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US Sparked Global Antitrust Enforcement In 2010

By **Megan Stride**

Law360, New York (January 1, 2011) -- While the U.S. was missing from the list of heavy hitters in global cartel enforcement in 2010, lawyers say its absence speaks more to its influence on the globalization of antitrust enforcement than any fine might have, suggesting the DOJ's efforts in recent years to export its cartel-fighting policies to its trading partners around the world may finally be paying off.

“The idea that cartel enforcement is something that is worth doing outside the U.S. is huge,” said Brady Dugan, a partner with Akin Gump Strauss Hauer & Feld LLP. “This is a push that the U.S. government has made.”

By working with the Organization for Economic Cooperation and Development and helping to establish the International Competition Network, the U.S. has been a leader in stressing the kind of tough antitrust regulation that informed 2010's top 10 fines list, according to Dugan.

Several of the year's largest penalties also hit industries previously fined by the U.S., including air cargo service and liquid crystal display manufacturer cartels targeted by the EU, attorneys said.

“The [U.S. Department of Justice] has been successful in convincing other countries that it matters, and that going after cartels is an important priority to make sure economies run smoothly,” Dugan said.

The European Commission has also been a major player in shaping the antitrust enforcement regimes around the world, attorneys said, with many newer regulators modeling themselves on the EU antitrust watchdog, which puts a premium on leniency programs for cooperating cartel members and pumps up civil penalties to make up for a lack of criminal prosecution.

The size and frequency of the EU watchdog's fines in 2010 showed that it has no plans to back down, attorneys said.

One reason for the commission's dominant position on the cartel-enforcement scene is its use of civil fines as a deterrent, according to Morrison & Foerster LLP partner Bradley Lui.
Unlike the U.S., the EU can't criminally prosecute the individuals behind cartels, so civil fines against companies have come to bear the full weight of the 27-country bloc's competition enforcement measures, attorneys said.

That use of civil penalties, like several other aspects of the EU's enforcement system, may catch on with more and more competition watchdogs around the world, Lui said.

“The European Commission really views these fines as serving that deterrent purpose,” Lui said. “I think that will have spillover effects in other jurisdictions, and that we'll see authorities in other areas of the world using large fines as a tool in the enforcement toolbox.”

But as the fines themselves continue to expand in size, so will demands from businesses for more information on how regulators come up with them, according to Ted Henneberry, a partner with Orrick Herrington & Sutcliffe LLP.

“The amounts of the fines in Europe will lead to increased demand for transparency of how they're calculated,” Henneberry said. “There's been a lot of criticism in the lack of transparency in that process, and I think that will continue.”

The steady increase in the size of fines was not confined to the EU in 2010, with relative enforcement newcomer Brazil topping the list and France, the U.K. and Japan all handing out staggering penalties.

The outcry for greater transparency is sure to be pronounced in all of these jurisdictions, as the penalties levied are far from “a slap on the wrist,” Lui said.

“Since these fines aren't based on alleged damages from misconduct, but instead based on turnover, you could find a situation where companies are paying huge amounts of fines that are quite large, especially relative to any effect of the alleged conduct,” Lui said. “I think for companies, that's a potential problem.”

“These fines could become so large that they potentially could hurt the business viability of these companies,” he said.

Regulators should be wary of the possibility that hitting companies with such enormous penalties could begin to work against them, according to Scott Stempel, the antitrust group leader at Morgan Lewis & Bockius LLP.

"At some point, if the fines get to be so large that companies can't pay them without compromising their competitiveness in the market, then the fine sizes become counterproductive," Stempel said. "The amount of fines themselves can actually harm competition."

As the size of penalties continues to swell, companies may decide to fight them, rather than cooperate with investigations and settle, Stempel said.

Despite the inevitable corporate friction, attorneys agreed that global fine amounts are likely to continue to climb skyward in years to come.

For 2010, here are the top 10 biggest competition fines around the world:

1. Brazil, Industrial Gas Cartel, $1.66 billion

Brazil's antitrust regulator levied the year's highest fine — and the only one on the list to come out of South America — on Sept. 1, hitting five companies and seven executives with a 2.9 billion Brazilian reais ($1.66 billion) fine for allegedly forming an industrial gas cartel.

The fine was the largest ever doled out by Brazil's Administrative Council for Economic Defense, which ordered Linde Gas SA, formerly known as AGA SA; Air Liquide Brazil Ltd.; and Air Products Brazil Ltd. to pay between 226 million reais ($129.5 million) and 249 million reais ($142.6 million) each.

White Martins Gases Industriais was ordered to pay 2.2 billion reais ($1.26 billion), the largest portion of the fine, while Indústria Brasileira de Gases Ltd. was told to cough up 8.5 million reais ($4.87 million).

The regulator said at the time that an investigation, sparked by an anonymous complaint in 2003, turned up documents that recorded the division of customers between the companies, as well as records of a compensation system and evidence of direct discussions on bidding procedures.

