
Hot Topics and Practical Strategies: Public and Private Cartel Enforcement in Europe and the U.S.

Presented by
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Davis Polk

Davis Polk & Wardwell LLP

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Presenters



Greg D. Andres

Mr. Andres is a partner in Davis Polk's Litigation Department, concentrating in white collar criminal defense and representing clients in both civil and criminal trials. He has represented individuals and entities alike in a wide range of regulatory and criminal investigations involving market manipulation, insider trading, securities, procurement and tax fraud, and money laundering. He also has extensive experience in anti-corruption matters, both in private practice and at the Department of Justice. He previously served in senior government positions including most recently as a Deputy Assistant Attorney General in the Criminal Division at the Department of Justice and the Chief of the Criminal Division at the U.S. Attorney's Office in the Eastern District of New York.



Arthur J. Burke

As a member of Davis Polk's Litigation Department in New York and Menlo Park, California, Mr. Burke has represented clients in a variety of antitrust, securities, corporate governance and general litigation matters. In his antitrust practice, he advises clients on the competition law aspects of mergers and acquisitions and represents clients in investigations of mergers undertaken by federal antitrust authorities pursuant to the Hart-Scott-Rodino Act.



Nicholas Spearing

Mr. Spearing is counsel in Davis Polk's Corporate Department, practicing in the London office. He has experience in a broad range of antitrust matters, acting for leading companies in a range of transactional and behavioral practices cases in the U.K. Office of Fair Trading/Competition Commission (now combined in the Competition and Markets Authority) and at the European Commission level. He is also regularly called upon to assist, at a broader level, in delivering industry-wide solutions to consumer concerns.

Agenda

- 1. U.S. Enforcement Trends and Developments**
- 2. EU Enforcement Trends and Developments**
- 3. Practical Compliance Strategies**

U.S. Enforcement Trends and Developments

Leadership at the U.S. Department of Justice - Antitrust Division



- Assistant Attorney General for the Antitrust Division - William J. Baer (since January 2013)



- Deputy Assistant Attorney General for Criminal Enforcement - Brent C. Snyder

Current Trends in U.S. Criminal Enforcement

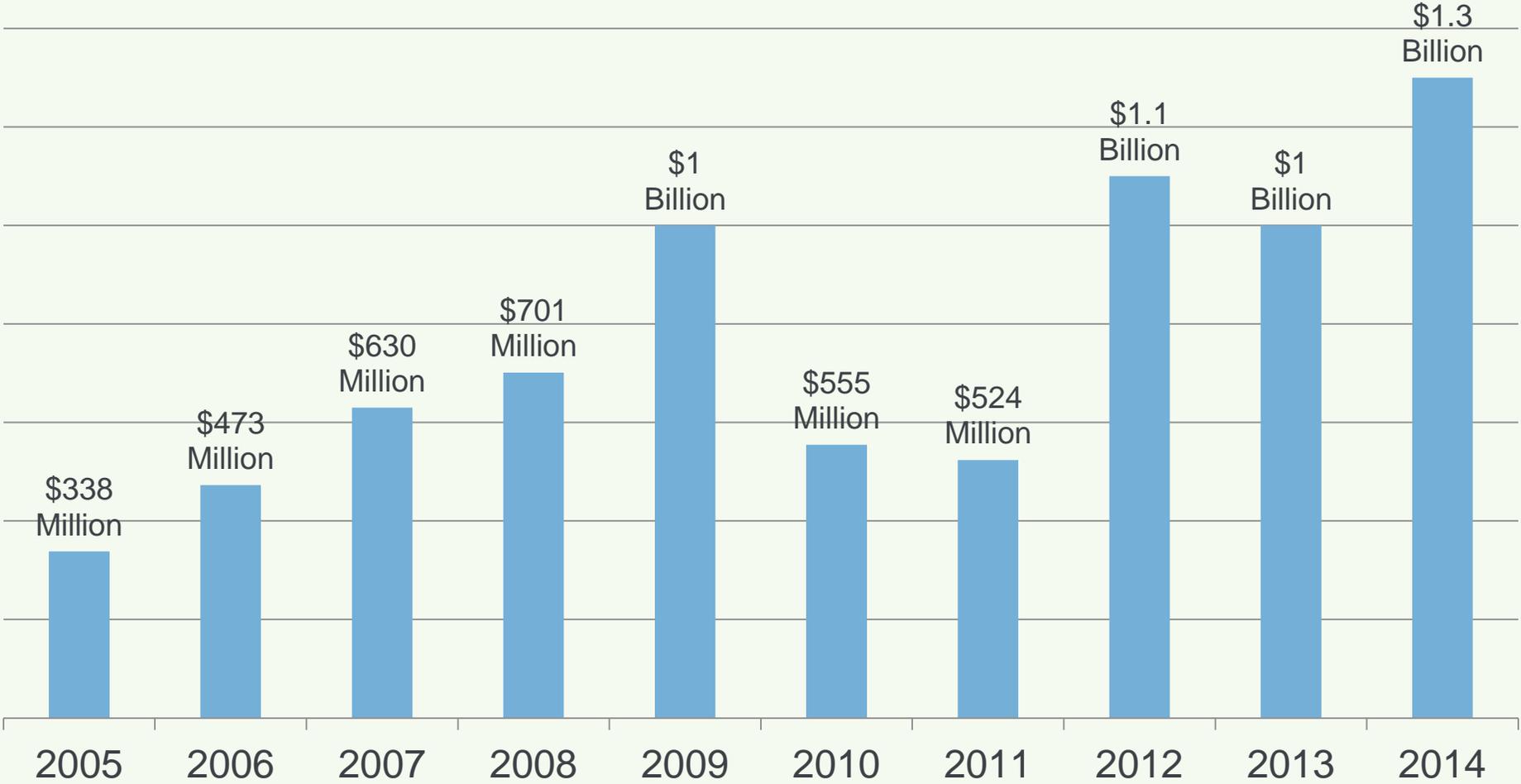
- **DOJ criminally prosecutes horizontal competitors who agree to:**
 - Fix prices
 - Rig bids
 - Allocate markets (customers/territories)
 - Allocate sales volume / restrict output
- **Cartel participants face stiff penalties under U.S. law**
 - Individuals – up to 10 years in jail and \$1M fine
 - Corporations – up to \$100M fine
 - Alternative corporate fine to statutory maximum (18 U.S.C. § 3571(d)) – twice the gain or twice the loss
- **Prosecuting “cartels” remains DOJ’s #1 priority:**
 - “Breaking up international cartels that harm U.S. consumers and businesses continues to be the Antitrust Division’s top law enforcement priority.” *Asst. Attorney General, DOJ Antitrust Division*

