Criminal Antitrust Enforcement 2013 (Mid-Year):

The calm before the storm?
Worldwide antitrust penalties topped USD5 billion in 2012, making it a tough act to follow for global regulators. Halfway through this year, the 2013 global enforcement statistics seem a long way from reaching last year’s staggering figures, with fines from prominent enforcement regimes totaling only about USD677 million. (See Figure 1). It is, however, premature to draw any firm conclusions on 2013 enforcement, as 2012 began with a deceivingly slow start in some key jurisdictions before exploding towards the end of the year. In the face of global cartel enforcers warning that mammoth investigations like LIBOR and Auto Parts are primed to produce results in the coming months, we expect the enforcement statistics for 2013 to substantially rebound before the close of the year.

Although enforcement numbers are down thus far in 2013, new enforcers, such as Hong Kong, have joined the global enforcement ranks, while other more established enforcement agencies, like those in the U.S., EU, and UK, have been active in making new policies meant to refine and strengthen existing processes and to bolster cartel detection and prosecutions. For those cases brought by authorities in 2013 so far, we also see a continuing trend towards more severe sanctions across jurisdictions, including increasing jail sentences for individuals. These developments signal a continuation of the globally shared objective among cartel authorities to target corporate and individual conspirators more effectively and more harshly than ever before.
2012 was an unprecedented year for criminal antitrust enforcement in the U.S., with the Antitrust Division obtaining a record USD1.14bn in criminal fines. Tough enforcement will no doubt continue under the new leadership of Assistant Attorney General, Bill Baer, who, in April, avowed before Congress that aggressively pursuing international cartels is a top priority. And Baer has lost little time in focusing his attention on the area, already introducing a new policy for how the Division will handle the names of individuals who are ‘carved-out’ of corporate plea agreements in cartel cases. The Division has also indicated that it will make a practice out of requesting that convicted corporations hire compliance monitors, as it recently did against AU Optronics in the LCD case.

We expect that 2013 enforcement in the U.S. will be another year dominated by the Auto Parts and LIBOR investigations. So far in the Auto Parts investigation, the Antitrust Division has received guilty pleas from nine companies and 14 executives, and has obtained fines of USD809m. The most recent pleas involved two Japanese executives, from Denso, pleading guilty in May, and each agreeing to pay USD20,000 in fines and to serve prison sentences of 15 and 16 months. The Auto Parts probe is set to continue through fiscal year 2013, with the investigation becoming broader and encompassing a wider range of product areas, particularly as a result of the ‘Amnesty Plus’ program, which encourages companies to disclose cartel violations in other product areas in order to secure fine reductions. Scott Hammond, the Deputy Assistant Attorney General for Criminal Enforcement at the Antitrust Division, recently acknowledged this fact, explaining that the Auto Parts investigation is being ramped up even further and is even “broader than what we’ve announced so far.”

Further developments are also likely in the Antitrust Division’s LIBOR investigation. Earlier this year, the Division obtained a fine against RBS totaling USD150m. The Division’s resolution with RBS marked a number of firsts for the Division, including representing the first time the Antitrust Division held a financial services firm criminally liable under the antitrust laws for a trader-based market manipulation scheme, as well as the first time the Division used a deferred prosecution agreement, as opposed to a criminal plea agreement or non-prosecution agreement, to resolve a criminal antitrust violation.

Still, the Antitrust Division has remained busy with other more mature investigations in fiscal year 2013:

- **LCD**: In the LCD case, a convicted executive was recently sentenced to 24 months in prison, three years of supervised release, and a USD50,000 fine, which brings the combined total so far to 184 months in prison for 13 executives, with criminal fines totaling USD1.39bn.

- **Municipal Bonds**: The investigation into bid-rigging on municipal bond contracts resulted in three former executives of GE Funding Capital Market Services receiving sentences of between three and four years. Also, a former financial services broker for Tradition NA received a prison sentence of 18 months and a USD12,500 fine. The Antitrust Division has also advocated for lengthy prison sentences for three former executives of UBS found guilty of conspiring to rig bids, the largest sentence being just less than 20 years.

- **Real Estate Auctions**: The Antitrust Division’s investigation of fraud and bid-rigging in public real estate auctions has resulted in charges nationwide
against 53 individuals and two companies. In Alabama, two individuals were recently sentenced to 20 months in prison each. In California, the Division has obtained plea agreements from 31 defendants to date.

Coastal Shipping: In its investigation into rate-fixing on water transportation services, the Antitrust Division convicted shipping executive Frank Peake, in January 2013. Importantly, the Antitrust Division is predicted to seek the largest prison term ever imposed for a single antitrust offense against Peake at his sentencing later this summer. In total, this investigation has resulted in prison sentences for five individuals and has yielded over USD46m in criminal fines.

