Cartel enforcement 2012

Record-breaking fines in multiple jurisdictions punctuate another aggressive year of enforcement

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This analysis of multiple jurisdictions in the EU, Asia Pacific and the Americas shows a pattern in global antitrust enforcement in 2012. With a seemingly continued slower pace of enforcement in the first half of 2012, the European Commission concluded this year with a record EUR1.47bn fine in the CRT investigation. The U.S. Antitrust Division concluded its fiscal year with a total of USD1.13bn in criminal fines obtained, the highest amount in the history of the Sherman Act. Enforcement agencies in Asia were similarly aggressive in 2012 in prosecuting and sentencing cartel offenders. The Japanese Fair Trade Commission this year imposed its largest fine on an individual company ever in the Wire Harness cartel case. The Competition Commission of India broke its records by imposing a INR67bn (circa EUR940m) total fine on conspirators of a cement cartel.

In total, the 2012 level of fines for nine of the most important antitrust regimes around the world comes close to EUR4bn, more than double the amount of last year. The record-breaking penalties handed out across the globe this year highlight the increasingly crowded and aggressive cartel enforcement environment and may very well represent but a small taste of what's to come.

Europe

With a mere EUR269m of fines imposed in the first 11 months of 2012, the European Commission seemed destined for a record low in fines since the year 2000. On 5 December, however, the Commission imposed a total fine of EUR1.47bn in the CRT cartel cases, which is the highest fine ever imposed by the Commission in a single investigation. The fine brings the Commission's 2012 total to EUR1.74bn. This total does not include an additional EUR136m fine that was re-imposed on Mitsubishi and Toshiba in the gas insulated switchgear cartel after an earlier annulment by the European General Court. Including this additional fine brings the Commission's 2012 total to EUR1.88bn.

The CRT investigation is the fourth case concluded by the Commission in 2012, and the only one concluded in the second half of this year. In the first half of the year, decisions were taken in only three cases: Freight Forwarders (consisting of four distinct cartels), Window Mountings, and Water Management Products. Out of the 30 companies fined in these cases, 18 are European, nine are Asian-Pacific, and three are incorporated in the United States. In terms of numbers of fines, this is roughly similar to the average geographic distribution of Commission fines in the previous two years. Interestingly, 55% of the total fine amount for 2012 was imposed on South Korean (39%) and Japanese (16%) companies. European companies account for 43% of the total fine amount (mostly Dutch, German and Swiss companies). Less than 1% of the Commission's 2012 fine total was imposed on U.S. firms.

In June, Commission Vice President and Competition Commissioner Joaquín Almunia had warned that the Commission's slower activity in 2011 did not imply a change in its priorities, nor a more lenient enforcement in the future. His message is supported not only by the record fine in the CRT cartels, but also by the number of cases currently pursued by the Commission. The Commission initiated at least eight new cartel investigations last year, and conducted dawn raids in at least six of those investigations. This adds to at least six inspections last year that led to ongoing investigations. The Commission sent Statements of Objections to suspected conspirators in another four cartel cases this year. The detection and prosecution of cartel offenders thus seems to remain at the top of the Commission's agenda.

The Commission may reach an even higher fine total in 2013 given the ongoing Auto Parts and Interest Rates investigations. The global Auto Parts investigation covers a number of cartels between manufacturers of car components, like electrical wiring, bearings, thermal systems or anti-vibration rubber parts. With seven guilty pleas so far in the United States – resulting in over USD790m in criminal fines – the Auto Parts cases are expected to result in equally significant fines in the EU. The Interest Rates investigation focuses on alleged collusion to manipulate the EURIBOR, LIBOR and
TIBOR benchmarks for interbank lending rates. For Almunia, this investigation has top priority. Almunia has indicated that he thinks the level of gravity for the alleged violation is above average, hence signaling the potential for significant fines. If the Auto Parts and Interest Rate investigations can be concluded next year, we can expect a total level of fines in 2013 that comes close to or even exceeds the levels of the peak years of 2007 and 2010.

**Americas**

As stated, the U.S. Antitrust Division has ended the fiscal year 2012 (October 2011-September 2012) with the highest level of criminal fines ever imposed in the 122-year history of the Sherman Antitrust Act. The Antitrust Division obtained USD1.13bn in criminal fines. That total does not include the additional USD218m the Antitrust Division secured for state and federal agencies in alternative penalties, disgorgement and restitution, in connection with the Municipal Bonds investigation. Including those figures, the Antitrust Division obtained a staggering USD1.35bn dollars from a mere 14 corporations in fiscal year 2012.

