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Global Cartel Enforcement

2015 Year in Review

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Global cartel fine totals fall, as the U.S. breaks records

Surging fines in the United States were countered by a marked decline in cartel fines globally this year, most notably in the European Union and Brazil. An increase in cartel enforcement activity is expected in 2016 in the wake of the number of new investigations begun by authorities.

Developing trends:

Auto parts and financial services penalties dominated global enforcement fine totals in 2015. And while financial services will remain a focus for enforcers in 2016, several new antitrust investigations suggest a shift in activity toward the digital, telecom, energy, and consumer products sectors.

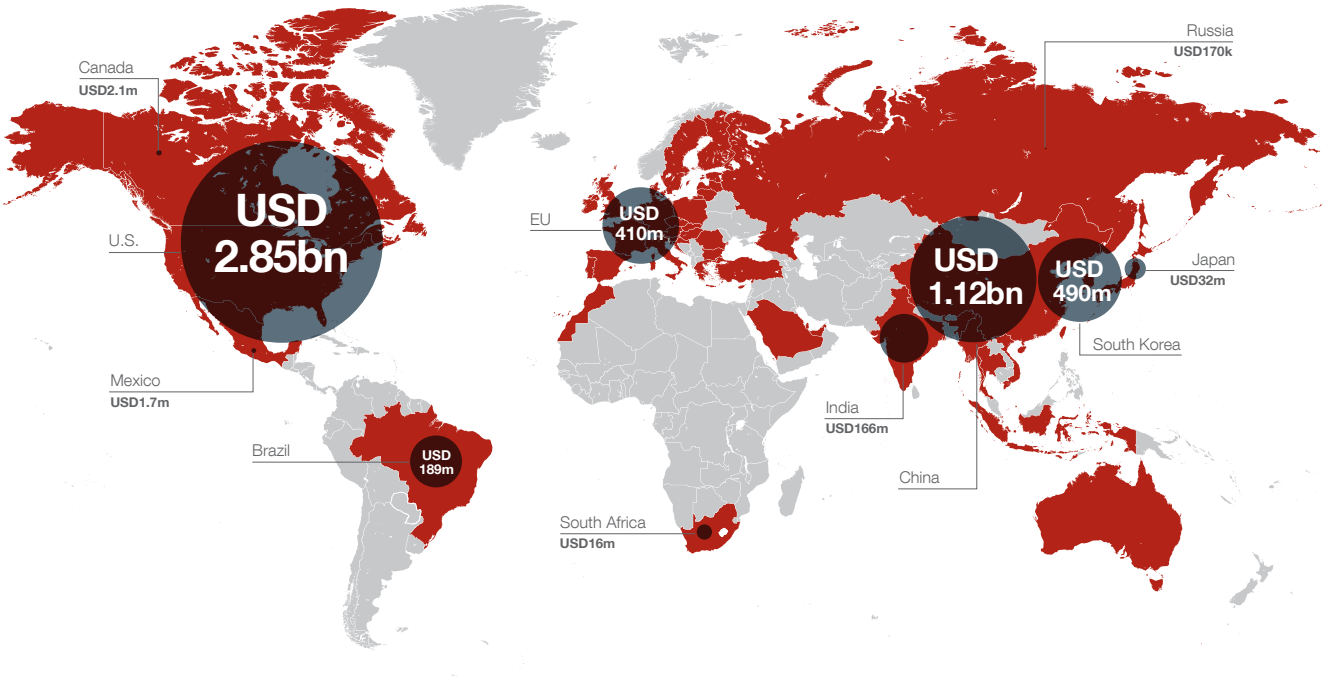
Global enforcers continued the mantra for increased accountability for individual executives. The United States issued serious warnings that the extradition of foreign national defendants will remain a top priority, while jurisdictions like the United Kingdom, South Korea, and Japan, in both word and action, emphasized the importance of individual prosecutions to their enforcement agendas.

The debate as to whether and how to credit compliance programs also prominently featured in 2015 and promises to remain an issue enforcers will wrestle with throughout 2016. The United States took significant strides on this issue in 2015, crediting compliance for the first time in connection with an antitrust prosecution and hiring a new compliance program expert.