Similar trends exist elsewhere in the Americas as well. Brazil has already topped its 2012 fine levels this year. In 2012, a major overhaul of antitrust policy took place with the centralization and enhancement of cartel prosecution power within the Administrative Council for Economic Defense (CADE). The impact of this change appears to be substantial. In February, CADE fined Société Air France and KLM BRL14m (USD6.4m) for participation in the air cargo cartel. In March, CADE imposed a fine in the fuel sector of BRL120m (USD55m) against three associations, 28 retail gas station companies and 31 individuals for engaging in price-fixing. In the same month, CADE also imposed a fine of BRL38m (USD17m) for price-fixing and abuse of dominance against a music distribution agency and related copyright associations for manipulating prices for performances of musical works. CADE also announced a revision to its cartel settlement procedure, which now requires both an admission of guilt and cooperation with the investigation. This new measure enhances CADE’s leverage and is in line with CADE president Vinicius Marques de Carvalho’s warning that CADE will “identify and punish such conduct with the necessary rigor.”

Similarly, Canada surpassed last year’s fine levels when, in April, the Competition Bureau imposed the largest bid-rigging penalty in its history of CAD30m (USD29m) against a Japanese supplier of motor vehicle components, Yazaki Corporation. Several weeks later it obtained a guilty plea and a CAD1.5m fine against Cathay Pacific Airways for its participation in the air cargo cartel. Additionally, following an immunity application from Cadbury Adams Canada Inc., the Competition Bureau charged Nestlé and Mars, as well as a distributor and three executives, with colluding to fix prices of chocolate products in Canada. Hershey pleaded guilty to the charges in June, and agreed to pay a CAD4m fine. Commissioner of Competition, John Pecman, emphasized that there is more to come, stating “both the likelihood of detection and prosecution are increasing. And with increasing cooperation and coordination between agencies, there are fewer places to hide.” He also introduced a new Transparency Initiative and Criminal Cartel Whistleblowing Initiative as means for members of the public to inform the Competition Bureau of possible criminal cartel violations and to enhance Canadian enforcement in the coming year.
Europe

In Europe, cartel enforcement figures are down into the negative-millions this year, with the General Court partially annulling fines the European Commission had imposed against the Auto Glass, Banana, and Marine Hose cartels. Nevertheless, there are indications that the Commission’s fine levels will increase in the second half of 2013.

Already this spring, the Commission conducted dawn raids on multiple white sugar manufacturers, as well as on companies in the freight-forwarding industry. It also orchestrated dawn raids on BP, Statoil, Shell, and Platts as part of an investigation into oil-price manipulation, which Commission Vice-President, Joaquin Almunia, said may have caused “huge” damage to consumers.

As in the U.S., we also expect Auto Parts and LIBOR to play prominently in the Commission’s results for this year. Vice President Almunia announced that the LIBOR probe is a “top priority” for the Commission, calling the alleged manipulation “extremely worrying.” He predicted that the Commission would make a preliminary enforcement decision in the matter by the end of the year. Similarly, public reports indicate that the Commission will imminently issue decisions relating to the wire-harness conspiracy in the Auto Parts matter.

For their part, the EU Member State enforcement authorities are also positioned to make their mark going forward. In particular, the UK recently revised its cartel law to dispense with the “dishonesty” element in criminal cases. When the changes take effect in April 2014, it will be easier for the UK authority to prosecute individuals for cartel violations. The UK enforcement regime may be further strengthened by early next year, with plans to merge the Office of Fair Trading and Competition Commission into a potentially more powerful Competition and Markets Authority (CMA).

In the future, EU Member States may also experience an increase in private antitrust enforcement. In mid-June, the Commission published its proposal on private damages actions. The Commission’s proposal would completely prohibit claimants from accessing certain types of leniency material in private actions (despite the ECJ’s rulings in Pfleiderer and Donau Chemie), but would allow them to use a national finding of liability as evidence of a violation. It also encourages EU Member States to adopt measures for collective redress on an “opt-in” basis. According to Almunia, this will “ensure that all victims of these infringements can obtain redress for the harm they suffered, especially once a competition authority has found and sanctioned such a breach.”
Asia Pacific

Asian antitrust enforcement regimes have continued to steadily expand their global influence this year. As in other jurisdictions, investigations into LCD, Auto Parts, and other industries have had notable results. For example, in China, the National Development and Reform Commission (NDRC) made history in January when it imposed a fine of CNY353m (USD56.7m) on a group of international LCD manufacturers, also marking the first time the NDRC prosecuted an international cartel and non-Chinese companies. In Japan, where 2012 marked the highest antitrust fine ever imposed against the wire-harness cartel in the Auto Parts investigation, aggressive enforcement has persisted with fines of JPY4.7bn (USD49m) against an auto lights cartel and JPY13.4bn (USD140m) against a cartel in the bearings industry, as well as a cease and desist order and a JPY2.6bn (USD26m) fine against manufacturers of high-fructose corn syrup, starch syrup, and glucose for concerted pricing practices.