Two of the largest individual antitrust fines ever obtained account for 86% of the Antitrust Division’s fine windfall this fiscal year. In January, Yazaki Corporation agreed to pay USD470m – the second largest criminal fine obtained for a Sherman Act violation – for fixing prices in the Auto Parts market. And not to be out done, in September, AU Optronics (AUO) was penalised with a USD500m fine for fixing prices in the TFT-LCD market. The USD500m fine tied the largest individual fine ever imposed for a Sherman Act violation.

In terms of cases, fines obtained in connection with the Auto Parts investigation dominated the Antitrust Division's 2012 fine total, accounting for over 50% of the fine total and seven of the 14 corporate convictions. In public statements on its website, the Antitrust Division warns that the Auto Parts investigation is “the largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope and the potential volume of commerce affected by the alleged illegal conduct”. Including the prosecutions this year, to date, nine companies and 11 executives have pleaded guilty or agreed to plead guilty in the Antitrust Division's ongoing investigation into price fixing and bid rigging in the auto parts industry.

The 2012 fine statistics also reflect a continued focus of the Antitrust Division's investigations on conduct by foreign-based corporations. Of the number of fines obtained this fiscal year, 58% were paid by corporations based in the Asia Pacific region, 25% were paid by European-based corporations, and a mere 17% were paid by corporations based in the Americas. Notably, focusing solely on the size of the fines obtained, as opposed to the number of fines, Asia Pacific-owned companies were hardest hit this year with their combined total accounting for over 95% of overall total fines obtained.

While fiscal year 2012 proved to be a record year for the Antitrust Division in terms of corporate fines, we expect that record to be closely rivaled or even eclipsed in fiscal year 2013. With the wide-ranging Auto Parts and LIBOR investigations still in their infancy, we expect more significant, and possibly even record breaking, corporate fines to be obtained in the coming year.

While the level of fines imposed in 2012 by the Canadian Competition Bureau were not as significant, it did further strengthen its cartel enforcement regime by enacting new criminal legislation applicable to cartel violations. Under the new rules, convicted individuals will face mandatory prison time and can no longer serve part or all of their sentence under house arrest. The Competition Bureau has committed itself to more active cartel enforcement, and while the ambitious Melanie Aitken has stepped down as Competition Commissioner last November, she expects the number of cartel cases to further increase in the short term.

Brazil's competition regime has experienced an extreme makeover in 2012, changing the laws and procedures on merger filings and turning the Brazilian competition authority CADE into the
country’s single antitrust enforcer, with the power to investigate, prosecute and decide on cartel cases. In addition, this year CADE has worked to speed up its cartel investigations and to provide guidance on fine-setting and settlement procedures. The authority expects a significant increase in workload and may employ 200 new case handlers in the next few years. With several dawn raids carried out in the first few months since the agency took over responsibility for cartel investigations, CADE seems eager to put itself on the map as an effective antitrust enforcer.

Other South-American jurisdictions are also stepping up their efforts to fight antitrust violations. Chile’s record-breaking fines of this year are illustrative. In February, Chile’s National Competition Tribunal imposed a USD38m total fine on two of the country’s largest pharmaceutical companies for colluding to fix the price of certain pharmaceutical drugs. This is the largest penalty ever imposed by the Tribunal. In June, a USD10m fine was obtained in the refrigerator compressor cartel case, marking the first successful use of Chile’s leniency policy. The case is referred to as “a milestone in Chile’s cartel prosecution history” by the cartel agency.

Asia Pacific

Antitrust authorities in Asia continue their efforts to become effective and aggressive cartel enforcers, and with success. Perhaps the strongest message was sent by the Competition Commission of India, when it imposed penalties totaling INR63bn (circa EUR881m) on 11 of the country’s major cement manufacturers in June this year. This was followed by a INR3.98bn (circa EUR58m) fine on a 12th conspirator in July. The record-breaking total fine in the cement cartel case is accompanied by several other cartel decisions this year, ranging from explosives to agricultural chemicals and liquid petroleum gas cylinders. In total, the CCI obtained fines totaling over EUR1bn in 2012, thereby making its entrance onto the world stage of cartel enforcement.

The Japanese Fair Trade Commission experienced a relatively slow year in terms of cartel fines. In four cases, surcharge payment orders totaling YEN18.3bn (over EUR180m) were issued. Last year's orders amounted to EUR296m, which was already less than half of the Commission’s EUR600m total in 2010. Still, 2012 marked a significant year for Japanese cartel enforcement because of the largest surcharge ever imposed by the JFTC on an individual company. For its part in the Wire Harness cartel, Yazaki received a YEN9.6bn surcharge payment order. The other cartel investigations concluded by the JFTC this year concerned bid-rigging in the auto parts, engineering, and expanded polystyrol (EPS) blocks industries.