Record-Breaking Fines and Prison Terms

- **Criminal cases in FY 2014**
 - 45 criminal cases filed (down from FY 2013)
 - Record-breaking fines:
 - Total fines assessed: \$1.3B
 - Record-breaking prison terms:
 - Average prison term: 25 months
- **FY 2015 will *far exceed* the total fine numbers based, in large part, upon fines of financial institutions.**

Criminal Antitrust Enforcement: Fine and Jail Charts Through Fiscal Year 2014

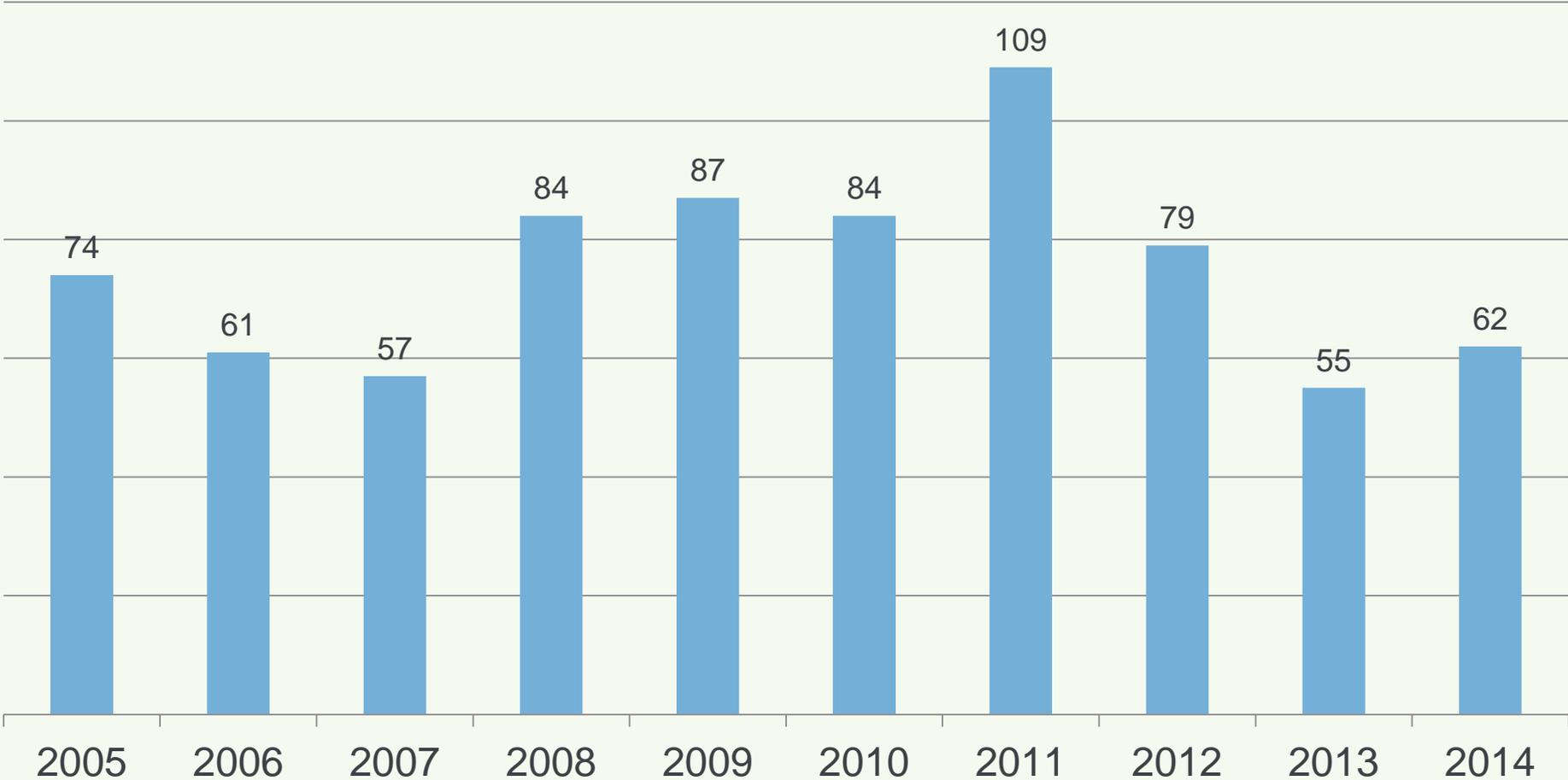
Total Criminal Fines



Source: U.S. Department of Justice. Last change June 25, 2015.

Criminal Antitrust Enforcement: Fine and Jail Charts Through Fiscal Year 2014 (cont.)

