

ALLEN & OVERY

Global cartel enforcement report

February 2020

Foreword

Antitrust authorities around the world continued to focus on tackling national and international cartels in 2019, with many jurisdictions showing an appreciable upturn in the level of fines compared to those imposed in 2018. The European Commission (EC) once again topped the global leader board, with fines totalling USD1.6 billion (up by 74% from 2018). The U.S., Japan, Germany, Italy and France also saw significant increases in the level of fines imposed in 2018, while a number of authorities with a reputation for aggressive enforcement, including South Korea and Brazil, saw a marked drop in their fine totals.

But behind the numbers sit several major questions, the answers to which may impact international cartel enforcement in the future:

- Will the ever-increasing spread of private damages actions, including a wave of claimant actions in Europe following on from the EC's *Trucks* and *Forex* decisions, ultimately make leniency an unattractive proposition?

To date, leniency remains the key enforcement tool in many jurisdictions. 100% of decisions in the EU, UK and Japan included an immunity/leniency applicant, as did the majority of decisions in Brazil, Spain and Hungary. But notably, immunity/leniency applicants featured in only 13% of decisions in China and 8% of decisions in the U.S.

- Does the broad use of settlement agreements, and the lower fines they deliver, reduce the need for an *ex ante* leniency strategy?

In the EU, Germany, the UK and the U.S., all decisions in 2019 involved settlement, with the EC's approach on the *Forex* cartel signalling a willingness to continue to pursue 'hybrid' settlement decisions in the wake of the *ICAP* and *Pometon* judgments. A notable percentage of decisions in Brazil and South Africa also made use of settlement procedures (88% in Brazil, 80% in South Africa). This has contributed significantly to overall lower fine levels.

- **Will there be a political will to focus in the future more on domestic cartels rather than international cartels?**

As the cycle of large, long-running international investigations in the financial services and automotive sectors continue to wind down, many new investigations are targeting bid-rigging in domestic industries. In 2019, decisions sanctioning bid-rigging accounted for two thirds or more of the overall number of decisions in South Korea, the CEE region and Italy and 46% of decisions in the U.S. With a number of authorities identifying enforcement against bid-rigging as a strategic priority and adding to their enforcement toolkit (including the launch of the inter-agency ‘Procurement Collusion Strike Force’ in the U.S.), domestic cartels are expected to remain an area of focus in 2020.

Irrespective of the answer to each of these questions, one thing is clear: the digital economy will continue to dominate the global antitrust debate. Regulatory scrutiny of the use of artificial intelligence and algorithms in business practices is expected to increase, while antitrust authorities continue to consider whether reform of existing laws is necessary to deal with the challenging issues raised by increasing digitalisation. There are also indications that authorities will be emboldened to investigate novel innovation-based theories of harm, taking their lead from the EC’s investigation into alleged collusion between German car manufacturers to restrict competition in emissions technology. Compliance efforts of companies will, of course, need to adapt and keep pace with these developments, as the focus of authorities increasingly extends beyond traditional ‘high risk’ areas of their business.

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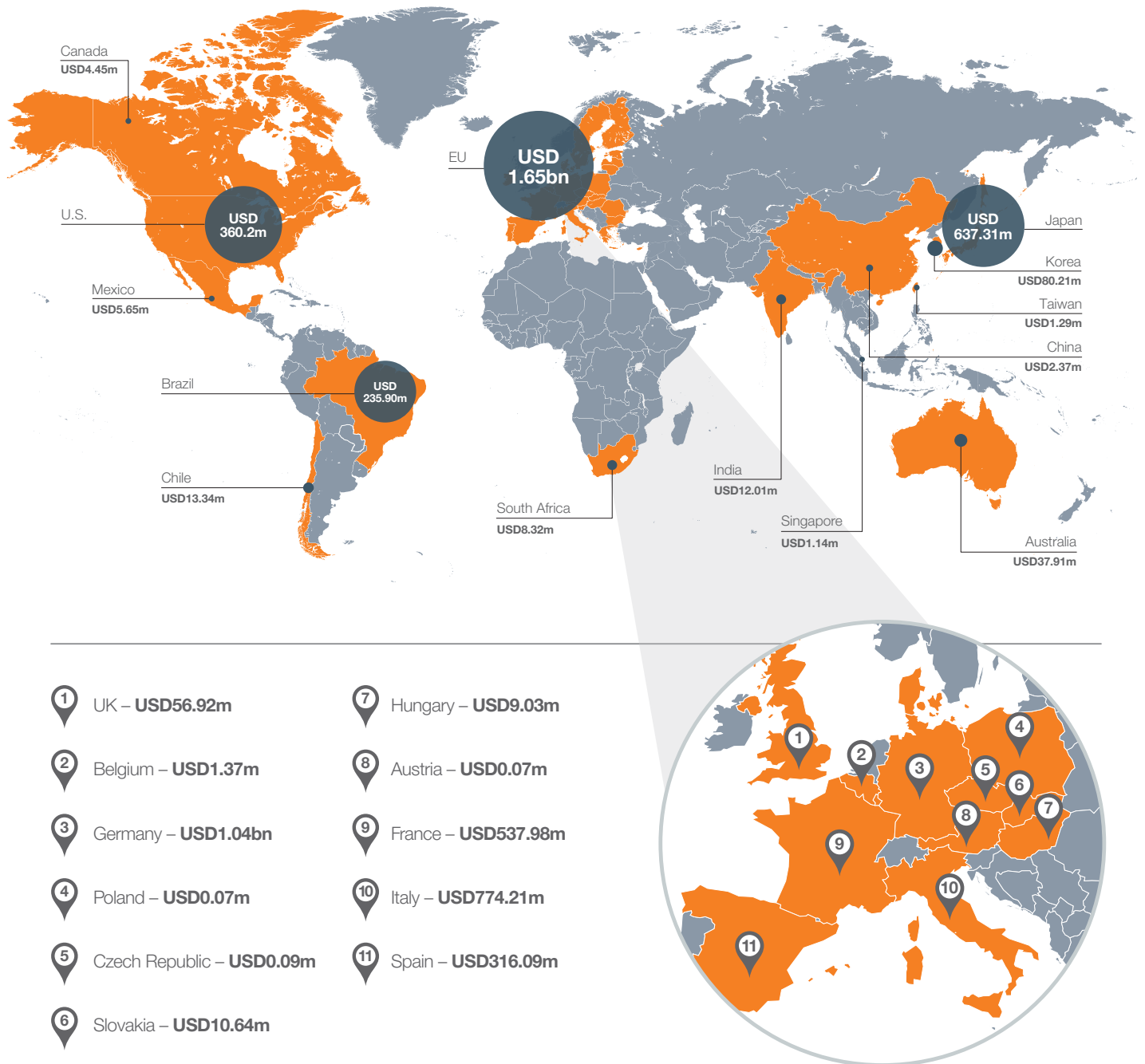


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2019 global cartel fine levels



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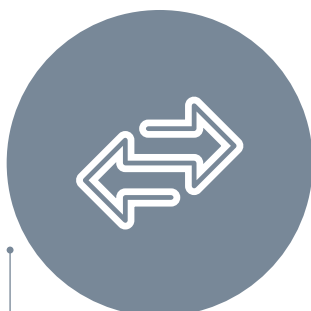
U.S. figures relate to fines imposed at federal level by the DOJ and are for the U.S. fiscal year, which runs from 1 October-30 September. All other countries' statistics relate to the calendar year. Cartel fines in this context mean fines imposed for a breach of Article 101 TFEU or national equivalent (excluding cases that are purely vertical in nature).

Hot topics 2020



DIGITAL, DIGITAL, DIGITAL....

Digital markets and platforms are expected to continue to dominate the antitrust debate in 2020 – particularly in Europe where EU Competition Commissioner Margrethe Vestager's portfolio has been expanded to include both Competition and Digital Markets – as authorities around the world increase their focus on the use of data, AI and algorithms. Discussion as to whether existing antitrust 'tool kits' are sufficient to deal with issues raised by the digital economy, or whether radical reworking or new alternatives are needed, is likely to intensify. Consumer and data protection issues will be a vital part of the debate. Many authorities, including those in Australia, South Korea, Taiwan, France and the UK, are introducing specialist digital units and are harnessing new technologies to improve their detection and investigation capabilities. Compliance initiatives by corporates are already adapting in response.



RISE OF INNOVATION-BASED THEORIES OF HARM

Although 'classic' cartel offences such as bid-rigging, information exchange, price-fixing, and market sharing, remained the primary enforcement focus in 2019, there are indications that in 2020 authorities will be investigating less familiar, and potentially novel, theories of harm. The EC is already looking into alleged co-ordination between German car manufacturers accused of delaying innovation around emissions technologies (sparking a parallel probe in China), which suggests greater scrutiny of industry collaborations on R&D and technical matters in the future. Companies may therefore need to extend their compliance efforts beyond traditional 'high risk' areas to include new strategic risk areas.



PROCEDURAL FINES ON THE INCREASE

Perhaps as a reaction to companies demonstrating less of an appetite to cooperate with cartel investigations – or as a sign of an increasingly aggressive position taken by some regulators in the face of fewer cases – 2019 saw a marked increase in antitrust authorities taking action against companies and individuals for breaching procedural requirements to produce documents or data or co-operate with investigations (eg Colombia, Latvia, the Netherlands, Lithuania, the UK, France and Russia). Some of the fines were significant (eg EUR 1.84 million in the Dutch case) and the Latvian fine was imposed several years after the breach. In Australia, in the on-going BlueScope case, criminal charges have also been brought against an individual for his part in obstructing the ACCC's investigation.



'GOLD STANDARD' COMPLIANCE

Antitrust authorities are now frequently giving greater guidance on what constitutes effective compliance, with the overarching need for robust compliance to be firmly embodied in corporate culture. Certain regimes, such as those in Australia, the UK and the U.S., give credit – in the form of a fixed or percentage reduction in a penalty – to companies with an effective antitrust compliance programme, while some authorities impose a requirement to implement/maintain a compliance programme as part of their sanction (eg Chile). We expect policies of this type will continue to be used by enforcers in 2020 to encourage more widespread compliance efforts.



FACILITATOR LIABILITY

'Facilitators' of cartels remain in the headlines as the European Court of Justice (**ECJ**), in 2019, upheld the General Court's decision to quash on procedural grounds fines imposed by the EC on ICAP in 2017 for its role as a facilitator in the *LIBOR* and *TIBOR* cases (discussed in last year's Report). This does not take away from the fact, however, that agencies will prosecute facilitators, as well as 'participants': in the UK, the energy regulator Ofgem, using its competition enforcement powers, fined a software and consultancy provider for its role in developing and providing software to two rivals allowing them to monitor each other's customer lists. Companies acting as intermediaries need to monitor carefully whether the services they provide could potentially fall foul of antitrust laws, even when they are not active in the markets concerned.



INDIVIDUAL LIABILITY

A number of authorities have declared an intent to increase enforcement against individuals who have been involved in cartel activity. The CMA, for example, has drastically increased the number of actions against directors of companies involved in cartel conduct, securing nine disqualifications in 2019. In Russia, the Federal Anti-Monopoly Service (**FAS**) introduced a draft law which would see criminal liability and custodial sentences imposed for directors and major shareholders of companies found to have engaged in cartel conduct. In 2019, the Canadian Competition Bureau (**CCB**) and the DOJ secured penalties against individuals involved with companies participating in bid-rigging schemes, while in Spain, a judgment of the Supreme Court significantly lowered the legal threshold required to prove a director had been involved in anti-competitive conduct, opening the door to further enforcement. China has also recently proposed draft legislation introducing the possibility of personal liability and criminal sanctions.