Although South Korea’s Fair Trade Commission also obtained lower fines in 2012 than in the previous two years, the authority has been able to strengthen its cartel enforcement on the basis of amendments to the country’s competition laws and policies. The amendments have inter alia extended the statute of limitations, criminalised interference with KFTC investigations, increased the maximum fine that may be imposed on companies engaged in cartel activities through a trade association, and limited the possibilities for fine reduction for second-in-line leniency applicants. Notably, in December the KFTC announced it has raised the maximum amount of award money granted to cartel whistleblowers to KRW3bn (EUR2.6m), to further incentive cartel participants to come forward.

In China, the State Administration of Industry and Commerce this summer imposed a record fine of over CNY15m (EUR1.9m) in a construction materials cartel. The fine was announced just days after a CNY1.73m (EUR0.2m) cartel fine on secondhand car dealers was reported as the largest confiscation in the SAIC’s enforcement history. The National Development and Reform Commission – the authority for pricing-related antitrust violations – published only one cartel fine this year. The case concerns a price-fixing agreement entered into by over 20 sea sand dredging enterprises in Guangdong Province, resulting in a total fine of CNY759,200 (EUR93,000). As not all decisions are published
by the Chinese authorities, there may have been other fines imposed in 2012. Meanwhile, competition policy makers in China continued their efforts to shape the country's legislative and organisational design of antitrust enforcement. Last September, the NDRC and SAIC concluded a memorandum of understanding with the European Commission to increase interagency cooperation. In June, a new regulation which aims to strengthen private antitrust litigation entered into force. The regulation inter alia stipulates that there is a presumption of an anti-competitive effect in cartel cases, thereby shifting the burden of proof to the defendant. While the draft regulation included a right to claim double damages, this proposal was eventually dropped.

Russia's cartel enforcement continues to gain strength / grow stronger. In January this year, changes to the competition laws introduced a formal definition of a cartel. The amendments also made it easier for the Federal Antimonopoly Service to prosecute cartel cases by removing the need to prove any actual harmful effects. On numerous occasions this year, the FAS has stipulated that combating cartels is one of its priorities. The number of cartel investigations initiated and concluded this year confirm this statement. Many cases are forwarded to the Ministry of Interior for possible criminal proceedings against the individuals involved. The head of the FAS, Igor Artemyev, has indicated that the level of cartel fines is likely to rise. In April this year, the FAS imposed a record fine of RUB912m (EUR23.5m) on the United Trading Company for organising a cartel on the market of liquid caustic.

The Australian Competition and Consumer Commission continued its prosecution of participants in the Air Cargo cartel cases. The ACCC fined five airlines in 2012, Malaysia Airlines (EUR4.8m), Thai Airways (EUR6m), Emirates (EUR8m), Cathay Pacific (EUR9m), and Singapore Airlines (EUR9.4m). According to ACCC Chairman Rod Sims, the fines imposed in the Air Cargo cases are "the highest penalties to have ever been ordered in an ACCC investigation".

Proceedings against Air New Zealand and Garuda Indonesia are still ongoing.

**General trends**

Globalisation is the overarching theme of today's antitrust cartel enforcement. Once-stubborn cultural attitudes regarding cartel activity are now gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in places where it has previously been regarded as wholly or principally a civil matter. And the growing use of leniency programs has worked to radically destabilise global cartels, creating powerful incentives for firms to turn against their co-conspirators. The increased cooperation and coordination by enforcement authorities has further heightened the risk of detection for conspirators.

The recent antitrust enforcement trends – the rapid rise of new enforcement regimes, increased criminalisation of cartel offences, the proliferation of leniency programs, greater cooperation and coordination among authorities, and more aggressive enforcement policies – have led to the globalisation of the practice of cartel enforcement and defence.

In this enforcement environment, more eyes are watching for cartel offences and more jurisdictions are eager to prosecute cartel offenders than ever before. As a result, large corporate enterprises whose products are sold abroad are increasingly likely to face antitrust investigations characterised by a variety of authorities, simultaneous processes, and seemingly endless demands for documents and witnesses. This environment requires corporations to tread cautiously to ensure that responses to the demands of one enforcement regime do not have a proverbial domino effect on the ability of the corporation to defend against civil and criminal liability in other enforcement jurisdictions. This reality places a premium on corporations and the counsel they employ on maintaining at all times a global perspective and strategy when navigating cartel investigations.