Standing in the antitrust firing line

Regulators investigating antitrust cases are working across borders and are getting tougher on transgressors. Corporates at risk need to be more prepared than ever.

In 2000, a cartel of companies producing the animal feed lysine was fined €110 million by the European Commission (EC)—at the time, the highest fine ever imposed by the EC and the first to address activity based outside Europe.

The EC's cartel enforcement division has come a long way since then. Last year, it fined five bearings manufacturers €953.3 million (US$1.07 billion). Germany's Schaeffler Group alone had to pay €370.4 million—more than triple the then-record fine imposed on the entire lysine cartel 14 years previously. The highest fine imposed on a single company for cartel behavior remains Saint-Gobain in the car glass case in 2008, at almost €900 million, and the highest collective fine in the EU in one case was in tubes for TVs and monitors, at €1.470 billion.

Indeed, the total value of fines imposed by the Commission has increased exponentially in the past decade, as a matter of policy. From 2010 to the middle of December 2014, Commission cartel fines, adjusted for court judgments, totaled €8.7 billion. In the four-year period from 2000 to 2004, by contrast, total fines amounted to only €3.1 billion. It is no coincidence that in 2006, the Commission issued new "fining guidelines" introducing a methodology enabling the imposition of higher fines.

The new EC Commissioner has signaled there will be no immediate end to the EU's "war against cartels."

"It should be clear that no industry, markets or company is immune from our scrutiny," said Commissioner Margrethe Vestager in a statement at the end of last year. "I think that the record shows that we are still getting better at catching the cartelists." Although the EU's fines in absolute terms are the highest, across the Atlantic, the US Department of Justice (DOJ) Antitrust Division has shown similar aggressiveness. In 2003, the DOJ collected criminal antitrust fines totaling US$107 million. In 2014, total fines came in more than 10 times higher at US$1.8 billion. Before 2009, the Division had never collected a total of more than US$1 billion in fines during a year. Since 2009, it has broken the US$1 billion threshold four times and filed 339 criminal cases—up 60 percent over the previous five-year period.

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The DOJ has also sent more of the individuals it prosecutes to prison on longer sentences (the EC only has the power to impose fines, although national competition authorities can jail individuals).

During 2013, more than two-thirds (68 percent) of the individuals sentenced in DOJ cases received prison time. Nearly twice as many defendants are going to prison for cartel offences than was the case in the 1990s. The average prison sentence for DOJ defendants in 2013 was 25 months, more than three times the eight-month average jail time of the 1990s.

As Bill Baer, Assistant Attorney General, DOJ Antitrust Division, said in a speech at the Global Antitrust Enforcement Symposium in Washington, DC, in 2014: "The Supreme Court puts it succinctly, calling cartels 'the supreme evil of antitrust.' There is no more important work we do."

Around the world, the focus on breaking up cartels and punishing offenders has never been more intense. The International Competition Network (ICN), a body of national and multinational competition authorities from around the globe, now has more than 320 members who cooperate and share information. A small case in a single jurisdiction can rapidly morph into a global investigation.

"There has been a change in enforcement priority towards cartels in the mature antitrust jurisdictions. At the same time, there has been the creation of new antitrust authorities with concomitant enforcement priorities in new countries. The overall result is major risk for companies doing international business," says Jacquelyn MacLennan, a White & Case partner in Brussels.

New priorities

It is only in the last 20 years that governments have made price-fixing investigations a primary concern. Tackling cartels—particularly where "national champion" companies were involved—used to be regarded as politically and practically difficult, but there has been a growing international consensus that colluding to manipulate prices damages economies, hampers innovation and hurts consumers, and must be confronted.

Two developments have driven the rising number of successful cartel decisions and the imposition of larger fines. The first is the refinement and widening use of leniency programs globally. Typically, these programs offer incentives designed to encourage corporates to inform on other cartel members. These range from reduced fines to total amnesty, depending on the order in which they come clean.

A leniency program established in the United States in the late 1970s was largely unsuccessful until 1993, when it was overhauled to allow full amnesty for the first informant, as well as for the directors, officials and employees of the informant firm.

"You can trace the trend of increasing prosecutions back to that revision of the amnesty program," says Chris Curran, a White & Case partner in Washington, DC. "Encouraging cartel members to self-report was a revolution. Full immunity from criminal prosecution is a strong incentive to report. It snowballed from there, and the model spread to other jurisdictions."

The EC's leniency program was revised in a similar fashion in 2002, and antitrust authorities around the world have followed suit. Since the revision, the number of cases opened by the EC following leniency applications has increased from five out of six cases in 2008 to six out of seven cases in 2009 and in every case from 2010 to 2014.

The leniency program has become de facto the only tool employed by the EC to detect cartel behavior.

