

# ALLEN & OVERY



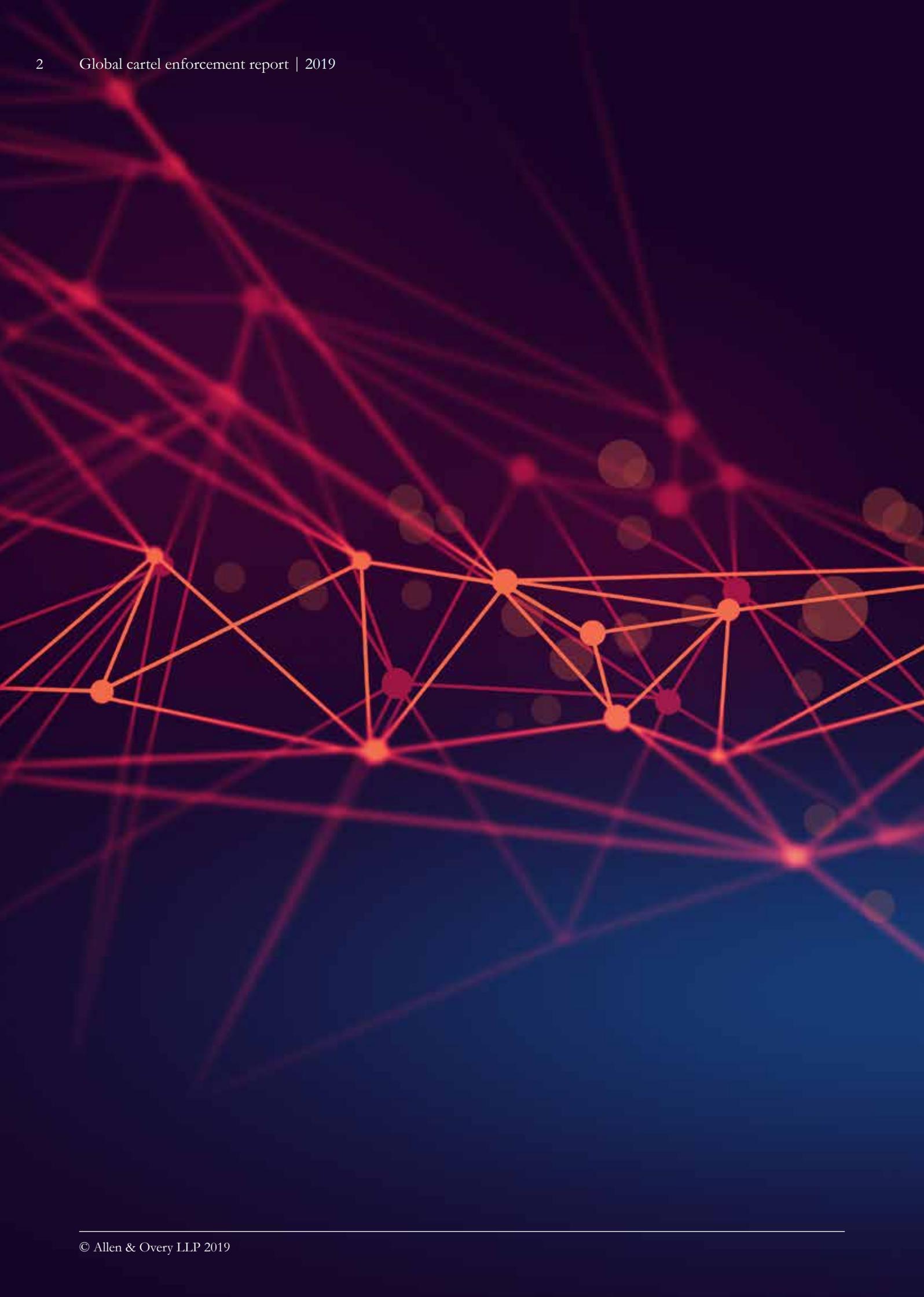
## Global cartel enforcement report

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2019

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# Foreword

2018 was a mixed picture in terms of global cartel fine levels, with only three jurisdictions – Brazil, Germany and Italy – seeing significant increases in the level of fines imposed in 2017, while the U.S. saw a modest rise from a low starting point and historically aggressive enforcers – such as the European Commission (EC) and the Korea Fair Trade Commission (KFTC) – experienced a second year-on-year decline.

