed to plead guilty and to pay $200 million in fines for its participation in an antitrust and bid-rigging conspiracy involving the sale of parts to automobile manufacturers. Three Japanese national executives also agreed to plead guilty and to serve prison time in the U.S. with ranges from one year to 18 months. These were the Division's first indictments in its ongoing international cartel investigation relating to price fixing and bid rigging in the auto parts industry. It was alleged that the Company participated in the conspiracy from as early as January of 2000 until at least January of 2010. The Company and individuals carried out the conspiracy by agreeing during meetings and conversations to allocate the supply of wire harnesses and related products on a model-by-model basis

and to coordinate the price adjustments requested by automobile manufacturers in the U.S. and elsewhere. It was also alleged that the harnesses and related products were sold to automobile manufacturers at non-competitive prices and that the participants engaged in meetings and conversations to monitor and enforce adherence to the bid-rigging and price fixing scheme.

- On September 30, **MOL Logistics (Japan) Co. Ltd.** agreed to plead guilty and to pay $1.84 million in penalties for its role in conspiracies to fix fees in relation to freight forwarding services for air cargo shipments from Japan to the U.S. from about September 2002 until at least November 2007. It was alleged that the Company and its co-conspirators agreed during meetings and discussions to coordinate and impose freight forwarding service fees and charges on customers purchasing freight forwarding services for cargo shipped by air from Japan to the U.S. It was further alleged that the Company and its co-conspirators levied service fees in accordance with those agreements and engaged in meetings and discussions for monitoring and enforcing adherence to the agreed upon fees.
- On September 30, **Morgan Stanley** entered into a civil settlement agreement in relation to an agreement with KeySpan Corporation that restricted competition in the New York City electricity capacity market. The settlement provided for disgorgement of profits and payment of a $4.8 million civil penalty. The complaint alleged that KeySpan and Morgan Stanley executed agreements to enable KeySpan to withhold substantial output from capacity so as to increase prices for electricity generation in the New York City area. Morgan Stanley earned revenues by retaining a spread between fixed prices for derivative agreements related to these arrangements.
- On September 30, **Hitachi-LG Data Storage Inc.** agreed to plead guilty and pay a fine of $21.1 million for participating in antitrust conspiracies to rig bids and fix prices for the sale of optical disk drives sold to various manufacturers, as well as participation in a scheme to defraud one manufacturer in a procurement process. The indictment alleged that from June 2004 to approximately September 2009, the Company and its co-conspirators participated in a series of conspiracies to discuss bidding strategies and pricing in optical disk drives, with the result that non-competitive and collusive prices were arranged between companies, as well as their enforcing adherence to the agreements.
- On October 4, **Danfoss Flensburg GmbH**, formerly Danfoss Compressors GmbH, agreed to plead guilty and to pay a fine of $3 million for its participation in an antitrust conspiracy to fix prices of light commercial compressors, a type of refrigerant compressor used in devices such as water coolers and vending machines. It was alleged that, from as early as October 2004 and continuing until September 2007, Danfoss participated in the

conspiracy by agreeing to coordinate prices of the compressors sold in the U.S. and elsewhere, as well as exchanging information to monitor and enforce adherence to the fixed prices. The Division's investigation produced indictments against two other companies, **Panasonic Corporation** and **Embraco North America Inc.** (which both pleaded guilty in 2010), as well as three former executives of those Companies.

- On November 30, a former executive of a Peruvian airline, **Cierlos Airlines**, pleaded guilty to a charge of participating in an antitrust price fixing conspiracy by agreeing to impose an increase to fuel surcharges on air cargo shipments from the U.S. to locations in South and Central America, over the period September 2005 until at least November 2005. Two other executives had previously pleaded guilty on their participation in the alleged conspiracy. On December 8, two executives of **Cargolux Airlines International SA** pleaded guilty and agreed to serve prison terms of 13 months for their participating in conspiracies in relation to surcharges including security and fuel surcharges, in international air freight forwarding markets.
- On December 8, **Wachovia Bank N.A.** (now known as Wells Fargo Bank N.A.) entered into a civil non-prosecution agreement with the Division in which it accepted responsibility for anti-competitive conduct by former employees in relation to unlawful agreements to manipulate the bid process for municipal investment and related contracts. This agreement was similar to the earlier arrangements entered into by UBS, Bank of America, and JP Morgan Chase & Co. Wachovia agreed to pay a total of $148 million in restitution, penalties, and disgorgement to federal and state agencies, and agreed to cooperate with the Division's continuing investigation into this area.