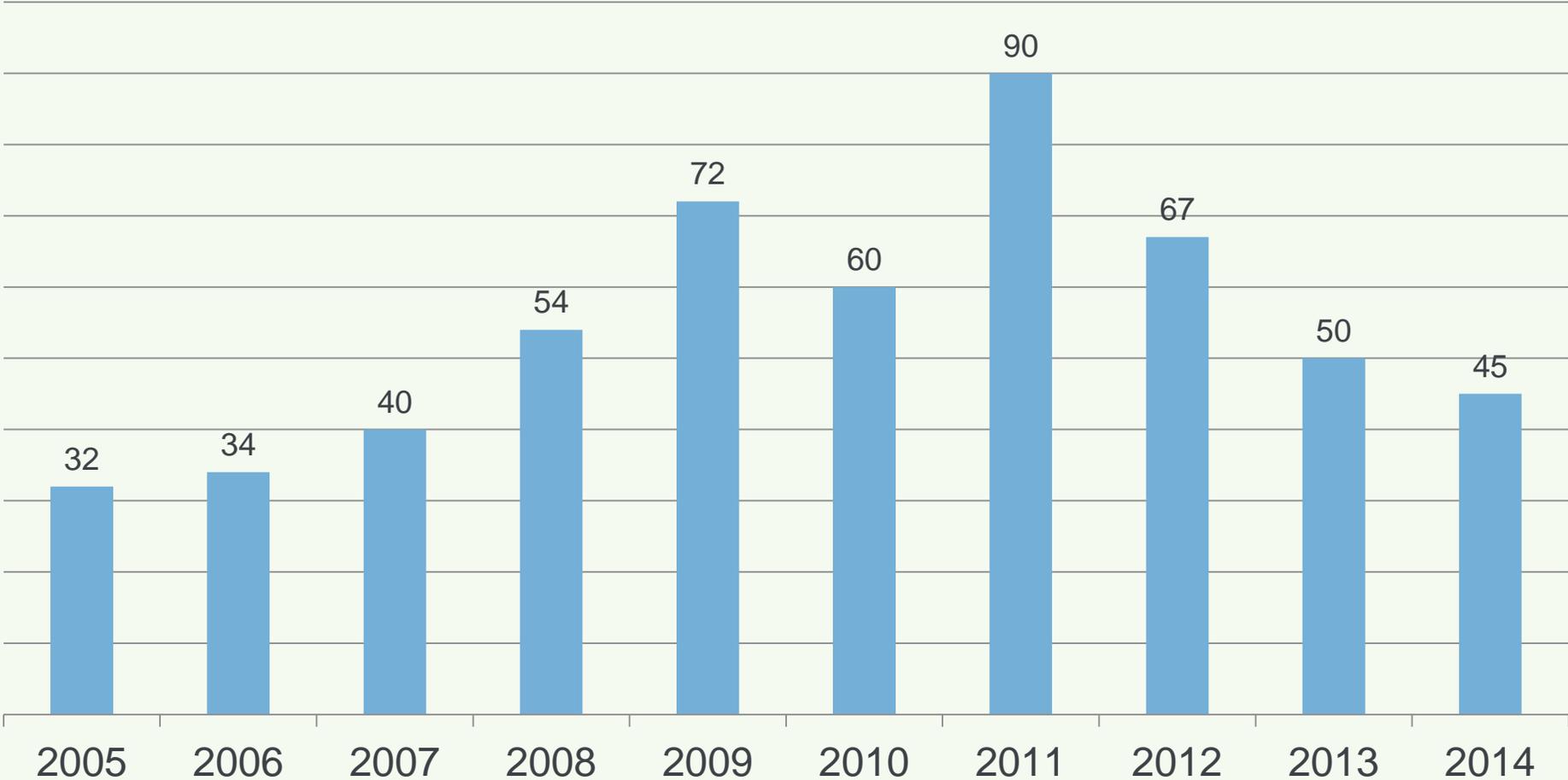
Total Defendants Charged



Source: U.S. Department of Justice. Last change June 25, 2015.

Criminal Antitrust Enforcement: Fine and Jail Charts Through Fiscal Year 2014 (cont.)

