

Antitrust Fines Rise In US As They Decline Elsewhere

By **Bryan Koenig**

Law360 (January 5, 2021, 7:04 PM EST) -- U.S. fines imposed on cartels involved in price-fixing and other anti-competitive acts spiked in 2020, marking a sharp contrast with European Union antitrust enforcement, which has been hobbled in part by the COVID-19 pandemic, according to the latest report on global cartel enforcement from Morgan Lewis & Bockius LLP.

Morgan Lewis tracked \$639 million in antitrust financial penalties imposed by the U.S. Department of Justice last year, nearly triple the \$221 million imposed in 2019 and an important signal after several years of global declines in cartel fines. The European Commission went in the opposite direction, from \$1.6 billion in fines in 2019 to just \$329 million last year.

One of the report's authors, London-based Morgan Lewis partner Omar Shah, noted in an interview that commission antitrust investigations have been severely hobbled by the restrictions imposed by teleworking amid the pandemic. As of Tuesday, COVID-19 had killed more than 427,000 people in Europe, according to the European Centre for Disease Prevention and Control. The Atlanta-based Centers for Disease Control and Prevention put the number of U.S. dead from COVID-19 at over 352,000 as of Tuesday.

The pandemic has severely inhibited the early morning raids that are a crucial part of antitrust investigations in the EU and elsewhere, according to Morgan Lewis.

"They just couldn't do any dawn raids," Shah said.

When the pandemic eventually ends, Shah said, watch for a spike in dawn raid activity as EU enforcers try to make up for lost time.

"Although many competition authorities have temporarily relaxed enforcement to avoid shortages of essential supplies, they also have clearly stated that the exemptions are limited in scope and that enforcement has not been relaxed due to the pandemic," the report said. "Consequently, it appears likely that 2021 will see a resurgence in enforcement activity in terms of both delayed investigations and new investigations arising from pandemic-induced market disruptions."

Dawn raids are not a feature of U.S. antitrust investigations. That fact may have helped the DOJ last year alongside a series of new efforts Shah pointed to, particularly the Procurement Collusion Strike Force set up by DOJ antitrust chief Makan Delrahim in November 2019 to go after bid-rigging and other anti-

competitive conduct targeted at government coffers.

That task force, Shah said, is part of an overall trend of antitrust enforcers "trying to be creative" beyond the leniency programs on which they've traditionally relied. Those programs, which reduce or eliminate fines for companies that inform enforcers about their own and others' anti-competitive conduct, appear to have lost some of their efficacy as the number of governmental and private enforcement mechanisms has proliferated, which critics say has made companies more reluctant to come forward for fear of compounding payouts.

"Companies think twice before going in for leniency these days," Shah said.

Morgan Lewis' own data shows just how many jurisdictions impose antitrust cartel fines, and how many of them saw a decline in overall fines from 2019 to 2020, which sank worldwide from \$2.9 billion to \$1.4 billion.

Brazilian fines fell from \$135 million to \$45 million. South African fines went from \$9 million to \$543,000. Chinese fines dropped from \$38.4 million to \$2.9 million. Japanese fines plunged from \$676 million to \$40,000. Australian and Indian fines dropped to zero from \$23.5 million and \$13.4 million, respectively.

A few jurisdictions did see upticks, however, including the United Kingdom, from \$60 million to \$78 million; Taiwan, from \$2 million to \$97 million; and Mexico, from \$9.3 million to \$32 million.

Antitrust agencies themselves argue that cartel enforcement follows a cyclical route of ups and downs, with cases taking years to reach the financial penalty stage. In the U.S., enforcers have insisted that the number of companies coming forward has held relatively steady, although they've refused to disclose data on leniency applications.

Morgan Lewis' data shows that U.S. fines had been on a mostly downward trend. While fines jumped from \$337 million in 2016 to \$603 million in 2017, they started going down from there, to \$406 million in 2018 and \$221 million in 2019. EU fines followed a more circuitous path, from \$4.1 billion in 2016 to \$1.3 billion in 2017, then \$890 million in 2018, \$1.6 billion in 2019 and \$329 million last year.

U.S. revenue last year was defined by a handful of big fines, Shah said, which will likely continue to be a major feature of domestic enforcement.

In particular, Morgan Lewis counted hundreds of millions of dollars in settlements reached as the DOJ investigates generic-drug makers for price-fixing, a probe that is more targeted than the sprawling multidistrict litigation against most of the industry from state attorneys general and private plaintiffs.

"There's been kind of a domino effect in that sector. And I think we'll see that continue," Shah said.

--Editing by Andrew Cohen.