What to watch for:

- Increased scrutiny on digital markets, which have captured the attention of several antitrust enforcers globally.
- Financial services and consumer products (food stuffs and electronic parts) sectors driving penalties in 2016.
- An increase in the targeting and prosecution of executives in cartel investigations.

Global fine levels



Statistics from selected jurisdictions are approximate and reflect fine levels and exchange rates at the time of writing and may not be exhaustive. 2015 U.S. statistics are for the U.S. fiscal year, October 1 2014 to September 30 2015. All other countries' statistics cover the 2015 calendar year. No fines were assessed in Australia or Singapore in 2015.

2015 global cartel fine levels

	U.S.	China	South Korea	EU	Brazil	India	Japan	South Africa	Canada	Mexico	Russia
USD	2.85bn	1.12bn	490m	410m	189m	166m	32m	16m	2.1m	1.7m	170k
EUR	2.42bn	1.02bn	414m	364m	170m	143m	29m	15m	1.9m	1.5m	155k

Americas

United States

The Department of Justice (DOJ) Antitrust Division imposed a record USD2.853 billion in criminal antitrust fines in fiscal year 2015 (October 2014-September 2015), more than twice the DOJ's previous record high, and over three times greater than the fine total in FY2014. Single cases continue to drive the majority of the Division's fines, with auto parts and foreign exchange (FX) market fines accounting for approximately 90% of the Division's total fines imposed in FY2014 and FY2015, respectively. This FY's antitrust fine total is primarily the result of fines imposed in the DOJ's investigation of the FX market, which account for 88% of the DOJ's total criminal antitrust fines this year. Fines imposed in the auto parts; capacitors; bearings; roll-on, roll-off shipping; parking heaters; and e-commerce investigations (a total of USD333.6million) account for the balance of the DOJ's antitrust fine total for FY2015.

In May, a number of financial institutions pleaded guilty to, or settled charges relating to, manipulation of the FX market. These resolutions resulted in the imposition of USD2.52bn in fines, which included the Division's largest individual fine of the fiscal year: USD925m levied against Citicorp. The Division is currently investigating suspected cartel activity in the gypsum drywall and packaged seafood industries, among others.

The Division continues to actively prosecute individuals, and indicted or convicted 63 individuals this year. In September, the DOJ issued the "Yates Memo" as guidance on pursuing higher levels of accountability for individuals involved in corporate wrongdoing. Although antitrust violations will be treated slightly differently under this guidance than other types of corporate wrongdoing due to the Antitrust Division's corporate leniency program, the Assistant Attorney General for the Antitrust Division, Bill Baer, advised that the Division is considering the memo's application to its enforcement programs, including whether to pursue civil prosecution of individuals.

In an anticipated move to strengthen its compliance enforcement authority, the Criminal Division of the DOJ hired a full-time compliance program expert. This year marks the most significant advances the Antitrust Division has made to credit effective compliance programs of companies that commit antitrust infractions, further bringing its enforcement practices in line with the treatment compliance receives at other divisions within the DOJ. In May, the Antitrust Division gave credit and ultimately reduced the final settlement amount to Barclays PLC, recommending that Barclays receive sentencing credit for implementing and maintaining an effective compliance program once the DOJ's investigation into the FX market began.

The Division also recommended that Kayaba Industry Co. Ltd. receive a discount on its fine for its participation in the auto parts price-fixing conspiracies because it had adopted an effective compliance program. Fully crediting the company's compliance policy, it noted in its sentencing memorandum that the policy "has the hallmarks of an effective compliance policy including direction from top management at the company, training, and anonymous reporting, proactive monitoring and auditing, and provided for discipline of employees who violated the policy." The Division's recommendation further underscores the rising importance compliance programs will play in antitrust enforcement policy moving forward.

Brazil

Fines levied by Brazil's antitrust enforcer, the Administrative Council for Economic Defense (CADE), dropped significantly from its record high of USD1.7bn set in 2014. CADE was, however, very active. CADE's fines for the year totaled USD188.85m, and included fines of USD20m-30m each in cases against construction, gasoline retail, and automotive parts cartels. This may represent a return to "normal" activity levels, considering that over 80% of the 2014 total came from a record-setting USD1.39b fine imposed on a cement cartel.