INCENTIVISING WHISTLE-BLOWERS

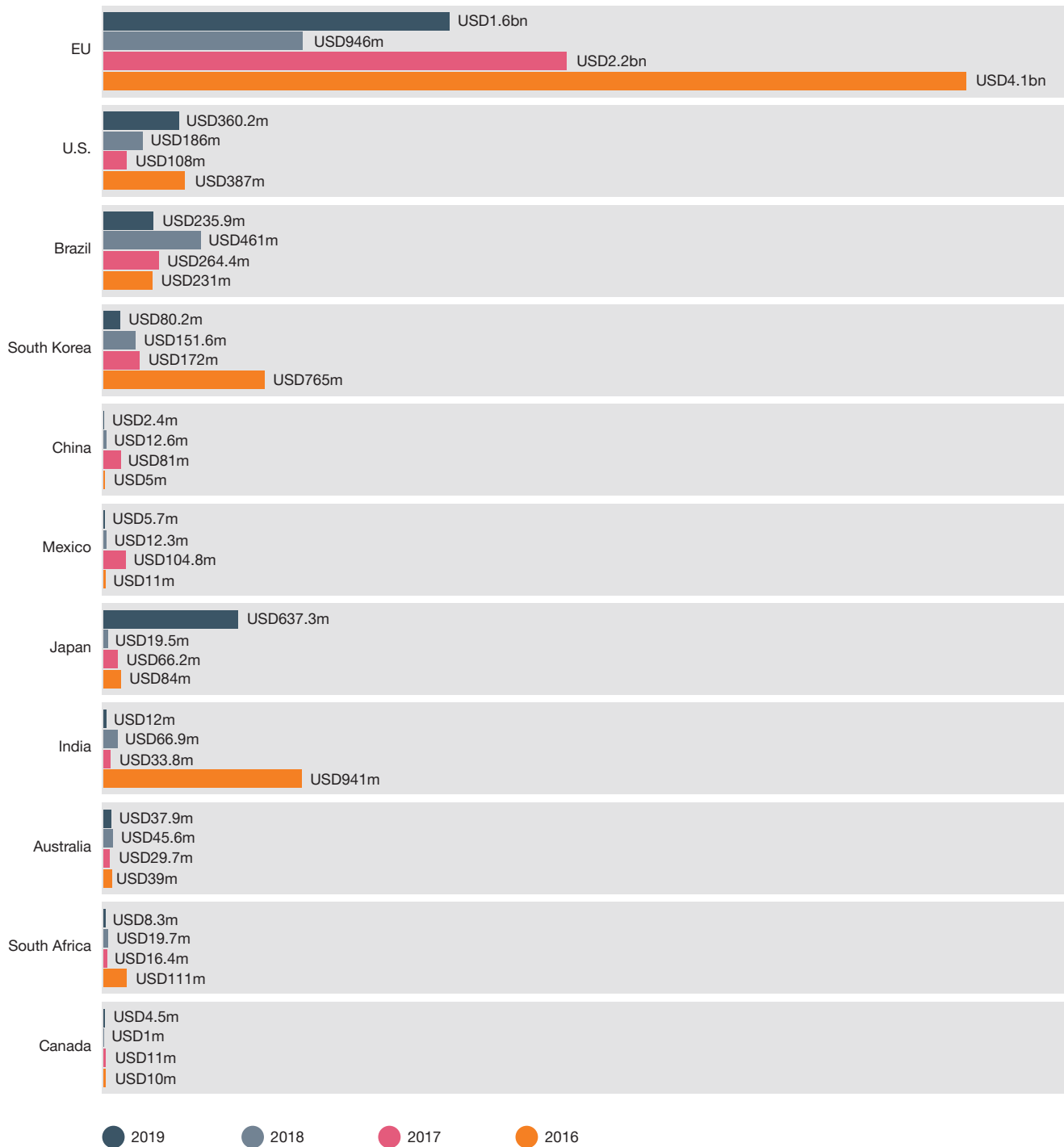
As the rate of leniency applications falls in some jurisdictions, authorities are looking for new ways to sufficiently incentivise the reporting of illegal cartel activity. A whistle-blowing tool for individuals is an increasingly popular option, and is already established in many jurisdictions, including Australia, the EU, Hungary, New Zealand, Poland and the UK. China's State Administration for Market Regulation (**SAMR**) is introducing new whistle-blowing provisions, while the Lithuanian authority introduced a reward-based system, calculated as a percentage of the final fine.



CRACKDOWN ON BID-RIGGING AND PURCHASING ALLIANCES

Enforcers have continued to prosecute bid-rigging across a broad range of sectors. The DOJ launched an inter-agency 'Procurement Collusion Strike Force'; the Spanish authority held for the first time that entities found to be involved in bid-rigging would be automatically banned from participation in public tenders (Korea operates a similar 'points-based' system for repeat offenders); Brazil issued fines of BRL535m (USD136m) in the 'subway cartel' and banned participants from public tenders; and the CMA and the Portuguese authority highlighted the issue as a priority focus area. Numerous publicly announced investigations and dawn raids indicate that cartel enforcement of bid-rigging is likely to remain in the global spotlight in 2020. Enforcement against purchasing alliances also came sharply back into focus in 2019: the EC and the French and Belgian authorities opened probes into purchasing cartels in the retail sector and investigations are on-going in Germany (auto steel), the Netherlands (agriculture), and at the EC level (batteries).

Select cartel fine comparison



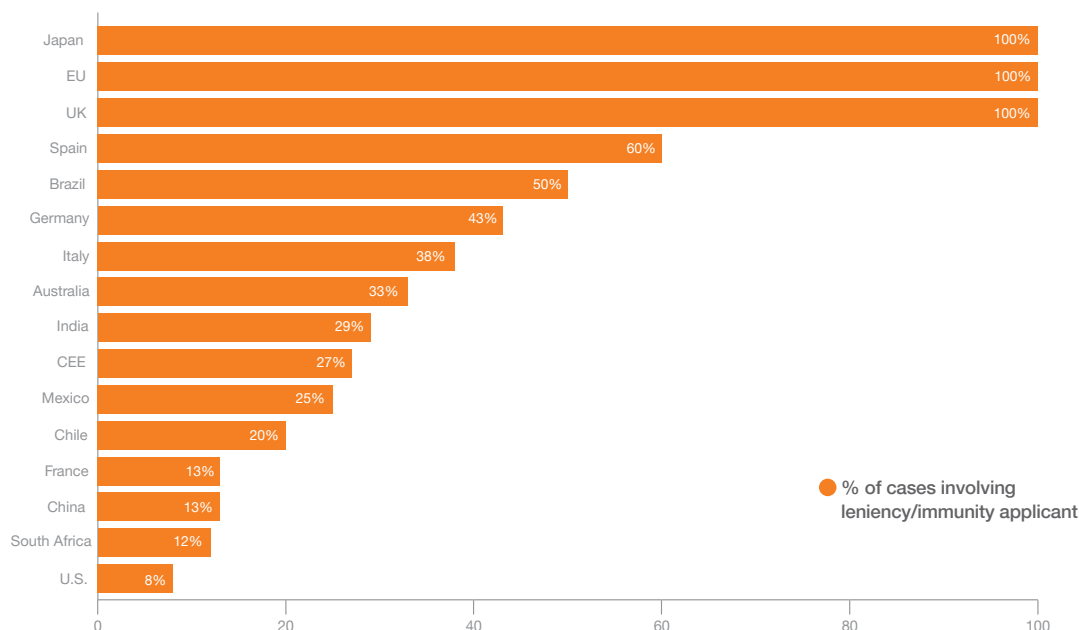
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Other key statistics in 2019

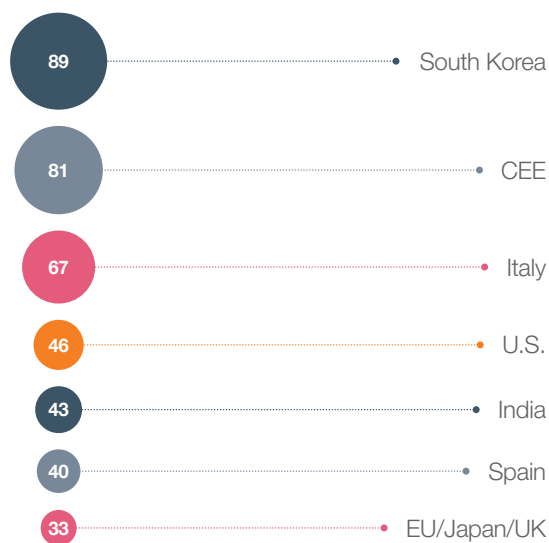
CARTEL DECISIONS INVOLVING AN IMMUNITY/LENIENCY APPLICATION

Selected jurisdictions with three cartel decisions or more

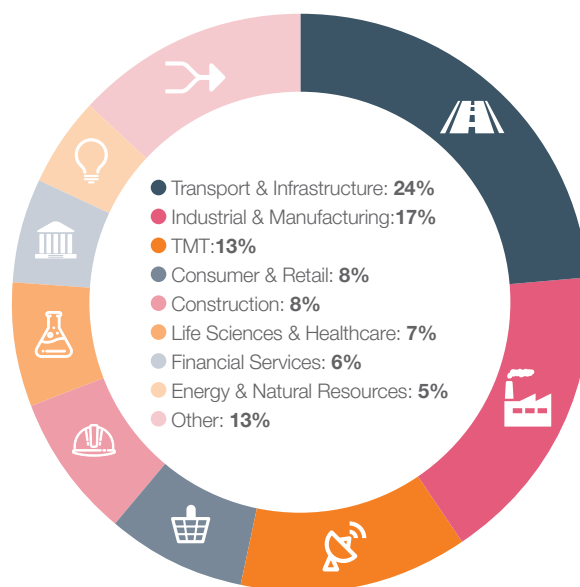


SPOTLIGHT ON BID-RIGGING

Percentage of fining decisions sanctioning bid-rigging conduct



SECTOR FOCUS OF SELECTED ENFORCERS



The EU statistics relate to decisions taken by the EC. CEE includes decisions from the Czech Republic, Hungary, Poland and Slovakia. Statistics relate to the volume of decisions taken.

As at the time of publication, information about some decisions adopted by the authorities above was not available and these decisions have been excluded from statistics. Also excluded are decisions which were overturned by an appellate body in 2019. For the sectoral statistics, the surveyed jurisdictions are: Australia, Austria, Belgium, Brazil, Canada, Chile, China, Czech Republic, EU, France, Germany, Hungary, India, Italy, Japan, Mexico, Poland, Singapore, South Africa, South Korea, Spain, Taiwan, the UK and the U.S.

