

# ALLEN & OVERY



## Global Cartel Enforcement

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2017 Full-Year Cartel Report

# Introduction

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Cartel fines across diverse jurisdictions around the world have continued to grab the headlines in 2017, with the European Commission (EC) breaking the USD2 billion barrier, thanks in large part to the fine imposed on Scania in the trucks investigation (EUR880 million) which is now being appealed to the EU's General Court.

But it is not the story of just one agency: mature and developing competition authorities alike continue to demonstrate an appetite for the detection and punishment of cartel behaviour, and to feature this high on their priority enforcement agenda. At the same time, they are recognising the need to bolster their arsenal of detection tools to meet the challenges of an increasingly sophisticated business environment. A fast-moving, interconnected world requires regulators with the same attributes: many have addressed this outright and are adapting to ensure they are equipped with 'gold standard' enforcement mechanisms.

While 2017 global fine totals are lower than in 2016, this is more a reflection of the conclusion of several major international investigations than a signal of less fervent anti-cartel commitment. More notable is that jurisdictions such as Mexico and China have posted significant increases in 2017, perhaps signalling their future aspirations. Korea has continued to cement

its position as a leading antitrust authority. In the EU, numerous Member States continue to enforce local antitrust rules actively, with France not only imposing a EUR302m fine on a price-fixing cartel in the floor coverings sector but also fining Brenntag EUR30m for a procedural infringement relating to another alleged cartel. Meanwhile, the UK's Financial Conduct Authority (FCA) has dipped its toe into the water with the announcement of its first statement of objections in a competition case.

Looking forward, geopolitical uncertainty remains in 2018. The potential impact of Brexit – on the UK and the remaining 27 EU Member States, is still being debated, while new figures at the helm of U.S. antitrust, such as President Trump's nominee Makan Delrahim, have yet to declare their hands. Nevertheless, international cooperation remains a stated priority aim of key agencies around the globe and, to date, there is no sign of retrenchment.

# Emerging trends 2018



## “My robot did it”

Digital collusion through mechanisms such as pricing algorithms, and the most effective ways of detecting and preventing it, is likely to be an increasing focus for regulators. Opinions are divided as to whether, or to what extent, AI and algorithms pose significant competition risks – and the suitability of current legislation to address any such risks.



## Bid-rigging tops the agenda

Regulators around the world have vowed to tackle bid-rigging in public contracts – a priority area in an increasingly consumer-focused policy approach. In 2018, we can expect more resources to be allocated in this direction; many authorities have already adopted new tools to detect this type of collusion and a number of cases have been opened.



## Sectors to watch

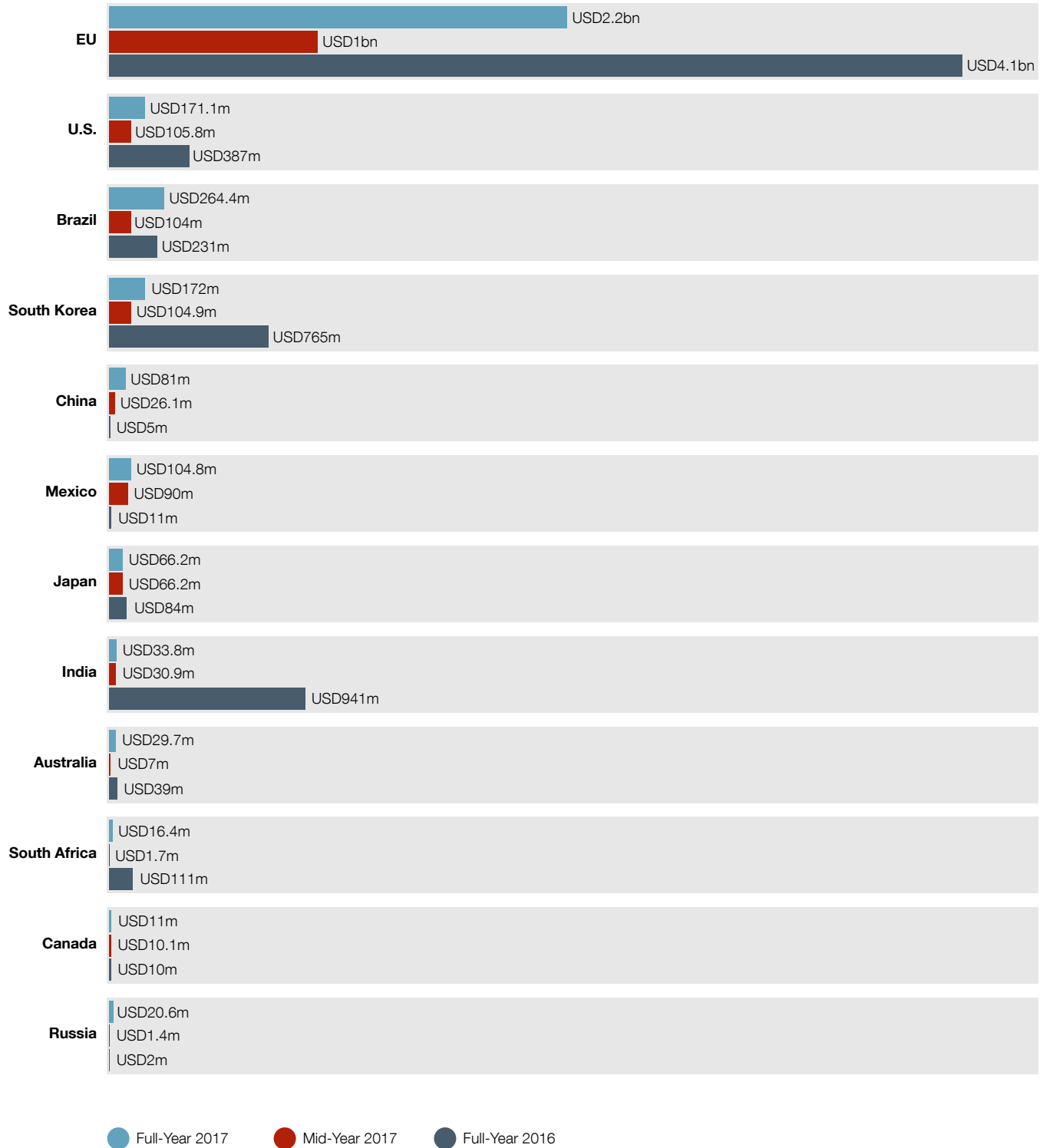
Current investigations and market studies suggest that **digital** and **pharmaceuticals** will be among the sectors receiving the full impact of regulators’ scrutiny in 2018.