As signaled by CADE president Vinícius Carvalho at the outset of the year, much of CADE's 2015 enforcement activity focused on public procurement cartels. CADE concluded investigations into diverse sectors, such as auto parts, freight logistics, paid parking, gasoline, resin, medical services, and public services (eg, state and local electricity contracts, water and sanitation services). In December, CADE announced it was launching a formal probe into alleged bid-rigging in relation to USD8.75bn worth of Petrobas engineering and construction contracts, signaling that public procurement may continue to be a focus for CADE well into 2016.

Canada

After imposing USD39m in fines in the first half of 2013 and nearly USD10m in the first half of last year, the fine figures for the Canadian Competition Bureau (the Bureau) have declined this year: until November, Canadian fines were less than USD1m. On December 9, a guilty plea by a Japanese manufacturer of automobile and truck tires for three counts of bid rigging under the Competition Act resulted in a fine of over USD1.2m. This more than doubled the Bureau's enforcement numbers in 2015, but the overall total remained just over USD2m.

The Bureau also suffered several setbacks in its enforcement agenda this year, including the acquittals of executives accused of bid rigging for public works contracts and a decision to drop a case against alleged participants in a chocolate cartel.

There were, however, several important legislative and policy developments in Canada this year. The Canadian Parliament introduced legislation to establish a new agency responsible solely for prosecuting competition cases. The Bureau is also building more partnerships with domestic enforcement agencies for combating corruption and cartel conduct. In this respect, in November the Bureau and the Royal Canadian Mounted Police (RCMP) signed a memorandum of understanding to cooperate in fighting bid-rigging and price-fixing activities by organized crime groups.

Mexico

In light of the 2014-2017 Strategic Plan issued by Mexico's Federal Economic Competition Commission (COFECE) in February 2014, many observers expected a marked increase in fines and cartel enforcement actions in 2015. These predictions, however, have not yet come to pass. In 2015, COFECE issued only a single cartel fine of USD1.67m against seven bus companies in the state of Chiapas.

Mexican antitrust officials recently met their U.S. and Canadian counterparts to discuss enforcement concerns and harmonize their approach, the first in a series of such annual trilateral meetings. It is worth noting that COFECE has several investigations currently in progress, including a recent probe into the possibility of price fixing or market allocation among pension fund operators.

Europe, Middle East & Africa (EMEA)

European Union

Last year marks the first full year of Margrethe Vestager's leadership as the Commissioner of the European Commission's Competition Directorate (the Commission) after assuming this role in November 2014. Vestager's first year brought substantial fines, totaling approximately USD410.16m in five cartel cases, but fell well short of fine totals in the EU for previous years. Fines against eight manufacturers and two distributers of retail food packaging trays (USD130.25m) and eight disk drive manufacturers (USD131.59m) account for approximately 64% of this year's fines.

The Commission also suffered several setbacks this year. In December, the General Court of the European Union annulled EUR 790m in fines the Commission levied in 2010 against 11 air cargo carriers accused of fixing fuel surcharges and security fees after determining that the Commission's decision included internal inconsistencies regarding the alleged cartel. The Commission also closed numerous long-running investigations this year without results, including investigations into: a suspected plastic pipe cartel; an alleged cartel of cement manufacturers; an alleged manipulation of Platts benchmarks; five companies in the liquid-crystal panel display industry after the Commission fined six other companies for cartel behavior in 2010; and 13 banks for allegedly colluding to avoid transitioning to exchange trading of credit default swaps.

Despite these setbacks, the Commission continues to pursue significant investigations. The Commission publicly acknowledged several ongoing investigations, including those into biofuels benchmarks, precious metals trading and laptop batteries. Additionally, the Commission issued a Statement of Objections to ten manufacturers of electrolytic capacitors and to suspected participants in a car battery recycling cartel, along with a charge sheet to 14 container liner shipping companies for alleged price signaling.

The Commission also won an important appeal and took other strides that will aid in strengthening its investigative powers. In October, the EU Court of Justice (ECJ) upheld the Commission's power to fine facilitators of cartel conduct. Although prices are typically fixed between competitors, the ECJ found that an unrelated entity could facilitate contacts and coordination in a cartel. This fall, the Commission published an updated version of the Explanatory Note it issues to companies at the beginning of a dawn raid, noting that the Commission may search private devices (ie, mobile phones and tablets) when those devices are used for work purposes.