The digital economy: challenges and opportunities

In April 2019, the EC published a report commissioned from a panel of external experts into ‘Competition Policy in the Digital Age’. Intended as a contribution to the EC’s on-going review of how competition policy can best serve consumers, the report is likely to be influential in shaping the EC’s future enforcement agenda. Recommendations of particular relevance to cartel enforcement included changes to the standard and burden of proof because of the high costs of under-enforcement in the digital era, and further guidance, and potentially a new block exemption regulation, on the conditions under which it is pro-competitive for companies to share or pool data (especially in aggregated form). Commissioner Vestager’s new dual mandate (responsible for shaping the EC’s policy on digital markets and overseeing the competition portfolio) is a clear sign the EC is serious about implementing reform.

The potential for automated collusion, in particular, is firmly on authorities’ radars: the head of the OECD’s competition division, Frédéric Jenny, has issued warnings on the issue, and Commissioner Vestager has made clear that companies cannot use ‘the computer did it’ as a cartel defence.

Whether existing laws enable regulators to deal with the novel issues raised by the digital economy, or whether reform is required, has been vigorously debated. Some commentators call for the creation of new dedicated regimes. For the time being, there is no consistent view on the most appropriate approach, and authorities are expected to continue to scrutinise carefully the use of AI and algorithms in business practice.

Increasingly, enforcers are also using AI to uncover infringements. As last year’s report noted, this may be part of their counter-attack to the continuing decline in leniency applications. And they continue to innovate: deputy head of Russia’s FAS Andrey Tsarikovsky has even trailed the possibility of automated enforcement, handing out decisions in the same way as motoring offences.

Compliance functions of companies are already adapting in response to authorities’ increased use of digital technologies to detect and monitor anti-competitive behaviour, and will need to continue to do so as enforcement practice in this area continues to evolve.

Europe

European Union

In 2019, the EC issued relatively few infringement decisions but nevertheless topped the leader board of the jurisdictions surveyed by total value of fines imposed. Four decisions were issued (the same number as in 2018) with aggregate fine values of EUR1.47bn, compared with EUR801m in 2018. Three decisions related to the financial services and automotive sectors, long-time targets of the EC's enforcement activity, while the fourth involved canned vegetables, imposing a fine of EUR31.7m. All cases involved settlements, either by all or the majority of participants, and the investigations were initiated by an immunity applicant.

The lion's share of the 2019 fine total related to the EC's decisions in the *Forex* cartel, where five financial institutions were fined just over EUR1bn in two decisions issued on the same day for their role in exchanging commercially sensitive information in the Spot Foreign Exchange market for a number of currencies. This was the EC's fifth-highest fine to date. One bank escaped a fine by blowing the whistle in exchange for immunity. Nearly all of the other banks received reductions in fines for cooperating with the EC under the leniency procedure, on top of the 10% discounts for settling the case.

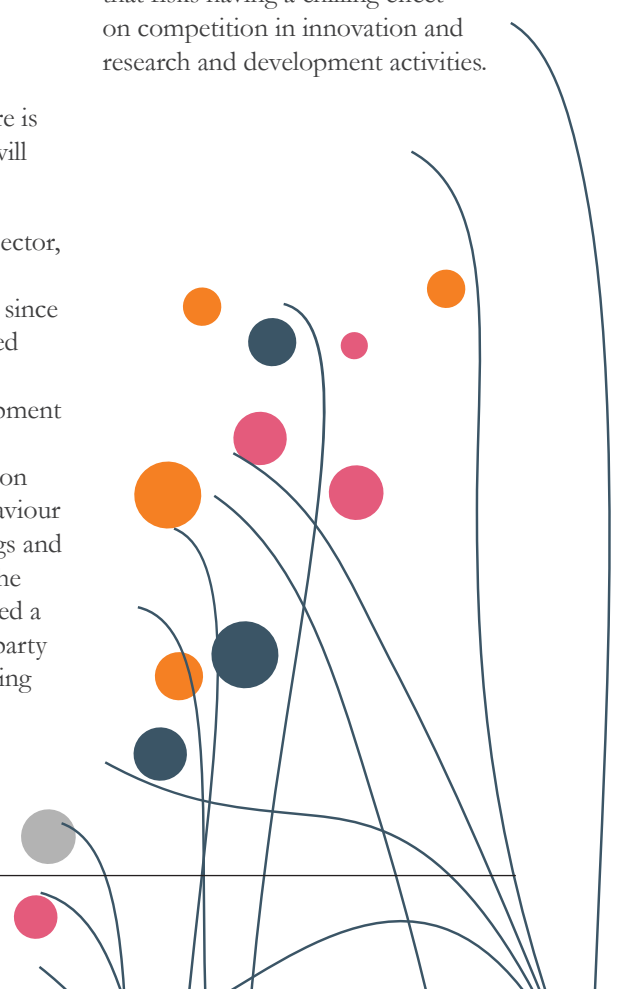
According to public sources, one bank refused to settle and continues to be investigated. The EC's willingness to continue to pursue 'hybrid' settlement

cases suggests that it does not feel constrained by the General Court judgment in the *ICAP* case, and that it is able to respect the rights of defence and presumption of innocence of parties that elect not to settle. The *Forex* decision has also sparked a wave of damages claims before the UK courts, including an 'opt-out' class action claim, brought by the former chair of the UK's pension regulator, Michael O'Higgins.

The *Forex* decision brings total fines imposed by the EC in the financial sector to over EUR3bn. With two further pipeline cases involving secondary market trading in U.S. Dollar supra-sovereign, sovereign and agency bonds (Statement of Objections (**SO**) issued in December 2018) and European government bonds (SO issued in January 2019), there is no indication that the spotlight will yet move off the banks.

In a decision in the automotive sector, bringing the total value of fines imposed by the EC in the sector since 2013 to EUR2.15bn, the EC fined two companies EUR368m for participation in a car safety equipment cartel involving the exchange of commercially sensitive information and coordination of market behaviour for the supply of seatbelts, airbags and steering wheels. Again, each of the parties chose to settle and received a 10% fine reduction in fine; one party received full immunity for revealing the existence of the cartel.

While all four decisions in 2019 involved 'classic' cartel activity (price-fixing, market sharing, information exchange and bid-rigging), the SO issued by the EC in April to three German car manufacturers illustrates the EC's willingness to pursue more novel theories of harm. The EC alleges that the car manufacturers colluded to limit technical development, and in particular to restrict competition in innovation for two emission cleaning systems (which, according to the EC, denied consumers the opportunity to buy less polluting cars). The case is part of a wider enforcement trend of antitrust authorities taking action against industry collaborations that risks having a chilling effect on competition in innovation and research and development activities.



Other notable developments include:

Consultation on the horizontal block exemptions and guidelines:

As part of its initiative to 'keep the rulebook up-to-date', two important Regulations exempting from the rules on anti-competitive conduct qualifying research and development agreements and specialisation agreements, and accompanying guidelines, are being updated. The Regulations are due to expire at the end of 2022. Also subject to review will be the EC's guidance on defining product and geographic markets.

Widening the scope for claimants in private damages:

The EC has recently sought to encourage parties suffering loss as a result of cartel activity to bring actions for damages against cartel participants, in particular through the EU Damages Directive. Generally, claims brought to date have been by customers of cartellists. However, the ECJ's December 2019 judgment in the *Austrian Elevators* case has opened up the potential for cartel compensation pay-outs to non-market participants.

The case involved an Austrian province which alleged that increased elevator prices paid by construction companies as a result of a cartel in the sector led it to grant higher subsidies (in the form of promotional loans) than it would have done absent the cartel. The ECJ has ruled that there is nothing under EU law to prevent the province's claim being brought (citing its own, earlier *Kone* judgment: *'for the purposes of guaranteeing the effectiveness of EU law... national legislation must recognise the right of any individual to claim compensation for the loss sustained'*), and the case has now gone back to the Austrian courts to determine causality under domestic law.

Syndicated lending report:

In April 2019, the EC published its long-awaited report on EU loan syndication, commissioned to assess whether the loan syndication market was working effectively and to identify potential antitrust concerns. Based upon interviews with over 100 industry participants across six Member States and focusing on two specific syndicated lending

segments (leveraged buy-outs and project/infrastructure finance), the report highlights the potential antitrust risks in the industry. These include lenders' use of 'market sounding'; transparency resulting from continued interaction between industry participants over time; restrictions requiring borrowers to procure ancillary services (such as hedging) from syndicate members; conflicts of interest where lenders simultaneously act as debt advisors; and possible coordination among lenders in the event of refinancing faced with borrower default.

Safeguards recommended for lenders include the improvement of staff training and internal policies; putting in place internal protocols for information-sharing between different functions and limitations on the cross-selling of ancillary services. Whether any enforcement action from the EC will follow from the report's findings is as yet unclear.

Second term for Commissioner Vestager

On 1 December 2019, Margrethe Vestager took office for a second term as Competition Commissioner in President Ursula von der Leyen's new Commission. A second term is unprecedented for a Competition Commissioner and it means that, by the end of her mandate in 2025, Vestager will have had the chance to shape a decade of EU antitrust policy.

Commissioner Vestager was formally sworn in as one of three Executive Vice-Presidents with the mandate of overseeing 'A Europe Fit for the Digital Age'. Her role now covers not only the antitrust brief but also co-ordination of EC policy across the whole digital economy. Commenting on the challenge of being both the policy maker for shaping the new economy, and its enforcer, Commissioner Vestager is confident:

"I see no trade-offs between the two legs of my portfolio, but rather synergies: it will allow me to use the insights and general market knowledge acquired under the competition portfolio when designing regulatory initiatives in digital matters."

Commissioner Vestager's willingness to challenge tech giants and major multinationals is likely to continue with vigour: she has stated that she will be bolder in the next five years than she was in the first five. In relation to cartels specifically, enforcement remains a priority and various initiatives have been floated to increase cartel detection, against the backdrop of a general decline in leniency applications, including the creation of an information sharing network comprising enforcers, police services and antitrust officials

and the introduction of a dedicated market surveillance unit.

Sector inquiries are expected to be an early feature of Commissioner Vestager's mandate; they were specifically called for, for new and emerging markets, in her 'mission letter' from President von der Leyen. The findings of such inquiries could well lead to increased enforcement against anti-competitive conduct in the related sectors, as happened, for example, following the pharmaceutical and e-commerce sector inquiries. Speeding up of investigations and improved cooperation with and between national antitrust authorities at both European and global levels are also likely to be high on the Vestager agenda.

What is a 'by object' infringement? (AG opinion in *Budapest Bank*)

In October 2019, Advocate General (AG) Bobek issued his opinion in the *Budapest Bank* case. While not binding on the ECJ, and arguably not breaking new ground, his views on how to assess whether an antitrust infringement is restrictive 'by object' within the meaning of the EC cartel rules usefully tie together loose strands from previous case law. A 'by object' infringement effectively allows an authority to bypass the need to prove that an agreement between competitors actually had anti-competitive effects. Historically, the European courts have

interpreted the concept narrowly, but there has been uncertainty over its precise scope.

The AG proposes a two-step test: (1) can the infringement fall within a category of infringements which, based on robust case law and practice, is highly likely to be restrictive of competition; and (2) if so, has a 'basic reality check' been performed, taking into account the infringement's legal and economic context (eg can the parties give a reasonable, not implausible, explanation of their conduct).

Or, in the AG's words, "*if it looks like a fish and it smells like a fish, one can assume that it is a fish. Unless, at the first sight, there is something rather odd about this particular fish such as that it has no fins, it floats in the air, or it smells like a lily, no detailed dissection of that fish is necessary in order to qualify it as such. If, however, there is something out of the ordinary about the fish in question, it may still be classified as a fish, but only after a detailed examination of the creature in question*".