### Other Judicial Developments

On May 31, the U.S. Supreme Court issued an opinion in the case of **Global-Tech Appliances, Inc. V. SEB S.A.** (a civil patent infringement case) which affirmed that the doctrine of "wilful blindness" requires two elements before liability attaches: (1) the Defendant must subjectively believe that there is a high probability that a fact exists and (2) the Defendant must take deliberate actions to avoid learning of that fact. This statement of the doctrine would be substantially in accordance with Canadian law in the area.

### European Commission

Compared to previous years, the amount of activity by the European Commission was somewhat diminished, with a total of €614 million in penalties imposed (as of December 7). This is substantially less than the €2.8 billion in total penalties imposed for the prior year. There are also no banner record penalties imposed on any individual cartel or cartel member during this period, with the

highest cartel fine on an individual undertaking remaining the amount of €896 million imposed on **Saint Gobain** in relation to the **car glass conspiracy** in 2008. However, there were a number of settlements, announcements of probes, and related judicial developments, as follows:

- On January 18, Commission regulators executed dawn raids at the offices of various truck manufacturers including **Daimler AG** and **Volvo AB** in relation to potential cartels in the industry.
- On February 10, the European Court of Justice affirmed a lower court ruling which upheld the imposition of a fine in the amount of €500,000 against **Activision Blizzard Germany GmbH** over its role in a cartel restricting parallel exports of Nintendo products within the European trading bloc.
- Similarly, on March 3, the European Court of Justice upheld a penalty of €396.6 million against **Siemens AG** in relation to its participation in an electrical grid equipment cartel case. However, the court reduced fines imposed on French energy technology companies **Alstom SA** and **Areva SA** by approximately €7 million.
- On April 13, the Commission imposed fines of €315.2 million on producers of household laundry powder detergents in eight European Union countries relating to the operation of a cartel between January 2002 and March 2005 which involved the coordination of prices. As a leniency (immunity) applicant, **Henkel** did not receive any penalty, with penalties imposed on **Proctor & Gamble** and **Unilever** reduced proportionately by their applications for leniency under the EU's leniency notice. Thus, Proctor & Gamble received a 50% reduction in total fines while 25% was allocated to Unilever. As well, each entity took a further 10% reduction because of their joint agreement to settle the case with the Commission, under its settlement procedure.
- On April 29, the Commission indicated that it had commenced investigations into **credit default swaps** involving 16 investment banks and, particularly, whether the banks and a provider of financial data in the CDS market agreed to control access to CDS transaction data.
- On May 17, Commission officials executed dawn raids against a number of **liner shipping industry** entities relating to a potential cartel or other anti-competitive activities. While the Commission did not identify the companies involved, **Maersk**, **Hamburg Sud Group**, and **Mediterranean Shipping Co. SA** confirmed that dawn raids had been carried out. The investigation is reportedly focused on whether the liner shipping companies may have fixed prices or have coordinated transport to and from the EU or EEA.
- On May 27, Commission officials carried out dawn raids on a number of **industrial piston engine manufacturers**, including **General Electric**

**Co.**, **Caterpillar Inc.**, and a unit of **AB Volvo** reportedly, on allegations of a cartel or other anti-competitive activities.

- On June 9, Commission officials confirmed that dawn raids had been executed against several **suppliers of automotive safety systems** in relation to allegations of anti-competitive conduct. The raids were in relation to companies that supply car seat belts, airbags and steering wheels. Although the Commission did not identify the targets of the raids, **Autoliv Inc.** and **TRW Automotive Holdings Corp.** confirmed that inspections had been carried out.
- On October 12, the Commission imposed a fine of €8.9 million in relation to a cartel involving the fixing of weekly sales prices and the exchange of pricing information in the **banana sector**. The **Chiquita** and **Pacific** food entities were alleged to have participated in the cartel in southern Europe from July 2004 to April 2005. Chiquita was the recipient of immunity and had no fines imposed as a result of its early approach to the Commission under its 2006 Leniency Notice.
- On October 19, the Commission imposed fines of €128 million on certain producers of **CRT glass** relative to a cartel from February 1999 until December 2004 involving coordination of prices for CRT glass in the EEA. The product was purchased by manufacturers of CRT's to use in traditional television and computer screens. As an immunity applicant in this matter, **Samsung Corning Precision Materials Co., Ltd.** received no penalty, while **Nippon Electric Glass Ltd.** received a reduction of 50%. **Schott AG** and **Asahi Glass Co., Ltd.**, together with Nippon Electric Glass, also received a further reduction of 10% relating to their participation in a global settlement of this case pursuant to the Commission's settlement procedure.
- On December 7, the Commission imposed fines of €161 million in relation to a conspiracy to coordinate European pricing policies and keep market shares stable in an attempt to recover cost increases for **household and commercial refrigeration compressors**. Cartel members held bilateral, trilateral and multilateral meetings at which they discussed pricing and engaged in exchanges of sensitive market information. As the immunity applicant in the matter, **Tecumseh Products Company Inc.** and its related entities did not receive any penalty, with penalties being imposed (with various reductions applicable under the leniency notice) upon **Panasonic Corporation**, **Embraco Europe S.r.l.**, **Danfoss A/S**, **Appliances Components Companies S.p.A.** and **Elettromeccanica S.p.A.**
- On December 8, the European Court of Justice upheld fines imposed by the Commission on various metal producers for their participation in a **copper tubing cartel**.

