Cartel Regulation

Contributing editor
A Neil Campbell

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GETTING THE DEAL THROUGH

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Introduction

Competition law, considered broadly, is full of grey areas – segments marked by vigorous policy and economic debate. When it comes to hard-core cartels, however, differences of opinion give way to universal condemnation. Legislators, enforcers and academics, regardless of political bent, agree that horizontal price fixing, output restrictions, bid rigging and market allocation agreements are inefficient, misallocate resources, hinder innovation and wrongfully transfer wealth from consumers to sellers. Accordingly, the past several decades have seen a steady global trend toward broader and more vigorous cartel enforcement and heightened maximum penalties. Leniency policies designed to disrupt and expose cartels have spread from their birthplace in the United States to scores of other jurisdictions. Systems of private enforcement have also spread. Class action litigation, which has long been a fixture in the US, is taking root in Europe with the UK, the Netherlands and Germany competing to be the jurisdiction of choice for private litigants. Yet as more players crowd onto the cartel enforcement field in an increasingly interconnected global economy, complex challenges emerge.

Take leniency, for example. After the US's programme was redesigned in 1993, leniency became the most important tool in the Department of Justice (DOJ) Antitrust Division's enforcement toolbox. The EU's programme, launched in 1996, has been instrumental to Europe's enforcement regime, as well. For international cartels, which are notoriously difficult to investigate and prosecute, the programmes allow the authorities to obtain information on illegal conduct that might otherwise never see the light of day. By most measures, the programmes have been dramatically successful. A series of international cartels have been brought to justice, billions of dollars of fines have been levied, and in the US hundreds of executives have been jailed. A huge percentage of cases in recent decades have relied on information that came, directly or indirectly, from the leniency programmes.

It is thus no wonder that leniency programmes have been adopted by many other jurisdictions. More than 80 jurisdictions now have them in one form or another. Prior to this global expansion, if a company discovered cartel activity the decision-making process was fairly straightforward. If the company moved quickly it could secure complete immunity from crippling fines and jail sentences for executives by fully cooperating with a few authorities. Yet with more countries adding leniency policies, the calculus has shifted. The costs of securing leniency have skyrocketed. The hill that multinational leniency applicants must climb has become ever steeper: review and production of millions of pages of translated documents, detailed attorney proffers, witness interviews, testimony. Moreover, each country's programme is administered differently. And because seeking leniency in only one or a few jurisdictions might leave one vulnerable to enforcement in others, seeking leniency anywhere means seeking it everywhere. But antitrust enforcers in one jurisdiction might issue cooperation demands that irreconcilably conflict with the demands imposed by another. Companies also have to take into account the risks (now more dire than ever) of follow-on private litigation, which is virtually inevitable when a cartel becomes public knowledge.

As the costs increase, the benefits of leniency, at least in some jurisdictions, seem to be shrinking. In the US, for example, the Antitrust Division recently published an amended version of its Frequently Asked Questions publication that explains the nuts and bolts of the leniency programme. Most observers interpreted the changes as eroding predictability, transparency and certainty, and signalling the division's intent to cover fewer current and former executives and employees. The EU's leniency programme, and especially its marker system designed to secure an applicant's place in the queue, has also been criticised for reducing predictability, as has the scope of protection ultimately afforded.

A consensus seems to be forming among lawyers who practise in the international cartel arena that leniency, at least in the US and EU, has lost some of its lustre. These lawyers and their clients are at least pausing before pulling the leniency trigger, if not turning away from leniency altogether. This year, like last year, overall cartel fines continue to be sharply off the record highs of just a few years ago. It is unclear whether any part of that reduction is a result of a diminished appetite for leniency programmes. The issue will continue to be debated. In the meantime, authorities around the world continue to energetically pursue anti-cartel enforcement agendas. Below are some recent cartel enforcement highlights from selected jurisdictions around the world.

The United States

The US is in the midst of a changing of the antitrust guard owing to the presidential election. Makan Delrahim, a lawyer, lobbyist, former Senate staffer and alumnus of the Antitrust Division during the George W Bush presidency, was finally confirmed after a several-month delay as President Trump's pick to lead the DOJ Antitrust Division. He will be served by a new slate of deputies. Under the division's current organisation chart the deputy in charge of criminal enforcement is considered a career position and thus does not automatically change with a new administration. However, because Brent Snyder recently left to head the Hong Kong Competition Commission, the occupant of that spot will also be changing. At the time of writing, Marvin Price is acting deputy for criminal enforcement. Mr Price is a steady hand with many years of cartel enforcement experience under his belt, having served as Director of Criminal Enforcement and before that chief of the division's Chicago office. The new 'front office' of the Antitrust Division will oversee the career staff of enforcement professionals. It remains to be seen whether there will be any noticeable changes in cartel enforcement in the Trump administration. Most observers are predicting continuity.