2. EU, Air Cargo Cartel, $1.1 billion

The EU dominated the antitrust enforcement arena in 2010, nabbing six of the top 10 spots on the year's list of largest fines.

The European Commission took its biggest action on Nov. 9, when it slapped 11 airlines with fines totaling more than €799 million ($1.1 billion) over an alleged six-year cartel for fuel and security surcharges on air cargo.

The regulator fined British Airways PLC, Air France-KLM, Cargolux Airlines International SA, Air Canada, Cathay Pacific Airways Ltd., Japan Airlines Corp., Martinair Holland NV, SAS AB, Singapore Airlines Ltd., Qantas Airways Ltd. and LAN Airlines SA's Chilean unit.

The amount of money was hefty, but it could have been even larger. The regulator said it cut the fines of all 11 carriers by 50 percent because some of the cartel's harm to international routes occurred outside of Europe. The airlines also received a 15 percent reduction because of the "general regulatory environment" for the industry.

In a prominent example of the increasingly popular immunity model, Deutsche Lufthansa AG and its Swiss unit went scot-free in exchange for reporting the cartel to the commission.

The other airlines also received various reductions for cooperating with the probe, though none of the five companies that sought discounts for financial hardship met the regulator's standards.

3. EU, LCD Cartel, $858 million

The European Commission struck again on Dec. 8, hitting five liquid crystal display panel manufacturers with a total of €649 million ($858 million) in fines for allegedly running a cartel in the market for televisions, computer monitors and other LCD products.

The regulator accused South Korea's LG Display Co. and Taiwanese companies Chimei InnoLux Corp., AU Optronics Corp., Chunghwa Picture Tubes Ltd. and HannStar Display Corp. of fixing prices on LCD panels between October 2001 and February 2006.

The commission handed full immunity to a sixth company involved in the cartel, South Korea-based Samsung Electronics Co., for providing information to the regulator about the scheme.

The fines seemed designed, in part, to send a message about EU antitrust regulation of foreign companies.

“Foreign companies, like European ones, need to understand that if they want to do business in Europe, they must play fair,” EU Competition Commissioner Joaquin Almunia said at the time. “The only understanding we will show is for those that come forward to denounce a cartel and help prove its existence.”

4. EU, Bathroom Fixture Cartel, $761 million

The European Commission targeted bathroom fixture manufacturers on June 23, levying more than €622 million ($761 million) in fines against 17 companies it accused of fixing prices on sinks, faucets, baths and other items.

The cartel lasted 12 years and covered six countries in the EU, according to the watchdog, which fined German firms Duravit, Villeroy & Boch AG, Grohe AG, Hansa, Kludi GmbH & Co. KG and Aloys F. Dornbracht GmbH & Co. KG.

The other companies hit with fines were Ideal Standard International Group; Austria's Artweger GmbH & Co. KG; Switzerland's Duscholux Holding AG; Spain's Roca Sanitario SA; Finland's Sanitec Corp.; and Italy's Zucchetti Rubinetteria SpA, Cisal Rubinetteria SpA, Mamoli, RAF and Teorema.

U.S.-based Masco Corp., whose subsidiaries Hansgrohe and Huppe were involved in the cartel, received full immunity because it was the first to turn over information about the scheme to the commission.

The regulator also cut fines for five of the 10 companies involved in the scheme that had claimed financial hardship, and Grohe and Ideal Standard received 30 percent reductions for their cooperation in the probe.

5. EU, Steel Cartel, $631 million

The European Commission focused its eye on the steel industry on June 30, fining 16 companies a total of €518 million ($631.1 million) for allegedly organizing an 18-year price-fixing scheme.

ArcelorMittal, the world's largest steel producer, took the heaviest hit by far with a fine of €315 million ($413 million), and Global Steel Wire SA's Tycsa PSC unit, WDI/Pampus and Voestalpine Austria Draht also suffered big penalties.

The commission said at the time that it had calculated the fines based on each company's sales in the year before the cartel ended in 2002, when participant DWK/Saarstahl informed the regulator of the scheme.

ArcelorMittal and some other companies received fine increases because they had previously been fined for cartels in the steel sector. ArcelorMittal also won a reduction in its fine, however, because it cooperated with investigators after the cartel was brought to light.

DWK was granted full immunity.

The commission alleged that the steel companies fixed individual quotas and prices of prestressing steel, used with concrete at construction sites to make foundations, balconies and bridges.

The cartel also established a system of national coordinators to monitor price, client and quota arrangements, the regulator said, an illegal move under the Treaty on the Functioning of the European Union.

6. France, Bank Check Fee Cartel, $504 million

France's L'Autorite de la concurrence levied its biggest fine of 2010 on Sept. 20, hitting BNP Paribas SA, Credit Agricole SA, BPCE and eight other banks with fines totaling €385 ($504 million) for allegedly fixing prices on check-clearing fees.

