

## Global Cartel Fines Down In 2017, Report Says

By **Kat Greene**

*Law360, Los Angeles (July 26, 2017, 9:27 PM EDT)* -- Antitrust regulators this year have dished out far fewer cartel fines than a year earlier as investigations into the automotive and financial industries wind down, but pharmaceutical companies may soon be subject to closer regulatory looks, according to a report Tuesday by Morgan Lewis & Bockius LLP.

Globally, cartel fines stand at \$1.2 billion for the first half of 2017, putting this year on track to clock in at a much lower number than 2016, which saw regulators charging \$7.8 billion, as major international cartel investigations into alleged collusion on prices of automotive parts and alleged rigging of benchmarks like the London Interbank Offered Rate reach their conclusions, according to the report.

But signs point to potential expansion of investigations and litigations against companies and executives in the pharmaceutical industry, including the issuance of subpoenas to at least 12 drugmakers asking questions about drug pricing and communication with competitors, the Morgan Lewis team found. And the U.K. is challenging an agreement between manufacturers, while the European Union is litigating two pay-for-delay cases, the report noted.

"The scope of investigations and litigations in the United States concerning potential collusion among generic pharmaceutical manufacturers continued to expand in early 2017," the report said. "Given these recent developments, we anticipate that the pharmaceutical industry will continue to be a considerable area of focus in 2017."

Mark Krotoski, a partner in Morgan Lewis' Silicon Valley office and one of the report's authors, told Law360 on Wednesday that the waxing and waning of cartel fines is a natural effect of investigations running their courses.

"In our view, it's part of a cyclical trend," he said.

The report cited charges lodged against two executives of Heritage Pharmaceuticals Inc. in Philadelphia by the U.S. Department of Justice as a sign pharmaceutical activity might pick up, in particular because Pennsylvania's Eastern District appears to be the source of the subpoenas issued to the dozen drug companies.

Jeffrey Glazer, the former CEO of Heritage, and Jason Malek, the company's former president, for conspiring to fix prices, rig bids and divvy up customers for an antibiotic and a diabetes medicine, were

charged with two felonies each in December. The charges for the alleged antibiotic plot reach back as early as April 2013 and both conspiracies ran until at least December 2015, according to the DOJ.

Both have since agreed to cooperate with the DOJ in its investigation into the alleged price fixing.

Meanwhile, Heritage, Mylan Pharmaceuticals Inc., Teva Pharmaceuticals USA Inc., Aurobindo Pharma USA Inc., Citron Pharma LLC and Mayne Pharma USA Inc. have all been sued by 45 states in cases that accuse the companies of acting in an anti-competitive manner. Both suits center around the diabetes medication glyburide and the delayed-release form of the antibiotic doxycycline hyclate.

Meanwhile, the DOJ still appear to be actively pursuing investigations into bid rigging at real estate foreclosure auctions, especially in Alabama, Georgia, North Carolina and California, according to the report.

A California federal jury in June convicted three men of rigging bids at auctions in the San Francisco Bay Area, nearly a year after the judge overseeing the case refused to block government evidence gathered from hidden microphones placed without a warrant.

The recording issue has come up in other foreclosure auction cases. The government says it has now earned some 68 convictions and guilty pleas in its crackdown, but it has faced friction in several cases over its methods.

Packaged seafood also landed on Morgan Lewis' list of industries under scrutiny in 2017, as several companies and executives have pled guilty and paid fines in the face of accusations of collusion.

For example, a former senior vice president for StarKist Co. pled guilty to one count of price-fixing in California federal court in late June, admitting to working with other executives and major players in the packaged seafood industry to set prices between 2011 and 2013.

And packaging companies appear to be facing pressure from regulators worldwide, including in the EU, where in March the antitrust authorities carried out unannounced inspections of several industrial paper companies in multiple member states on Tuesday over concerns of anti-competitive practices. The watchdog did not reveal the names of the companies it targeted.

But industries that have long dominated regulators' attention are starting to work their way out of global hot water, the report noted. For example, in the auto parts industry, while 65 people and 48 companies had been charged and have agreed to pay more than \$2.9 billion in criminal fines as part of a U.S. investigation, there have been relatively few new plea agreements and indictments this year, according to the report.

And global agencies appear to be nearing the end of prosecutions of people and banks for alleged manipulation of various financial benchmarks like Libor and several foreign exchange markets, Morgan Lewis said.

On the policy side of things, the U.K.'s Competition and Markets Authority in March launched an advertising campaign highlighting its program that rewards whistleblowers who weren't involved in the accused cartel up to £1 million (\$1.3 million) for their efforts.

And the EU kicked off a program to facilitate anonymous whistleblowers giving information to assist in new cartel investigations, the report noted.

In the U.S., leadership positions at the DOJ may continue to shift as the administration of President Donald Trump works out its nominations for the agency. The White House nominated Makan Delrahim to head the Antitrust Division, which is currently led by acting Assistant Attorney General Andrew C. Finch.

Lastly, the report noted that lawyers and executives alike that do business in the U.K. and EU will want to keep an eye on policy shifts as Brexit, the shorthand name for the U.K.'s departure from the union, moves forward.

EU competition law will apply to companies doing business in both regions, but how those laws are interpreted and enforced may change. One immediate impact is that there may soon be parallel investigations, for example. And whether and to what extent the precedents set in EU courts would apply in courts in the U.K. is still being negotiated between the two jurisdictions, according to the report.

Krotoski noted that companies and antitrust attorneys alike will want to keep an eye on the way regulatory agencies around the globe treat prices set by algorithms designed to pinpoint the most efficient price for an item. A question Krotoski sees bubbling up to the surface is whether regulators will call it price-fixing if the pricing choices were made by a machine, rather than a person.

"There have been a number of enforcers on both sides of the Atlantic that have mentioned this in significant speeches," he said. "That's why we think clients using algorithms should seek antitrust counsel to ensure that they're being used in a manner that won't violate antitrust laws."

--Additional reporting by Melissa Lipman, Dani Kass, Paige Long, Matthew Perlman and Cara Bayles. Editing by Katherine Rautenberg.