- Controversies have arisen in relation to access to EC leniency documents by parties seeking private enforcement, with the June 14 decision by the European Court of Justice in ***Pfleiderer AG v. Bundeskartellamt*** indicating that individual Member State courts could determine questions of access, as Community Law did not bar this; in the U.K., the High Court is now faced with similar issues in the matter of ***National Grid Electricity Transmissions Plc v. ABB Limited & Ors.***

## Australian Competition & Consumer Commission

The ACCC imposed a number of penalties in relation to antitrust cartels in 2011:

- Two photocopy paper and uncoated folio paper suppliers had penalties totalling $4.2 million imposed by the Federal Court in relation to agreements to fix the price of photocopy paper and uncoated folio paper supplied to Australian customers. **Asia Pulp & Paper Co. Ltd.** (APP Singapore) was ordered to pay $3.4 million while **PT Indah Kiat Pulp & Paper Tbk** was ordered to pay $800,000. The participants admitted taking part in 16 meetings with competitors to make arrangements or understandings concerning the average price of paper sold. The meetings did not take place in Australia. The ACCC's investigation into this industry had (as of the date of this announcement) produced $8.2 million in fines on these and other corporations.
- On April 11, **Japan Airlines** was ordered to pay a penalty of $5.5 million for its participation in illegal price fixing agreements with other international airlines relative to the imposition of fuel surcharges and insurance and security surcharges on air cargo shipments carried by their networks. As at the day of this announcement, the ACCC had imposed fines totalling $46.5 million against a number of airlines for alleged participation in these cartels.
- On April 14, a fine of $2.7 million was imposed by the Federal Court against two overseas companies, **Yellow Page Marketing BV (YPM)** and **Yellow Publishing Limited (YPL)**, in relation to a fake "yellow pages" directory scheme in which misleading faxes and invoices were sent to businesses in attempts to obtain subscriptions to online business directories. The court noted that the parties may not comply with the orders, inasmuch as they are not located in Australia, and that few assets may be available for recovery.
- On November 18, **Korean Airlines Co. Ltd.** was fined $5.5 million for its participation in an antitrust cartel relating to carriage of freight from Indonesia to destinations throughout the world, including Australia. The agreement was alleged to have been made with other co-conspirators in relation to fuel and security surcharges for the period May 2003 to February 2006 and customs fees during the period May 2004 to October 2005. As at the

date of this release, the total fines imposed by the ACCC against various air cargo cartel participants totalled $52 million.

- On August 25, the Federal Court in Brisbane determined that three Queensland-based construction companies had engaged in price fixing and misleading or deceptive conduct in relation to government tendering projects in Queensland. The participants engaged in a practice of "cover bidding" which amounted to controlling the price at which services are to be supplied. As of the date of this release, the determination of penalties had not yet been made.
- The ACCC also imposed penalties in relation to misleading advertising in relation to broadband services, ordering **Optus** to pay $5.26 million in civil penalties for breaches of the *Trade Practices Act 1974*. The Federal Court in Brisbane also imposed a penalty of $1.25 million for misleading representations related to the sale of 3D televisions by **Harvey Norman Holdings Ltd.**

### New Zealand Commerce Commission

The NZCC was active in the investigation of air cargo and other global antitrust conspiracies in 2011.

