The globalisation of antitrust enforcement: more authorities, increased coordination, higher stakes

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Globalisation is the overarching theme of modern 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.

In this 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. 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.

Proliferation of antitrust enforcement

For cartel participants whose activities impact global commerce, the aggressive United States and European Union enforcement agendas remain a primary concern. The United States has a long history in cartel enforcement. Core violations like price-fixing, market allocation, and bid-rigging have been punished criminally since the passage of the Sherman Act in 1890, though it was not until the 1970s that prison sentences became common. The Antitrust Division of the U.S. Department of Justice, which has exclusive jurisdiction to prosecute criminal violations of the U.S. antitrust laws, believes that while companies may be inclined to regard civil fines and private litigation damages as simply a cost of doing business, they are unlikely to feel the same way about prison sentences for senior executives. And while comity concerns prevent the Antitrust Division from attempting to dictate enforcement priorities to other jurisdictions, the agency has advocated for general acceptance of the U.S. view that cartel behavior inflicts serious consumer harm and should be a top enforcement priority around the world.

The European Union has a similarly rich tradition of cartel enforcement. Antitrust enforcement by the European Commission finds its origin in the 1957 Treaty of Rome, which stipulated that "the activities of the Community shall include the institution of a system ensuring that competition in the common market is not distorted." In its first 40 years, the Commission's competition policy was largely used as an instrument of European single market integration, with price-fixing cartels receiving relatively little attention. As part of the Commission's efforts to modernise its competition law regime, however, the focus shifted in the late 1990s from preventing restrictive practices which interfere with market integration objectives, to ensuring effective competition by detecting and stopping cross-border cartels and maintaining competitive market structures. Since that time, the Commission has established itself as a leading jurisdiction in uncovering and penalising cartels.

While the United States and European Union continue to be the leading cartel jurisdictions, there are now antitrust authorities in over 115 countries actively pursuing cartel activity, and that list is growing. More importantly, the swiftest and most momentous changes in cartel enforcement are arguably taking place in areas outside of the

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Western hemisphere. For example, both China and India have enacted new regulations in last few years and their authorities have already begun aggressively stepping up the level of antitrust enforcement applied to conduct impacting their growing economies.\(^4\) The authorities are eagerly using the new laws to initiate new investigations, impose large penalties, and put themselves on the map as effective antitrust enforcers. Illustrative are the heavy penalties totalling more than USD1.1bn recently imposed by the Competition Commission of India on 11 of the country’s major cement companies. The Asia-Pacific area has also seen a revival of antitrust regimes which have long been in place. In Japan for example, the powers of the Japan Fair Trade Commission have been significantly increased in recent years to allow for more aggressive enforcement.\(^5\)

"Beware that you can violate a country’s antitrust law without even having so much as a sales office in that country and that your executives can be convicted of and forced to serve jail time for an antitrust violation in a country they never set foot in."

An important element of the proliferation of antitrust enforcement is the expansion of jurisdictions that are moving from mere civil/administrative enforcement towards a regime of criminal prosecution. More than half of the EU member states have now criminalised certain cartel offences\(^6\), as have countries like Australia, Brazil, Japan, Korea, Mexico and Russia. But the shift to criminal enforcement of antitrust offences has not come without challenges. While some jurisdictions have had criminal statutes on the books for decades, many have failed to devote appreciable resources to criminal enforcement and, thus, have yet to imprison anyone. Still other jurisdictions, which have devoted substantial resources to criminal enforcement, are grappling with establishing sufficient protocols and processes necessary to ensure successful criminal prosecutions.\(^7\) In the end, however, criminalisation of cartel enforcement is gaining momentum globally. More importantly, with dual-criminality becoming the norm across enforcement regimes, pressure is mounting on jurisdictions to extradite citizens facing cartel offences for prosecution abroad.\(^8\)

Another notable aspect of the proliferation of cartel enforcement is the extended territorial reach of each individual authority’s enforcement actions. Extraterritorial application of national antitrust laws is becoming commonplace, with authorities regularly prosecuting foreign-based corporations and foreign nationals. The U.S. Antitrust Division’s prosecution record demonstrates this point. U.S. companies account for a mere 10% of all of the corporate fines imposed by the Division to date of USD10 million or more.\(^9\) And the U.S. is not alone, jurisdictions across the globe are now increasingly targeting foreign-based cartel participants as hard as their own nationals when it comes to antitrust violations affecting commerce on their soil.\(^10\)

These developments spell out a very sobering message for internationally operating corporations and their executives: beware that you can violate a

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\(^4\) For an overview of the new regulations in China, India and other (Asian) countries, see the GCR Asia-Pacific Antitrust Review 2012 or the GCR – Getting the deal through publication Cartel Regulation 2012.