EU Member States

At the beginning of 2019, the EU adopted the ECN+ Directive, targeted at harmonising the outcomes of antitrust proceedings by ensuring that Member States have appropriate enforcement tools (eg powers to conduct dawn raids and collect information from companies) and to bring about a level playing field. Largely motivated by a desire to bolster enforcement amongst regimes which have been historically less active in pursuing cartel behaviour, it is still too soon to tell whether it will have the intended effect, given that the period for transposition into national law runs until 4 February 2021.

Nonetheless, cartel enforcement continued apace across Europe. Jurisdictions such as France, Germany and Italy retained their reputation as active enforcers, and Spain had a particularly busy 2019. Despite not being one of the jurisdictions surveyed for this report, Portugal twice broke its fining record in 2019: first, with fines of over EUR54m on insurance companies and executives and a month later, in September, fining 14 banks EUR225m for information exchange in relation to the supply of retail credit products. In the CEE, bid-rigging investigations topped the enforcement agenda. Several dawn raids and on-going investigations throughout the bloc indicate a strong pipeline of cases for 2020.

Austria

With thanks to Christine Dietz and Isabelle Innerhofer of Binder Grösswang.

In 2019, the Austrian Cartel Court (**ACC**) imposed fines totalling EUR1.76m (in 2018: EUR2.38m). However, the major share of the 2019 fines related to vertical infringements, such as resale price maintenance (three decisions with fines totalling EUR1.24m).

Over the past few years, the principal focus of the Austrian Federal Competition Authority (**AFCA**) has been the construction industry, digital markets, and the healthcare sector. The largest cartel investigations in the history of the AFCA to date concern alleged bid-rigging in the Austrian construction sector. The investigations were initiated in Spring 2017, and the AFCA is expected to apply for fines in 2020. In the digital sphere, in 2019 the AFCA began investigations against two major technology companies, which ultimately led the companies to amend their terms and conditions. In November, the authority announced increased cooperation with the Austrian Regulatory Authority for Broadcasting and Telecommunications (**RTR**), in particular with regard to the RTR's development of a monitoring system for digital platforms. The system covers the most important digital communications platforms used in Austria as well as platforms that influence how the internet is being used generally (including voice and messaging apps, voice assistants, operating stores, and app stores or browsers), and assesses their impact on competition.

The food industry and the energy market are also attracting the attention of enforcers in Austria. Two proceedings against the Austrian sales subsidiary of international food company Mondelez, in relation to alleged anti-competitive pricing and territorial restrictions, are currently pending before the ACC. An investigation in the energy sector may well be in the pipeline, following AFCA dawn raids at premises of several companies in the Austrian market for energy metering and consumption recording. The AFCA is also looking at the online automatic pool cleaning equipment sector (which has been the subject of previous Austrian investigations and proceedings), and in 2019 it requested the French Competition Authority (**FCA**) to carry out dawn raids in France concerning potential vertical restraints. Other sectors likely to be in the spotlight in 2020 are rental cars and taxis and the funeral market.

Belgium

In 2019, the Belgian Competition Authority (**BCA**) imposed two fines on the Belgian pharmacists association of EUR1m and EUR0.23m respectively. The first decision concerned restrictive practices aimed at foreclosing the MediCare-Market group from the market and/or hindering the development of its innovative business model. On the appeal of the BCA's decision, the Market Court ruled that the fine should not exceed 10% of the association's annual turnover. As a result, the BCA will need to adopt a new decision revising the fine.

The second decision was a settlement decision and concerned restrictions imposed by the association on certain types of offline and online advertisement by pharmacists in Belgium. The two decisions are part of a long line of BCA decisions targeting restrictive practices imposed by professional associations.

A further fine imposed by the BCA in 2019 related to vertical price-fixing. HM Products Benelux NV was fined EUR0.1m for fixing the resale prices of infrared cabins. The decision (which was a settlement decision) confirms the BCA's renewed focus on vertical restrictive practices.

The BCA confirmed that it carried out two dawn raids in 2019: in May, in the retail distribution sector involving members of a purchasing alliance, and in October, in the pharmaceutical sector, a sector which clearly continues to be on its radar. According to a BCA press release, this second investigation relates to practices that allegedly hinder the access to or expansion on the Belgian market of biosimilar drugs. Further information regarding the investigations, or whether additional dawn raids were carried out in 2019, is not yet available.

Two regulatory developments in Belgium merit attention. Firstly, the new Belgian Competition Act, which entered into force in June 2019, increases the maximum amount of fines to 10% of worldwide turnover (it previously was 10% of turnover from both domestic and export sales) and amends, and to some extent

expands, the scope of individual liability for hard-core cartels. Secondly, in October the BCA published guidance on information exchange in the context of trade associations, covering the collection and publication of market overviews, price comparison websites, information on expected market developments, and formula for cost calculations and price composition.

France

In 2019, the FCA issued eight cartel decisions, with fines totalling EUR480.5m. This amount exceeds the amount in each of the last three years (which ranged from EUR200m to EUR300m), but is still less than the FCA's high-water mark of EUR1bn in 2015.

Of the eight infringement decisions, two related to market sharing agreements (EUR5.5m), two to price-fixing agreements (EUR1.7m), two involved the imposition of discriminatory conditions for membership of a collective body (EUR0.2m) and two concerned hybrid agreements, i.e. agreements covering various anti-competitive practices (the first involved price-fixing and market sharing as well as general information exchange, resulting in a EUR58.3m fine; and the second involved discriminatory conditions for membership of a professional organisation, an agreement not to innovate, and general information exchange, resulting in a EUR414.7m fine).

As in 2018, there was increasing use of settlement proceedings, with four cases settled in 2019. On the other hand, only one investigation (relating to a cartel between fruit-compote manufacturers) involved a leniency application.

In the digital sector, the FCA's cartel enforcement activity is likely to be bolstered in the year ahead by the creation, as of January 2020, of a digital economy unit, tasked with developing in-depth expertise in all digital areas and cooperating in the investigation of anti-competitive practices in the digital economy. The FCA also announced in its priorities for 2020 the publication of a study on the compliance of trade associations and unions with antitrust rules, ahead of the entry into force of the ECN+ Directive which will lead to associations, unions and professional bodies being subject to heavier penalties.

Germany

Continuing where it left off in 2018, the Federal Cartel Office (**FCO**) imposed fines totalling EUR925m in 2019. This includes the FCO's highest fine ever – a fine of EUR646m imposed for a cartel in the steel sector (the sector also being subject to the highest fines in 2018). The FCO's other decisions in 2019 related to plant protection products wholesaling, bicycles wholesaling and the embossing of licence plates.

The three major authorities dealing with cartel cases were unusually divided in 2019. The Federal Supreme Court overturned three decisions by the Düsseldorf Court of Appeal (liquid gas, coffee and candy cases). The Düsseldorf Court of Appeal, for its part, refused to apply the legal standard established by the Federal Supreme Court (in the railway cartel damages case). The Düsseldorf Court of Appeal also overturned the FCO's Facebook decision (which, while not a cartel case, points to the differences in approach by the key cartel authorities).

In another development, the German business and antitrust community has been voicing growing concerns over the lack of effective judicial review of cartel fines. In recent years, the Düsseldorf Court of Appeal has consistently increased cartel fines upon appeal. As a result, fewer appeals are lodged by cartelists and companies prefer to settle cases with the FCO. The most noteworthy case in this regard in 2019 concerned the beer cartel where the FCO had imposed a fine of EUR62m on Carlsberg. Upon Carlsberg's appeal, the state prosecutor before the Düsseldorf Court of Appeal asked for an increase of the fine to EUR250m.

Ultimately, Carlsberg prevailed on procedural grounds, as the statute of limitations had expired, but the case is now at Federal Supreme Court level and it remains to be seen how that court will rule. The underlying issue nevertheless remains and the legislator is considering amending the law to ease concerns.

Italy

The Italian Competition Authority (**ICA**) imposed fines of EUR691m in eight separate decisions (the authority elected to impose no fine in one decision). The total was bolstered by two separate cases, in the corrugated cardboard and facility management sectors, where the authority fined, respectively, 43 parties an aggregate amount of EUR287m and 22 separate parties an aggregate amount of EUR234m. Both cases are currently on appeal. Bid-rigging was an element in six of the eight cases, including the facility management case, highlighting the ICA's continued focus on such conduct.

2019 also saw an unusually high number of cases involving a leniency applicant (three), with several other on-going cases having also been instigated by a leniency application. It is difficult to explain what may have caused this, especially as follow-on damages have been headline news in Italy this year: in the wake of the ICA's cartel decision in the International Football TV Rights case, three Italian clubs filed damages actions for approximately EUR500m, with the result that total liability for the defendants in the case could reach EUR3bn (with the remaining amount likely to be claimed by Lega Serie A on behalf of the remaining clubs).

Netherlands

While the Dutch antitrust authority (**ACM**) issued no decisions in 2019, it did impose the highest stand-alone fine in its history for non-co-operation or obstruction during an investigation. The unidentified company was fined EUR1.84m because employees under investigation left WhatsApp groups and deleted online chats while the ACM raid was on-going. The fine was subject to a 20% reduction for the company's co-operation, but is nonetheless intended to send a clear message that the ACM will take vigorous action against cartel infringements and breaches of the procedural rules.

Spain

The five decisions taken by the Spanish Competition Authority (**CNMC**) in 2019 was in line with previous years (six decisions in 2018). However, the total amount of fines imposed (EUR282m) has more than doubled from 2018 (EUR118.4m). The increase is attributable to the size of the companies fined, particularly those in the decisions involving the railway electrification and dairy sectors, which represented around 70% of the total amount of fines imposed by the CNMC.

Following the trend of past years, cartel cases dealing with market-sharing agreements (including bid-rigging) have been priority areas for the CNMC. Four out of the five 2019 cases fell within this category. In a first, the CNMC has found that findings of cartel infringement could automatically result in the companies involved being debarred from participation in future public procurement procedures,

referring three cases to the Spanish Public Procurement Board to decide the scope and duration of the ban.

2019 also confirmed the CNMC's readiness to fine directors for corporate cartel infringements. A recent judgment by the Spanish Supreme Court has significantly reduced the level of director involvement required to establish individual liability.

Over half of the cases decided by the CNMC in 2019 involved a leniency application. It remains to be seen whether this is a one-off or whether it heralds a revival of the use of leniency applications in Spain.

UK

The CMA issued three cartel infringement decisions in 2019 (compared to one in 2018), relating to cover bidding in the office fit-out sector, price-fixing and market sharing in the precast concrete drainage industry and price-fixing in the estate agency sector. The total amount of fines imposed (GBP44.6m) marks a significant increase on the 2018 amount (GBP3.4m).

The CMA also issued SOs in seven cases involving suspected cartel activity. Five of these relate to the

pharmaceutical sector, where the CMA continues to be highly active. It also has a number of on-going cases related to alleged excessive pricing and other abusive conduct.