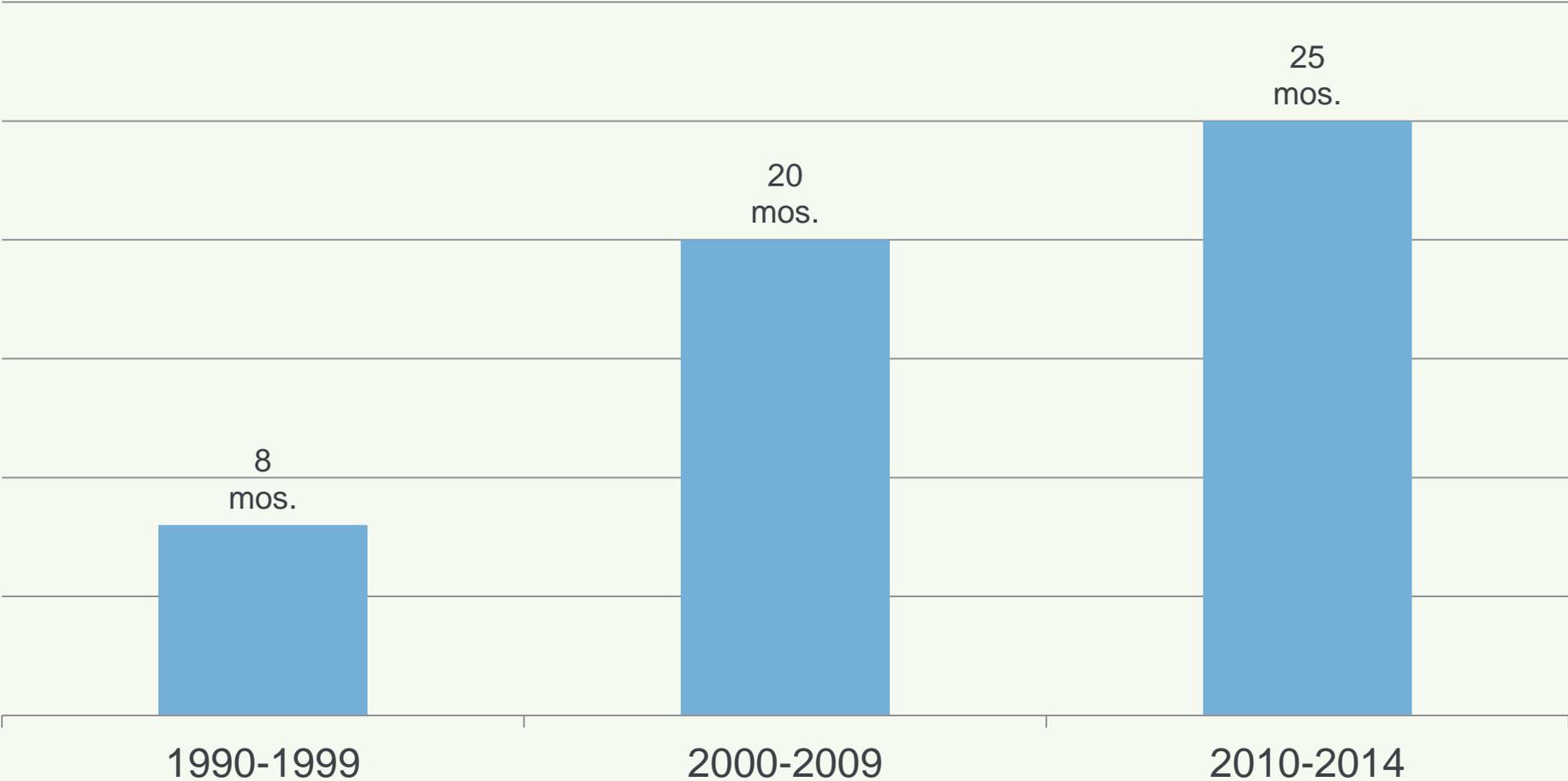
Total Criminal Cases Filed



Source: U.S. Department of Justice. Last change June 25, 2015.

Criminal Antitrust Enforcement: Fine and Jail Charts Through Fiscal Year 2014 (cont.)

Average Prison (months)



Source: U.S. Department of Justice. Last change June 25, 2015.

Recent DOJ Criminal Cartel Prosecutions

- Foreign Exchange – Citicorp, Barclays plc, JPMorgan Chase & Co., and RBS plc resolved their foreign exchange investigations with the U.S. DOJ (Antitrust Division and the Criminal Division, Fraud Section). In total, the five banks will be required to pay fines equaling \$2.783B.
- Auto Parts – DOJ and JFTC cooperated intensely in the world’s largest cartel probe. Over 27 companies pleaded guilty and over 35 individuals charged; more than \$2.3B in criminal fines assessed.
- TFT-LCD Flat Panel – 10 companies and 13 executives convicted; more than \$1.39B in criminal fines assessed.
- Lithium Ion Batteries – SANYO and LG Chem Ltd. agreed to plead guilty and pay more than \$11M in fines.
- Freight Forwarding – “K” Line Logistics Ltd. agreed to plead guilty and pay \$18.9M in fines; in all, 16 companies have pled or agreed to plead guilty and pay more than \$120M in fines.

DOJ Corporate Leniency Program

■ The “Division’s most effective investigation tool”

- First company to report an antitrust violation and meet amnesty program criteria receives full immunity from prosecution in exchange for cooperation (extends to cooperating employees).