The second development has been the growing cooperation between antitrust watchdogs in different countries. Through the ICN, regulators have been able to exchange information and join forces to pursue multinational cartels as well as price fixers in their own backyards.

By cooperating with colleagues in other countries, regulators are not just going after local businesses but also foreign ones. Recently, many companies have been involved in EU, US and other investigations and faced multiple fines for the same behavior. A number of Japanese companies were fined as part of the EC's automotive bearings decision last year. The DOJ, meanwhile, has also had its eye on the automotive supply chain, fining more than 20 car parts manufacturers more than US$2 billion. EURIBOR, LIBOR and Air Cargo are other recent high-profile examples of global investigations.

"As antitrust authorities have become more terrier-like in their enforcement of competition law, international cartels have become more of a target. Investigating international cartels is now a major focus," says MacLennan.

US$2bn+

Total antitrust fines levied against more than 20 car parts manufacturers in the United States by the Department of Justice in recent years.

Fighting your corner

As cartel enforcement has become more sophisticated, corporates that think they may be the subject of a cartel investigation—or already are—need to be prepared. Now that antitrust enforcement authorities are working more closely together, perhaps the most important thing for any corporate to do is ensure that its response is coordinated around the globe.

"When a company is being investigated or could be investigated, everything has to go into fast forward. Speed is of the essence," says MacLennan. "You need a coordinated strategy, which is not just the strategy that seems right in one jurisdiction, but a strategy that makes sense in multiple jurisdictions.

"The sanctions in different countries also need to be considered. High fines are the main risk in the EU. In the US, prison sentences are a possibility, and executives may be subject to extradition orders. In some countries, you can be blocked from competing in a market for a number of years. From the beginning, you need to consider your best move—where are the

right jurisdictions if immunity or leniency is an option, or what is the optimal defense where the company chooses to fight the charges. Fast fact finding is key," explains MacLennan.

Some behavior, for example, may be illegal in one jurisdiction but not another. This will influence not only where, but also whether or not a company should apply for amnesty.

"All decisions on whether to go for amnesty need to have a global perspective. Decisions in one country will impact investigations in others," Curran says. "Regulators in the US need to see evidence of an agreement to fix prices. The mere exchange of information among competitors generally is not an offense. In Europe, however, exchange of information can be treated as collusion. In articulating a defense in the US, you can end up incriminating yourself in Europe."

Given the trend of increasing fines and longer prison sentences, the temptation for a corporate to report other cartel players can still seem like the most

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rational course of action in certain circumstances, despite the risks.

Pinning down the players

Establishing whether a company has actually participated in a cartel and the scope of that cartel's activity is by no means straightforward.

It is no coincidence that before immunity regimes were introduced, regulators found it very difficult to identify and prosecute cartel behavior. Markets in which price fixing is present can look very much like markets that are competitive. If one company raises its prices and others follow suit, it could look like a cartel is in operation, but it could just as easily be companies reacting to a move by a rival. There is a big gray area.

"It all comes down to trying to establish what happened and what effect it has had in the market," says Julius Christensen, senior vice president and general counsel for Toshiba America Electronic Components. "First, you have to gather all the documents and find people who are knowledgeable to explain what they mean. There is always ambiguity. You are often trying to figure out what happened at meetings held years before. Even in cases where there is hardcore cartel behavior, not everyone in an industry will be involved and interactions between competitors could, in fact, be pro-competitive, like joint ventures. Establishing who is a collaborator and who is a competitor is very nuanced."

The difficulty for a company, let alone for a regulator, in establishing whether cartel behavior has occurred means that applying for leniency is not as clear-cut as it may at first appear, especially if a corporate suspects that rivals may have already confessed and taken all the spots available for amnesty and reduced penalties.

Leniency also comes with heavy obligations that corporates cannot escape. You have to engage in self-incrimination and incriminate others, and it requires continuing cooperation. Curran points out that applying for leniency can also open up a company to other risks as well: "When you report and apply for immunity, that does not stop private litigation. Applying for immunity can leave you exposed to onerous private lawsuits."

A fine line

Competition law enforcement has become both more belligerent and more effective in the past 20 years. Watchdogs are working together more effectively, and cartel busting has taken on a global scale. This has made life much more challenging for alleged price fixers. Regulators may team up, but do not always agree on what constitutes illegal behavior or take note of fines already issued by their colleagues. Companies may be guilty of price fixing in one region but not in another. They can also end up with multiple fines for the same offense.

The improving track record of watchdogs and the increasingly harsh penalties they impose can make corporates feel like they have no option other than to apply for amnesty.

As Christensen explains, however, it is not that simple: "Even in a case where one company has applied for leniency, the applicant will tell the story one way and that can differ from what other companies think. Figuring out what happened, what it means, the effects on a market and the legal ramifications is very complex."

Regulators may have more sophisticated tools at their disposal, but there is still a case to be made for standing your ground.