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Global Cartel Enforcement Down, But Not Out

By **Matthew Perlman**

Law360 (February 7, 2019, 10:17 PM EST) -- Global cartel enforcement has been bolstered by sprawling investigations into the auto parts and financial services industries for the past decade, with billions of dollars in fines levied, but as those cases wind down experts are seeing a dip in enforcement, for now anyway.

Fines levied against cartel perpetrators worldwide reached a high water mark in 2015 and 2016, when a handful of outsized penalties skewed the numbers upwards, and the totals have been coming down since. But experts say there's been no major policy shift or change in enforcers' focus to account for the drop off. Instead, a confluence of factors has led to the trend.

John Terzaken, a former director of criminal enforcement for the U.S. Department of Justice's Antitrust Division and a partner with Simpson Thacher & Bartlett LLP, told Law360 that numbers from the past year in particular suggest enforcement is down.

"These are among the lowest we have seen in a number of years," said Terzaken, who co-authored his firm's annual global cartel enforcement report. "If you look at enforcement statistics as a proxy for how aggressive the enforcers have been over the course of the year ... they're definitely further down than they have been in some time."

Reporting really is, in the U.S. at least, the primary source of getting cartel investigations going.

LISL J. DUNLOP
Manatt Phelps

While the numbers don't tell the whole story, and should be viewed cautiously, experts say the drop in cartel enforcement is probably the result of a number of things, including the nature of cartel investigations, decisions to allocate enforcement resources elsewhere and the increasing risks posed to companies seeking leniency for participating in cartels.

Lisa Phelan, a partner with Morrison & Foerster LLP and former chief of the Antitrust Division's National Criminal Enforcement and Washington Criminal I sections, told Law360 that there's "definitely a bit of a lull" after a period of years that saw large international investigations into the auto parts and financial services industries that each led to a string of interconnected cases across the globe.

"Is there a lull now? I think it would be hard to deny," Phelan said. "The question is, why? And there's not one factor, there's sort of a collection of factors."

The DOJ's auto parts investigation, which began in 2010, has resulted in cases against dozens of companies and executives allegedly involved in price fixing and other anti-competitive conduct relating to dozens of individual parts. The agency has obtained guilty pleas and convictions with fines totaling in the billions, and the cases have led to massive multidistrict litigation over the alleged activity.

The European Commission also investigated the industry, levying billions in fines, and other international enforcers have followed suit with their own investigations.

Investigations into the financial services industry began shortly after the financial crisis and have tackled the foreign exchange market and key benchmarking rates like the London Interbank Offered Rate. Fines from various enforcers in those cases have also climbed into the billions and private follow-on litigation continues.

But we haven't seen any signs of a blockbuster investigation since.

"They're in what I would consider to be a bit of a down cycle at the moment in terms of new investigations that are ramping up," Terzaken said. "You had some significant cases ... all of which were winding down and wrapped up in the prior year."

John Roberti, head of Allen & Overy LLP's D.C. antitrust practice, told Law360 he also hasn't seen any signs of a new blockbuster case on the horizon.

"If that case were out there, I think you probably would have started to hear some buzz about it," Roberti said.

Both the auto parts and financial services probes took years to unfold and occupied the resources of enforcers around the world, which is one factor sometimes attributed to a dearth in recent action. Phelan said that at the DOJ those cases required "tremendous resources and monopolized huge chunks of attorney time."

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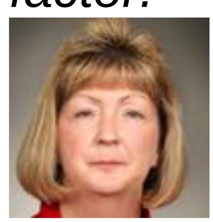

LISA PHELAN
Morrison & Foerster

"So, it's not totally surprising that there would be a dip following those two monster sets of cases moving through the system," she said.

Those cases also provided senior staffers at the agency with valuable experience and many of them have since departed, Phelan said. This could mean any cases currently in the works under the direction of less experienced personnel at the DOJ are taking longer than they might have in the past.