- “Amnesty Plus” – companies negotiating a plea deal may provide information about a second, unknown conspiracy, as to which the reporting company will receive full immunity.

■ Antitrust Criminal Penalty Enhancement and Reform Act (“ACPERA”)

- Provides amnesty recipient with added benefits in follow-on civil actions
- Limits private plaintiffs to single damages; no joint and several liability
- Must provide substantial, “timely” cooperation in exchange

■ Will spread of leniency programs internationally reduce incentives to cooperate?

- In 1990, U.S. was only jurisdiction to offer complete immunity to the first corporation to self-report.
- Today, more than 50 countries offer similar programs.

DOJ Focus on Prosecution of Individual Cartel Managers

- “Holding culpable individuals accountable is the most effective way to deter and punish cartel activity.” *Asst. Attorney General, DOJ Antitrust Division*
- DOJ places great weight on deterrence value of significant prison sentences for convicted cartel managers.
- Frequency and severity of prison sentences on the rise.
- DOJ is committed to holding foreign nationals accountable for U.S. antitrust violations.
 - DOJ has called “no-jail deals” for foreign nationals a “relic of the past,” but time will tell if that is accurate.
- Extradition is a viable tool for cartel enforcement in some cases.
 - In 2014 the DOJ extradited two individuals (an Italian citizen and a Canadian citizen) to the US to face antitrust charges.