While not much should be read into the statistics given that investigations tend to run for several years, a number of trends may be highlighted:

- Several long-running international investigations – mainly in the auto and financial services sectors – that have dominated headlines (and fines) over the last few years are now coming to an end, and it is unclear what investigations will fill that “void”, especially when the remaining financial services cases are completed.
- While a small number of the “newer” enforcers buck the trend, there is a general downturn in the number of leniency applications across many jurisdictions. For example, in Brazil there were 31 leniency agreements in 2017, but there were only five in 2018. This trend poses a significant challenge to future cartel enforcement since historically a material proportion of cartel decisions have been founded on immunity and/or leniency applications; in fact as the table on page 8 shows, only two of the 17 jurisdictions/regions issued cartel decisions in 2018 that did *not* involve immunity/leniency applications (ie, UK and Taiwan), while the majority of decisions in the EU, Canada, Brazil, Japan, Singapore, India and Germany were based on immunity/leniency applications. This reduction in the number of leniency applications is likely attributable to the spread of private damages actions beyond the U.S., with cartelists increasingly aware that the creation of a paper trail for the purposes of obtaining a leniency discount may end up costing them more money if it facilitates aggressive damages claims which are no longer limited to the U.S..
- Perhaps aware of the threats to the future success of their pivotal leniency programmes, certain agencies are already looking to bring in new tools to make the leniency process more “user friendly”.
- In Europe, the Courts are holding the EC to account on how it manages its settlement process so as not to bias the adoption of any infringement decision in hybrid cases (where only some parties elect to settle) and to ensure that there is sufficient transparency in how fine levels are calculated (see the discussion of the *ICAP* and *Pometon* judgments on page 9).

It is perhaps no coincidence that faced with these challenges, some agencies – such as the EC in the recent *Nike* and *Guess* cases – now appear to be focusing their efforts on addressing “vertical infringements” (eg, resale price maintenance, restrictions on parallel imports) where they have the discretion of offering generous “cooperation discounts” without having to consider the implications of any formal leniency programmes. This shift in focus, however, may encourage some parties to attempt to characterise vertical infringements as having a horizontal (cartel) component in order to seek immunity from fines and mitigate their exposure with more certainty.

Looking forward, there will undoubtedly be a number of high fines imposed in 2019 as long-running cases come to an end, but this should not distract from the more important message that will be conveyed on the one hand by the number of new immunity/leniency applications filed in 2019 and on the other by the amount of damages that are paid out on the back of cartel decisions that have already been adopted.

**Philip Mansfield, Partner**

# Hot topics 2019



## DAWN RAIDS

Dawn raids carried out in several jurisdictions involved a wide variety of sectors (including metal packaging, pharmaceutical, luxury watches and DRAM), confirming that surprise inspections remain an important tool in the agencies' armoury and that companies must be well prepared to handle such events. Training should include how to handle electronic document searches, employee interviews and conflicting legal privilege considerations.



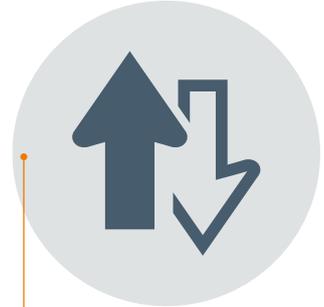
## ANTITRUST AUTHORITIES CONTINUE TO FACILITATE CARTEL DETECTION AND ENFORCEMENT

As highlighted in our 2017 Report, antitrust authorities' toolkits are becoming ever more sophisticated in order to tackle new detection and enforcement challenges: for example, the new digital investigation methodology unit, centralised intelligence network, eLeniency and online whistleblowing tools used by the EC, and Spain's screening unit for identifying potential collusive practices in public bids.



## INCREASED FINING POWERS

A number of jurisdictions have amended their cartel enforcement rules to allow for increased fines, particularly in Asia Pacific. In South Korea, new amendments to the Monopoly Regulation and Fair Trade Act will increase the maximum fine that the KFTC can impose from 10% to 20% of relevant revenue.