Looking at the past year, the DOJ has had notable successes in many of its ongoing matters, notching guilty pleas in its auto parts, capacitors, packaged seafood, real estate bid rigging, heir location services, promotional products, foreign currency exchange, international ocean shipping and generic drug matters. All parts of the division's criminal programme – the two sections in Washington (Criminal I and II) and the field offices in San Francisco, Chicago and New York took part. Aggregate cartel fines, however, continue to be significantly off their peak of a few years ago. The DOJ has also faced some significant setbacks in individual cases.

For example, a district court in Utah ruled that the Antitrust Division's prosecution of a defendant in the heir location service matter was subject to the defendant-friendly rule of reason standard, rather than the per se standard. For decades the Antitrust Division has, as a matter of prosecutorial discretion, reserved criminal prosecution for per se violations where the court and jurors bypass inquiry into the reasonableness of the restraint and presume the anticompetitive effect of the agreement. Consistent with its historical practice, the DOJ indicted

the heir location case as a per se market allocation violation, alleging that the defendants and their competitors developed and implemented a set of written guidelines that governed how the participants would allocate potential customers that had been contacted by multiple competitors. The defendant, however, persuaded the court that the restraint was different enough from standard customer allocation agreements that it should not be analysed under the per se standard. The court also ruled that the DOJ's claim was barred by the statute of limitations.

In the electrolytic capacitors price-fixing matter, the DOJ is facing different challenges. Several parties would like to settle their cases by pleading guilty, but district court judge James Donato is erecting roadblocks that the DOJ is not used to facing. In May 2017, when Matsuo Electric Company sought to enter a guilty plea, the judge balked, calling the plea agreement a 'sweetheart deal' for the company. In June, when it was Elna's turn, the judge again rejected the plea deal as too lenient. In August, he rejected a plea deal for Holy Stone Holdings Co. In September, he rejected a second plea effort between the DOJ and Elna. Such rejections are unusual because judges typically defer to the DOJ when it comes to adequacy of plea arrangements. Judge Donato, however, clearly feels that the DOJ is not being tough enough.

In a more serious setback for the DOJ, the Second Circuit Court of Appeals threw out convictions of two former London-based Rabobank traders, Anthony Allen and Anthony Conti, for rigging the London interbank offered rate (Libor) benchmark (*United States v Allen*, 864 F.3d 63 (2d Cir, 2017)). The court found that the defendants' testimony to the UK Financial Conduct Authority had been improperly used against them in their US criminal trial in violation of the US Constitution's Fifth Amendment right against self-incrimination. Under US law, the government cannot force a defendant to testify without safeguards to ensure that it will not use the testimony against the defendant.

The case demonstrates the friction created when enforcement agencies around the world bump into each other on parallel investigations. The decision could have wide-ranging implications for other cross-border cases, especially if other circuits adopt the Second Circuit's reasoning. The court stated that '[t]he practical outcome of our holding today is that the risk of error in coordination falls on the US government (should it seek to prosecute foreign individuals), rather than on the subjects and targets of cross-border investigations'. The defendant in a related case, a Deutsche Bank Libor trader, immediately requested a hearing to investigate whether the government's case against him had problems similar to those in the *Allen* case. The district court judge in that case noted that '[t]he implications for this case are huge'. She said, '[i]t's like uncharted waters. It's like we've sailed off the edge of the map'.