In South Korea, the Fair Trade Commission (KFTC) recently imposed a hefty KRW38bn (USD34m) fine on glass plate producers, KCC Corporation and HanGlas Industries, for price-fixing. Fine-levels are expected to increase in South Korea as a result of new measures announced in Chairman Dae Rae Noh’s 2013 Work Plan, which will make it more difficult for cartel participants to obtain fine-reductions. The 2013 Work Plan also provides for the adoption of “opt-out” class action lawsuits for treble damages to further enhance cartel enforcement.

The Australian Competition and Consumer Commission (ACCC) made its mark in 2012, imposing the highest fines to date in the global air cargo cartel cases. This momentum has carried into 2013, with a fine of AUD1.35m (USD1.3m) imposed on a Japanese cable supplier for agreeing to rig bids and fix prices with its Japanese and European competitors. Rod Sims, Chairman of the ACCC, warned that this is “yet another example of the ACCC obtaining a substantial penalty in relation to alleged cartel conduct.” There is likely more ahead, as the ACCC has also announced that 10 cartel investigations are currently pending, including an inquiry into the travel agency, Flight Centre, and a recently filed enforcement action against an auto parts manufacturer, Yazaki Corporation. Private enforcement is also expected to continue after plaintiffs recently obtained a substantial fine of AUD21.7m (USD22.4m) against Bradken, Ltd., which was the first company to be held liable for bid-rigging under Australian competition law.

Still we expect other emerging Asian antitrust regimes to make an impression in 2013. As of June, the New Zealand Commerce Commission has obtained fines of NZD17.1m (USD13.6m) against four airlines involved in the global air cargo cartel. In Taiwan, regulators imposed its largest fine of TWD6.32bn (USD213m) against a cartel of electricity suppliers, perhaps demonstrating an inclination to ramp-up enforcement in the wake of the U.S. Antitrust Division’s successful prosecution of Taiwanese executives last year. Also, 2013 will mark the arrival of a new Hong Kong competition authority, which appointed its first chairperson in April and is set to establish a Competition Tribunal in August.
Middle East/Africa

In South Africa, the Competition Commission has already handed down more fines in the first six months of 2013 than in all of last year. In June, the Commission obtained what Commissioner Shan Ramburuth described as South Africa’s “biggest collective fine” of ZAR1.5bn (USD148m) against 15 construction firms. This successful resolution was achieved through South Africa’s first use of its “fast track” cartel settlement process, which allows a cartelist to cooperate with an investigation in exchange for a fine-reduction. The Commission’s effective use of its enforcement toolkit was further demonstrated a few months earlier when the leniency program yielded a ZAR2.8m (USD312,000) fine against Air Products for price fixing and market allocation in the market for specialty gases.

General Trends

Although the major antitrust enforcement regimes are far from matching their unprecedented 2012 statistics, as top enforcers have warned, the magnitude of on-going investigations indicate that substantial penalties are on the horizon for 2013 and beyond. It is apparent from these developments that global regulators are prioritizing international cartel investigations now more than ever. These efforts are likely to be enhanced by the proliferation of regional antitrust authorities and the cultural shift in favor of criminal and private enforcement of cartel violations. In this increasingly crowded and aggressive enforcement environment, the risk of potential liability, both civil and criminal, for corporations engaged in unlawful agreements with competitors as to price, markets, and output, is growing steadily.
Key Contacts

If you require advice on any of the matters raised in this document, please call any of the contacts listed below or your usual contact at Allen & Overy.

Dirk Arts  
Partner  
Tel +32 2 780 2924  
dirk.arts@allenovery.com

Olivier Fréget  
Partner  
Tel +33 1 4006 5010  
olivier.freget@allenovery.com

Philip Mansfield  
Partner  
Tel +44 20 3088 4414  
philip.mansfield@allenovery.com

Michael Reynolds  
Partner  
Tel +32 2 780 29 50  
michael.reynolds@allenovery.com

Michel Struys  
Partner  
Tel +33 14 006 5035  
michel.struys@allenovery.com

John Terzaken  
Partner  
Tel +1 202 683 3877  
john.terzaken@allenovery.com
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