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Global Cartel Fines Down For 2nd Year In A Row

By **Matthew Perlman**

Law360 (January 25, 2019, 8:14 PM EST) -- The total value of fines levied by global enforcers for cartel conduct last year dropped slightly compared to 2017, but antitrust authorities still doled out significant penalties over both domestic and international activity, according to a report released Thursday by Morgan Lewis & Bockius LLP.

The report found that cartel fines last year totaled $3.6 billion, down from $4.2 billion the year before. In both 2016 and 2015, enforcers racked up more than $7 billion in penalties, but each year was marked by outsized, individual fines reaching into the billions. While last year failed to produce any case of that magnitude, Mark L. Krotoski, a partner with Morgan Lewis who worked on the report, said the fines that were issued are still worth noting.

"On a global basis, and regional basis, there are some reductions in aggregate fines, but ... where the enforcers around the world have focused on specific industries, or conduct, the fines have been very significant," Krotoski told Law360. "It's very important to ensure that companies are doing what they can to mitigate those consequences, including having compliance programs and being prepared if there is any enforcement activity."

Krotoski said that there's a "cyclical component" to the aggregate totals, which in the U.S. sees fines issued by enforcers at the front end of an investigation, and that we're currently seeing the tail end of several significant cases. The U.S. Department of Justice, for example, took cases to trial last year against individuals allegedly involved in the manipulation of the London Interbank Offered Rate and foreign exchange rates, after previously hitting banks associated with the schemes with financial penalties.

The resources needed to prepare for and try the cases — along with several others last year — may have had impacted investigations that were in earlier stages, according to Krotoski.

"That certainly always is a factor, and that's why I think when you look at the aggregate totals, there's always going to be a cyclical pattern to it," he said.

The DOJ did issue around $406 million in new fines last year, the report found, including $82 million in criminal fines for three South Korea-based companies over a decadelong bid-rigging conspiracy that allegedly targeted contracts to supply fuel to U.S. Army, Navy, Marine Corps and Air Force bases. In that case, the DOJ also filed a concurrent civil case that saw the companies agree to shell out an additional $154 million to the U.S., because of the government's position as a victim of the scheme.

DOJ Antitrust Division chief Makan Delrahim had previously talked about seeking that kind of recovery, which comes under Section 4A of the Clayton Act, and Krotoski said it's something to keep an eye on moving into 2019.

"That is something that DOJ has emphasized and here they actually used it as a tool," Krotoski said. "It hasn't been used that much, but they've been signaling that they're going to be active in this area."

J. Clayton Everett, another Morgan Lewis partner who worked on the report, pointed to the DOJ's settlement with six broadcast television companies over the alleged sharing of competitively sensitive information about advertising prices, as another case to note. While it did not result in any fines, he said most cases based purely on information sharing are brought privately, not by the government.

"There wasn't a specific allegation about actual coordination, about what the companies would do, but the exchange of information was alleged to have affected negotiations," he said. "Generally, the government's enforcement actions have been focused on activities that at least the government will characterize as being part of an explicit agreement."

The European Commission had a relatively quiet second half of 2018 in terms of cartel fines, the report found, attributing the falloff partly to the expected departure of Margrethe Vestager, the body's competition head, later this year. Omar Shah, a co-author of the report based out of Morgan Lewis' London office, said this may have had the commission more focused on existing cases rather than new ones.

Earlier in 2018, the EC did fine five maritime car carriers a total of €395 million ($450.3 million) over an alleged cartel in the intercontinental vehicle shipping industry. It also hit eight Japanese electronics manufacturers with €254 million in cartel fines.

But a notable investigation launched last year by the commission, Shah said, was the probe into allegations that German automakers Volkswagen AG, BMW AG and Daimler AG colluded to limit the development and implementation of certain emissions control systems. That case deals with a cartel that is accused of diminishing innovation, which Shah said could have implications for the standard-setting process and the introduction of new technology across a number of industries.

"That's the interesting facet of that case and would create a new angle of attack for the authorities if they manage to get that off the ground," he said. "We'll see what happens. That's a massive case."

The report found that competition enforcers in other jurisdictions around the world also remained active last year, with many cases focused on domestic cartels.

Egyptian authorities issued their largest fine to date, hitting pharmaceutical companies with 5.58 billion Egyptian pounds ($311.5 million) in fines for fixing prices charged to small and medium-sized pharmacists. Singapore issued that country's largest cartel fine last year as well, slapping suppliers of fresh chicken products with fines totaling 26.9 million Singapore dollars ($19.9 million).

But global authorities also increasingly pursued international cartel investigations last year. Australia's Federal Court ordered Japanese auto parts company Yazaki Corp. to pay a record 46 million Australian dollars ($33 million) fine for its role in an international price-fixing scheme for wire harnesses used in the Toyota Camry.

Shah said the increasing activity from, and shear number of, global authorities may be contributing to a recent dearth in leniency applications. It's become increasingly difficult for companies to comply with the different requirements posed by each jurisdiction, and the possibility of private actions following a leniency application have increased in many places.

"I think that's a reason why, anecdotally, leniency applications are down," Shah said. "It's very difficult to advise a company and say, 'You should go and this is actually going to result in a benefit.'"

Authorities are working on this problem, Shah added. It's one of the issues the DOJ hopes to address with the its Multilateral Framework on Procedures in Competition Law Investigation and Enforcement. But enforcers in other areas, including Vestager in Europe, would rather see the issue tackled by existing international forums like the the International Competition Network or the Organization for Economic Cooperation and Development.

"The authorities are trying to do something about it, but it will take some time," Shah said.

--Editing by Breda Lund.