Civil price-fixing plaintiffs also suffered a setback involving friction between different jurisdictions. The US Court of Appeals for the Second Circuit vacated a US$147 million district court judgment against two Chinese companies accused of fixing the price of vitamin C (*In re Vitamin C Antitrust Litigation*, 837 F.3d 175 (2d Cir 2016)). The court ruled that the Chinese corporate defendants had been compelled by the Chinese government to fix prices for the vitamin sold to US companies. The appellate court held that the defendants could not have complied both with Chinese law and US antitrust law simultaneously. Applying principles of international comity, the court held that Chinese law should prevail when the conduct involves Chinese companies acting on Chinese soil. China's Ministry of Commerce filed amicus briefs in the case and the Second Circuit noted that the briefs were 'historic' because 'it is the first time any entity of the Chinese government has appeared amicus curiae before any US court'. Moreover, the court noted that the: 'Chinese government has repeatedly made known to the federal courts, as well as to the United States Department of State in an official diplomatic communication relating to this case, that it considers the lack of deference it received in our courts, and the exercise of jurisdiction over this suit, to be disrespectful and that it "has attached great importance to this case".' It is clear from these and other passages of the opinion that the Chinese Ministry of Commerce's decision to participate directly in the litigation and present its position on the proper interpretation of Chinese law directly to the US courts was pivotal to the outcome. The plaintiffs have filed a petition for writ of certiorari with the Supreme Court and the Supreme Court has asked for the view of the US Solicitor General regarding whether it should take on the case.

Europe

The European Commission's activity in cartel enforcement in 2017 continued the trend seen in the previous two years. To the end of September 2017, the Commission had taken six decisions against 26 companies. This compares with six decisions against 16 companies in 2016 and five decisions against 21 companies in 2015. It is much lower than the activity seen in 2014 when the Commission made 10 decisions against 52 companies.

The Commission has imposed fines of €1.9 billion by the end of September 2017. In comparison, in 2016, the total was over €3.7 billion and in 2015 €364 million.

The largest fines related to the truck cartel which, between 2016 and 2017, has led to fines totalling over €3.8 billion. This includes the top three largest fines ever imposed on individual companies by the EU (Daimler over €1 billion, Scania over €880 million and DAF over €752 million).

Other notable decisions in 2017 related to the financial markets. On 7 December 2016, the Commission issued fines totalling over €485 million to three banks for their role in the Euro Interest Rate Derivatives cartel. JPMorgan Chase received a penalty of over €337 million, Crédit Agricole over €114 million and HSBC over €33 million. Barclays received immunity as the whistle-blower, and another three banks that had previously admitted their involvement in the cartel settled the case in December 2013 (Deutsche Bank, Société Générale and RBS). Further decisions in this sector are expected.

The Commission also imposed fines totalling €155 million on six suppliers of air conditioning and engine cooling components to car manufacturers. The investigation concluded that four separate infringements had occurred involving the suppliers. Denso received full immunity for revealing three of the cartels (thereby avoiding an aggregate fine of approximately €287 million). In addition, a 10 per cent discount was applied to the other companies involved for acknowledging their participation in the agreements. This represented the 23rd settlement since the introduction of the procedure.

In addition to its case work, the Commission continued its drive towards empowering national competition authorities (NCAs) to prosecute competition infringements in their national territory. To achieve this aim, in March 2017, the Commission proposed a directive to enhance NCAs ability to take decisions fully independently and have effective tools (such as coordinated leniency programmes, adequate penalisation tools and investigatory powers and financial/personnel resources) to sanction breaches of competition law.

This year also saw the implementation of the EU Damages Directive across the EU member states. The directive is intended to facilitate competition law damages claims, and to harmonise the approach of national judicial systems to these claims. To this end, the directive introduces measures such as giving parties easier access to evidence and allowing national courts to rely on the Commission's or NCA's final infringement decision as evidence of a competition law infringement.

There are early indications that claimants will find the directive helpful. US plaintiff law firms are becoming increasingly active in the EU (often partnering with third-party litigation funders) and are, for example, already preparing follow-on damages claims against the participants in the truck cartel.

The Commission also launched a whistle-blower tool, which is intended to encourage individual (rather than corporate) whistleblowers by protecting their anonymity through a specifically designed encrypted messaging system that allows two-way communications. The tool is intended to complement and reinforce the Commission's leniency programme, through which the majority of cartels are discovered. Whether individuals will be prepared to use this tool remains to be seen as, unlike in the UK or South Korea, there is no financial reward for individuals who do report a cartel. Further, given the potential for a disgruntled employee or a competitor to provide false information, it will be interesting to see whether the Commission is prepared to launch a dawn raid solely on an anonymous tip-off.