EU Member States

In the wake of diminishing fines for the EU, member states continued to step up enforcement. Most significantly:

- In December, France's competition authority issued a near-record USD738.27m fine to 20 companies and a professional trade union in the delivery service industry for two anticompetitive agreements.
- In August, the United Kingdom's Competition and Markets Authority (CMA) and Serious Fraud Office (SFO) also brought its first criminal trial of an individual in the LIBOR rate-rigging case, resulting in a 14-year prison sentence for a former UBS and Citigroup trader after a unanimous London jury convicted him of fraudulently rigging the LIBOR rate. In December, the Court of Appeal in London reduced the sentence to 11 years.
- The Spanish Competition Authority was particularly aggressive this year, imposing USD702m in fines.

Russia

Enforcement by the Russian Federal Antimonopoly Service (FAS) continued to decline in 2015, with year-end fines totaling less than USD1m. This was a steep decline from the USD13m collected by the FAS in 2014. This year's fine total includes fines assessed for collusive activity or bid rigging with respect to insurance, facilities maintenance, military goods, and postal services industries. Further fines were levied against nine companies in the commercial fishing industry for colluding to rig the allocation of fishing rights in various parts of Russia, though the amounts have not been disclosed. FAS also suffered a significant loss on appeal, when the Russian appeals court upheld a ruling quashing a RUB2.2bn (USD32m) fine imposed on the country's railway network RZD and other train companies for their roles in an alleged coal transport cartel. In December, FAS concluded its investigation into five major international container shippers finding the companies guilty of price signalling in relation to surcharges added to their freight rates. However, a decision on fines for these five companies will not be made until 2016.

Though the fines imposed have dwindled, Russia's cartel enforcement program has undergone a number of notable changes. Russia's Supreme Court held in December 2015, that Russian antitrust officials do not need to explain the legal basis and aims of dawn raids to their subjects. The Russian authorities have also demonstrated willingness to penalize non-payment, doubling the applicable fine against two companies for failure to timely pay assessed penalties in relation to a bid-rigging scheme in auctions organized by the Central Military Commandant's Office. This has likewise led to increasing fines related to price fixing in contracts for the maintenance of various Moscow sports grounds for failure to provide turnover information and for non-payment of the fine within the applicable term. The past year also saw FAS significantly advance cartel policy, by introducing a new leniency program that allows the first individual to participate in a cartel investigation to receive immunity after revealing the existence of the cartel and aiding the investigation, provided that the person concerned is not guilty of other violations of the law, and by introducing new appeal procedures against decisions.

Significant changes are also to come on the legislative front: a fourth antimonopoly package was signed into law on October 5, 2015, and will come into force in early January 2016. Some of the new measures include increased punishments for officials who repeatedly violate the competition laws, an amendment allowing for the application of cartel laws to agreements between businesses and their customers, and legislation granting the FAS power to review the decisions of regional antitrust bodies. Meanwhile, the FAS is expected to include a measure in the fifth antimonopoly package that would reduce fines for companies that employ staff trained in competition law compliance. With investigations still pending into the construction and medicine industries, the effects of these changes should be visible in the coming year.

South Africa

South Africa's Competition Commission (the Commission) imposed fines totaling USD16.33m in 2015. This is more than double the USD7.7m total imposed by the Commission in 2014. The two largest fines were issued against Japanese shipping liner Nippon Yusen Kabushiki Kaisha Ltd. and shipping company Wallenius Wilhelmsen Logistics. Together these fines equaled a combined total of USD16.08m (98% of the Commission's 2015 total). Other smaller fines were issued in the fuel and security sectors.

In 2015, the Commission invoked sector inquiries into the retail and healthcare industries. It also launched an investigation into foreign currency trading, focusing on trades involving the South African Rand, which is one of the most heavily traded emerging market currencies. South Africa's competition commissioner, Tembinkosi Bonakele, stated that although the conduct took place outside of South Africa, the Commission will pursue extraterritorial cartels that affect South Africans.