## Revamp of regulatory toolbox

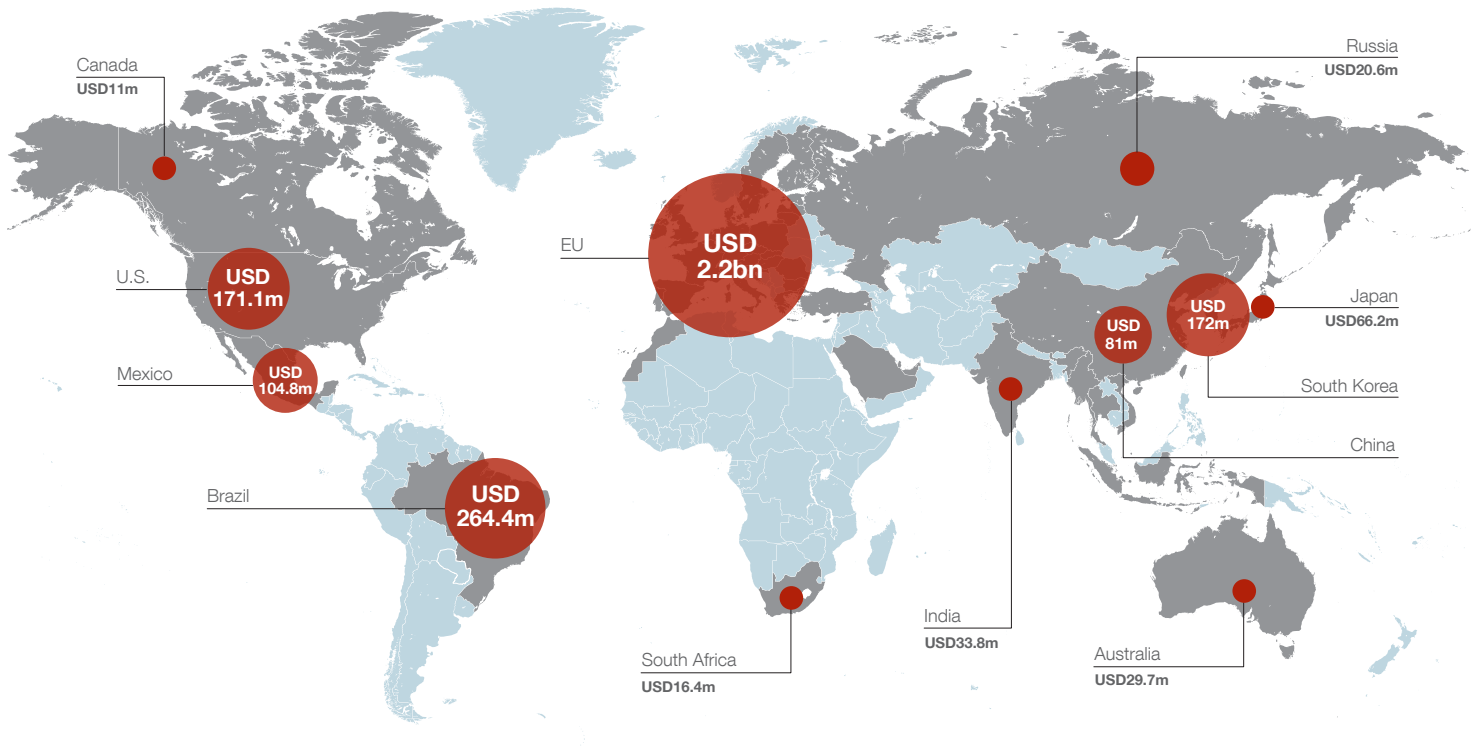
As leniency applications decline in number, new initiatives to facilitate whistleblowing as a detection method for cartels are increasingly being introduced. The EC and the UK’s Competition and Markets Authority (CMA) are among the regulators that have recently launched new whistleblowing campaigns. Overall, the regulatory toolbox is likely to become ever more sophisticated, with social media playing a growing role, in order to tackle new detection and enforcement challenges.

# Select cartel fine comparison



Statistics are approximate and reflect fine levels and exchange rates as at 18 December 2017 and may not be exhaustive. 2017 U.S. statistics are for the U.S. fiscal year, which began on 1 October 2016. All other countries' statistics relate to the 2017 calendar year. U.S. figures relate to fines imposed at federal level by the Department of Justice. EU figures include fines imposed in re-adopted decisions.