## VERTICAL RESTRAINTS

Vertical restraints are an increasing area of focus, in particular in the EU where the EC has used its discretion to grant fine reductions for cooperation in vertical cases above the 10% limit for cartel cases. We are also seeing instances of attempts to re-characterise complex vertical infringements as "horizontal conspiracies".



### CONTINUED TREND TOWARDS SETTLEMENT

The German Federal Cartel Office (**FCO**) concluded six of its seven cartel cases through settlement procedures and all of the cartel decisions in the U.S. involved settlement. At the EU level, the EC settled three out of the four cartel decisions issued, bringing the number of settlement decisions to 28 since the regime was introduced in 2008 (a further settlement decision in early 2019 brings the total to 29). It will be interesting to see what impact the *ICAP* judgment, and the more recent *Pometon* judgment, will have on the EC's approach to hybrid settlement cases going forward.



### BID-RIGGING

This remains high on the priority list with a number of jurisdictions (including Brazil and Slovakia) signing cooperation agreements with other administrative bodies in order to seek greater efficiency in cartel enforcement for bid-rigging.



### INFORMATION EXCHANGE BACK ON THE AGENDA

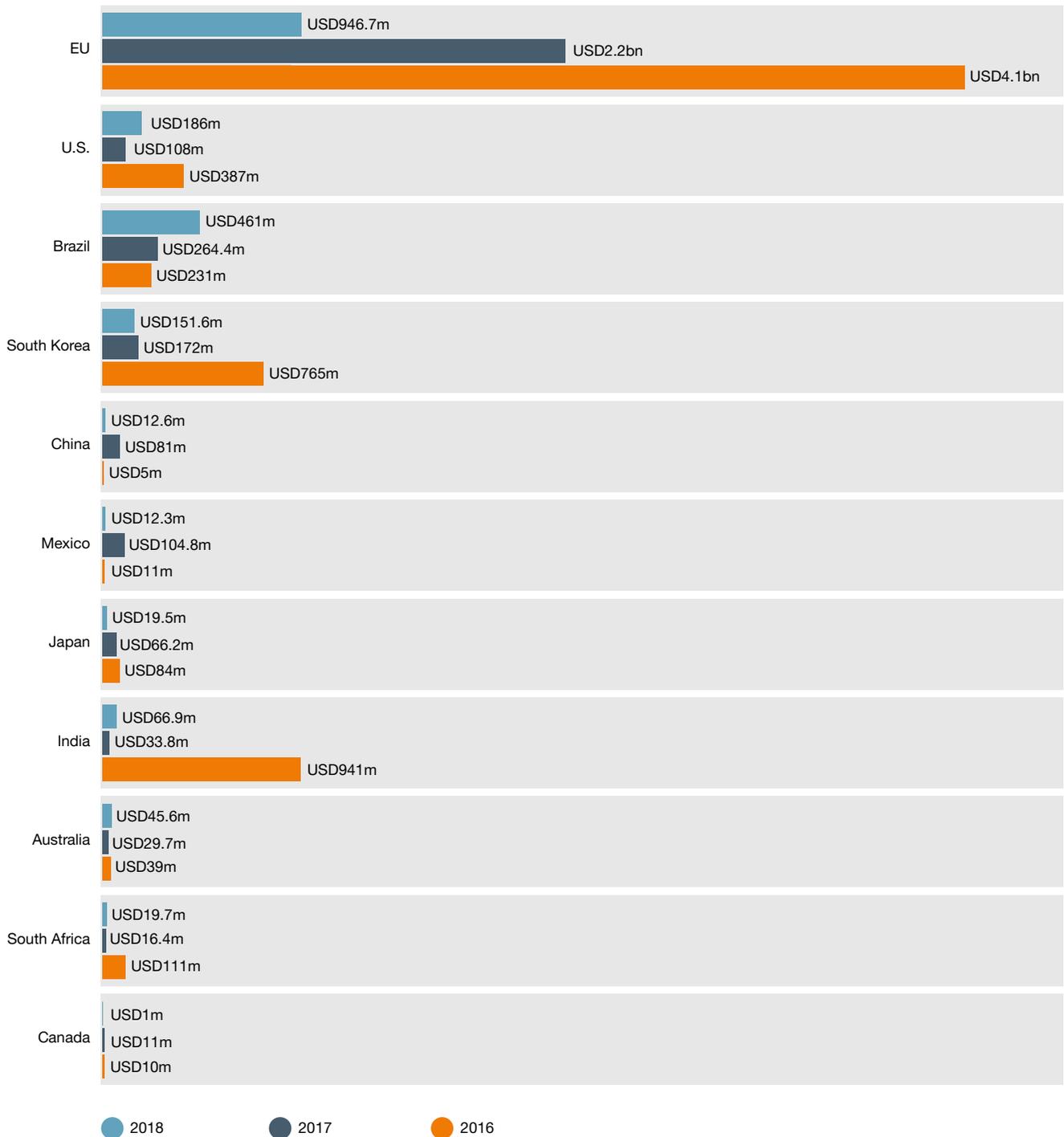
In the UK, the Court of Appeal upheld the Competition and Markets Authority (**CMA**)'s fine on Balmoral Tanks for illegally exchanging price information with competitors at just one meeting, sending a clear message that even single instances of illegitimate information exchange will be investigated. The Financial Conduct Authority's first competition decision (in November) also sanctioned an isolated information exchange, sending an equally clear message to financial institutions. Information exchange cases were also successfully pursued in a number of other jurisdictions, including France, and it has been put forward as a new type of collusion under proposed reforms in South Korea.