Asia Pacific (APAC)

Australia

The Australian Competition and Consumer Commission (ACCC) did not issue any cartel fines in 2015. Chairman Rod Sims, however, is hopeful that the ACCC will bring its first criminal action by the first half of 2016. The ACCC is currently involved in an estimated 12 in-depth cartel investigations in industries ranging from construction to red meat processing. The ACCC has also stated its plans to crack down on union cartel conduct, an area that it previously neglected due to over-reliance on the exemptions in the Competition and Consumer Act, and to look critically at what Chairman Rod Sims called "aggressive" pricing practices in the petrol sector.

The ACCC also bolstered its cooperation with other antitrust enforcers. Specifically, in November, the ACCC signed a memorandum of understanding with China's National Development and Reform Commission, paving the way for increased cooperation between the two authorities in their investigations of international cartel conduct. The agencies have agreed to exchange information and evidence, enabling them to make the best use of available resources and avoid inconsistent remedies. Having signed this agreement, the ACCC now has cooperation agreements in place with all three of China's competition agencies.

China

China's National Development and Reform Commission (NDRC) imposed a total of USD1.12bn in fines in 2015. According to Zhang Handong, director general of the NDRC's Price Supervision and Anti-Monopoly Bureau, these probes involved vertical and horizontal monopolistic agreements and abuse of market dominance. The NDRC also launched numerous new probes. The NDRC raided several coffee companies, including Nestlé, for alleged violations of China's antitrust law, with price fixing as the possible focus of the investigation. The NDRC also announced a nationwide investigation into the prices of medicines for consumers, and another investigation into suspected price-fixing and collusion activities among global shipping companies in the roll-on, roll-off shipping industry.

In addition to its enforcement efforts, the NDRC has been designated by the State Council's Antimonopoly Commission to take the lead in drafting new legislation regarding antitrust enforcement guidelines in the auto sector. These efforts follow the record USD201.6m in fines the NDRC imposed on Japanese car manufacturers in 2014. A senior official at the NDRC commented that, in addition to these new guidelines, the NDRC will be prioritizing further and better enforcement procedures and sector studies; it is currently conducting a study, authorized by the Antimonopoly Commission of the State Council, on revising the Anti-Monopoly Law (AML). According to the NDRC, certain provisions of the AML have proved inadequate in guaranteeing rigorous antitrust enforcement and it is necessary to revise them in order to step up enforcement.

India

The Competition Commission of India (CCI) imposed a total of USD166m in fines in 2015. This fine total is the result of investigations into a variety of sectors including: pharmaceuticals, manufacturing, travel, road transportation, and insurance. The CCI levied USD9.8m in fines on two pharmaceutical companies for their role in colluding to raise the price of vaccine bids; imposed fines totaling USD106m on four public sector insurance companies for manipulating the bidding process; imposed a fine of USD39m on IndiGo, Jet Airways and SpiceJet for allegedly colluding to fix fuel surcharge rates; and, most recently, levied a fine totaling USD11.2m on drugmaker Alkem Laboratories for anticompetitive practices.

The CCI did, however, also suffer a significant setback this year. In December, the Competition Appellate Tribunal overturned the record-breaking USD924.83m fine the CCI imposed on 11 members of an alleged cement cartel in 2012, finding that CCI's investigation was procedurally unfair. CCI was instructed to restart the investigation and issue a new order within the next three months.

On January 7, 2016 it was announced that Ashok Chawla would be stepping down from his position as chairman of the CCI and Devender Kumar Sikri, a former officer of the Indian Administrative Service, had been appointed to assume the role. The young agency is expected to continue to strive for greater stability, efficiency, and predictability, while vigorously pursuing anti-cartel rules throughout 2016.

Japan

The Japanese Fair Trade Commission (JFTC) fine total was lower in 2015 as compared to recent years, with fines totaling USD31.7m over the year. The agricultural storage industry was hit the hardest, fined a total of more than USD15m related to collusion and bid rigging in manufacturing and construction tenders for grain storage facilities in multiple conspiracies that spanned across Japan. The largest single fine, however, was assessed against 11 companies for rigging bids related to snow removal equipment for Honkuriku Shinkansen, the Japanese bullet train, making it the first case to be tried under the JFTC's new hearing procedure.

In 2015, Japan placed a strong focus on individual accountability. This year individual executives were sentenced to prison terms of a year or longer for obstructing bids in a fire-fighting equipment inspection project. Two former directors of ball bearing companies received suspended prison sentences in relation to their role in price fixing. And most recently, two executives were arrested on account of allegations of collusive bidding for public construction work.