# 2017 global cartel fine levels



	EU	U.S.	Brazil	South Korea	China	Mexico	Japan	India	Australia	South Africa	Canada	Russia
USD	2.2bn	171.1m	264.4m	172m	81m	104.8m	66.2m	33.8m	29.7m	16.4m	11m	20.6m
EUR	1.9bn	155.2m	234.1m	158.3m	68.6m	94.2m	61.6m	31.3m	25.6m	14.2m	10m	16.4m

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# Europe and South Africa

## European Union

The EC imposed the highest total fines of any jurisdiction for 2017, at just over EUR1.9bn (USD2.2bn). Even though the 2017 fine total was only about half of that in 2016, the EC's crackdown on cartel behaviour is, as emphasised by Commissioner Vestager, a continuing priority, with the EC very likely to remain at the forefront of cartel enforcement in 2018. Commissioner Vestager is now well over halfway through her mandate and this may influence the EC in wrapping up and initiating new investigations.

The 2017 total is largely attributable to the EC levying its second-ever-largest fine (EUR880m) on Swedish truckmaker Scania in September for collusion over 14 years with five other truck manufacturers on truck pricing and passing on to customers the costs for emissions technologies. The five other manufacturers all settled with the EC in 2016 but, as Scania disputes any involvement in the alleged cartel and therefore did not settle, it was subject to the standard cartel procedure. Scania is now filing an appeal at the General Court of the EU against the EC's decision. Scania's fine brings the total sanctions against the truck manufacturers to over EUR3.8bn, with extensive damages claims likely to add significantly to the overall liability.

Overall, the EC concluded seven cases (similar to the numbers in 2016 and 2015), two of which were re-adopted decisions. The first was in the air cargo case, where the EC fined 11 airlines in

2010 for fixing the prices of air cargo flights. The decision was subsequently quashed on procedural grounds by the General Court in 2015, so in March the EC issued a new decision, imposing USD833.2m (EUR776m) in fines, largely mirroring those imposed in the 2010 decision. The second re-adopted EC decision related to the envelopes cartel, and resulted in a fine of EUR4.7m (identical to the amount of the original fine).

In an attempt to increase the number of cartels uncovered, the EC launched a new online whistleblower tool in March. This tool is similar to the one used by the German Bundeskartellamt and is expected to reinforce the effectiveness of the EC's leniency programme.

Other notable developments include:

- Follow-on actions in Member States' national courts seeking damages sustained as a result of cartel activity are increasing in number, and the trend is likely to continue. At the time of writing, 25 of the 28 Member States had notified the EC of their implementation of the Directive on Antitrust Damages, which introduces a statutory presumption that a cartel causes harm and which aims to facilitate damages claims for victims of infringements of EU antitrust rules. Transposition of the Directive into national law is at a relatively advanced stage in the remaining three Member States. It remains to be seen how more effective private antitrust enforcement will affect future leniency applications.

- Harmonisation on cartel fine calculations is still an aspiration throughout the EU as debate takes place as to whether such calculations should be based on worldwide sales of the price-fixer or merely its sales in the relevant market.
- The EC is seeking to strengthen its existing enforcement cooperation with Member States' enforcement bodies through the European Competition Network. The plan is to give national competition authorities a minimum common toolkit to be effective independent enforcers of competition laws, for example by having necessary evidence-gathering powers and coordinated leniency programmes. This commitment to combating cartels will continue in 2018 with a focus both at the EC and Member State level. As Commissioner Vestager commented: "EU antitrust rules make markets work better, with Member States' competition authorities and the Commission working hand in hand in this regard."
- Our 2017 mid-year report predicted that "digital disruption" would be an area to watch going forward, and that certainly seems to be true. The uptick in cases opened by the EC is also a result of a focus on e-commerce following the EC's sector inquiry announced in 2015. Furthermore, the EC's Directorate-General for Communications Networks, Content and Technology is seeking comments on three policy options for regulating digital platforms.

## European Member States

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European Member States generally maintained a strong focus on combating domestic cartel activity, many devising new tools to facilitate detection and encourage whistleblowing, and listing the tackling of bid-rigging as a key agenda item. The highlights:

- **Belgium** focused on enforcing public procurement cartels, publishing a guide to help public authorities and companies to detect cartels in public tenders (in the same vein as the new screening tool launched by the UK CMA). In line with this policy, the Belgian competition authority has fined five undertakings (including Siemens and ABB) in a settlement decision for cartelising a public tender organised by Infrabel (the national railway grid operator).
- In **France**, 2017 was marked by a fine of EUR302m imposed by the French Competition Authority (French CA) in relation to a price-fixing cartel in the floor coverings sector. Three leading manufacturers of PVC and linoleum floor covering and the relevant trade association were fined. Not only was this the largest fine imposed by the French CA in 2017 but it also exceeded the French CA's 2016 aggregate fine total (EUR203m). The case involved the first combined use of the settlement procedure introduced by the Macron Act of 6 August 2015 (under which the parties are able to negotiate with the French CA with knowledge of the proposed upper and lower fine limits) and the leniency procedure (two of the parties were leniency applicants). Without the use of the two procedures, the fine would have been significantly higher. In another 'first', the French CA fined chemical company Brenntag EUR30m for obstructing its investigation into an alleged cartel. Brenntag is claimed to have submitted incomplete, unclear and tardy information and then refused altogether to disclose specific data despite repeated requests to do so. The fine represents 7.8% of Brenntag's turnover in France, reflecting the impact Brenntag's behaviour is stated to have had on the agency's ability to pursue the investigation. Priority areas for the French CA in 2018 are likely to include online advertising and healthcare – both currently the subject of sector inquiries.
- **Germany** was very active in 2016, but the prosecution of horizontal cartels, in particular, slowed down in 2017, with only EUR60m being levied in fines. These fines involved the automotive parts, industrial batteries and harbour towage services sectors. The low level of fines can be attributed in part to a loophole in the legislation which meant that a number of cartellists escaped fines. The loophole has since been closed, which may lead to an increase in the number of fines in 2018. Vertical restraints, however, continued to be a focal point for the Bundeskartellamt with fines imposed in the furniture and clothing sector and guidance issued in relation to the food retail sector (set to have an impact beyond that sector).
- The upwards trend in cartel fines has continued in **Italy**. The Italian Antitrust Authority (IAA) handed down a total of EUR350.7m in cartel fines in 2017, an increase of more than EUR100m on cartel fines in 2016 (EUR245m). Although many of these fines have been reduced by the administrative courts, the value still represents a significant jump in fining levels. The IAA has continued its focus on protecting public finances from collusive behaviour with two out of the eight new cases opened by the IAA in 2017 involving bid-rigging and a public contracting authority. With eight new cases underway, it is likely that 2018 will be another active year for the IAA.
- In the **Netherlands**, the Dutch competition authority, the ACM, closed one cartel investigation regarding the sale of traction batteries, fining five undertakings and a trade association (all of which settled in exchange for a 10% fine reduction). Two parent companies were fined in a separate decision. Interestingly, the ACM closed two related cartel investigations against the same trade association without issuing fines, as it was not able to establish an infringement of the competition rules. Two new investigations were confirmed (into bid-rigging in unknown sector and cartel conduct in the marine gas and fuel oil bunker sector). The ACM cooperated closely with the German Bundeskartellamt on investigations into cartel conduct between harbour towage service providers, which led to

the companies settling with the FCO. The Dutch harbour sector has been a target for increasing compliance awareness, with the ACM making use of LinkedIn to approach over 6,500 individuals.

- **Spain's** Comisión Nacional de los Mercados y la Competencia (CNMC) carried out a significant number of dawn raids and opened six investigations in 2017. Although the total amount of fines imposed was down on 2016, this activity suggests that 2018 will be a busy year. 2017 saw a move away from the more traditional price-fixing cases with all four cases concluded relating to some kind of market sharing agreement (in line with the CNMC's focus in recent years on these types of infringement). Out of the four infringement proceedings, almost 90% of the total fines imposed in 2017 came from just two infringement decisions (relating to cables and railways). There was a tendency in 2017 for the CNMC to close cases without finding an infringement or imposing a fine (three in total). Whether just an anomaly for 2017 or an emerging trend remains to be seen in 2018.

– In the **UK**, 2017 saw Andrea Coscelli take up the permanent role of Chief Executive at the CMA. Under his leadership, the CMA has continued its efforts to crack down on cartels with a dedicated social media campaign designed to raise awareness of the law and generate new information on suspected cartels. Whistleblowers are now being offered up to GBP100,000 as a reward for information about a cartel.

It has been a year of “firsts”: the CMA launched its first-ever cartel screening tool which analyses procurement data for signs of bid-rigging; a curfew order was imposed on a chief executive involved in the precast concrete drainage products cartel (the first of its kind); and the FCA (which shares certain competition powers with the CMA) issued its first statement of objections in relation to the information sharing investigation in the asset management sector.

Looking to 2018, an increase in budget will help the CMA to pursue more cartel cases but there remains a big resourcing question surrounding Brexit (including how to deal with the increased caseload from the EC and ensure productive information

exchange with the EC and national competition authorities (NCAs)). Another hot topic in 2018 is how the current legislative framework applies in the digital space, for example in relation to collusion via algorithms.

Although 2017 did not see many landmark cartel decisions in the **CEE region**, most of the NCAs (the Czech Republic, Poland, Romania and Slovakia) have been actively pursuing cartel enforcement, with bid-rigging at the top of the agenda. The construction, aviation insurance, and car paint sectors faced particular scrutiny.

The strengthening of enforcement tools is a clear trend seen across CEE authorities. Poland, for instance, has launched a whistleblowing programme and Hungary has implemented initiatives aimed at ensuring an effective compliance culture and honed its fining guidelines. However, at the same time, many NCAs suffered setbacks from judicial interventions in high-profile cartel cases. In the Czech Republic, Slovakia and Poland, those interventions paved the way to changes in NCAs' dawn raid policies.

## *Key takeaway*

New tools to facilitate cartel detection and an increased focus on bid-rigging were priorities for EU NCAs in 2017.





## Russia

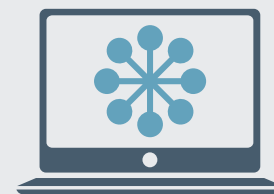
Russia's Federal Antimonopoly Service (FAS) closed only a few cases and imposed USD20.6m in fines. Although the FAS's stated aim is to focus on "quality" cartel cases over "quantity", 2018 may nevertheless bring an increase in cases. Five cases were opened under Article 178 of the criminal code for restricting competition and preliminary investigation agencies are working on seven criminal cases. The FAS has said that these cases are largely against top executives at various companies.

Continuing the theme of digital disruption highlighted in the mid-year report, one of the cases opened by the FAS focused on signs of digital collusion at medical auctions. An investigation is currently underway to determine whether collusion between companies was enabled by the use of software tools. The FAS has also implemented

a remote collusion detection tool and continues to work on the development of experience in the use of digital technologies, making the digital space an area to continue to watch in the year ahead.