The sector regulators were also active in 2019. We saw the first fine imposed by the UK's financial sector regulator, the Financial Conduct Authority, using its competition powers. Three asset management firms were fined around GBP0.4m for exchanging strategic information. The energy regulator Ofgem also (unusually) exercised its powers as a competition regulator, imposing fines of around GBP0.9m on two energy suppliers for agreeing not to poach each other's customers, as well as on the consultancy firm which facilitated the conduct by designing, implementing and maintaining the software which allowed them to do so. In targeting the facilitator, Ofgem noted that it was aware of the suppliers' conduct and anti-competitive intent.

A particular area of focus for the CMA has been the deterrence of bid-rigging of public contracts: its efforts have included a free screening tool to enable public sector procurers to review their tender data for signs of illegal activity. It has also taken steps to make reporting cartels easier, through its

#stopcartels campaign and has reported a rise in tip-offs of over 30%. Whistle-blowers in the UK can receive financial rewards of up to GBP100,000 for providing information on a cartel. In 2019, CMA Chair Lord Tyrie called publicly for an increase in the reward, citing the need for it to be "*commensurate with the financial impact, the loss of career prospects, and the distress*" for whistle-blowers.

In the digital sphere, the CMA has published a document setting out its digital markets strategy, following on from a series of independent reports commissioned into the sector, including the Furman Report in March. Amongst other recommendations, the report noted the importance of the CMA monitoring the development of AI and machine learning tools to guard against potential harm to consumers (something which the newly established, Data Technology and Analytics (DaTA) unit has been developing its competence in).

After several delayed starts, Brexit took place on 31 January 2020, with a transition period currently scheduled to last until the end of 2020. During that period it is broadly 'business as usual': the EC's role is unchanged and the CMA will continue to apply UK law in accordance with the EU

Individual liability in the UK: Directors disqualification

A notable trend in UK antitrust enforcement this year has been the increase in enforcement action taken against individuals. Directors of companies found to have infringed competition law have in particular been targeted. In 2019, the CMA announced nine director disqualifications – up from only three in total since it obtained its powers in 2003. Lengths of

disqualification have ranged from 1.5 to 7.5 years – well short of the 15 year maximum, but by no means insignificant. The CMA's director of cartels and competition reportedly expects the number of director disqualifications to double in the next 12 months, with a focus on 'more prominent' directors and larger companies. Alongside its power to seek

disqualification orders, the CMA has the possibility to pursue criminal proceedings against individuals, although to date enforcement has been low and, as reported last year, the CMA has advocated the divestment of its powers to the Serious Fraud Office, an agency it feels is more suited to the task.

cartel rules. There remains, nevertheless, the possibility that alleged cartel infringement is reviewed by both regimes, and that parties will have to deal with two sets of investigations in tandem. For example, if the EC has opened formal proceedings before 31 December 2020, although it will in principle retain the handling of those proceedings, in some circumstances (eg on-going conduct affecting trade in the UK), the UK authorities could have jurisdiction over the UK-related elements. After the transition period, the CMA expects an additional five to seven complex antitrust (ie not purely cartel) cases a year.

CEE Region

Bid-rigging remained a key focus area for antitrust authorities in the CEE. All of the 2019 cartel decisions by the Polish authority (**PCA**) (five), the Czech authority (**CCA**) (three) and the Slovak authority (two) related to collusive practices in procurement tenders. Bid-rigging was also a feature of several decisions in Hungary, one of which resulted in the imposition of fines on several solar power firms for collusive tenders in relation to a government programme. The technology sector (production of electronic equipment, software supply and technical support) and the transport sector (transport of disabled children, domestic market for road freight transport) were among the principal sectors investigated for bid-rigging in Poland, while in the Czech Republic the healthcare and construction sectors also attracted attention.

In terms of detecting potential cartel behaviour, CEE authorities relied heavily on dawn raids, conducting numerous inspections across a range of sectors including automotive, cosmetics and informatics. Like other regulators across the world, CEE authorities have been using a range of tools to strengthen their detection and enforcement capabilities. In Hungary, all of the authority's 2019 cartel decisions involved at least one successful leniency applicant. The Hungarian Authority (**HCA**) also ramped up the use of penalty discounts to encourage the implementation of compliance programmes. In half of its cartel decisions, it granted a fine reduction after the parties agreed commitments to introduce or improve compliance programmes. Poland is actively promoting its *Signalista* programme, which allows whistle-blowers to anonymously submit information about anti-competitive practices, and the Czech authority is reportedly working on a software tool to detect bid-rigging.

Withstanding judicial review has often been challenging for CEE authorities. After defeats for the HCA in cartel cases in court in 2018, it achieved a more balanced record in 2019. Critically, it received support in an important Constitutional Court ruling for its use of protected witnesses in cartel cases. The Constitutional Court confirmed that the parties' right of defence is not affected even if they do not have direct access to, and cannot directly ask questions of, protected witnesses (eg through a distorted video link). In Poland, a decision which fined two transport consortium

members PLN0.2m (around EUR0.04m – the largest fine imposed by the PCA in 2019) for attempting to nullify a tender in order to remain the sole service providers is currently under appeal, and the CCA saw the largest fine imposed by it in 2019 reduced on appeal from around EUR0.07m to around EUR0.04m.

Russia

Cartel enforcement remains a priority for the FAS as well as for the Russian government. The FAS has consistently pointed to the harm cartel agreements pose for the Russian economy in terms of adversely affecting the quality of goods produced and leading to artificial price increases. In 2019, the government estimated the resulting damage to the economy could be in the region of 1.5% of GDP, and adopted, in June, a 2019-2023 anti-cartel roadmap.

Against this backdrop, the FAS has put forward draft legislation which increases the sanctions available for cartel agreements (the **Draft Law**). The Draft Law, which the FAS has been working on for around two years, introduces criminal liability for bid-rigging for major shareholders and directors with the possibility of a prison sentence of up to six years, and establishes a register of cartelists which are banned from participation in public tenders. It also provides for the automatic doubling of fines for recidivists, and facilitates coordination and information flow between the FAS and criminal investigative authorities. The Draft Law has been submitted to the government and will also have to pass through the Russian Parliament before it becomes law.

According to public sources, the number of cartel investigations handled by the FAS this year is significant, with no decrease in sight. While at the date of publication the FAS had not issued its full official enforcement statistics, 2019 cases included bid-rigging investigations of four medical product suppliers for participating in rigging tenders in 31 separate electronic auctions (aggregate fine of RUB115m or USD1.8m; the

companies' top executives were also found liable), and two private companies, as well as the Ministry of Construction and a regional Housing and Utilities department in relation to a road construction project in the Astrakhan region (the two private companies were fined an aggregate amount of RUB86m (USD1.3m)). A further case involved an aggregate fine of RUB283.5m (USD4.4m) against two private companies for participating

in a price-fixing cartel, and bribing the staff of medical facilities.

On the global stage, the FAS continues to be an active member of the International Competition Network, including the Cartel Working Group, which is prioritising action against digital cartels and conducting research and studies on the impact digitalisation has on detecting and sanctioning cartels.

Americas

United States

The beginning of the DOJ's fiscal year in October 2019 signalled a year of change in both the statistical trends and the policies underlying the DOJ's criminal enforcement. The DOJ saw a turn in the tide in the amount of corporate criminal fines imposed, which had been on the decline in the latter half of this decade. In FY2019, the DOJ imposed corporate fines on 13 entities amounting to USD360.2m (approximately double FY2018's figure of USD186m and FY2017's figure of USD171m). This year's total is the highest since FY2016, when fines totalled USD387m, but still remains well below the fine levels earlier in the decade.

Notable fines in FY2019 included the USD100m fine (the statutory maximum) imposed on StarKist Co., for its participation in the conspiracy to fix prices of canned tuna, and fines imposed on five South Korean companies for their participation in a bid-rigging and price-fixing conspiracy involving government contracts to supply fuel to U.S. military bases in Korea. In relation to the latter, seven individuals were also indicted, and one executive charged with obstruction of justice. In total, the companies agreed to pay USD156m in criminal fines and more than USD205m in separate civil settlements. The civil recoveries are the largest the DOJ's Antitrust Division (**Division**) has obtained under Section 4A of the Clayton Act, which permits the U.S. to obtain treble damages when it is the victim of an antitrust violation.

Partially in response to the South Korean case, the DOJ announced the formation of a Procurement Collusion

Strike Force (**PCSF**) on 5 November. The PCSF is an inter-agency organisation charged with deterring, detecting, investigating, and prosecuting antitrust crimes such as bid-rigging conspiracies and related schemes in government procurement, grant, and programme funding. In April, the Division also secured its first plea agreement in an investigation into bid-rigging at online auctions for surplus government equipment. With the formation of the PCSF and the Division's successes in 2019, we expect the spotlight on government procurement to continue in 2020.

2019 also saw significant changes to leniency policy. Under the new policy, the DOJ will take into account the existence and adequacy of a company's compliance programme at the charging stage in criminal antitrust investigations and consider proceeding by way of a deferred prosecution agreement (**DPA**) against companies which have robust antitrust compliance programmes but are not eligible for leniency. The DOJ has published public guidance on the application of this new policy, and revised the Division Manual to reflect the announced change.

The Division has also been quick to implement this change in policy in its enforcement. On 31 May 2019, the Division entered into a DPA with Heritage Pharmaceuticals Inc., which was charged with conspiracy to fix prices, rig bids, and allocate customers with its competitors for a diabetes medication. The agreement specifically identified the company's

"substantial and ongoing cooperation..., including its disclosure of information regarding criminal antitrust violations involving drugs other than those identified in the criminal charge and the agreement." Other relevant factors included Heritage agreeing to resolve all civil claims relating to its conduct in connection with federal health programmes, and the likely consequences, including to U.S. consumers, of Heritage being mandatorily excluded from health programmes in the event of a conviction. Under the terms of the agreement, Heritage agreed to pay USD0.23m in criminal fines, and the U.S. agreed to defer prosecution for a period of three years to allow Heritage to comply with the agreement's terms. (Heritage agreed to pay USD7.1m in a separate civil settlement.)

Similarly, on 3 December, the Division announced another DPA with Rising Pharmaceuticals Inc., which was charged with conspiracy to fix prices and allocate customers for a hypertension medication. Rising agreed to pay USD1.5m in monetary fines (reduced from USD3.6m because of the company's bankruptcy proceedings), and the government agreed to defer prosecution for three years or until Rising's on-going bankruptcy proceedings became final, whichever came first. In this case too, the agreement specifically identified Rising's co-operation including its disclosure of criminal antitrust violations involving other drugs. Other relevant factors included Rising's agreement to pay restitution, and the fact that conviction would cause significant delay to its bankruptcy and liquidation.

Brazil

With thanks to Marcelo Calliari and Raquel Souza Jorge of TozziniFreire Advogados.

In 2019, the total amount of fines imposed by the Administrative Council for Economic Defense (CADE), decreased by around 50%, with a total of BRL930m (USD235.9m), compared to USD461m in 2018. The lower total was expected, given that the 2018 total was heavily inflated by the series of settlements reached in the context of the ‘Operation Car Wash’ Petrobras investigations.

CADE’s enforcement activity was affected to some extent by the unprecedented departure of four commissioners in the middle of the year. The resulting lack of a quorum paralysed the agency for nearly three months. While this had a greater impact on merger review than on cartel cases, the number of cartel rulings has nevertheless slightly decreased since last year, with a total of 15 proceedings concluded in 2019 (six cases fewer than in 2018).

