

Cartel Regulation

Contributing editor
A Neil Campbell



2017

GETTING THE
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Cartel Regulation 2017

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Global overview

Peter K Huston, Ken Daly and Lei Li

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Introduction

It has been 240 years since Scottish economist Adam Smith warned about cartels in *The Wealth of Nations* and over 125 years since the US and Canada outlawed them. Yet it is just within the past 25 years or so that we have seen a flood of anti-cartel enforcement sweep across much of the rest of the world. We are in the midst of a global trend toward broader and more vigorous cartel enforcement, heightened maximum penalties, leniency policies designed to disrupt and expose cartels and increased global cooperation among enforcers. Indeed, more and more jurisdictions are viewing cartels as not just illegal, but criminal. For example, this past year saw criminalisation of cartels take effect in South Africa and Chile's legislature is considering re-criminalisation. While only a few countries, to date, have actually jailed individuals convicted of cartel offences, this is likely to change as authorities seek to take advantage of the powerful deterrent effect that custodial sanctions provide.

While corporations cannot be incarcerated, the maximum corporate fines on the books in many jurisdictions are now staggeringly high. In addition, private class action litigation, which has long been a fixture in the US, is finally starting to take root in Europe. In this environment an issue of concern to global companies is the threat of multiple, overlapping sanctions. Price-fixed products can touch a number of different countries before finally coming to rest and defence counsel have lamented the possibility of double or triple counting. Japan's Ministry of Economy, Trade and Industry (METI) raised the concern in a report this year (which is understandable given how many enforcers around the world have focused on Japan's automotive industry). The issue of overlapping penalties is now firmly on regulators' radar and was discussed by officials from the US, Canada, Mexico and Brazil at an Antitrust Sentencing Symposium sponsored by the Antitrust Section of the American Bar Association in June 2016. In July of that year, Canada's Competition Bureau coordinated with the US Department of Justice Antitrust Division to avoid overlapping fines for Nishikawa Rubber Company, a Japanese automotive parts manufacturer. The parts at issue had been incorporated into automobiles assembled in Canada, most of which were ultimately sold in the US. After having cooperated closely on the case, it was agreed that the US would pursue a guilty plea and a US\$130 million fine and Canada would step aside.

As increasing numbers of players crowd onto the cartel enforcement playing field and become more active, it is inevitable that they will continue to bump into one another, putting a premium on cooperation and coordination among enforcers and increasing the level of complexity for companies and counsel involved in international cartel investigations. Listed below are some of the highlights from the last year in cartel enforcement from selected jurisdictions around the world.

Europe

While the European Commission continues to refer to cartel enforcement as a priority in its public statements, its actual enforcement record over the past few years has been somewhat uneven. In 2014, 10 decisions were taken against 53 companies. This dropped to five decisions against 21 companies in 2015 and stood at only four decisions against 10 companies by the end of 2016's third quarter.

On the other hand, although the Commission's rate of work seems to have slowed in comparison to previous years, 2016 has seen the imposition of a fine that broke all EU cartel enforcement records.

On 19 July 2016, the Commission imposed fines amounting to €2,926,499,000, after finding that four truck manufacturers engaged in a cartel relating to truck pricing and the passing on of costs associated with compliance with new emissions' rules. A fifth truck maker received immunity from fines because it revealed the existence of the cartel. This was the highest total fine ever imposed by the EU for cartel activity. It also represented the highest and second-highest individual cartel fines ever imposed (€1,008,766,000 and €752,679,000 on two manufacturers). All companies acknowledged their involvement in the cartel and their liability for it and agreed to a settlement. This was the 21st settlement since the introduction of the procedure, which allows the Commission to apply a simplified and shortened procedure, and benefits the parties themselves due to faster decisions and a 10 per cent reduction in fines.

The other cases concluded by the Commission so far in 2016 related to canned mushrooms (a total fine of €5.2 million), car parts (total fine of €137.8 million) and steel abrasives (total fine of €6.2 million). The Commission also continues to work on other cases, including a series of investigations in the automotive parts' sector, including for occupant safety systems, thermal systems and exhaust systems.

Several factors seem to be influencing the overall rate of enforcement. The first is that the Commission does seem to be prioritising other types of antitrust cases (such as a number of major state aid and abuse-of-dominance investigations), and is using its resources more sparingly and focusing on fewer, though larger, cases. The second is that national enforcement is becoming increasingly prominent and to some extent this displaces Commission enforcement. The Commission actively encourages the national authorities of the EU member states to take the lead on cases that can be dealt with adequately on a national level. For example, in December 2015 France imposed fines of €672 million on parcel delivery companies and significant fines have been seen across a number of member states. The third is that the number of leniency applications submitted to the Commission appears to be falling, meaning that fewer cases are being commenced.