Although no new legislation was enacted in 2017, international cooperation remained a key aim of the FAS. The Head of the FAS Anti-Cartel Department, Andrey Tennishev, participated in an international workshop on "best practices and advanced cartel exposure methods" and the FAS signed a Memorandum of Understanding with China in November to further bilateral cooperation between the countries' respective competition authorities.

## Key takeaway



The digital space is anticipated to be a key focus for the FAS in 2018.

## South Africa

After a relatively slow start in the first six months of 2017, the Competition Commission of South Africa (SACC) ended the year by issuing over USD16.4m in fines. Industries on the receiving end of notable fines were suppliers in the automotive parts industry, the chemical manufacturing industry and in the television industry.

Although the fine total is dramatically lower than 2016's USD111m, the SACC has recently initiated a raft of proceedings and launched raids against 25 fire sprinkler installing companies, 11 furniture removal companies, a Norwegian car shipping company, over three dozen sports agents for

soccer players and 14 fresh produce market intermediaries. These investigations – coupled with the on-going investigations into the pharmaceutical industry – are likely to increase the SACC's 2018 fine totals.

The SACC also released new draft guidelines with regard to information exchanges between competitors, citing a need to provide more guidance to relevant businesses and industry associations as to which types of information exchanges may be either permissible or prohibited. This can be expected to feature in the SACC's enforcement agenda in 2018.

## Key takeaway



A busy 2018 is forecast as the SACC launched proceedings and conducted raids in sectors ranging from fire sprinklers to sports agents.

# Americas

## United States

2017 again saw a decrease in the total fines imposed by the Department of Justice (DOJ) for cartel conduct. This decline has not come as a surprise, given that several major investigations were wrapped up in FY2015 and FY2016, and FY2017 was a relatively quiet year in terms of investigations concluded. However, active investigations currently underway may indicate higher fining levels for the year ahead. Particular sectors attracting cartel enforcement attention continued to include the beleaguered auto parts industry, which accounted for the largest single Division fine in 2017 as Hitachi Automotive was fined USD55.4m for conspiring to fix the prices of shock absorbers sold to Suzuki and Toyota. The electronic components sector also attracted a significant fine: Nichicon was fined USD42m for fixing the prices of electrolytic capacitors, after pleading

guilty (the seventh company to do so) to price-fixing in the industry. In line with the Division's continuing focus on individual accountability, various individuals have also been charged. The packaged seafood industry was another area of focus for the Division, and looks set to remain so in 2018. Bumble Bee Foods was fined USD25m (with a novel post-sale escalation clause) for conspiring to fix the prices of tinned tuna. This followed two former Bumble Bee executives pleading guilty to price-fixing. A former StarKist executive also pleaded guilty to price-fixing charges in the tinned tuna industry.

The generic drug industry is likely to remain of interest to the DOJ. Two former executives of Heritage Pharmaceuticals have been charged with fixing prices on generic drugs, and while charges have yet to be levied on drugmakers, it may be only a matter

of time, as the Division has sought documents from Pfizer, Actavis, Mylan and Sun Pharmaceuticals. Both this and the seafood sector are anticipated to involve domestic rather than international investigations.

2017 also saw a change of key personnel with a new antitrust chief taking the reins at the DOJ. The appointment of Makan Delrahim, President Trump's nominee to lead the Division, was confirmed by the U.S. Senate in September, after having been held up because of a concern on the part of certain senators that he might pursue policies favouring corporate interests over those of consumers. While collaboration with other competition agencies around the world on cartel cases looks set to remain a Division priority under Mr Delrahim, the specific direction in which he elects to lead the Division remains to be seen in 2018.

### *Key takeaway*

Prosecutions of individuals involved in cartel activity look set to be a continuing DOJ priority in 2018.



## Brazil

Brazil's antitrust enforcer, the Administrative Council for Economic Defense (CADE), maintained a steady pace of cartel enforcement, with total fines (USD264m) up 10% from the previous year's USD231m. This was despite a tumultuous year involving a raid by federal prosecutors on the agency itself in May, and a leadership change in June.

2017 also saw CADE levying its largest individual cartel sanction to date: a USD38.9m fine on construction firm UTC (along with another USD17.3m on Brazilian-headquartered conglomerate Andrade Gutierrez) in relation to Petrobras contract bidding in the "Operation Car Wash" investigations. In July, UTC agreed to pay a further USD175m to the national transparency authority in restitution for embezzled funds.

Beyond the high-profile "Operation Car Wash" Petrobras investigations, CADE was active in pursuing cartels involving electrical systems components, gas and fuel distribution and retail, and construction and maintenance services, with settlements in each of these areas totalling tens of millions of dollars over the course of the year. Significant settlements were also made in relation to auto parts (over USD40m) and consumer electronics products, such as optical drives and CRT panels (over USD12m), all of which have been subject to major international cartel investigations.

CADE's sustained enforcement activity has been fuelled in part by accelerating use of its leniency programme, which resulted in a record 31 leniency agreements in 2017, up from 23 in 2016 (there were only 30 in total from 2003 to 2015). Although the majority of these

agreements relate to the Petrobras investigations, CADE is likely to seek to replicate the programme's effectiveness in other industries. Reports of the emerging "Operation Greenfield" probe into alleged embezzlement from pensions and state banks may signal an intent to apply "Car Wash" tactics to financial markets in the future. Meanwhile, CADE is expected to rule on which documents from leniency agreements can be disclosed to third parties seeking damages in 2018. Whether this has an impact on the number of leniency agreements reached remains to be seen.

In early December, Brazil made a formal request to become an associate of OECD's Competition Committee, evidencing its desire to foster inter-agency cooperation and to participate in international policy debate.