There were few developments in the jurisprudence relating to cartel infringement. However, in April 2017, the European Court of Justice (ECJ) provided some clarity on the reliance the Commission can place on evidence transmitted to it from national authorities other than competition authorities. The case stemmed from a Commission decision in 2011, in which it fined a number of companies for their involvement in

a banana price-fixing cartel. In coming to its finding, the Commission had relied on copies of documents provided by the Italian tax authority. One of the importers, Pacific Fruit group, appealed to the General Court and then the ECJ (Case C-469/15 P) specifically challenging the Commission's use of the documents transmitted by the Italian tax authority. The ECJ ultimately rejected the appeal and found that the Commission was not prohibited from using information transmitted by national authorities other than the member states' competition authorities, solely because such information had been obtained for other purposes. The court noted that such a prohibition would excessively hamper the role of the Commission in its task of supervising the proper application of EU competition law.

Following the UK's decision to leave the EU, much uncertainty remains regarding the future application of EU cartel law in the UK. Although UK law and EU are in substance very similar, Brexit will create the possibility of parallel enforcement and potentially divergent outcomes. It will be necessary for the EU and the UK to negotiate a cooperation mechanism, though by the end of September 2017 no substantive negotiations on this topic had yet occurred.

Japan

This year, Asia's oldest antitrust enforcement agency, the Japan Fair Trade Commission, continued to strengthen its ties with other enforcers around the world. In 2017, it entered into cooperation agreements with Canada and Singapore following its 2016 cooperation agreements with Australia, the EU and China. Meanwhile, it continued to pursue its anti-cartel enforcement programme, assessing surcharges for price fixing or bid rigging in several industries, including wallpaper, disaster restoration contracts, textile products, construction of greenhouse horticultural facilities, equipment for electronic power security communications, working clothes and combat uniforms, European government bonds, and equipment for fire rescue digital radio, among others.

China

While Japan's Anti-monopoly Act dates back to the post-World War II 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, CDRCs and price bureaux), 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, including market allocation.

The NDRC has been a fairly active anti-cartel enforcer in recent years. In September 2017, it fined 18 manufacturers of polyvinyl chloride 457 million yuan (representing 1 to 2 per cent of their sales of relevant products) for illegal price cartels. This is a record fine in China. Interestingly, the NDRC stated that the companies conspired through discussions on WeChat, a popular instant-messaging application in China. This is the first time that the agency used instant message communications as the primary source of evidence in an antitrust investigation.

The pharmaceutical industry has been getting particularly close scrutiny by the NDRC. It investigated five allopurinol tablet manufacturers in January 2016. It found that these manufacturers engaged in a series of cartel activities, including 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. In August 2017, the NDRC issued a draft of Guidelines on Pricing Activities of Operators for Drugs in Shortage and APIs, which cautioned drug companies against, among other things, cartels for drugs in shortage and APIs.

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 draft Guidelines on Leniency in Horizontal Anti-monopoly Cases for public comment. The guidelines require that to be eligible for leniency, an applicant company should:

- submit evidence materials on the horizontal collusion;
- admit to the illegal nature of the activities;
- cease illegal activities when or before reporting; and
- 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:

- 100 per cent reduction for the first leniency applicant before the initiation of the government investigation;
- 80 per cent or more reduction for the first leniency applicant after the initiation of the government investigation;
- 30 to 50 per cent reduction for the second leniency applicant; and
- 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, the general principles of the AML shall apply.

Over the years, the NDRC has paid attention to the role of trade associations in cartel activities. In July 2017, it issued Guidelines on Pricing Activities of Trade Associations. The new guidelines group various trade association activities into several risk categories, ranging from risk-free to extremely high risk. Unsurprisingly, the guidelines classify price fixing, price coordination, price guidance and the exchanges of price information among competitors as posing a high risk of violating the AML and possibly the Price Law.

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

In September 2016, the Anhui provincial AIC found that two cipher code device manufacturers engaged in illegal market partitioning and imposed fines totalling 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.

Hong Kong

In Hong Kong, the Competition Ordinance that was passed 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. The HKCC's new Chief Executive Officer, Brent Snyder, brings a wealth of experience to this effort. He was recently the Deputy Assistant Attorney General for Criminal Enforcement of the US DOJ Antitrust Division, and had been a government prosecutor for 10 years before that. Andrea McCauley, a cartel specialist from the Competition Bureau of Canada, also joined the HKCC for a six-month secondment.

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 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. In 2016, the HKCC launched a community awareness campaign designed to educate the public on detecting and preventing bid rigging. The campaign earned an award from the International Competition Network and the World Bank Group. The HKCC's commitment is proving to be more than just talk. In March 2017, the HKCC commenced bid-rigging proceedings against five information technology companies. In August 2017, the HKCC commenced price-fixing proceedings against 10 construction and engineering companies.

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