On the policy front, in December, the JFTC announced it was considering adjusting fines for companies involved in the same conduct. The JFTC also adopted a significant change in investigation procedures earlier this year, directing appeal of JFTC administrative orders to the Tokyo District Court, rather than challenging them through a hearing procedure at the JFTC. These changes allow companies to have a greater ability to examine the evidence against them and increase chances for companies to refute related charges.

South Korea

South Korea's robust enforcement efforts have continued in 2015, with fines totaling USD490.7m. While the cartel fine level is far less than the USD1.01bn mark reached last year, South Korea was second only to the United States this year in the total number of cases (44) in which fines were levied. Following the pattern set in 2014, the Korea Fair Trade Commission (KFTC) imposed four of its largest fines this year–USD161.4m, USD27.6m, USD28.12m, and USD24.4m–for bid-rigging in government construction projects. Yet these fines, amounting to USD275m, notably show a total decrease of 62.2% from the total amount imposed on construction companies in 2014. The KFTC also imposed a USD68.83m fine on companies for fixing prices in the local compound feed market, and a USD59.3m fine for price fixing on industrial explosive manufacturers. Of note, on December 24, 2015, the Supreme Court of Korea overturned the KFTC's 2012 decision against Nongshim for ramen price-fixing due to lack of sufficient evidence, indicating the sizeable burden of proof imposed when cases are built entirely upon statements from leniency applicants and evidence of mere information exchange.

Non-monetary sanctions continue to be at the forefront of Korean competition enforcement as well: a total of five executives were sentenced to prison terms this year, including two railway executives for their roles in colluding to win supply contracts in a high-speed railway construction project. The KFTC also recently banned two companies, Hyundai Development Co. and Samsung C&T, from participating in any government tenders as a result of alleged bid-rigging.

Chairman of the KFTC, Jung Jae-chan remains committed to stepping up the KFTC's monitoring of suspected international cartels, including a special focus on price fixing related to global financial benchmarks and currency exchange rates. Importantly, earlier this year the KFTC unveiled a new anonymous reporting system for alerting the KFTC to potential anticompetitive activities. Over 50 reports were submitted within the first month of the program's existence. On September 9, the KFTC also signed a memorandum of understanding on antitrust cooperation with the U.S. antitrust agencies regarding information exchange and case coordination in competition law and policy.

Singapore

Though the Competition Commission of Singapore (CCS) did not impose any fines in 2015, the agency took important steps to increase its enforcement program by advocating for increased leniency applications, the strengthening of internal compliance programs, and comprehensive competition legislation throughout ASEAN's ten member states. In September, the CCS proposed revisions to Singapore's existing enforcement framework in an attempt to introduce a "fast-track procedure" intended to expedite investigations and lessen economic burdens accrued by companies over the duration of an investigation. The CCS broke from international norms in October when it proposed new legislation that would offer a 50% discount to individuals guilty of anticompetitive behavior who work with the CCS, underlining a renewed emphasis on cooperation with authorities over objective fiscal penalties.

Other developments

The Hong Kong Competition Ordinance went into full effect on December 14, 2015, three and a half years following its enactment. The new law authorizes the Hong Kong Competition Commission to investigate and bring enforcement actions before the Competition Tribunal against corporations and individuals engaged in criminal cartels, anticompetitive agreements, and/or abuse of substantial market power. Both the Competition Commission and Competition Tribunal have made clear that they are ready to take action and that cartels are their top enforcement priority. The Commission has already received complaints in the hospitality, shipping, construction, and gold sectors, although it does not expect to initiate enforcement actions against conduct already existing at the time of commencement of the new law. The Commission is empowered to seek pecuniary penalties against corporations and individuals, as well as disqualification orders that disqualify individuals from acting in their corporate roles for up to five years.

In Taiwan, the Fair Trade Commission imposed its highest-ever international cartel fine of approximately USD175m against ten capacitor producers engaged in cartel activities.