\(^6\) These member states are Austria, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Malta, Poland, Romania, Slovakia, Slovenia, and the UK. In some jurisdictions only certain cartels are criminally prosecuted (e.g. bid rigging). See the GCR – Getting the deal through publication Cartel Regulation 2012, and the Antitrust Encyclopedia of the Institute of Competition Law, http://www.concurrences.com/anglais/droit-de-la-concurrence-150/antitrust-encyclopedia/?lang=en.

\(^7\) The Office of Fair Trading’s (OFT) recent foray into criminal prosecution illustrates this point. The OFT’s first contested criminal case – involving four British Airways executives accused of price fixing – collapsed even before any witnesses were heard because of disclosure failures. See Julian Joshua, ‘Shooting the Messenger: Does the UK Criminal Cartel Offense Have a Future?’, The Antitrust Source, August 2010, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Aug10_Joshua8_2fauthcheckdam.pdf.

\(^8\) Many bilateral treaties stipulate that extradition requires dual-criminality, i.e. criminal conduct in both the foreign and the home jurisdiction. Under such treaties, a country will not extradite a citizen for prosecution of conduct which does not amount to a criminal violation in the home country (voluntary extradition, for example in the context of a plea agreement, is still possible).

\(^9\) Ron Knox, ‘The longer arm of the law’, GCR, October 2, 2012, http://www.globalcompetitionreview.com/features/article/32398/the-longer-arm-law. Notably, of the companies comprising the remainder of those fined USD10m or more in the U.S., Japanese, South Korean and German companies account for 26%, 18%, and 11% of the total, respectively.

\(^10\) This development is well illustrated by the EC’s fining of one Korean and four Taiwanese companies for a total amount of EUR648m in the recent LCD-cartel case, the JFTC’s fine on five cartel participants, all foreign, in the CRT cartel in 2009, and the Korean KFTC’s increasing use of its national antitrust laws to prosecute foreign corporations. Yo Sop Choi, ‘Analysis of the Microsoft, Intel and Qualcomm decisions in Korea’, European Competition Law Review, 2010, 31(11), p. 470-475.
country’s antitrust law without even having so much as a sales office in that country, and that your executives can be convicted of and forced to serve jail time for an antitrust violation in a country they never set foot in.

Increased coordination between authorities

With an ever increasing number of antitrust authorities around the world aggressively pursuing national and foreign participants of global cartels, an obvious need for coordination and cooperation arises. Through efforts of multilateral organisations – like the International Competition Network (ICN), the Organization for Economic Cooperation and Development (OECD), the International Bar Association (IBA), and the American Bar Association (ABA) – guidelines and best practices have been developed with an aim to harmonise antitrust enforcement actions. Bilateral agreements have been concluded to govern the level of assistance and exchange of information in the case of joint investigations. And as evidenced by the recent Auto Parts investigation, dawn raids are routinely taking place in close coordination between multiple enforcement agencies.

The increased cooperation and coordination by enforcement authorities has dramatically heightened the risk of detection for conspirators. This is largely due to the proliferation of leniency programs. In the 1990s, only the United States and a handful of other countries had leniency programs in place. Today, however, there are antitrust leniency programs in place in more than 50 jurisdictions. Cartel members are now at risk of being "ratted out" by one of their co-conspirators – in return for immunity from prosecution – in nearly every industrialised nation across the globe.

The impact that leniency programs have had on cartel detection and prosecution cannot be overstated. In the years 2004 to 2010, around 75% of all criminal cartel cases filed by the U.S. Antitrust Division had been initiated, or were being advanced, by information received from a leniency applicant. Moreover, out of the 28 cartel cases decided upon by the European Commission in the last five years, full immunity under the leniency program was received by one of the conspirators in 23 of them. Possibly even more striking is the fact that in 2011, the Japanese Fair Trade Commission received 143 leniency applications—more than ten applications a month. The virtually global availability and use of leniency programs has worked to radically destabilise global cartels because of the tremendous incentives that now exist for co-conspirators to self-report to authorities once a cartel no longer serves their purpose.