Anecdotal evidence suggests that the changing civil liability risks are having an important influence over the number of leniency applications filed and the number of cases commenced. For some years the Commission has pursued the goal of increasing the degree of civil enforcement following on from public enforcement decisions. It has issued a recommendation to all EU member states inviting them to create collective redress systems and the EU has also adopted the Antitrust Damages Directive, which member states are required to implement in their legal systems by 27 December 2016. This Directive is designed to make it easier for victims of antitrust infringements to sue for damages. It harmonises various rules regarding access to evidence, the availability of the passing on defence, limitation periods and the burden of proof in various scenarios. Even in advance of the full implementation of the Directive, antitrust damages actions are now far more common than they were only a few years ago, with most public authority decisions now being swiftly followed by civil actions. For example, follow-on damages actions have already been announced in Ireland and the UK following on from the above-mentioned truck cartel. In the UK, the 2015 Consumer Rights Act introduced the possibility of a US-style 'opt-out' class action for competition cases, which is already proving popular with plaintiffs.

This trend towards greater civil enforcement appears to be altering the risk calculation for would-be leniency applicants, as applying for immunity or leniency does not prevent the applicant from having to pay compensation to victims. The EU's Directive does offer immunity applicants one benefit, which is that they will typically only be responsible for harm to their own direct or indirect purchasers, as opposed to being jointly and severally liable for all harm caused by the cartel. However, even this benefit can be claimed only if full compensation is actually available from other cartelists and so its application is uncertain. It is perhaps too soon to tell if this trend is the result of early nervousness regarding how damages will be awarded, but commentators now routinely query whether the right balance has been struck and whether the focus on damages will have the unintended effect of reducing the overall level of enforcement.

In parallel to the above developments, the European courts continue to have an important influence over how competition law is enforced at EU level.

In one case in March 2016 (Case C-248/14, C-267/14 and C-268/14) the European Court of Justice (ECJ) took the unusual step of criticising the Commission for excessively broad enforcement and quashing certain demands for information that had been issued to a number of cement manufacturers under investigation for suspected cartel activity. In March 2011, the Commission had adopted a decision requiring production of certain information. The request was more than 100 pages in length and requested highly detailed data covering an extended period of time, to be provided within 12 weeks. The companies appealed the production decision arguing that it was inadequately reasoned and justified and placed a disproportionate burden on them. The ECJ agreed and found that the Commission's justifications for the decision were 'excessively brief, vague and generic.' This is a relatively rare example of the Commission's investigative powers and methods being reined-in by the Court. However, it is noteworthy that it took the companies in question from 2011 until 2016 to achieve the annulment of the information demand, which perhaps illustrates why there are not more such cases.

In another important judgment on 20 January 2016 (Case C-428/14), the ECJ handed down a preliminary ruling concerning the relationship between the EU and member-state leniency programmes. The Court found that those systems 'coexist autonomously' and that being the first to apply for a fine reduction from the EU does not guarantee the applicant a marker in any subsequent national procedure. It therefore remains possible for an undertaking which was not the first to submit an application for immunity to the Commission to still be the first to submit an application for (full) immunity to the national competition authorities. This case illustrated once again that there can be no presumption of a 'one-stop-shop' system for leniency at the EU level and that consideration must often be given to multiple parallel applications.

The Americas

North America

Fines imposed in the US were down for fiscal year 2016 (ending on 30 September 2016) compared to recent years. Specifically, while total fines exceeded US\$1 billion in each of fiscal year 2012, 2013 and 2014, and were over US\$3.6 billion in fiscal year 2015 (an anomalous spike due to huge fines imposed in the financial services sector), the fines in 2016 were well below a billion dollars. It would be a mistake, however, to think that the Antitrust Division is letting its foot off the pedal when it comes to vigorous cartel enforcement. Total fines do not correlate with enforcement effort, charges levelled or number of successful outcomes. For one thing, fines are not imposed evenly across the multi-year arc of a cartel investigation. For example, in the massive auto parts investigations, corporate pleas and fines came in earlier years and now the Antitrust Division is devoting resources to prosecute individuals. And rightly or wrongly, the US Sentencing Commission's Sentencing Guidelines, which are used to calculate fines in the US, are in large measure driven by the volume of commerce affected by a cartel.