In seven out of these 15 cases the CADE Tribunal subsequently dismissed the case against the individuals and companies involved for lack of evidence. The cases included two international investigations, originating from a leniency agreement,

followed by settlement agreements, where lack of evidence nevertheless led to dismissal of the case against the remaining defendants. Analysis of the cases dismissed, together with the public statements from some of CADE’s new commissioners, indicate that there may be moves to significantly increase the standard of proof required in cartel cases in the coming years.

Bid-rigging has been a key focus of cartel enforcement in Brazil for some time, with the authority one of the most active in the world in its crackdown against the practice and recently publishing a study by its own economists into deterrence and detection methods. In one of the most high-profile cases in 2019, in July CADE fined 42 individuals and 11 companies including Alstom, Bombardier and Mitsui & Co., for rigging at least 26 public tenders to manufacture subways and trains for CPTM and METRO between 1999 and 2013 in four Brazilian states. The total fines imposed amounting to BRL535m (USD136m). CADE also banned Alstom from participating in public tenders in the rail sector for five years and barred Alstom, Bombardier and CAF from receiving public subsidies or tax exemptions for the same period. The investigation

received significant media attention and was launched following an immunity application by Siemens.

Immunity applications in 2019 continued to decline: according to CADE’s annual report, around 11 agreements were signed (compared to five in 2018 and 37 in 2017). Settlement agreements also reduced in number in comparison to the previous year. In contrast to the 49 settlements in 2018, 19 settlements were reached in 2019, culminating in BRL145m (USD36.7m) in fines. Particularly noteworthy settlements were reached in connection with two cartel probes into the sales of medical equipment, mainly to Brazilian public entities, between 2004 and 2017.

Issues to look out for in 2020 include the role likely to be played by the four new commissioners in the CADE Tribunal, who will increasingly influence decision-making and could potentially advocate an increased standard of proof in cartel cases. The Brazilian Data Protection Law (very much modelled on the EU General Data Protection Regulation) will enter into force in 2020, and is likely to impact on how companies negotiating immunity applications have to deal with private data.

Canada

With thanks to Cassandra Brown and Gillian Singer of Blake, Cassels & Graydon LLP.

As in 2018, Canadian cartel enforcement in 2019 focused largely on bid-rigging activities in the province of Quebec. Engineering firms Genivar Inc. (now WSP Canada) and Dessau were ordered to pay a total of CAD5.9m (USD4.4m) for rigging bids for municipal infrastructure contracts in Quebec. This represents an increase in penalties from 2018, which involved a single CAD1.3m (USD1.0m) fine. The bid-rigging scheme involved 21 municipal infrastructure contracts across various Quebec municipalities,

and led to an estimated 33% increase in cost. Over the course of the year, all four individuals charged in connection with the scheme pleaded guilty and received conditional sentences ranging from 12-22 months (sentences included house arrest, curfews, and community service, but no jail time).

In April, the CCB also concluded an investigation into gasoline pricing practices in the province of Ontario. The CCB did not uncover any evidence of anti-competitive agreements among competitors in the wholesale or retail gasoline markets.

The CCB remains engaged in several high-profile cartel investigations. This includes an investigation into price-fixing in the commercial bread industry, as well as an investigation into conduct by newspaper companies Postmedia and Torstar, which each closed several newspapers immediately after acquiring them in an asset swap deal.

In June, Matthew Boswell was announced as the new Canadian Commissioner of Competition. Previously acting as Interim Commissioner of Competition, he will lead the CCB's cartel enforcement efforts for a five-year term.

Chile

With thanks to Luis Eduardo Toro Bossay and Francisco Bórquez Electorat of Barros & Errázuriz.

The Chilean Tribunal for the Defense of Competition (**TDLC**) adopted four cartel decisions in 2019. According to the TDLC's annual public statement, although the number of decisions remained steady compared to last year, the number of antitrust investigations brought by the National Economic Prosecutor's Office (**FNE**) have increased by 37% year-on-year (the statement also noted that the average length of investigations has decreased by 42% since 2012).

In an interesting development for leniency applicants in Chile, the Supreme Court recently issued its judgment in the *FNE vs. Tissue Companies* case. The court revoked the immunity which had been granted by the TDLC to pulp and paper company CMPC Tissue as the first leniency applicant to report a tissue cartel, finding that CMPC Tissue had coerced its competitor SCA into joining the cartel through threats of an exclusionary price war. It found that the scope of coercion covered not only threats of physical violence but also

economic threats and that CMPC Tissue's threat was credible, given its market position. It then imposed a fine of around USD15.5m on CMPC.

2019 also saw one of the first follow-on damages cases being filed in Chile, involving a consumer association suing the main poultry companies in Chile to obtain compensation for customers who had been affected by a price-fixing cartel, following sanctions previously imposed by the TDLC and upheld by the Supreme Court.

The highest fine imposed by the TDLC in 2019 was approximately USD6.5m in *FNE vs. Supermarkets* where a group of supermarkets was found liable for having fixed the price of poultry products as part of a hub-and-spoke style infringement. In addition to the fine, the infringers were also required to implement a minimum five-year compliance programme. The case is now with the Supreme Court after the FNE requested an increase in the fine to around USD14m for each participant.

In a similar set of circumstances, in *FNE vs. Shipping Companies*, the infringing parties were fined

approximately USD4.8m for participation in a market sharing cartel and were also required to implement a five-year compliance programme. The whistle-blowing company was granted immunity from the fine, but not from the compliance programme obligation. This case is also being appealed before the Supreme Court, with the FNE hopeful of increasing the fine.

In January 2020, the TDLC launched modernising reforms of its judicial system, including a new digital system for the processing of judicial cases. Several important legislative changes are also in the pipeline. Following the social uprising in Chile in the latter part of 2019, the Government introduced a new 'Anti-Abuse' agenda in December. The President has indicated that measures introduced as part of this, intended to stamp down on 'white collar crimes' such as cartels, will include an increase of the criminal penalties for collusion; the strengthening of the FNE's powers with the introduction of more investigative tools; and provision for anonymous whistle-blowing.

Mexico

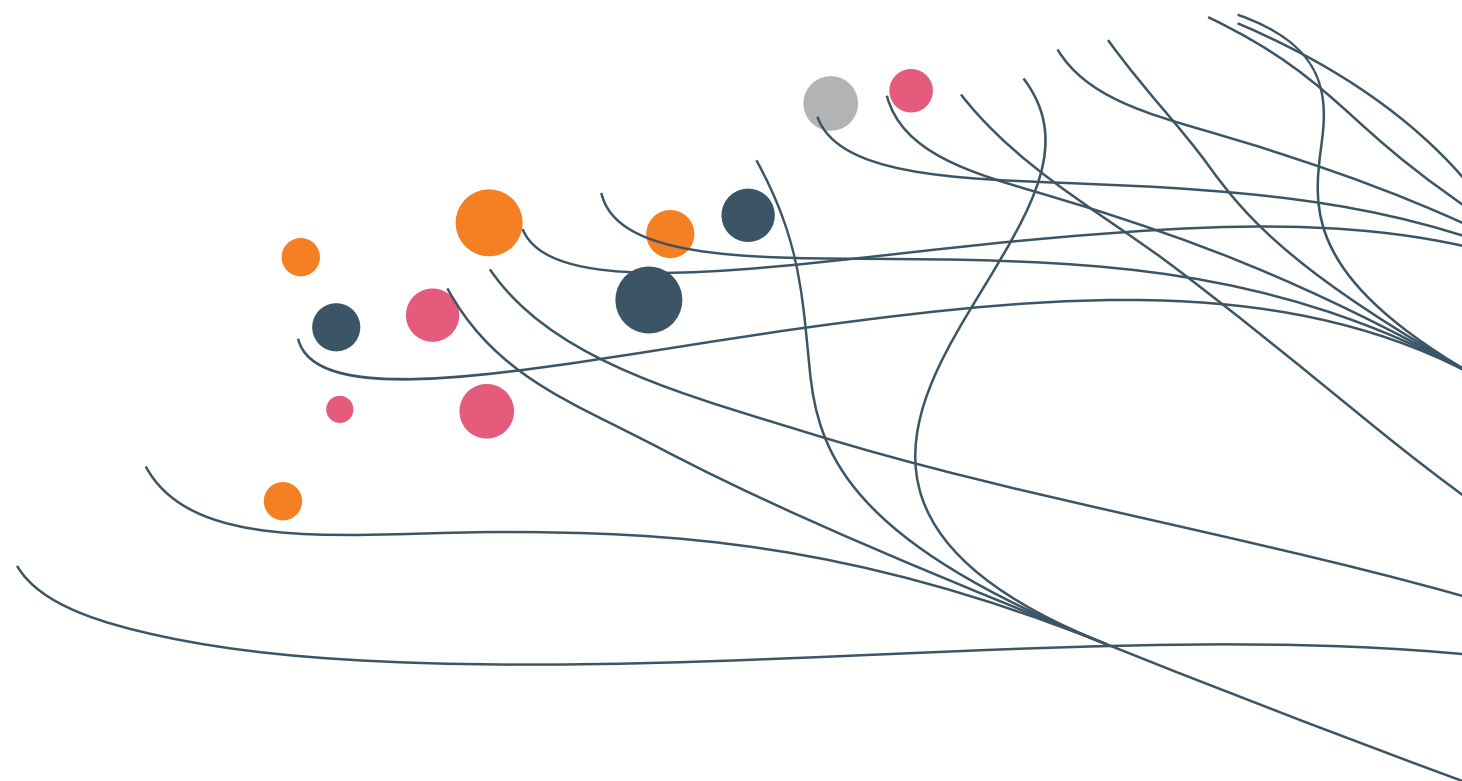
With thanks to Eduardo Pérez Motta of SAI Law & Economics.

Compared with the activity of the previous year, there was an increase in the number of fines imposed by the Mexican Federal Economic Competition Commission (**COFECE**) in 2019, which concluded four cases with total fines rising to USD5.6m.

The first two cases involved price-fixing, offer restriction, market sharing and other anti-competitive practices in the corn 'tortilla' market.

Sixteen individuals and three associations were fined a total of USD127m. In the third case, three individuals and two air transport companies were found guilty of coordinating the minimum reference price for air transportation services on intra-Mexican routes (USD4.6m in fines). The fourth case concerned public tenders for toothbrushes: five individuals and three companies were found guilty of coordinating bids or abstaining from tenders and were fined USD0.9m.

Bid-rigging and public procurement cartels will continue to be a focus of COFECE's activity in 2020, with a case related to tenders to hire integrated health services of laboratory and blood bank studies currently under investigation. As of January 2020, COFECE had two additional open investigations into potential cartel activity: the first concerns Mexican government securities intermediation; and the second relates to the pharmaceuticals market.



Asia Pacific and South Africa

Australia

The trend for increased enforcement action, particularly with respect to criminal cartels, continued in 2019. The Commonwealth Director of Public Prosecutions (**CDPP**) laid criminal charges in two cases – one against global shipping company Wallenius Wilhelmsen Ocean AS in relation to international shipping of vehicles to Australia, and the other against a money transfer business and five individuals for allegedly fixing the Australian dollar and Vietnamese dong exchange rate and fees charged to customers. In relation to an ACCC investigation now subject of civil cartel proceedings, the CDPP (for the first time) charged an individual with inciting the obstruction of a Commonwealth official. The charges allege that former Bluescope executive Jason Ellis took actions to obstruct an ACCC investigation into alleged cartel conduct by Bluescope.