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Once the norm solely in the opening investigative stages of cartel matters, global coordination among authorities has now slowly begun to permeate the enforcement process to the level of prosecutions and punishment. The demand for such coordination is on the rise because of the growing list of interested enforcers in any given antitrust investigation and the increased risk of overlapping punishment by those enforcers. This next level of coordination will be challenging for authorities moving forward.

Higher stakes

While new and better-equipped enforcers are rapidly emerging on the world stage, the penalties exacted by individual jurisdictions for violations of the antitrust laws are more severe than ever. In the U.S., cartel enforcement has never been more robust. In the last few years, the Antitrust Division imposed unprecedented fines, with a record-setting USD1bn in fines assessed in 2009 and fines on track to eclipse that record in 2012. In fact, just recently one Taiwanese company, AU Optronics, which took the Department of Justice to trial this year and lost, was just punished with a

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12 Not all 23 cases were initiated by a leniency application, however. The 2012 Bananas and CRT cases, for example, were initiated ex officio whenever the opportunity presents itself", http://ec.europa.eu/atwork/synthesis/amp/doc/comp_mp.pdf, p. 4.
13 For an overview of the penalties imposed by the U.S. Antitrust Division in the last 25 years, see its Division Update, Spring 2012 http://www.justice.gov/atr/public/division-update/2012/criminal-program.html.
USD500m fine. This equals the largest fine ever imposed on a corporation for an antitrust violation in the United States.

Furthermore, the 90 criminal antitrust cases filed by the U.S. Department of Justice in 2011 was the largest number in more than two decades. And whereas the average jail time for defendants sentenced in criminal antitrust cases was eight months in the 1990s, the number more than doubled to 19 months in the period 2000-2009, and has further increased to close to an average of 28 months this current fiscal year. This includes foreign defendants facing record-long prison sentences in the range of two to three years.

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Follow-on private damages exposure in the U.S. also remains a leading concern for cartel offenders. The U.S. is still something of an outlier in the scope and complexity of its private enforcement regime, particularly, the permissibility of class action suits and the potential for treble damage awards. Many jurisdictions continue to treat cartel enforcement as entirely a matter for public enforcement. The risk of follow-on litigation in the U.S. is both real and substantial, with civil awards for any given cartel roughly equaling the magnitude of the criminal fines imposed by the Antitrust Division.

The European Commission has been equally aggressive in recent years, with a high-water mark of nearly EUR2.9bn in fines in 2010. We have also seen increasingly aggressive cartel enforcement by EU Member States, such as France, Germany, Italy and the United Kingdom. And there is growing support in the European Union for follow-on civil damage actions – including 'collective redress' actions – by the victims of cartel conduct and other antitrust violations.

Importantly, this trend of aggressive enforcement is not confined to the United States and Europe. In a 2010 survey by the ICN, 43 out of 45 interviewed antitrust agencies indicated that the level of penalties has increased over the last ten years under their cartel enforcement programmes. It is without question that there is a globally shared objective to target conspirators more effectively and more harshly than ever before.

**Conclusion**

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 new regulatory environment, internationally operating corporations are well advised to maintain a global perspective and strategy in addressing potential cartel liability. An international approach greatly enhances the efficiency of investigative processes, enables multi-jurisdictional negotiations on sanctions, and significantly reduces the costs for the corporations involved. More importantly, it prevents additional liability that may otherwise inadvertently result from narrow-focused or inconsistent responses to competition authorities. Regardless of the path a corporation facing a cartel investigation may choose to follow – cooperation or defence – careful consideration must be given to the global implications of every step taken in these complex matters. The wrong step may not only expose the corporation and its executives to greater punishment by the enforcement regime immediately before it, but expose it to further liability at the hands of the scores of enforcement regimes lurking just around the corner.

14 Relevant case documents can be found on the U.S. Antitrust Division's website: http://www.justice.gov/atr/cases/auopt.htm.
15 The other fine being imposed on the Swiss firm Hoffman-La Roche in 1999 in the Vitamin cartel. The largest fine ever imposed worldwide or antitrust violations was the European Commission's EUR896m fine on Saint-Gobain in the Car Glass Cartel.