### PRIVATE DAMAGES ACTIONS – A CHILLING EFFECT ON LENIENCY?

Although leniency programmes remain an important tool in detecting and enforcing cartels, the spread of private damages actions beyond the U.S. is having a chilling effect on leniency applications. How far this will spread remains to be seen, but authorities around the globe are already feeling the impact.

# Select cartel fine comparison

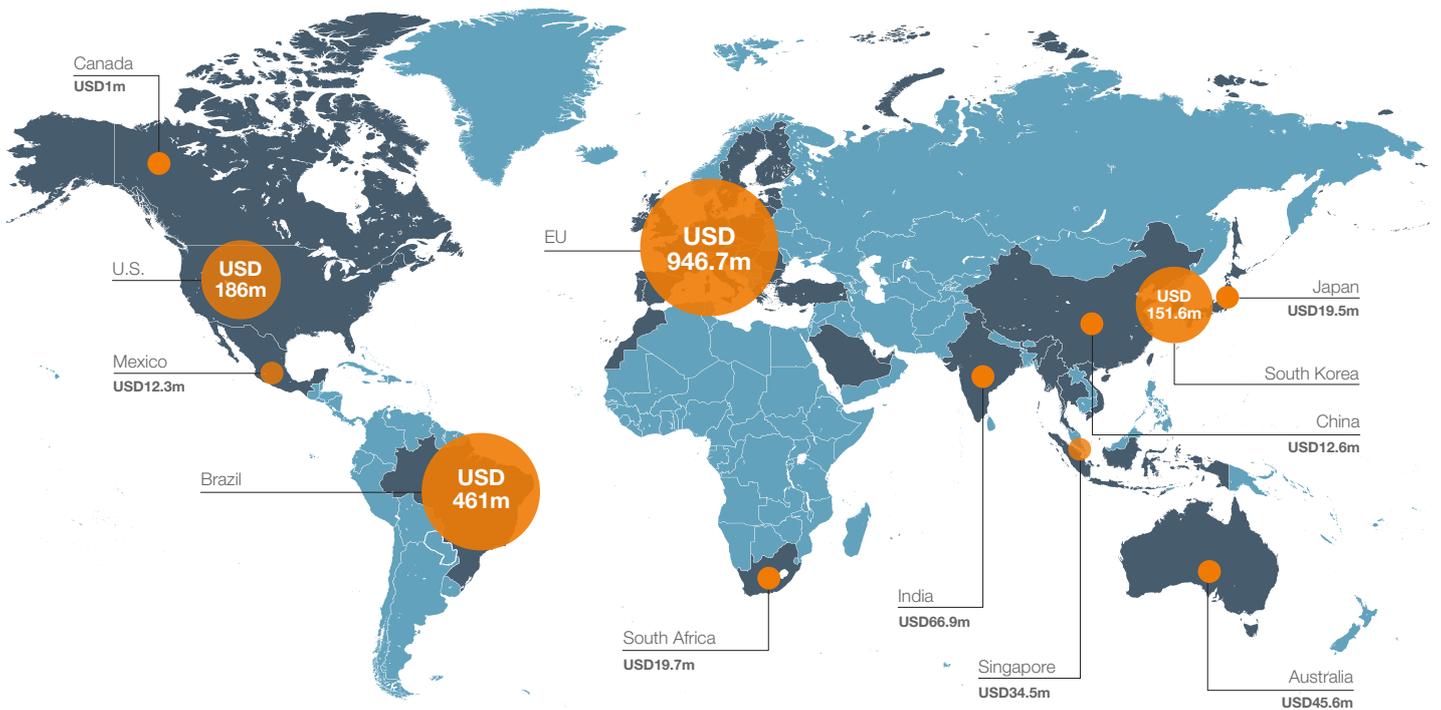


Adjustments have been made to the U.S. figures included in our 2017 Report to allow for fines that were revised/actually imposed in FY2018 rather than FY2017.