### *Key takeaway*

CADE imposed its largest fine to date on a single company: USD39m on UTC in the context of the "Operation Car Wash" investigations.



## Canada

The Canadian Competition Bureau (CCB) has continued its trajectory from 2016 with a slightly increased fine total of USD11m, up from the previous year's USD10m total. The figure was driven by a CAD13.4m (USD10m) fine on car parts manufacturer Mitsubishi Electric for participating in an international bid-rigging conspiracy with a Japanese car manufacturer.

Continuing its focus on fairness in government contracting and combating bid-rigging, the Government of Canada launched a hotline in April of this year

to enable the anonymous reporting of federal contracting fraud. Those who witness or suspect unethical business practices relating to government contracting are able to call a dedicated telephone line or submit an online form. Fittingly, Canada also hosted the 14th annual International Competition Network Cartel Workshop in October with the theme: Combating Cartels in Public Procurement. The CCB's focus on the public sector is likely to continue in 2018.

## Key takeaway



Bid-rigging targeted through introduction of new hotline for anonymous reporting of federal contracting fraud.

## Mexico

Mexico's Federal Economic Competition Commission (COFECE) continued its upward trend in activity, with 2017 cartel fines totalling USD104.8m. This represented a near tenfold increase from the previous year's USD11m total. This total was driven by mid-year settlements of USD51.8m (with major pension fund operators) and USD31.9m (with vehicle freight providers). These are the largest fines issued by the regulator to date. A series of actions against latex glove suppliers, taxi associations and tortilla producers brought in an additional USD14.8m in fines in the second half of the year.

Beyond these settlements, much of COFECE's activity appears to be centred, directly or indirectly, on public procurement cartels. In addition to its investigations of bid-rigging in tenders by the state oil company PEMEX (including bribery allegations linked to

the global Odebrecht investigation) and the Federal Electrical Commission, COFECE also investigated public tenders for medical supplies. This is the first investigation to have involved criminal referrals to the Mexican prosecutor general. Meanwhile, COFECE's investigation of the sovereign bond markets has prompted the national securities regulator and the Bank of Mexico to examine these markets.

Coupled with COFECE's rapid institutional growth – its investigative staff has nearly quadrupled in numbers since reforms in 2013 and 2014 endowed the agency with greater independence and new sanctions powers – these on-going matters and the agency's evident enforcement appetite suggest that Mexico's profile in global cartel enforcement will continue to develop in 2018.

## Key takeaway



COFECE 2017 fine totals increased by around tenfold from those of 2016.

## South America

Other than regulators in Mexico and Brazil, it was Colombia's Superintendence of Industry and Commerce (SIC) that emerged as the broad region's most active cartel enforcer in 2017, with a trio of settlements. The SIC closed the year with a fine of USD70m levied in December against three cement manufacturers, representing 96% of Colombia's cement market, for alleged price-fixing. Senior managers in the companies have also been fined. The cement market has been the subject of numerous probes by different authorities around the world, and at least five investigations have been carried out in the sector in Colombia since 1997.

In Chile, although the Fiscalía Nacional Económica (FNE) was less active than in recent years, its 2015 leniency agreement with paper company CMPC (which saved CMPC from an antitrust fine) resulted in CMPC paying a USD149m penalty to Chile's consumer watchdog as restitution for the effects of alleged price collusion in the Chilean paper tissue market. This, along with the USD69m paid by CMPC and its competitor Kimberley Clark to Peru's National Institute for the Defense of Free Competition and Intellectual Property (Indecopi) in April (and fines paid by the companies to SIC for similar collusion in 2016), demonstrates the increasing likelihood of knock-on effects within the region.

Meanwhile, the Odebrecht bribery and bid-rigging investigations begun in Brazil have since spread to implicate projects in Argentina, Ecuador, Peru, and Venezuela, as well as farther afield. Reportedly, 29 countries have requested Brazil's help in relation to their own Odebrecht investigations.

Although prosecutors have appeared to focus to date on the bribery aspect of these investigations, the allegations have reinforced support for more powerful market regulatory agencies in the region. The recent entry into force of Chile's 2016 antitrust reforms, the proposed cartel enforcement legislation in Argentina, and Indecopi's introduction of new leniency programme guidelines over the course of 2017 illustrate the growing appetite for enforcement in the region.

### *Key takeaway*

Fallout from the Odebrecht scandal has resulted in calls for more powers for South American regulators.



# Asia Pacific

## Australia

2017 was another active year of cartel enforcement for the Australian Competition and Consumer Commission (ACCC). Cartel fines imposed by the Federal Court of Australia in proceedings commenced by the ACCC totalled USD29.7m, similar to those of 2016. In August 2017, Nippon Yusen Kabushiki (NYK) was fined AUD25m (USD19.9m), the second highest in ACCC history, for colluding with other shipping lines for the transport of motor vehicles in Australia between 2009 and 2012. The NYK proceeding was also the very first criminal case against a corporation under Australia's criminal cartel provisions, which were introduced in 2009. The Federal Court also levied an AUD3.5m (USD2.8m) fine in July against Italian corporation Prysmian Cavi E Sistemi for engaging in cartel conduct in relation to the supply of high voltage land cables (this decision has, however, been appealed by Prysmian). In May, Japanese auto parts maker Yazaki was fined AUD9.5m (USD7m) for coordinating with a competitor on the quotes they would submit to Toyota for the supply of wire harnesses (the ACCC has also appealed this decision arguing that the penalty is too low). In June, the ACCC prevailed in the High Court against Air New Zealand and PT Garuda in its long-running case against a group of international airlines for their involvement in an international air cargo cartel, and the matter has now been remitted for a penalty hearing.