- On March 17, **British Airways**, **Qantas Airways Ltd.** and **Cargolux Airlines International S.A.** agreed to pay penalties in relation to their participation in agreements to raise prices on air freight shipments by imposing fuel surcharges on shipments into and out of New Zealand. Cargolux was ordered to pay $6 million, together with $25,000 in costs, while British Airways paid $1.6 million and $100,000 in costs. Qantas was ordered to pay $6.5 million. The NZCC has alleged that 13 air carriers were involved in agreements to raise freight rates over a seven year period by imposing fuel surcharges on cargo shipments in and out of New Zealand. Other participants in the alleged cartel have contested the allegations.
- Also in relation to the air cargo matter, on August 26, the High Court determined that the ACCC properly had jurisdiction in relation to inbound air cargo services, in response to a challenge by defending air cargo providers; the defendants were bound by an undertaking not to appeal this decision until the conclusion of the next phase of the continuing trial proceedings.
- On June 14, penalties totalling $5.2 million plus costs were ordered against three international freight forwarding companies (**BAX Global Inc.**, **Schenker AG**, and **Panalpina World Transport (Holdings) Ltd.**) which were alleged to have engaged in illegal agreements to impose additional fees for international freight forwarding services. Each of the parties had reductions on maximum fines through their cooperation with the NZCC's investigation. Total penalties levied in this investigation have so far reached $8.85 million.

- On October 10, the NZCC announced a settlement with **Impresa Brasileira de Compressores S.A.** (Embraco) in relation to an agreement to exchange information on prices, production capacities and market intelligence relating to the supply of refrigerator compressors in New Zealand. On December 22, the High Court imposed a penalty of $3 million together with $50,000 in costs.
- On October 18, the New Zealand High Court approved the NZCC's move to proceed to trial against **Kuehne + Nagel International AG** in relation to allegations that the Company, together with other competitors, colluded in relation to the imposition of security and other surcharges on freight forwarding shipments. The decision by the High Court is not a final decision in the matter.

### U.K. Office of Fair Trading

- On January 20, the U.K. Office of Fair Trading (OFT) issued a decision imposing civil penalties upon **Royal Bank of Scotland** (RBS) in relation to prohibited exchanges of confidential future pricing information between October 2007 and February or March of 2008 for **loan products to large professional services firms**. A fine of £28.5 million was imposed upon RBS. As Barclays (the other party involved) received leniency, no penalty was imposed on it.
- On August 10, the OFT imposed fines totalling £49.5 Million upon **four supermarket chains as well as milk producers** for a conspiracy to coordinate price increases in 2002 and 2003.
- On August 16, the OFT asked the U.K. Competition Commission to investigate the **concrete mix and cement industry** after a market study determined that the parties could be engaging in anti-competitive practices in aggregates, cement, and ready-mix concrete businesses.
- On December 22, the OFT announced that it had terminated its criminal investigation into possible cartel activity in the **commercial truck manufacturing industry** but indicated that it may pursue civil remedies into the case.

### Japan Fair Trade Commission

- On April 15, the JFTC imposed cease and desist orders and surcharge payment orders pursuant to the *Anti-Monopoly Act* against **51 companies** totalling ¥756.8 million in relation to agreements to rig bids for works undertaken over a period of time ending on April 1, 2006.
- On May 26, the JFTC imposed cease and desist orders and surcharge payment orders totalling ¥14.1 billion against **four manufacturers** to increase the selling price of specified air separation gases by approximately 10%,

thereby restricting competition for the product in Japan. The agreement was alleged to have occurred up until January 23, 2008.

- On October 6, the JFTC issued cease and desist orders and surcharge payment orders against various participants in bidding for engineering works ordered by Ishikawa Prefecture and the City of Wajima alleging that the participants engaged in a bid-rigging scheme. The total amount of surcharge payments was ¥670.05 million.
- On July 26, the JFTC carried out on-site inspections of various industrial bearing manufacturers on allegations that the *Anti-Monopoly Act* had been violated. The inspections were carried out on **NSK Ltd.**, **NTN Corp.**, **Jtekt Corp.**, and **Nachi-Fujikoshi Corp.** Industrial bearings are used to reduce friction at mechanical joints in industries relating to wind energy, mining, automotive and construction.