Indonesia's Supervision of Business Competition (KPPU) is continuing to prove that it is a serious cartel enforcement authority, imposing fines against 14 different cartels in 2015. Actions were brought in a variety of sectors including construction, medical equipment, oil and gas, and manufacturing. A majority of the actions involved bid rigging in public tenders. Despite the large volume of cartel enforcement actions, the penalties imposed remain low. Yet, with a budget of nearly twice the amount allotted in 2015, KPPU is likely to continue its upward trajectory in cartel enforcement in 2016.

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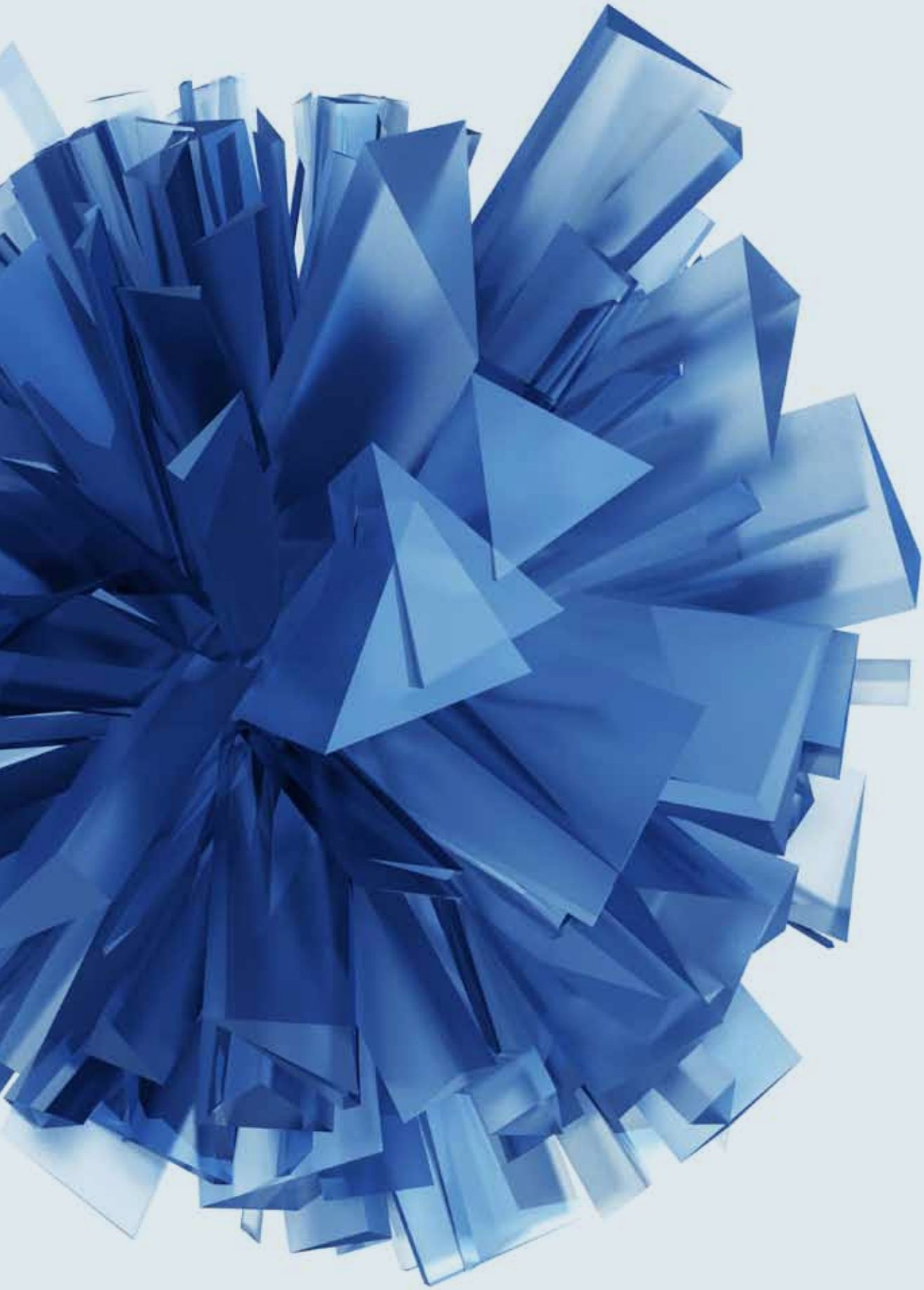

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