The ACCC also lost a number of cartel proceedings this year. In March, the Federal Court dismissed the ACCC's

price-fixing charges against a group of electrical cable manufacturers and wholesalers and their executives. In September, the ACCC lost an appeal in its proceedings against a number of egg producers and the major egg trade association in relation to an alleged cartel arrangement to reduce the supply of eggs. In December, the ACCC's case against PZ Cussons Australia Pty Ltd in relation to an alleged laundry detergent cartel was dismissed by the Federal Court.

Looking ahead to 2018, we can expect a similar (if not higher) level of ACCC cartel enforcement. In an August 2017 speech, ACCC Chairman Rod Sims highlighted that the agency has built up "a substantial team of specialist criminal cartel investigators, representing a significant investment by the ACCC." What is more, as Sims noted in a November 2017 speech, there are currently five cases of criminal cartel conduct that the ACCC has referred to the Commonwealth Director of Public Prosecutions and that could be heading to court in 2018. The ACCC is also still awaiting decisions on a number of cartel cases, including on penalty in the proceedings against Air New Zealand and PT Garuda Indonesia for their participation in the air cargo cartel, and on liability against Kawasaki Kisen Kaisha (K-Line) for its involvement in the international shipping cartel in respect of which NYK was fined in 2017.

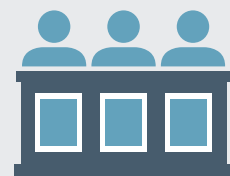
Digital collusion through algorithms, highlighted as a global emerging trend on page 3, is an area of active focus for the ACCC. Rod Sims, in a November 2017 speech, referred to the agency's

initiatives in building up its expertise to analyse algorithms. His line was unambiguous: "In Australia, we take the view that you cannot avoid liability by saying "my robot did it". This is an issue we expect to see under the microscope in 2018.

### Key takeaways



The second highest fine in ACCC history (USD19.9m) was imposed on NYK for collusion on motor vehicle transport.



Criminal cartel cases remain high on the agenda for Australian enforcement activity, bolstered by the addition to the ACCC of a substantial specialist team.

## China

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China's National Development and Reform Commission (NDRC) imposed fines totalling RMB538.6m (USD81m) in 2017, a significant increase from 2016's USD5.3m total. In September, the NDRC issued its largest fine of the year: USD68.9m against 18 poly vinyl chloride (PVC)-manufacturing companies, for manipulating prices.

In August, the NDRC fined 23 Shanxi thermal power generators RMB73.38m (over USD10.9m).

China continues to increase its focus on competition law, in the wake of its promulgation in June 2016 of a Fair Competition Review System (FCRS), intended to ensure that local governments create a level-playing field by curbing anti-competitive policies. In October 2017, China's competition

agencies jointly issued the Implementing Rule of the Fair Competition Review System, which provides guidance regarding the FCRS, including review mechanisms and procedures, review criteria, policy guidance, and supervision and accountability.

## India

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There was an upsurge in cases prosecuted and number of fines imposed by the Competition Commission of India (CCI) in 2017, even though the year saw a steep decline in fine totals compared to 2016. That year, the CCI imposed only a single fine, albeit of a significant amount. This was imposed on 11 cement companies for a total of INR63.2bn

(USD941m). By contrast, in 2017 the CCI closed five cases (in the construction and manufacturing industries) but the overall fine total was only INR2.3bn (USD33.8m).

Activity levels for 2018 are predicted to be higher: the CCI has announced that several other investigations are underway and may well result in an

increase in the number of cases closed. The pharmaceutical industry is an area to watch: the CCI announced in September that it would conduct a study into the domestic pharmaceutical and healthcare sectors, and launched a probe in December against four drug manufacturers over suspected price-fixing involving an anti-diabetic drug.

## Japan

The Japan Fair Trade Commission (JFTC) imposed approximately USD66.2m in fines in 2017, representing a decrease from the previous year's total of USD83.9m. All these fines were imposed in the first half of the year with the largest in the manufacturing industry – accounting for USD56m. Although the second half of the year was quiet, the JFTC did issue advance notice of a USD9.8m fine against NHK Spring, a leading maker of suspension systems for hard drives. We expect that this fine, along with a cease-and-desist order, will be issued formally in the coming months.

2017 was the 70th anniversary of Japan's Antimonopoly Act. To mark this, the JFTC released a report from The Study Group on the Antimonopoly Act (The Study Group) examining the effect of fines as a deterrent to anti-competitive conduct and highlighting an increased need to review the system under which fines are imposed. This is to ensure that the system can adapt to variant economic and social conditions. Based on the recommendations of The Study Group, the JFTC issued a public consultation calling for specific proposals for changes to the existing system.

2017 also saw an increase in international interdependence with Japan entering into cooperation agreements with multiple jurisdictions, such as Mongolia, Canada and Singapore. Japan also completed the first round of negotiations to amend its 2003 cooperation agreement with the European Union.

## South Korea

After earning the first ever “five-star” antitrust rating for an enforcement watchdog in Asia from Global Competition Review in 2016, the Korea Fair Trade Commission (KFTC) saw a significant drop in fine totals from that year (USD764.81m). It nevertheless continued its active enforcement efforts by levying USD172m in cartel fines. The largest fine was for USD61.4m against four construction companies for colluding in sub-base course construction tenders for the railways.

In an initiative led by Chairman Kim Sang-jo, the KFTC also invited public comment on the amended Enforcement Decree of the Fair Trade Act, one purpose of which is to impose additional surcharge penalties for repeat offenders. The KFTC's goal is to strengthen sanctions against repeat offences in order to increase the deterrent effect of fines. To achieve this, the KFTC has increased the limit of additional penalties, based on the time period and number of infringements, from 50% to 100% of a fine.