2018 statistics are approximate and reflect fine levels and exchange rates as at 31 December 2018 and may not be exhaustive. U.S. figures relate to fines imposed at federal level by the Department of Justice. 2018 U.S. statistics are for the U.S. fiscal year, which began on 1 October 2017. 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).

The EU fine total relates to decisions taken by the EC.

# 2018 global cartel fine levels



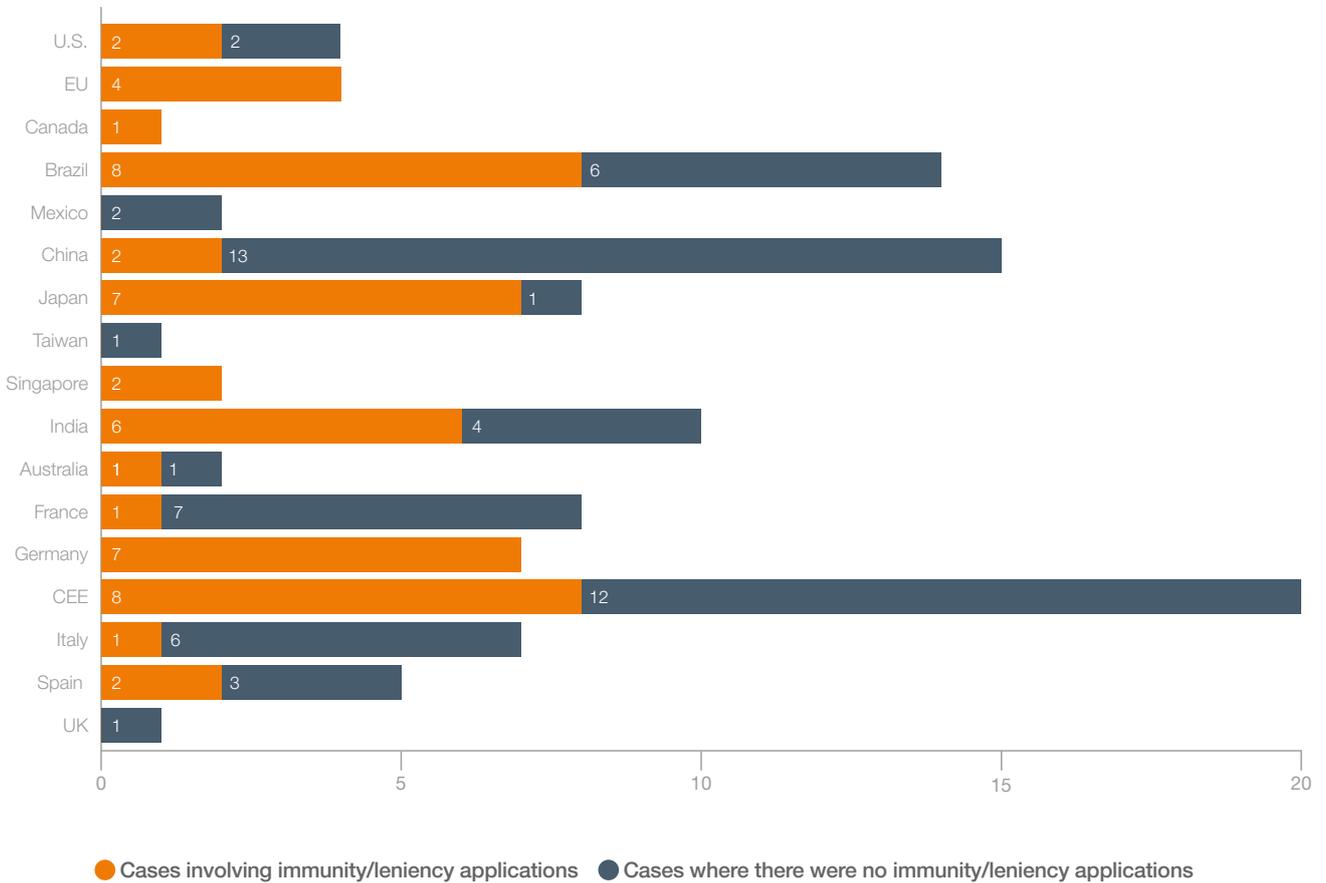
	EU	U.S.	Brazil	South Korea	China	Mexico	Japan	India	Australia	South Africa	Canada	Singapore
<b>USD</b>	946.7m	186m	461m	151.6m	12.6m	12.3m	19.5m	66.9m	45.6m	19.7m	1m	34.5m
<b>EUR</b>	801m	156m	390m	128.4m	10.7m	10.4m	16.5m	59.2m	38.6m	16.7m	0.85m	29.2m