### Korea Fair Trade Commission

- On January 27, the KFTC imposed total surcharges of ₩22.2 million (US$23.5 million) on five colour display tube (CDT) manufacturers for violations of article 19 of *Monopoly Regulation and Fair Trade Act.* The five manufacturers were **Samsung SDI Co. Ltd.**, **LG Philips Display Korea Co. Ltd.**, **Chunghwa Picture Tubes, Ltd.**, **Chunghwa Picture Tubes (Malaysia) Stn. Bhd.**, and **CPTF Optronics Co., Ltd.** It was alleged that the producers agreed to fix prices and reduce input of CDTs in meetings that took place in various jurisdictions including Korea for almost a ten-year period from November 1996 to March 2006. As well, it was alleged that production was reduced by agreement, together with exchanges of confidential business information. In imposing the fine, it was noted that LG Philips Display Korea Co., Ltd. was exempted from paying the surcharge because it could not afford it, closing the business in June 2009 by transferring the business lines (including the CDT sector) to another corporation.
- On May 26, the KFTC imposed surcharges totalling ₩434.8 billion relating to a domestic cartel against four petroleum refiners to restrict competition in relation to the distribution of petroleum products and to maintain market shares. The agreement alleged that the participants controlled distributors as a way of maintaining market shares at the current level and minimizing competition. Retail gas stations were restrained from switching to other suppliers, with the result that relative market shares remained stable for a period exceeding ten years.
- On September 5, the KFTC imposed fines of ₩11 billion against various **pharmaceutical manufacturers** in relation to improper provision of rebates in order to increase production and prescription of their respective

medications. The illicit rebates were made in the form of free dinners, golf outings, and lecture and consultancy fees.

- On October 28, the KFTC imposed total surcharges of ₩194 million (approximately US$175 million) on **10 Thin Film Crystal Transistor Liquid Display (TFT-LCD) manufacturers** for their violations of the *Monopoly Regulation and Fair Trade Act.* The penalties were imposed in relation to a price fixing and production restriction cartel over a five year period. The agreements were carried out through secret bilateral and multilateral meetings taking place in countries including Korea and Taiwan at least monthly over the five year period ending in September 2001. According to the KFTC release, the parties agreed on minimum selling prices of large size LCD panels, the level of price increases (or decreases), price differences by use or specification, the timing of price increases, and prohibitions on offering of rebates. When there was over-supply, the participants reduced production by shutting operations of one of the plants or shifting capacity. The participants exchanged sales-related information and jointly conducted analyses of supply and demand for market forecasts, using the media to artificially boost price increases by providing false information on the supply and demand of the product in the market. Compliance with the agreements was monitored and sanctions were imposed against those who breached the agreements. All communications and meetings were conducted in secret.

  The largest penalty was imposed on **Samsung Electronics Corp.** for a total of ₩96.1 million.

- On December 12, the KFTC imposed total surcharges of ₩54.5 million (approximately USD$48 million) on **four cathode ray tube (CRT) glass manufacturers** for violations of the *Monopoly Regulation and Fair Trade Act.* The KFTC alleged that the manufacturers had agreed to fix prices and reduce output of CRT glass over an eight year period commencing in March of 1999. According to the KFTC release, the participants conducted secret meetings in various jurisdictions including Korea at least 35 times over the eight year period. The participants agreed on price rises for CRT glass, allocated market shares by major customers, and reduced production by shutting down CRT glass production lines. They also exchanged confidential business information and market shares in order to monitor the implementation of the agreement.

  The largest surcharge was imposed on **Samsung Corning Precision Materials Co., Ltd.** in the amount of ₩32.4 million.

  The release noted that the KFTC had jointly investigated the cartel with

authorities including the EC from March of 2009. The release further indicated that there was a leniency application as a component of the investigation.

## Conclusion

The year 2011 was another reasonably active period for national and global criminal antitrust enforcement. While overall major global international investigations remain limited, enforcement efforts show no real decline in the pattern of investigative activity and imposition of fines.

As noted above, certain tensions are emerging in the interplay between civil enforcement and criminal regulatory regimes, chiefly related to requests for production and disclosure of previously confidential or restricted immunity materials to civil litigants. In the EU, these tensions continue to play out in member state court proceedings. While the full impact of these interactions will take time to crystallize, investigative processes could be implicated by these trends, with the consequence that there could be diminished global coordination of antitrust probes. These are important developments and will be closely watched in the coming year.

As for Bureau enforcement, recent statements by officials indicate a stronger line will continue to play out over the coming years, with increased emphasis upon individual accountability through more charges and an attempt to gain support of trial courts in imposing jail terms. The Bureau has also indicated that it must be "top of mind" for applicants who are making global immunity applications with Canadian implications, and that it will not play "second fiddle" to other regulators in this process.

In conclusion, the criminal regulation of antitrust cartels shows no abatement and will continue to be a focal point for enforcement in the coming years.

**Endnotes**

[1] Partner, Osler, Hoskin & Harcourt LLP, Toronto