The ACCC's campaign for higher penalties, including in relation to cartel conduct, appeared to gain momentum in 2019. In relation to the Air Cargo cartel proceedings, the Federal Court ordered penalties of AUD19m (around USD13.2m) against Garuda and

AUD15m (around USD10.4m) against Air New Zealand, with the former penalty subject to appeal. In imposing criminal fines in relation to the shipping cartel prosecutions, the Federal Court ordered fines of AUD25m (around USD17.4m) for NYK and AUD34.5m (around USD24.0m) for K-Line, noting that were it not for NYK's early plea and cooperation, the fine would have been AUD50m (around USD34.8m). The Federal Court highlighted the importance of deterrence and had regard to the fines and penalties imposed in overseas jurisdictions.

In another first, the Federal Court ordered Cryosite Limited to pay penalties of AUD1.05m for cartel conduct following an ACCC investigation into gun jumping. While the penalties were on the lower end of the available maximum penalty, the Federal Court considered it to be of sufficient deterrence in light of Cryosite's size and precarious financial position.

In October, the ACCC's new cartel immunity and cooperation policy came into effect. Informed by the ACCC's

experience during key criminal investigations, the new policy requires a higher level of cooperation from immunity applicants, narrows the scope of application and clarifies a number of issues related to eligibility for immunity. The ACCC also launched an encrypted online portal, which allows whistle-blowers to anonymously contact the ACCC to report cartel conduct.

The criminal cartel prosecution against three banks, and several senior executives for alleged cartel arrangements relating to trading in ANZ shares, is still in its very early stages, many months after charges were laid in June 2018. A fourth bank was granted conditional immunity in exchange for on-going cooperation with the ACCC and CDPP. At the time of writing, committal proceedings were underway, with the case expected to go to trial later in the year.

Looking ahead to 2020, we can expect the high level of ACCC cartel enforcement, the focus on individual accountability, and the trend of courts imposing more substantial penalties, to continue.

China

As predicted in last year's Report, there were only a limited number of cartel decisions in China in 2019. In part, this could be due to the fact that the recently established SAMR has been finding its feet as well as focusing upon legislative developments. The total amount of fines issued was relatively modest (RMB16.4m (USD2.4m), although this may increase to around RMB24m (USD3.5m) if a proposed fine in the *Maoming Concrete* case is adopted).

Antitrust enforcement has been conducted at local level through government's local branches rather than by SAMR at the central level (SAMR does, however, play an important coordinating role and was very active on legislative initiatives last year). No decisions were issued against international companies for cartel activity in 2019.

Enforcement has generally been targeted at industries affecting daily life (pharmaceuticals, automotive, and energy being three of the areas typically earmarked as 'relevant' in China), such as the investigation opened into three German car manufacturers over possible collusion on emission technology in parallel with the EC's probe. Enforcement efforts were also directed at the key economic sector of construction and infrastructure, with a high proportion of cartel cases concerning building materials.

The relative lack of use of the leniency regime continued in 2019, with investigations typically being opened on an own-initiative basis. With a whistle-blower incentive policy having been trailed in the latter half of the year, it appears that SAMR is considering ways to change this, although it remains unclear whether this will be adopted as formal policy.

SAMR is also focusing on the message of prevention being better than cure, with businesses facing strong encouragement to implement effective compliance programmes.

A significant development has been the shift in the methodology for calculating fines: in the future, fines will be calculated on the basis of total sales in China rather than of sales of the products/services concerned. Proposed revisions of the Anti-Monopoly Law further signal that fines could increase in the coming years. Proposals include significant increases in the caps for trade associations and for agreements that were not implemented and the introduction of penalties for aiding and abetting antitrust infringement. Additionally, the proposals open the door to the introduction of criminal liability.

Hong Kong

Hong Kong's Competition Ordinance legislation came into effect in December 2015. The Competition Tribunal has now handed down its first two judgments, finding four IT companies and 10 interior decorating firms guilty of cartel conduct. The rulings provide greater legal certainty. First, the judge closely followed EU and UK precedent, for example the EU's interpretation of anti-competitive agreements and by-object infringements. This means that companies can safely rely on the rich source of EU and UK case law in

future investigations to predict how the antitrust rules will be enforced. Second, the judge decided that a criminal standard of proof – proof beyond reasonable doubt – applied. Assuming that this is not appealed, this will impact how the Competition Commission chooses its future cases and how it conducts its investigations; cases involving complex behaviour will be harder to prove. Third, the judge found one IT firm not guilty on the basis of a 'rogue employee' defence – the person that participated in the cartel was a junior employee who acted

beyond the scope of his employment. This is a welcome potential avenue for companies to escape liability.

A further court hearing will determine what sanctions should be imposed in each case. The infringement decisions and any fines serve as a warning to businesses – especially in the IT and construction sectors – that the Hong Kong antitrust regime is up and running. The Competition Commission has welcomed the judgments, noting that it is open to complaints from members of the public as well as leniency applications.

India

With thanks to Manas Kumar Chaudhuri, Arshad (Paku) Khan and Anisha Chand of Khaitan & Co.

In 2019, India witnessed a significant decline in the number of competition law cases prosecuted (seven) and number and value of fines imposed. Overall, the total amount of fines imposed by the Competition Commission of India (CCI) was INR 0.8465bn (USD12.0m): a decrease of around 82% compared to 2018. The highest individual fine imposed was in the energy and natural resources sector (INR0.3984bn, USD5.7m).

After a record year for decisions involving immunity in 2018, only two cases in 2019 involved

leniency applicants. In both, the CCI granted full immunity, as it continues to develop its leniency programme to encourage cartel disclosures by giving more certainty for fine reductions for successful leniency applicants.

Overall, cartel enforcement activity was relatively subdued in 2019. The CCI has not issued an order finding cartel conduct since August 2019, and the National Company Law Appellate Tribunal, the relevant appellate body, gave no substantive rulings on cartels in 2019. However, the CCI did carry out three dawn raids, which may result in a busier agenda in 2020.

2020 may also bring changes to the Indian competition regime, in the wake

of the Competition Law Review Committee's report on streamlining the system, which was submitted to the government in August 2019. Drawing upon consultation with stakeholders, 'including industry bodies, professional associations, government departments/ministries, NGOs and experts' the report makes a range of recommendations, including introducing provisions for hub-and-spoke cartels and purchasing cartels, additional mechanisms for settlements and commitments, penalty guidelines, and amendments to the cartel leniency programme, including a 'leniency plus' option and procedures for the withdrawal of leniency applications.

Japan

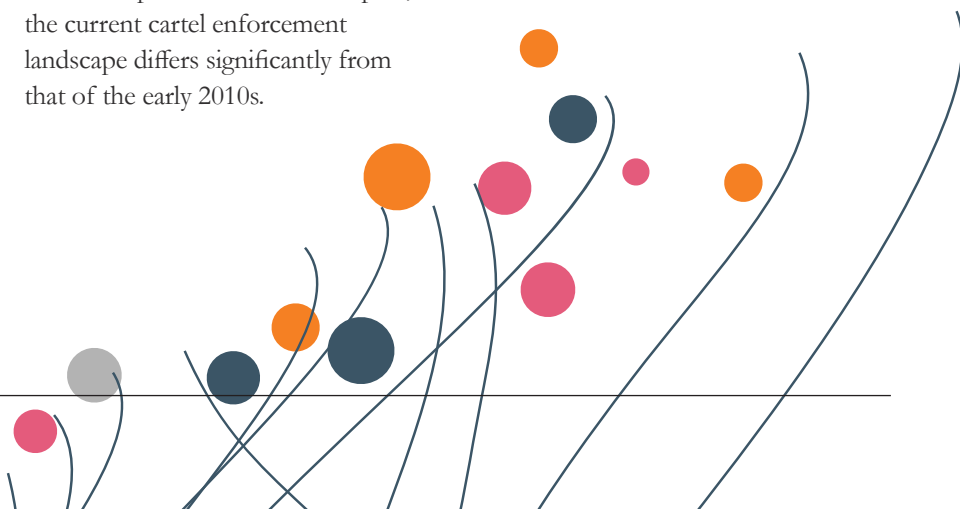
With thanks to Kenji Ito and Yusuke Takamiya of Mori Hamada & Matsumoto.

There was a dramatic increase in the total cartel fines imposed by the Japan Fair Trade Commission (JFTC) in 2019: JPY69.3bn (USD637m), as against the 2018 total of JPY2.2bn (USD19.5m). The fines are largely attributable to two big price-fixing cases: the first involving nine asphalt mixture manufacturers and the second involving four steel and aluminium can manufacturers. The fine imposed in the asphalt case was the largest ever imposed by the JFTC for an antitrust infringement. The JFTC also issued cease-and-desist orders against most of the companies, requiring them to put

in place monitoring systems to prevent future collusion, conduct regular audits, and ensure that the employees involved in the collusion are assigned to other positions for a five-year period.

While 2019 marks greater cartel enforcement activity by the JFTC than in the past few years, it is still a long way from that of the first half of the past decade. In another change, all 2019 cases related to domestic cartels and no international cartels have been publicised. In this respect, the current cartel enforcement landscape differs significantly from that of the early 2010s.

Looking ahead, Japan's amended Anti-Monopoly Law will come into effect in 2020. It is expected that the amount of fine that the JFTC can impose per cartel case will be increased, and the leniency programme expanded. Businesses will want to monitor whether the amendments will prompt a change in JFTC's enforcement policy.



Singapore

With thanks to Daren Shiao of Allen & Gledhill LLP.

After the imposition of its largest fine to date in relation to a poultry cartel in September 2018, the Competition and Consumer Commission of Singapore (CCCS) continued to take action against cartels in 2019 by issuing an infringement decision against the owners and operators of four hotels in Singapore. This decision, CCCS's first concluded case in the hospitality industry, resulted in CCCS imposing penalties totalling SGD1.5m (USD1.1m). CCCS found that the hotels' owners and operators had exchanged commercially sensitive information about issues such as room rates, price-related strategies and other information capable of materially affecting the future determination of

prices offered to corporate customers. Unlike the poultry cartel case, investigations into this case were begun following own-initiative enquiries by CCCS and not pursuant to tip-offs.

This decision brings the total number of cartel cases concluded by CCCS to 15 since the relevant provisions of the Singapore Competition Act came into force in 2006. After having conducted unannounced inspections on its own initiative, CCCS again relied upon leniency applicants who provided further information regarding the cartel, confirming that its leniency programme is a crucial and well-established tool in its cartel detection and enforcement toolbox.

2019 also saw CCCS's publication of a market study on the online travel booking sector in Singapore. In the

study, CCCS emphasised that price and non-price parity clauses in the online travel booking sector could potentially harm competition and concluded that it would continue to actively monitor market developments in the sector and take enforcement action where there is sufficient evidence to indicate competition infringements.

Looking ahead to 2020, we can expect more cartel enforcement activity from CCCS in sectors such as digital platforms, transport and hospitality. Given the increasing relevance of the digital and data economy, CCCS also plans initiatives to study the impact of digital platforms on competition and to review its assessment toolkits to ensure their relevance in today's digital sector.

South Korea

With thanks to Yong Woo Lee and Sangdon Lee of Shin & Kim.