By most measures, the Antitrust Division has been busy. All parts of the Division's criminal programme – the two sections in Washington DC (Criminal I and II) and the field offices in New York, Chicago and San Francisco – have been productive recently. The number of individuals charged was slightly lower than the average over the past five years (but within a standard deviation). The Division has seen significant

results in domestic matters such as bid rigging at real estate foreclosure auctions in Alabama, northern California, Georgia and North Carolina, bid rigging and price fixing in water chemicals, market allocation in heir-location services and price fixing in poster art through internet pricing algorithms. While the Division has been successful in these areas, the fines suggested by the Sentencing Guidelines in such cases are dramatically lower than those in international cartel cases or financial services cases.

On the international cartel front, the Antitrust Division continued its investigations into cartels involving electrolytic capacitors, roll-on roll-off cargo, financial services and automotive parts. The automotive parts investigation saw the somewhat rare indictment of corporations this year (last seen in the indictment of AU Optronics, which was convicted at trial for the price fixing of liquid crystal display panels, fined \$500 million and required to retain a corporate antitrust monitor).

In the London Interbank Offered Rate matter, two former Rabobank derivatives traders were convicted in November 2015 after a four-week jury trial in the Southern District of New York. The case was jointly prosecuted by the Fraud Section of the Criminal Division and the Antitrust Division. The defendants later received sentences of one year and two years respectively. Additional indictments were handed down against two Deutsche Bank traders. The financial sector will likely remain under scrutiny from numerous directions in the US.

Following the September 2015 issuing of the Yates memo, which lays out the Department of Justice's more aggressive policy on individual accountability for corporate wrongdoing, Brent Snyder, the Antitrust Division's Deputy Assistant Attorney General for criminal enforcement, recommitted the Division to pursuing individuals and announced that the Division had instituted new policies to ensure that it followed the spirit of the memo. It is clear that the Antitrust Division will continue to seek maximum deterrence by attempting to hold culpable individuals directly accountable and impose jail time.

To the north, the head of Canada's Competition Bureau (CCB), Commissioner John Pecman, has also expressed a desire to see culpable individuals jailed. Canada's law now carries the world's stiffest potential jail sentences (up to 14 years), but so far no one has been jailed. The CCB refers criminal prosecutions to the separate Public Prosecution Service of Canada (PPSC) and the CCB is engaged in a process of improving its 'rocky' relationship with the PPSC.

As part of Mexico's effort to maintain close ties with US enforcers, the Federal Economic Competition Commission (COFECE) hosted an attorney from the US Antitrust Division's Criminal I section for two months at the end of 2015. Also of note, COFECE announced this year that for the first time it has revoked leniency benefits due to the petitioner's failure to continue its cooperation. The revocation came in the investigation of makers of air compressors for car air conditioning units. Several years ago, the Antitrust Division in the US revoked a company's leniency and charged the company for failure to withdraw from the conspiracy. The leniency revocation turned out poorly for the Antitrust Division because the District Court ultimately dismissed the indictment based on the Antitrust Division's violation of the non-prosecution agreement.

South America

South America remains a centre of vibrant cartel enforcement activity. Brazil's competition authority, the Administrative Council for Economic Defense (CADE) pursued alleged cartel conduct in anaesthesiology services and liquefied petroleum gas, among other industries. The sprawling scandal involving Petrobras continues to generate headlines. While many of those headlines are focused on political corruption, competition aspects are often at the heart. For example, in June 2016, the Brazilian Prosecutors Office (MPF) filed a complaint against several individuals with ties to two construction firms charging them with bid rigging and cartel activity. According to the prosecutors, construction contracts for a refinery and petrochemical complex were awarded to the companies based on rigged bids. Petrobras officials then took bribes in order not to take action against the cartel. The prosecutions stem from a leniency agreement CADE entered into with one of Brazil's largest construction companies.

CADE has used its leniency programme, which has been in place since 2000, to propel its increasingly vigorous enforcement regime. Efforts to strengthen the programme were made in 2016. To promote transparency, this year CADE issued comprehensive guidelines in a

question and answer format. CADE also redesigned the leniency programme to provide more flexibility in the process for perfecting leniency markers and executing the leniency agreement. The amendments create a waiting-list system to allow those who are not first in the door to secure their status for purposes of settlement negotiations and for purposes of stepping into the lead position if the first in is unable to perfect its marker. CADE also clarified how discounts are calculated. The leniency programme will continue to mature as CADE works through thorny issues regarding influences that affect incentives and disincentives for companies considering cooperation, including private claims and disclosure of leniency documents.

