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# Global overview

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Over the past year, dramatic developments have topped a decade that propelled anti-cartel enforcement to the top of law enforcement agendas around the globe. The increase in the number of countries that aggressively prosecute anti-cartel behaviour criminally has changed the competition law landscape globally.

Nations in six continents have enacted, enhanced or are currently considering legislation criminalising cartel conduct. Of the 23 European Union nations that have reported their cartel regulations to *Global Competition Review (GCR)*, 11 impose criminal penalties for cartel behaviour. Greece and Slovenia have increased the maximum prison terms for individual cartel members. Four countries in north and south America have enacted or will soon enact criminal sanctions for cartel activity. Countries in Asia, the Middle East and Africa now criminally prosecute individuals and corporations for collusive market conduct.

The global trend towards criminalising cartel behaviour has been accompanied by the growth of corporate leniency programmes, which have resulted in multinational companies paying record fines globally. Countries that have recently adopted or revised their amnesty or leniency programmes include Austria, Belgium, Bulgaria, China, Cyprus, the Czech Republic, Denmark, the European Commission, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Singapore, Slovakia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. These programmes are similar and share the goal of deterring and detecting cartel offences by encouraging self-reporting and cooperation through the promise of leniency.

The proliferation of countries that actively and aggressively prosecute cartel conduct has made it far more costly for companies to completely resolve global cartel investigations by pleading guilty and paying fines. The benefit associated with a global resolution is typically a lower fine. At some point, the costs of settling a cartel investigation globally can outweigh the benefits if there are so many countries in line for a fine that the benefit of a fine 'discount' becomes illusory. In other words, if one country is willing to reduce a fine based upon a company's willingness to admit wrongdoing, those savings may be swallowed up by the next jurisdiction which seeks its own fine.

By applying for leniency in one jurisdiction, a company is admitting engaging in anti-competitive conduct. Given the increasing cooperation and information sharing by enforcement agencies across jurisdictions, a company may be hard pressed to 'confess' improper conduct in one jurisdiction while trying to successfully defend a case in another.

## The Americas

Recent changes to cartel regulations in North and South America underscore the increased focus on anti-competitive behaviour. Of the

six countries in North and South America that reported their cartel regulations to *GCR*, four countries – the United States, Canada, Brazil and Argentina – have or will have criminal sanctions for cartel activity.

In the United States, criminal antitrust enforcement continues to be a high priority of the Department of Justice's Antitrust Division (DoJ). In recent years, the DoJ has increased its focus on prosecuting individuals. Since May 1999, more than 30 foreign defendants have served or are currently serving prison sentences in the United States for their participation in international cartels.

In March 2009, Canada amended its Federal Competition Act establishing a per se criminal offence for price fixing and collusive agreements regarding production or supply. The amendments also significantly increase the criminal penalties for cartel activity: corporations or individuals may be fined up to US\$25 million per count and individuals may be imprisoned for up to 14 years. The practical impact of these changes likely will be a more proactive and aggressive effort to prosecute cartel behaviour by Canada.

Civil fines for competition law violations in the Americas have continued to ratchet upwards as well. For example, Colombia's Law No. 1340 of July 2009 increased the civil fine for individual violators from 300 to 2,000 minimum monthly wages (from US\$69,000 to US\$500,000). Likewise, the fine for corporations increased from 2,000 minimum monthly wages (US\$500,000) to 100,000 minimum monthly wages (US\$24 million) or, if higher, up to 150 per cent of the company's profit.

Chile's amended Law Decree No. 211 of 1973 (DL 211) increased the maximum civil fine that can be imposed on individuals or corporations to US\$26 million and established a leniency programme offering full immunity to the 'first in' company that provides substantial information to the Fiscal Nacional Económico (FNE) regarding a cartel and a 50 per cent reduction in the fine for subsequent amnesty applicants.

## Europe

Of the 23 EU member states that reported their cartel regulations to *GCR*, 11 criminally prosecute cartels. Five additional EU member states – Austria, Germany, Italy, Poland and Turkey – have criminal sanctions for bid rigging. Within the past six months, Greece and Slovenia have increased the maximum prison terms for individual cartel conduct.