Private Civil Litigation Follows Government Investigations

Government investigations have spurred extensive private litigation

- Many cartel cases also have parallel private litigations.
- Results vary widely:
 - In the LCD panel civil litigation, the 7th Cir. held that the FTAIA barred claims of a US-based finished product manufacturer, although this decision was vacated several months later for a rehearing en banc.
 - In LIBOR, Judge Buchwald dismissed all antitrust claims and many other federal and common law claims. Appeal is scheduled to be argued in the Second Circuit on November 13, 2015.
 - In FX, a subgroup of nine defendants settled for an aggregate of over \$2 billion. Other cases continue to proceed.
- Criminal plea agreements obviously complicate defense of civil cases.
 - But private litigation claims face many hurdles that are not faced by the DOJ – like class certification.

EU Enforcement Trends and Developments

New Commission, New President, New Competition Commissioner



European Commission President
Jean-Claude Juncker



European Commission Competition
Commissioner Margrethe Vestager

- **From 1 November 2014, Jean-Claude Juncker vowed to lead “a very political” Commission:**
 - *“While I am a strong defender of the Community method in normal times, I am not a purist in crisis times. I do not mind how we cope with a crisis... as long as we find a solution and get things done in the interests of Europe’s citizens”*
- **Mission letter to new Competition Commissioner Margrethe Vestager urged her:**
 - *“to mobilise competition policy tools ... so that they contribute ... to our jobs and growth agenda, including areas such as the digital single market, energy policy, financial services, industrial policy...”*

The EU Perspective

Background:

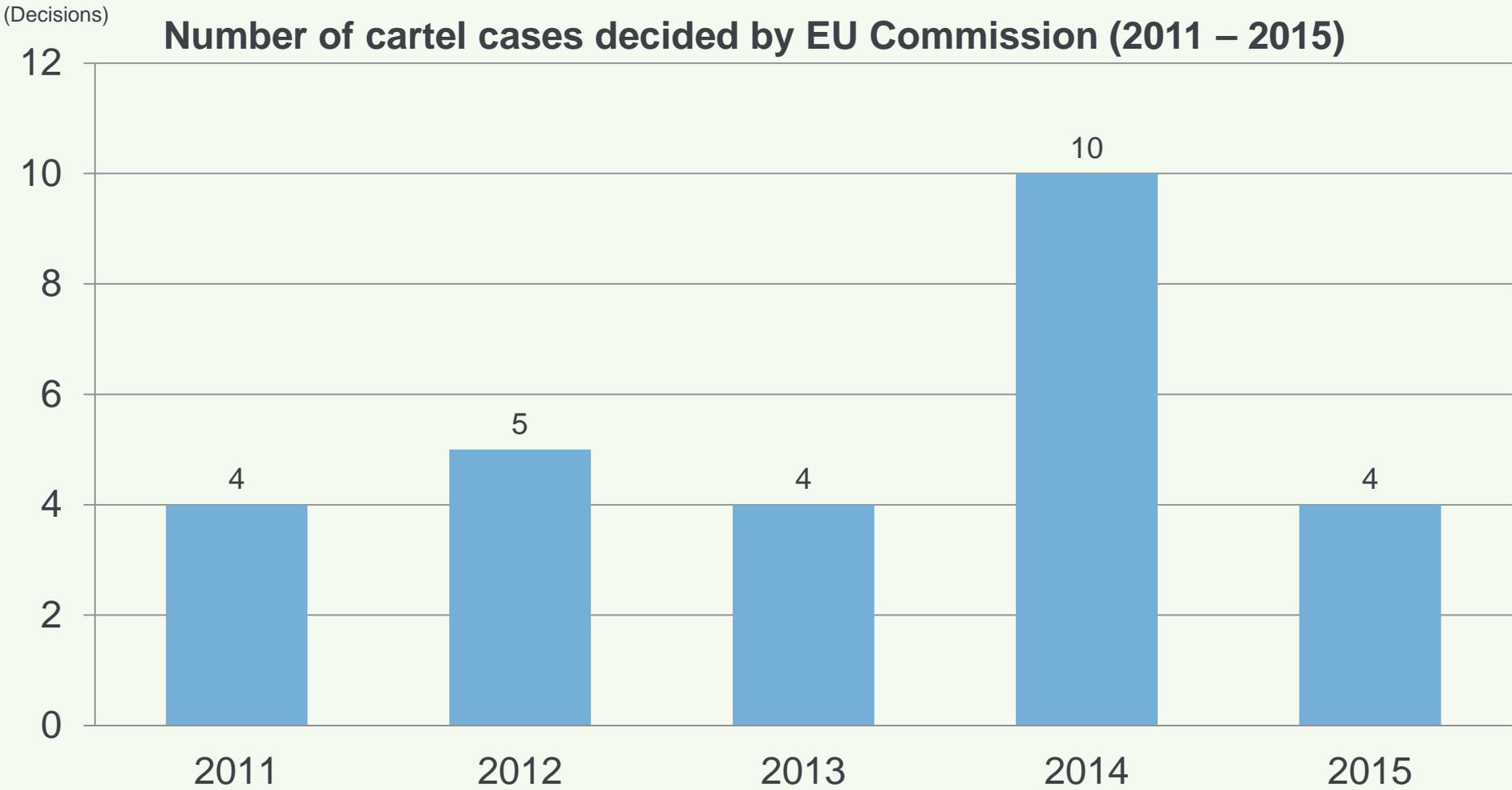
- European Commission in Brussels is the executive arm of the EU – its Competition Directorate is responsible for enforcing EU antitrust, merger control and state aids rules.
- Commission is well resourced, with extensive investigatory powers.
- But 28 Member States, the vast majority with their own national competition authority, are also applying domestic and EU antitrust law.