In 2019, the Korea Fair Trade Commission (KFTC) continued active enforcement against cartels, with the issue of no fewer than 46 decisions (with potentially additional decisions which have not yet been published).

Overall fine levels fell significantly. The KFTC imposed total fines of around KRW89.1bn (USD80.2m), about 50% less than the previous year's total (USD151.6m). The case with the highest fine was imposed in a domestic bid-rigging case involving ready-mixed concrete and totalled KRW14.7bn (USD12.6m). As in 2018, the KFTC's sanctions were mostly for bid-rigging conduct, with about 82% (KRW71.8bn, USD66m) of the total value of fines

imposed in relation to such cases. The transport and infrastructure sector was high on the list of priorities for the KFTC, accounting for KRW33.1bn (USD29.9m) of the 2019 fines.

Compared with 2018 where only two cases involving an international element resulted in the issue of a fine, the KFTC in 2019 issued fining decisions for seven international cartels, including in the financial services and manufacturing sectors.

Explaining the drop in overall fines, the KFTC has stated that its investigations are not carried out with the goal of levying large fines and that some larger cases have been delayed for procedural reasons. As a result, it is difficult to draw a conclusion that

future cartel fine levels in South Korea are likely to be significantly lower than in the past.

Bid-rigging will remain firmly in the authority's sights in 2020. New KFTC Chair Sung-wook Joh has announced the agency's plan to strengthen surveillance of and strictly sanction bid-rigging. Amended review guidelines loosen bidding eligibility restrictions with effect from 2020, and sanctions on bid-rigging are expected to increase further in the years to come.

Taiwan

With thanks to Stephen Wu, Yvonne Hsieh and Wei-Han Wu of Lee and Li.

The fines imposed by the Taiwan Fair Trade Commission (**TFTC**) in 2019 for cartel infringement amounted to NTD60.4m (USD2m). This is a ten-fold increase from NTD0.6m (USD0.2m) in 2018. However, in terms of the number of closed investigations in 2019, the TFTC only issued decisions in two local cartel cases, with no cross-border cartel investigation or leniency case reported. Official enforcement statistics are available only in the TFTC's annual report, which is usually released in

April, and it is possible that these figures may alter.

As with many global authorities, the focus of the TFTC in the coming years is expected to be on digital markets, and dealing with the enforcement challenges presented by rapid developments in technology. In response to the challenges, the TFTC has set up an internal special task force to study new business models and its appropriate responses as a gatekeeper for fair competition. It has also expressed an intention to pay particular attention to the four major digital technology giants and to examine potential competition issues related to their business models.

In the TFTC's view, current legislation, including the cartel rules, is sufficient to tackle the potential antitrust issues arising in the digital economy.

However, it has highlighted the need to enhance its enforcement tools so as to more precisely hone its competition analysis. In line with the Government's aim of encouraging innovation as the driver for economic growth, the TFTC has emphasised that it will not take a predetermined view in its handling of new issues. Rather, it intends to carefully apply the law to avoid a chilling effect on innovation.

South Africa

With thanks to Pieter Steyn of Werksmans Attorneys.

2019 saw another active year for cartel enforcement in South Africa. The South African Competition Commission (**CompCom**) imposed fines in 25 separate cases. However, the total value of fines was low at around ZAR120.2m (USD8.3m) – the lowest aggregate amount in four years.

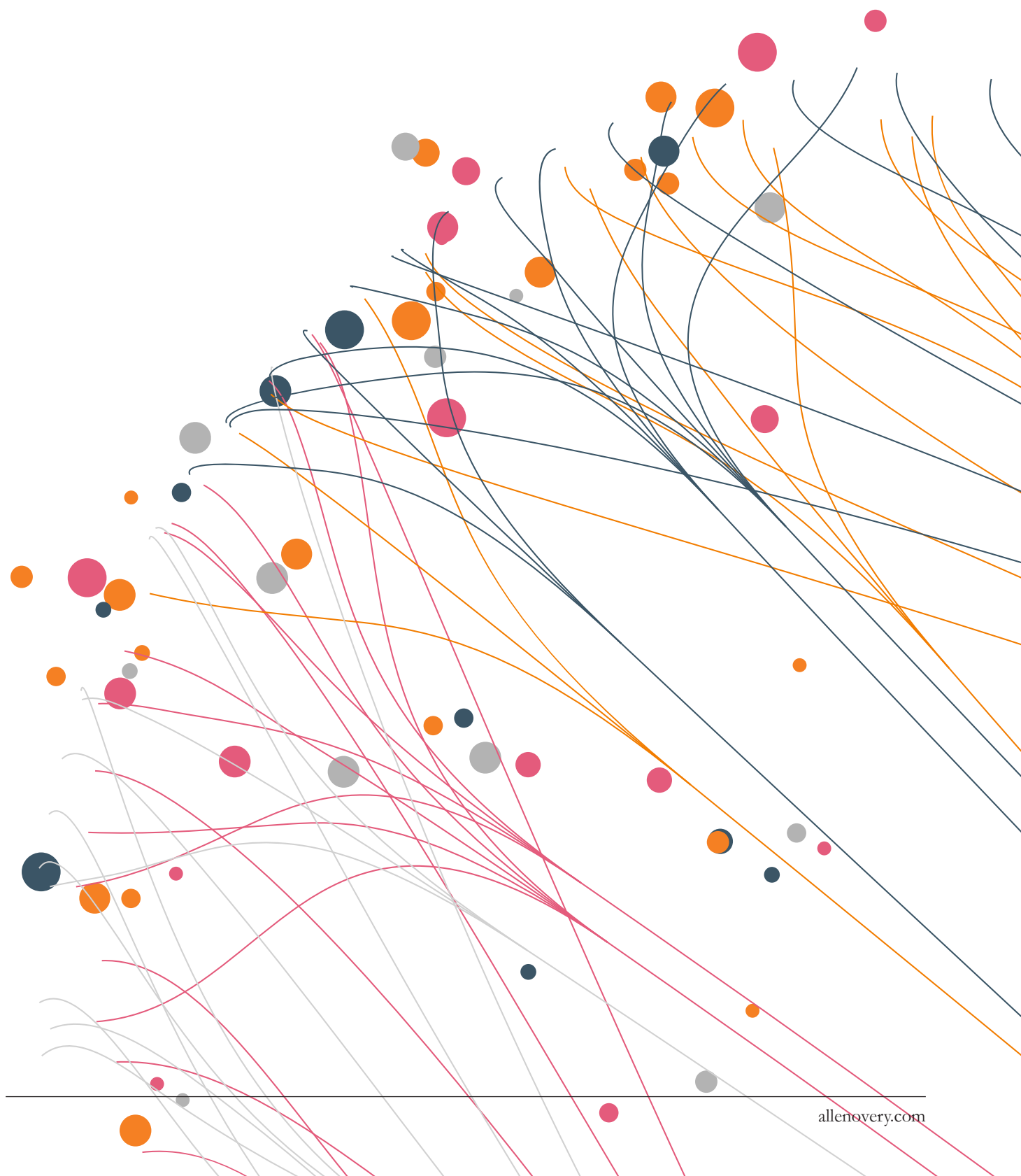
The largest fines imposed were against a manufacturer of wood-based panels for price-fixing and collusive conduct (ZAR46.9m, USD3.2m), which agreed to settle proceedings in June 2019. CompCom also reached settlement agreements in a long-running probe into price-fixing arrangements in the media sector whereby through a separate organisation, Media Credit Co-Ordinators, various companies co-ordinated prices charged to advertising agencies. The South

African Broadcasting Corporation, which agreed to pay a fine of around ZAR31.9m (USD2.2m), also committed in its settlement to provide additional advertising space to certain, smaller advertising agencies over the next three years as a fixed proportion of every rand spent by those agencies.

There was also an important ruling from the Competition Tribunal in early 2019 which should provide comfort for companies considering entering into leniency or immunity agreements in South Africa in the future. The Tribunal ruled against CompCom who had been hoping to introduce into evidence, in an on-going case, an earlier leniency application filed by Unilever relating to the same conduct (CompCom had earlier rejected the leniency application).

Looking at the African continent more broadly, cartel enforcement still

remains relatively limited, with the Chief Executive of the Common Market for Eastern and Southern Africa (**COMESA**) Competition Commission quoted as saying that existing laws in the region were 'gathering dust'. 2019 nonetheless saw signs of future change, with the Namibian authority agreeing settlements with two insurance companies for price-fixing and the Mauritian agency recommending fines against two chemical fertiliser companies. It has also been reported, although not fully confirmed, that the Moroccan authority, which started operations in earnest in 2019, has begun probes (as have the Egyptian authority and COMESA itself). In early 2020, the President of Kenya called upon the Competition Authority of Kenya to increase its enforcement activity. Going forward, enforcement is only likely to increase.



A&O global cartel practice

Our global cartel practice is ranked first in the world by Global Competition Review 2020. We represent clients in the most high-profile international and national cartel investigations as well as in the equally important subsequent litigation. Cartel and other behavioural investigations are often now carried out simultaneously across different jurisdictions and regulators are increasingly coordinating approaches, while sanctions for cartelists at both corporate and individual level remain a serious threat. 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. We handle all stages of the investigation process, from launch to advising on immunity/leniency applications, to appeals of infringement decisions and follow-on

damages actions. Alongside our competition team, we also have data protection, privacy and employment law experts around the world that can provide the specialist advice that is crucial to ensuring that the internal investigation (which is often time critical) runs smoothly and quickly.

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.

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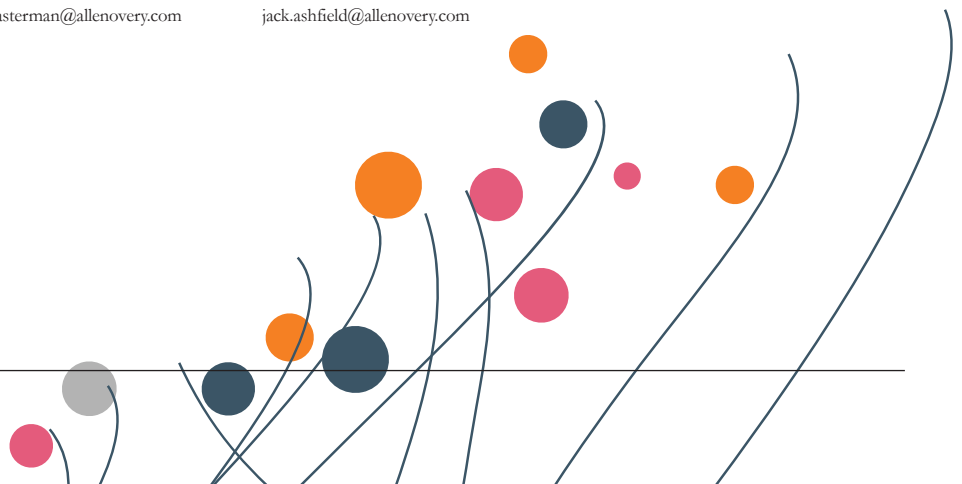
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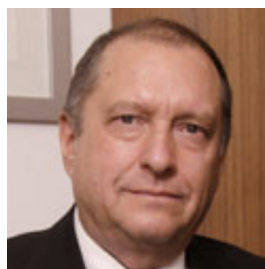
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