

Aggressive anti-cartel enforcement

Competition authorities around the world are vigorously pursuing domestic and international conspiracies and other anticompetitive activities.

Focus on the US

Criminal antitrust enforcement remains a top priority of the U.S. Department of Justice (DOJ) Antitrust Division. The US is targeting domestic and international cartels, prosecuting both corporations and individuals, whether foreign or domestic. The Antitrust Division is placing particular emphasis on combating international cartels. Through the end of Fiscal Year (FY) 2012, approximately 67 percent of conspiracy cases were associated with subjects or targets located in foreign countries. Of the approximate \$7.8 billion in criminal antitrust fines imposed by the Division between FY 1997 and the end of FY 2012, approximately 97 percent were imposed in connection with the prosecution of international cartel activity. In addition, approximately 65 foreigners have served, or have been sentenced to serve, prison sentences in the US.

During FY 2013 the Antitrust Division filed 50 criminal cases and obtained \$1.02 billion in criminal fines. The most notable example was the DOJ's ongoing investigation of cartel activity in the automotive parts industry. *On a single day in September*, nine Japanese manufacturers agreed to plead guilty to criminal price-fixing charges and were assessed more than \$740 million in criminal fines.

The Antitrust Division's Corporate Leniency Program continues to be a particularly effective investigative tool for detecting large-scale international price-fixing cartels.

Within the cartel area, so-called "reverse payment" settlement cases will be an area to watch in 2014. In *Federal Trade Commission v. Actavis* (the Actavis case), a "reverse payment" settlement occurred after a brand-name pharmaceutical manufacturer sued a generic manufacturer for patent infringement, with the generic firm allegedly accepting a payment to stay out of the marketplace for a certain period of time. The court rejected the argument that, when the anticompetitive effects of reverse payments "fall within the scope of the exclusionary potential of the patent," they do not violate the antitrust laws. At the same time, the court rejected a "quick look" standard of presumptive illegality of such payments and concluded that a rule-or-reason standard applies and will take into account the size of the payment, its relation to expected litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The *Actavis* case is likely to lead to a period of intense rethinking of the extent to which it is possible to structure reverse payment settlements that will pass muster under the rule of reason.

Focus on the European Union

In 2013 the European Commission (the Commission) reached four new cartel decisions, imposing total fines of approximately EUR 1.9 billion, which made it an average year in the Commission's recent cartel enforcement history. The cases concerned covered sectors as diverse as financial markets, North Sea shrimp, and wire harnesses. The bulk of these fines were levied in cases involving financial institutions (in particular, fines totaling EUR1.043 billion were imposed in the Euro interest rate derivatives case, whereas the Yen interest rate derivatives case yielded fines of ca. EUR 669.7 million). This reflects the Commission's closer scrutiny of financial markets since the 2008 financial crisis.

EU scrutiny in the cartel area in 2014 is expected in the car parts sector (following the wire harness producers cartel decision of 2013) and in oil and biofuels, white sugar and cargo train transport services (following dawn raids conducted by the Commission in 2013).

More generally, the financial services sector can expect to enjoy the continued interest of the European Commission. There may be a resolution of pending cases such as a ruling by the European Court of Justice on the MasterCard appeal against a decision of the European Commission of 2007 that the member bank delegates of MasterCard had collectively

set cross border fall back multilateral interchange fees. In addition, there may be progress this year on a regulation on interchange fees for card-based payment transactions which would impose a cap on the level of interchange fees charged in four-party payment (credit and debit) card schemes.

The Commission is also pushing forward with further cases involving agreements to delay market entry by generic drugs ("pay for delay" cases). For example, the Commission's June 2013 decision against Lundbeck is being appealed as the company challenges the Commission's contention that patent settlement agreements restrict competition by object, (i.e., there is no requirement to demonstrate that such agreements have an adverse impact on competition).

In addition to cartels, vertical competition restrictions are also very much within the Commission's sights. The three main areas to look out for in this regard in 2014 are: restrictions on online sales, resale price maintenance (RPM), and most favored nation clauses.

E-commerce is considered instrumental to achieving the goal of a single internal market in Europe and as a result, EU competition rules specifically target restrictions of online sales in distribution agreements. In the first major enforcement action in this area, in December 2013, the Commission conducted dawn raids at companies active in the manufacture, distribution and retail of consumer electronics products and small domestic appliances, which it suspects of restricting online sales of their products. Resale price maintenance cases are also on the rise, both before the European Commission and before national competition authorities in the EU Member States. At the EU level, the General Court may rule in 2014 on the *Ordre national des pharmaciens* (ONP) appeal against the Commission's 2011 decision fining ONP for imposing minimum prices.

Finally, most favored nation (MFN) clauses have been the subject of attention in EU jurisprudence over the past two years. In 2013 MFN clauses were again prominent with the Commission accepting binding commitments in the e-books case from Penguin to refrain from including MFN clauses in agreements with retailers. In parallel, MFN cases flourished at the national level (notably in the UK and Germany) and are expected to be on the rise in 2014.

In this environment, it is critical for companies to have an effective antitrust compliance program. This includes focused training sessions with those senior executives who are responsible for major strategic planning, as well as those officers or employees whose conduct potentially carries the most antitrust risk to the company from charges of price fixing, market allocation or bid-rigging. Periodic reviews with key managers of their pricing and other business practices, sources of market information, and potential risk areas such as trade association activities and other competitor contacts will lower the risk of non-compliance.

Focus on China

Chinese government agencies are actively pursuing price-fixing and other anti-competitive behaviour.

The National Development and Reform Commission (NDRC) has used the anti-cartel law as a means of keeping prices, especially in key mass consumption sectors, under control. Major cartel cases in the past have involved rice noodles, garlic, beans, and infant milk formula industries. NDRC has announced that its anti-cartel efforts will continue to focus on products and services that are directly purchased by end consumers, such as food, groceries, drugs and internet products. In August 2013, international news outlets reported that NDRC had been working with the China Automobile Dealers Association to collect data on pricing behaviour of foreign auto manufacturers. It is believed that this data will be used by the NDRC to determine whether the automakers have required their distributors and retailers to resell products at a minimum price.

It is noteworthy that compared to fines imposed elsewhere, fines are much lower in China. For example, despite reaching all time highs in 2013, the total amount of fines was still much lower than fines imposed by the European Commission. In 2013, NDRC fined two liquor manufacturers and nine baby formula manufacturers for price fixing arrangements. The fines imposed on those companies ranged from 1% to 6% of sales revenue in the prior year.

The State Administration of Industry and Commerce (SAIC), which oversees non-price monopoly activities in China, announced in January 2014 that it would focus its efforts on regulating infrastructure industries such as telecom, public transportation, water, power and gas supply.