EU Cartel Enforcement: Overview

Cartel participants face heavy fines under European law

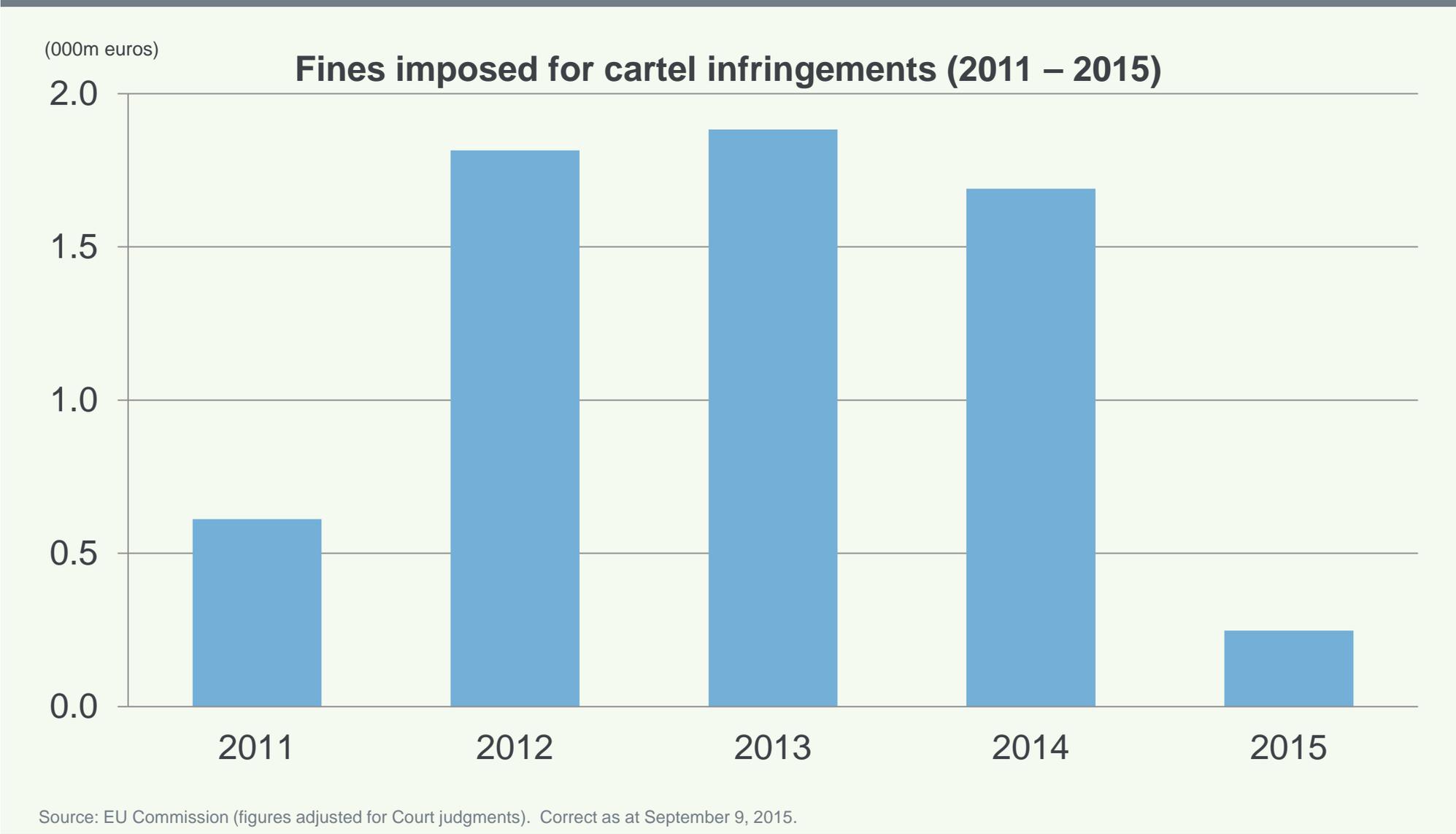
- Companies in cartel cases face fines that are often higher than in the US.
- Individuals in cartel cases do not face jail time under EU law (but they can in some member countries, such as the U.K.).
- In order to calculate fines, the EC looks at a percentage of relevant sales multiplied by the number of years and months the infringement lasted (resulting figure can be increased or decreased based on circumstances).
- A fine is limited to 10% of the overall annual turnover of the company.
- 10% reduction of the fine if a company settles.