## Key takeaway



Recidivist cartel offenders face increased penalties in South Korea.



## Other developments

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Cooperation between antitrust authorities and aligned enforcement approaches were key themes of other APAC countries during 2017, evidenced by numerous bilateral agreements and joint competition policy workshops. Instances of activity at national level included:

- The Commission for the Supervision of Business Competition (KPPU) in **Indonesia** continued its focus on the construction and agricultural/food sectors, and announced that these, together with the digital economy, would remain priorities in 2018. As with many other economies, bid-rigging in public procurement is viewed as a particular concern. The highest-profile cartel case during 2017 was in relation to scooters, where KPPU imposed the maximum permissible fine (USD1.78m) on Yamaha Indonesia Motor Manufacturing and another very high fine (USD1.6m) on Astra Honda Motors, for price-fixing. Together, the two entities account for around 90% of Indonesia's motorbike market. So far, the KPPU's decision has been upheld by the courts, although an appeal to Indonesia's Supreme Court is reported to be imminent. Amendments to Indonesia's competition law have been going through the legislative process for some time and have yet to be enacted into legislation. These include the introduction of a leniency programme and the replacement of the current fixed penalty ceiling with a cartel turnover-related percentage of up to 30%.
- The appeal process for competition cases has taken a step forward in **Pakistan**, with the Competition Commission of Pakistan (CCP)'s decisions now being subject to appeal to a specialist tribunal. A significant proportion of the CCP's decisions have been upheld by the tribunal, notably its 2016 decision to fine a national poultry trade association nearly USD1m for price fixing. Pakistan retained its 3-star enforcement authority rating by Global Competition Review, in recognition of its approach to enforcement and advocacy and to improving compliance.
- **New Zealand** enacted new cartel legislation widening the definition of cartel conduct to include output restrictions and market allocation; previously only price fixing was specified. Other amendments include new exceptions for collaborative activity such as joint ventures and strategic alliances, for vertical supply contracts and for certain international liner shipping services, as well as the introduction of a clearance regime. On-going court proceedings in respect of the Commerce Commission's case against a number of real estate agencies and individuals for agreeing to pass on the cost of listing properties to property vendors have resulted in over NZD18.5bn court-imposed penalties. Most recently, the case against two of those agencies and their directors was dismissed by the High Court, but is being appealed by the Commerce Commission.
- In November 2017, the Competition Commission of **Singapore** (CCS) imposed fines totalling USD472,000 on a number of entities for their involvement in bid-rigging in electrical services for the Formula 1 Singapore Grand Prix and asset tagging services for GEMS World Academy (Singapore) tenders. In a further commitment to pursuing an enforcement agenda, the CCS has proposed three changes to the Competition Act 2004, two of which relate to anti-competitive conduct. The CCS wants to make voluntary commitments given for potential infringements legally binding and enforceable in a court of law. It is also proposing to empower itself to conduct general interviews during inspections and searches. The changes are currently out for consultation.

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- Since December 2015, the **Hong Kong** Competition Commission has received more than 2,500 complaints and queries from the public. More than 160 of the complaints were elevated to initial assessments and around 10% of those became full investigations. Those investigations have resulted, so far, in two cases being filed with the Competition Tribunal. One is a bid-rigging case, and the other is a price fixing and market sharing case. Both cases are due to go to trial in 2018.
  - In the **Philippines**, 2017 saw the publication of the Rules of Procedure of the Philippine Competition Commission (PCC). The Rules of Procedure will apply to investigations, hearings, and proceedings of the PCC, apart from matters involving mergers and acquisitions, and will strengthen the PCC's capacity to conduct cartel investigations.
  - **Thailand** adopted amendments to the Trade Competition Act. These give the Competition Commission power, for the first time, to impose administrative penalties for non hard-core cartels/ anti-competitive agreements (up to 10% of turnover in the year of the infringement). The Commission is also now able to request the public prosecutor to take action in respect of hard-core cartels.

## Global cartel practice

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We represent clients in the most high-profile international and national cartel investigations and subsequent litigation. Cartel and other behavioural investigations are often now carried out simultaneously across different jurisdictions and regulators are increasingly coordinating approaches. Sanctions for cartelists at both corporate and individual level are growing in scope and volume. More than ever, any multinational needs to have a cross-border and consistent approach and response

strategy in place to meet the potential risks of public and private enforcement actions.

We have one of the most extensive competition networks in the world, and our integrated teams understand both the technical legal requirements of multiple jurisdictions and the investigative methods used by different regulators. As a result, we are particularly well-placed to provide both co-ordinated cross-jurisdictional and local advice on cartel matters.

We handle all stages of the investigation process, from launch to advising on leniency applications, to appeals of infringement decisions and follow-on damages actions.

Major cases we have advised on include those involving trucks, auto parts, multiple financial instruments (including credit default swaps and foreign exchange), DRAM, speciality chemicals, pre-packaged seafood, and air cargo.

*“stellar cartels track record... , this team has strengths across the world, and is a serious presence before multiple authorities.”*

Global Competition Review 2017

## Key contacts

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**Philip Mansfield**  
Partner – London/Brussels  
Tel +44 20 3088 4414  
philip.mansfield@allenoverly.com



**Jo Dishington**  
Global Antitrust Business  
Development Manager – Brussels  
Tel +32 2780 2395  
jo.dishington@allenoverly.com

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## GLOBAL PRESENCE

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