"Because cartel cases take years and years to develop and see through, having very senior career folks that have been around a long time and seen a lot can be important to make sure cases are being developed, investigations are being advanced," Phelan said. "I think the loss of that institutional knowledge, career leadership, is a factor."

Roberti said that large sprawling investigations like those into the auto parts and financial services industry often grow out of a single leniency application, with a company coming in to the agency to report problematic activity. Once other companies involved in the alleged cartel start looking at their business practices, they often uncover similar problems with other products or markets and will then report that additional conduct and seek leniency themselves.

When there's not "one piece of low-hanging fruit after another," Roberti said, it takes time for enforcers to build their next case.

"When you don't have this giving tree, then you have to go and build cases from the ground up," he said. "I expect the DOJ is going to be doing that, it's just running uphill."

Another factor experts attribute to a downturn in cartel enforcement is a reduction in the number of new leniency applications being sought. While some cases do crop up during the course of civil investigations, like merger reviews, most are brought to the agency by companies seeking leniency, said Lisl J. Dunlop, a partner with Manatt Phelps & Phillips LLP.

"Reporting really is, in the U.S. at least, the primary source of getting cartel investigations going," she said.

One of the big reasons fewer companies seem to be seeking leniency, Roberti said, is the increasing risk of private litigation in the U.S. and elsewhere. Seeking leniency could reduce or eliminate fines from enforcers, but it has no bearing on lawsuits brought by customers and other stakeholders, whose damage claims can outpace any fines that would be issued. Private suits have been a problem in the U.S. for companies accused of cartel conduct for some time and collective actions and other follow-on litigation are now growing in popularity in Europe.

"A good example of that is the trucks cartel case where we understand that there have been thousands of actions that have been filed on the back of the EU's cartel decision," Terzaken said, referring to a €2.93 billion ($3.23 billion) fine leveled by the European Commission in 2016. "It's sort of representative that the EU is very much a player in the collective action space."

Roberti said more and more plaintiffs in the U.S. are also choosing to opt out of class actions, which makes the litigation more difficult.

"The plaintiffs bar has always been aggressive and I don't think they're more aggressive" now, he said. "I think what you're seeing is certain companies have realized the benefit of opt-out litigation and are employing that tool more frequently."

Private litigation also starts sooner than it used to in the U.S., Phelan said, noting that when she first started working at the DOJ 30 years ago, civil suits weren't lodged until after indictments were handed down. But over the last decade, she said, private

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JOHN ROBERTI
Allen & Overy

suits have been filed when the first subpoena goes out. This makes the process longer for the parties, and also means more companies get roped in to the litigation, since it's not exactly clear at the beginning of an investigation which players in a particular industry are going to be charged.

Leniency is also less attractive to companies because of the increasing assertiveness of antitrust authorities beyond the U.S. and EU, many of which have their own leniency programs with separate requirements and conditions.

"The total package of what you're buying into when you go in for leniency has gotten more daunting," Phelan said.

She said the loss of senior staffers at the DOJ could also be deterring leniency applicants in the U.S., because the cartel defense bar had grown accustomed to the agency's prior leaders and felt the leniency process was predictable.

"With all the turnover, that just adds one more risk factor," Phelan said. "Are they going to handle it the same way?"

The DOJ also saw acquittals recently on criminal cases related to the auto parts and foreign exchange investigations. Dunlop said those losses were likely too recent to have had any real impact on enforcement yet. But, she said, you may see more cases going to trial as the decision to seek leniency becomes more difficult, especially for close cases "where the evidence isn't particularly bulletproof."

"You'll see people pushing back, going to trial and giving it a go," Dunlop said. "That's going to be a big drain" on agency resources.

Phelan, who left the Antitrust Division last year, said it would not be surprising if agency staffers decided to take their time after those recent losses to make sure the next cases they bring "are as rock solid as they can be."

"That could cause them to take a few extra months and it looks to us in the outside world like a lull, but there are things brewing," she said. "Before I left, there were definitely things at the early baking stage. We'll have to see whether or not those all come to fruition."

--Editing by Breda Lund.