EU – Cartel Enforcement Activity



Source: EU Commission (figures adjusted for Court judgments). Last change July 15, 2015.

EU – Cartel Enforcement Activity – Overall Fines



EU – Cartel Enforcement Activity – Individual Fines

Ten highest cartel fines per undertaking (since 1969)

Year	Undertaking	Case	Amount in € millions
2008	Saint Gobain	Car glass	715
2012	Philips	TV and computer monitor tubes	705
2012	LG Electronics	TV and computer monitor tubes	688
2013	Deutsche Bank AG	Euro interest rate derivatives	466
2001	F. Hoffmann-La Roche AG	Vitamins	462
2013	Société Générale	Euro interest rate derivatives	446
2007	Siemens AG	Gas insulated switchgear	397
2014	Schaeffler	Automotive bearings	370
2008	Pilkington	Car glass	357
2009	E.ON	E.ON/GDF collusion	320

Source: EU Commission (figures adjusted for Court judgments). Correct as at September 9, 2015.

EU – Private Enforcement of Antitrust Law

- Traditional EU position:
 - EU antitrust law primarily enforced by public bodies – very limited role for private enforcement
 - Substantial legal and procedural hurdles in EU member states' rules governing actions for antitrust damages before national courts
 - Restitutionary damages, not punitive/exemplary
 - Pre-2004, across EU only 60 decided cases for damages (12 on basis of EU law, 6 EU/national law basis), 28 resulted in an award
- Trends:
 - Increased focus on private enforcement of EU antitrust law
 - Directive on antitrust damages actions
 - Growth in collective action regimes and representative actions in member states
 - EU non-binding principles for collective redress mechanisms in EU member states
 - Adoption of 'opt-in' or 'opt-out' collective action regimes in EU member states, e.g. U.K., Spain, Portugal, Italy, Belgium

EU Antitrust Damages Directive

- EU countries need to implement by December 2016
- By harmonising procedures, “litigation to recover losses will become a realistic option for smaller companies, SMEs and consumers”
- Easier access to evidence
- Infringement decision by competition authority constitutes proof for court
- Presumptions of harm, and that overcharges are at least partially passed on to indirect purchasers



Each country will at least have the basic rules in place to enable claims for full compensation

All Change in the U.K. for Antitrust Private Actions?

From 1 October 2015, the Consumer Rights Act

- Widens the scope for collective actions:
 - Now includes claims by businesses
 - “Opt-out” claims now permitted
 - Collective settlements can be approved by Competition Appeal Tribunal (“CAT”)
- Broadens the CAT’s powers:
 - Can hear stand-alone (as well as follow-on) actions
 - Limitation periods harmonised (6 years) with High Court
 - Fast-track procedure for simpler claims
 - Power to injunct
- Opens the way to voluntary redress schemes
 - Possible reductions in fines
 - No “double recovery”

Practical Compliance Strategies

Practical Compliance Strategies

1. Train employees on compliance and consequences of non-compliance

- Recent criminal prosecutions provide cautionary tales.
- Focus on compliance efforts can mitigate penalties.

2. Control use of communications technologies (e.g., chats)

3. Carefully monitor industry standard setting bodies and consortia

- The antitrust authorities recognize that these organizations can have procompetitive objectives and benefits, but they present risks of “spillover” into inappropriate coordination.

4. Consider leniency application opportunities

- Time is of the essence if compliance issues arise.
- Leniency applications should be coordinated across jurisdictions.

Questions