In June 2008, the United Kingdom's Office of Fair Trading (OFT) criminally prosecuted three businessmen who were involved in the marine hose cartel. They were sentenced to 20 to 30 months in prison after pleading guilty to price fixing and bid rigging charges. In September 2009, the OFT also imposed a £39.27 million fine on six recruitment agencies who participated in the 'Construction Recruitment Forum', a cartel that agreed to boycott new entrants and fix fees.

The European Commission imposed over €1.3 billion in competition fines in 2009. In November 2009, the European Commission imposed fines totalling €173 million on 24 companies for fixing the price of plastic additives. Also notable, two of Europe's largest gas providers were fined more than €553 billion each for agreeing not to compete in each other's home natural gas markets. In November 2008, the European Commission imposed the largest cartel fine in its history – €1.4 billion – on four car glass producers for illegal market sharing and price fixing.

The international air cargo investigation highlights the increasingly sophisticated cooperation among transatlantic enforcement authorities. In 2006, US and European regulators launched an investigation into illegal price fixing among the largest companies in the air cargo industry. By the close of 2009, the DoJ had obtained guilty pleas from 15 corporate defendants and imposed more than US\$1.6 billion in collective fines on air cargo carriers. In February 2009, the Australian Competition and Consumer Commission fined Martinair, Cargolux, and Air France A\$17.3 million. The Canadian Competition Bureau followed suit and imposed over C\$10 million in fines on Air France, KLM, and Martinair in June 2009. In addition, the Japanese Fair Trade Commission (JFTC) ordered 11 Japanese transport companies to pay a total of ¥8.4 billion in 2009 for forming a cartel to fix air cargo charges.

On 2 March 2009, the French Competition Authority issued revised Leniency Programme Guidelines. The advisory guidelines describe the minimum evidentiary requirements necessary to benefit from full or partial immunity. Corporations requesting immunity must provide the French Competition Authority with information and evidence about the existence of a cartel and its anti-competitive activities. In addition, various 'cumulative conditions' must be satisfied: the company must end its involvement in the alleged cartel 'without delay', fully cooperate with the Competition Authority throughout the investigation and refrain from destroying or falsifying evidence of the cartel.

Greece's recent amendments to article 29 of Law 703/1977 increase the criminal sanctions imposed on cartel members. Under the new legislation, anyone who 'either individually or as a representative of a legal entity participates in a cartel' may be fined between €15,000 and €150,000. The amendments also raise the maximum prison sentence from three to six months. The Greek Competition Commission (GCC) has been active over the past two years. In 2009, the GCC fined four major insurance companies €32.5 million for price fixing. In 2008, it imposed €50 million in fines on British Petroleum and Shell for colluding to fix discounts offered to petrol station owners in Greece.

In June 2009, Hungary amended its legislation governing cartels, Act LVII of 1996 on Unfair Market Practices and Restraints of Competition. Under the new legislation, individuals involved in cartel activity may be imprisoned up to five years. The amendments also created a robust leniency regime. Although the amnesty programme only applies to 'hard-core' cartels, which are defined as agreements or concerted practices between one or two competitors involving price fixing, sharing of markets or the fixing of quotas, Hungary's leniency policy offers both full and partial immunity from fines. The 'first in' company will receive complete immunity. Partial immunity is granted for later applicants who provide 'clear added value' to the evidence already submitted with respect to the cartel.

Slovenia's June 2009 amendments to its Competition Act follow the international trend towards criminalising cartel offences. The amendments substantially increased the criminal penalties for cartel activity and established Slovenia's first corporate leniency programme. Individuals may be imprisoned for up to five years and fined up to €1 million. Slovenia's leniency programme applies to

cartel members who disclose their participation in the cartel, submit evidence to assist the investigation and cooperate with the Slovenian Competition Protection Office. The 'first in' company receives a 30 to 50 per cent reduction in fines. The second applicant's fine will be reduced by 20 to 30 per cent and all subsequent applicants can receive a 20 per cent reduction in fines.

Recent amendments to Macedonia's Law on Protection of Competition make it a crime to 'prevent, restrict, or distort competition which results in a material damage of huge value'. Although criminal liability is only imposed on individuals, penalties are severe: they may be sentenced to 10 years in prison and fined 250 'average monthly salaries'.

On the Eurasian front, recent amendments to the Russian Penal Code establish criminal liability for 'competition-restricting actions, price fixing, unreasonably evading contracts, and restricting market entry'. Since October 2009, cartel activity is now punishable by up to seven years in prison, a 1 million rouble fine, or the equivalent of five years of the punished individual's salary. The amendments also expanded the personal criminal liability of top executives for 'competition-related offences'.