In October 2015, Colombia's Competition Authority, the Superintendency of Industry and Commerce (SIC), issued record fines against Colombia's sugar companies for a conspiracy to block imports. Another milestone was marked in 2016 as the SIC decided the first three cases in which the leniency programme was applied. The cases involved cartels in the nappy, soft paper (napkins, tissue and toilet paper) and notebook industries.

Chile's Fiscalía Nacional Económica (FNE) has also been active, going after ocean shipping, poultry production and supermarket chains. And, as noted above, Chile's legislature is considering criminalisation of hard-core cartel conduct.

Peru's National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI) entered into a cooperation agreement with US antitrust agencies in 2016, agreeing to share information and conduct coordinated enforcement where possible. The agreement follows similar memoranda of understanding entered into with Brazil in 1999, Mexico in 2000 and Colombia in 2014.

Argentina's Comisión Nacional de Defensa de la Competencia (CDNC) has proposed legislation to overhaul Argentina's competition law and procedures. The legislation would, among other things, allow for much stiffer monetary sanctions for anticompetitive conduct and establish a leniency programme.

Asia and Oceania

Japan

Cartel enforcement continues to evolve and mature in Asia. This year, the region's most seasoned antitrust enforcement agency, the Japan Fair Trade Commission (JFTC), strengthened its ties with other enforcers around the world, signing cooperation agreements with Australia, China and the EU. Meanwhile it carried on its aggressive anti-cartel enforcement programme, assessing surcharges in the capacitors and water purification industries, among others. In 2016, the JFTC convened a study group to review perceived shortcomings in Japan's administrative surcharge system. Among the issues identified are a rigidity that prevents the JFTC from imposing surcharges on culpable companies in the absence of domestic sales in Japan (for example in an international market allocation cartel where a company agreed not to sell in Japan), incompatibility with the JFTC's leniency programme and divergence from international norms.

China and Hong Kong

While Japan's Anti-monopoly Act (AMA) dates back to the post-Second World War era, China's Anti-monopoly law (AML) dates back only to 2008. Before China enacted the AML, cartels were regulated by other laws, primarily: the Anti-unfair Competition Law for all cartels and bid rigging; the Price Law for price-related cartels; and the Bidding Law for bid rigging. While those laws remain on the books, government authorities have relied on the AML for cartel enforcement since its passage.

Enforcement authority under the AML is divided. The National Development and Reform Commission (NDRC), with its local offices (Development and Reform Commissions, CDCRs and Price Bureaus), has enforcement authority over price-related cartels, while the State Administration for Industry and Commerce (SAIC), including its local offices (Administrations for Industry and Commerce (AIC)), has authority over 'non-price related' cartels.

After an active 2014, anti-cartel enforcement at the NDRC slowed somewhat in 2015, but came back in 2016 with a few cases. One notable enforcement was the investigation of five allopurinol tablet manufacturers in January 2016. The NDRC found that these manufacturers engaged in a series of cartel activities, that is, price collusion, market partitioning and bid rigging, and fined them approximately 4 million yuan. Also, in July, 2016, the NDRC found that three manufacturers of

estazolam active pharmaceutical ingredient (API) and tablets violated anti-cartel provisions of the AML by agreeing not to supply estazolam API to other companies and agreeing on a price increase of estazolam tablets. The NDRC imposed a fine of about 2.6 million yuan. These two cases have shown the NDRC's focus on the pharmaceutical industry in its anti-cartel enforcement.

At the provincial level, Shanxi provincial DRC fined 31 car testing institutions for price collusion a total of approximately 5.77 million yuan in April 2016.

In February 2016, the NDRC under the authority of the Anti-monopoly Commission of the State Council (AMC), issued a draft of the Guidelines on Leniency in Horizontal Anti-monopoly Cases for public comment. The guidelines require that to be eligible for leniency, an applicant company should: (i) submit evidence materials on the horizontal collusion; (ii) admit to the illegal nature of the activities; (iii) cease illegal activities when or before reporting; and (iv) fully cooperate with the NDRC's subsequent investigation. If the NDRC finds that the applicant company has met these requirements, it may reduce the fines to be imposed, specifically: (i) 100 per cent reduction for the first leniency applicant before the initiation of the government investigation; (ii) 80 per cent or more reduction for the first leniency applicant after the initiation of the government investigation; (iii) 30 per cent to 50 per cent reduction for the second leniency applicant; and (iv) 30 per cent or less reduction for the third and subsequent leniency applicants. Also, the NDRC may reduce the disgorgement of illegal proceeds for leniency applicants as well, though the Guidelines do not specify the percentage of reduction.