The antitrust regulator claimed the banks had charged an unjustified 4.3 euro-cent fee on some 80 percent of the checks exchanged in France between 2002 and 2007, and that two additional fees levied by the banks for "related services" represented an unwarranted burden to customers.

Consumers paid €220 million ($288 million) in increased prices while the scheme was in play, the regulator alleged at the time.

Banque de France, Banque Postale, Confederation Nationale du Credit Mutuel, Credit du Nord, Credit Industriel et Commercial, Credit Lyonnais, HSBC and Societe Generale were also hit with fines.

Several of the banks, including Credit Agricole and BPCE, have since said they would appeal the fines.

7. EU, DRAM Cartel, $408 million

The European Commission broke in its settlement procedure for the first time on May 19, making use of a system launched in 2008 that allows companies to take a 10 percent reduction in fines for admitting that they were part of a cartel.

The regulator slapped nine memory chip makers, all of which acknowledged they had participated in a price-fixing scheme, with reduced fines totaling more than €331 million ($408 million).

Samsung Electronics, Infineon Technologies AG, Hynix Semiconductor Inc., NEC Electronics Corp., Hitachi Ltd., Mitsubishi Electric Corp., Toshiba Corp., Elpida Memory Inc. and Nanya Technology Corp. ran their chip cartel from July 1998 to June 2002, according to the antitrust watchdog.

Micron Technology Inc. also played a part in the cartel, but received full immunity because it told the commission of the scheme's existence in 2002, according to the regulator.

The EU's fines on dynamic random access memory makers followed similar moves by the U.S. Department of Justice, which by 2006 had levied more than $731 million in fines and brought claims against four companies — including Samsung, Infineon, Elpida and Hynix — and more than a dozen individuals as a result of its investigation into the DRAM industry.

8. UK, Tobacco Cartel, $347 million

The U.K.'s antitrust watchdog made a historic enforcement move on April 16, when it fined two tobacco companies and 10 British retailers a total of £225 million ($347 million) over an alleged price-fixing scheme.

The fine was the largest the U.K.'s Office of Fair Trading ever levied under the country's Competition Act of 1998.

The regulator charged that Imperial Tobacco Group PLC and the Gallaher Group Ltd. made agreements with retailers to link the price of their tobacco with the prices of a competing brand, starting in March 2001.

The deals, which lasted about two years, restricted the retailers' ability to determine their own prices, the OFT said at the time.

Gallagher was granted a reduced fine – one of £50.4 million, rather than the maximum £93 million it could have been charged – because it began cooperating with the OFT in July 2008, according to the regulator.

Sainsbury's, a unit of J Sainsbury PLC, was one of the retailers involved in the cartel, but received immunity from fines because it alerted the OFT to the price-fixing scheme.

9. EU, Chemical Cartel, $227 million

The chemicals industry faced serious antitrust heat on July 20, when the European Commission hit six chemical manufacturing groups with fines totaling nearly €176 million ($227 million) for allegedly fixing the prices of animal feed phosphates.

The shake-up marked the first time the commission combined its settlement procedure and enforcement process, with all but two of the groups implicated in the scheme settling with the watchdog for 10 percent fine reductions.

The EU authority's leniency program was also at play, with three units of Yara International ASA receiving full immunity.

The French group of Timab Industries SA and Compagnie Financiere et de Participations Roullier opted out of the settlement process.

The commission alleged that for more than three decades, the cartel members divvied up the European market for the animal feed additives, fixed prices throughout the EU and, in what the regulator called "one of the most serious violations" possible under EU antitrust law, allocated customers and set sales quotas.

10. JFTC, Fiber-Optic Cable Cartel, $180 million

Japan made a big showing in antitrust enforcement on May 25 when it fined nine companies a total of 16 billion yen ($180 million) for an alleged price-fixing cartel on fiber-optic cable parts.

The only Asian regulator to crack 2010's top 10 fines list, the Japan Fair Trade Commission hit Sumitomo Electric Industries Ltd., Furukawa Electric Co. Ltd., Fujikura Ltd., SWCC Showa Cable Systems Co. Ltd. and Sumitomo 3M Ltd. for their roles in the scheme.

The companies allegedly set prices for fiber-optic cable parts sold to a unit of Nippon Telegraph and Telephone Corp., Asia's largest telecommunications company.

The regulator also accused several of the offenders of colluding to set prices on optical fiber cable products that were sold to Japanese cell phone company NTT Docomo Inc. and on heat shrink splice protection sleeves and FAS connectors sold to Nippon Telegraph and Telephone East Corp.

The regulator charged each of the nine companies with violating Article 3 of Japan's Anti-Monopoly Act and issued cease-and-desist orders.

The companies were also required to institute training programs for the companies' sales employees.

--Additional reporting by Shannon Henson, Melissa Lipman, Erin Marie Daly, Ben James, Richard Vanderford, Derek Hawkins