#### Asia-Pacific

Four of the seven Asia-Pacific nations that reported their cartel regulations to GCR criminally prosecute cartels. Recent amendments to Japan and Australia's cartel laws have increased the maximum prison terms for individuals. Korea's amendments to article 35 of the Enforcement Decree of the Act also revolutionised its leniency programme.

The Australian Parliament passed the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 on 16 June 2009. This new legislation, which took effect in July 2009, follows the US approach of criminally prosecuting individuals and corporations for competition law violations. Individuals face a maximum prison term of 10 years and fines up to A\$220,000. Corporations may be fined up to 10 per cent of their annual profits in the preceding year. Under the Trade Practices Amendment, a person must not make, or give effect to, a contract, arrangement or understanding that contains a 'cartel provision'. Civil fines for cartel violations were also increased: corporations may be fined up to A\$10 million per violation and individuals may be fined up to A\$500,000.

Japan's amendment to the Antimonopoly Law of Japan (2010 Amendment) was enacted on 1 January 2010. The amendment increased criminal sanctions for collusive market conduct. In particular, the 2010 Amendment increased the maximum prison sentence for cartel activity or bid rigging from three to five years. Corporations can be fined up to ¥500 million and individuals can be fined up to ¥5 million. The 2010 Amendment also includes a civil 'fee enhancer'. The 'fee enhancer' allows for a 50 per cent increase in civil fines if: a corporation either planned conduct that constitutes an 'unreasonable restraint of trade in violation of the Antimonopoly Law'; requested another corporation to conduct an act in violation of the Antimonopoly Law; or prevented other corporations from ceasing such conduct. The new legislation also allows up to five corporations to apply for leniency under Japan's amnesty programme. The latter three applicants, however, will only receive a 30 per cent reduction in any fines imposed. The JFTC has also just announced that in April 2010 it will launch a 10-member international cartel investigation team to exclusively probe cross-border cartels.

In May 2009, Korea revolutionised its leniency programme in its amendments to article 35 of the Enforcement Decree of the Act. Prior to these amendments, joint leniency applications were forbidden in Korea. Now affiliated companies who belong to the 'same business group' may file a joint leniency application. The amendments also

permit 'upward movement of leniency rank' if there is a voluntary withdrawal of a higher-ranked leniency application.

#### **Middle East and Africa**

The rising tide of cartel enforcement has advanced to the Middle East and Africa. Israel criminalised cartel conduct in 1988 and South Africa is on the verge of introducing criminal sanctions for cartel offences.

Israel's statute governing cartel activity – Restrictive Trade Practices Law 5748-1988 – imposes criminal sanctions on individual cartel members. Individuals may be fined up to 2 million Israeli shekels and imprisoned for up to three years for cartel offences or up to five years if the cartel offence was committed under 'aggravating circumstances'. Over the past decade, numerous executives have served prison sentences in Israel for cartel offences.

On 28 August 2009, the South African president Jacob Zuma signed the Competition Amendment Act (the Amendment) into law. Although it was signed into law, the Amendment will come into force 'on a date to be proclaimed by President Zuma' after constitutional concerns are addressed. The amendment provides new criminal punishments for individuals and includes criminal sentencing penalties of up to 10 years. Under the Amendment, a director, executive or any

other person with managerial authority in a firm will be criminally liable if he or she 'causes the firm to engage in cartel conduct' or 'knowingly acquiesces in the firm's engagement in cartel conduct while having actual knowledge of such conduct'. If an individual is found guilty, he or she may be fined up to 500,000 rand and imprisoned for up to 10 years. The Amendment also revised South Africa's leniency programme to apply to both corporations and individuals seeking amnesty.

#### **Looking ahead**

The remarkable pace of change around the globe regarding anti-cartel enforcement demonstrates the heightened interest in detecting and prosecuting such behaviour. This increased attention to cartel conduct has resulted in countries previously uninvolved in competition enforcement becoming active and greater coordination among countries in their enforcement efforts. As the number of countries actively proscribing such activity has increased, so too have the fines that are being imposed on companies. In addition, although still relatively rare globally, prison terms for individuals are becoming increasingly common, particularly for defendants prosecuted in the United States. These changes are likely to continue in the new decade.

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