In March, 2016, the NDRC, also in the name of the AMC, issued a draft of the Anti-monopoly Guidelines for the Automobile Industry for public comment. The draft Guidelines have focused on prohibition of vertical restraints and state that with regards to anticompetitive horizontal agreements, general principles of the AML shall apply.

SAIC has also been very active in anti-cartel enforcement. In 2014 and 2015, unlike the NDRC, SAIC targeted much smaller companies, with the resulting fines being smaller as well. However, in 2016, SAIC had several high-profile investigations.

In February 2016, the Jiangxi provincial AIC found that 17 insurance companies engaged in illegal market partitioning and imposed fines. In May 2016, the Shandong provincial AIC found that 23 accounting firms violated the AML by agreeing on market partitioning arrangements and imposed fines. In May 2016, the Hubei provincial AIC found that the Hubei Provincial Insurance Trade Association organised four insurance companies for concerted price increase, and imposed a fine of 200,000 yuan on the association. This is one of the rare cases in China where a trade association was fined for organising a cartel.

In September 2016, the Anhui provincial AIC found that two cipher code device manufacturers engaged in illegal market partitioning and imposed a fine in the total of 9.83 million yuan. This case has an interesting prelude. In September 2015, the Anhui provincial AIC started the investigation, but one of the investigated companies did not cooperate with the investigation and refused to produce documents. As a result, the AIC fined this company 200,000 yuan. This is the first case in China where the antitrust enforcement agency fined a company for non-cooperation.

A comparison between the enforcements of the NDRC and the SAIC shows that the NDRC has focused on price cartels, while the SAIC has focused on market partitioning.

In Hong Kong, the Competition Ordinance that was passed back in 2012 was finally implemented at the end of 2015. The Competition Ordinance's First Conduct Rule prohibits price fixing, market allocation and bid-rigging cartels, and the Hong Kong Competition Commission (HKCC) has indicated that such conduct will be an enforcement priority. Under the Competition Ordinance the HKCC and the Communications Authority have broad investigatory powers, including the right to conduct dawn raids. The HKCC published a leniency policy in November of 2015. Similar to leniency programmes in other countries, the first company to admit participation in a cartel and fully cooperate with the authorities (and its officers, employees and agents) will not face actions from the HKCC.

Korea

The Korea Fair Trade Commission (KFTC), which in September 2015 entered into a cooperation memorandum of understanding with the

US enforcement agencies, remains an aggressive anti-cartel enforcement agency. It continued to impose large fines for bid rigging in the construction industry and corrugated cardboard market, among other industries. The KFTC has recently faced some headwinds, however. In cases involving ramen noodles and commercial freight vehicles, the courts in Korea have required the KFTC to show more than information exchanges among competitors in order to prove a violation of the Monopoly Regulation and Fair Trade Act (MRFTA).

Taiwan

In 2015 the Taiwan legislature amended the Fair Trade Act to allow the Taiwan Fair Trade Commission (TFTC) to establish a whistleblower reward fund to strengthen its ability to investigate and punish collusion. The fund, comprised of 30 per cent of fines from fair trade violations, is used to reward the reporting of cartel activities, promote international cooperation and establish and maintain a database to help strengthen

cartel enforcement. In 2016, the TFTC put the programme in motion. A confidential whistleblower was awarded US\$15,500 for blowing the whistle on a shipping and storage cartel. The resulting investigation led to significant fines against several companies.

Australia

After not collecting any fines in 2015, Australia's cartel enforcement came alive in 2016. The Australian Competition and Consumer Commission (ACCC) brought in tens of millions of dollars of fines in 2016. Moreover, in July of 2016, Australia brought its first criminal cartel case. Nippon Yusen Kabushiki Kaisha (NYK), a global shipping company based in Japan, pleaded guilty to criminal cartel conduct in the Federal Court. The case is not a fluke. The ACCC has said it has additional criminal investigations underway and it was aiming for a 'steady stream of one to two criminal cases per year.'

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