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# 2018 other key statistics

## CARTEL DECISIONS INVOLVING AN IMMUNITY/LIENIENCY APPLICATION BY VOLUME



## SETTLEMENT DECISIONS

by volume, for selected jurisdictions

● Hybrid settlement decisions: Total – 18 ● Pure settlement decisions: Total – 23



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

# Europe

## European Union

As 2018 marked the final full year for Commissioner Vestager at the head of DG Competition and with numerous cases on-going, it was perhaps a little surprising that only four cases were concluded. Having said that, despite closing fewer cases in 2018 than in previous years, the EC still retained its place at the top of the global leader board, imposing the highest fine totals of the jurisdictions we surveyed: EUR801 million (USD946.7m).

The EC's focus remained on the long-running auto industry investigations, with three out of the four decisions in this sector. Unusually the three decisions were all delivered on the same day, with the EC fining seven companies a total of EUR546m for taking part in cartels relating to: the transport of new cars, trucks and other large vehicles by sea (**the maritime car carriers cartel**); the supply of spark plugs (**the spark plugs cartel**); and the supply of hydraulic and electronic braking systems (**the braking systems cartels**).

These decisions follow a line of ten previous cases in the auto sector in which the EC has imposed fines of over EUR6 billion. It appears that the EC is not quite finished with the auto sector yet: it opened a new investigation in September 2018 into potential collusion by BMW, Daimler and VW (Volkswagen, Audi, Porsche) to avoid competition in the development and roll-out of technology to clean the emissions of petrol and diesel passenger cars. The statement of objections was issued in April 2019. The only other EC cartel decision of 2018 saw eight companies fined a total of EUR254m, for a cartel relating to the supply of aluminium and tantalum electrolytic capacitors.

Other notable developments in 2018 include:

– **Criticism by the General Court for the EC's handling of the investigation in the ICAP case.**

In a judgment handed down in late 2017, the General Court was critical of how the investigation involving ICAP had been conducted, stating that EC investigators needed to 'respect the presumption of innocence of the undertaking which has decided not to enter into a settlement' (ie when handling hybrid settlements where some parties settle the case and others continue to contest the allegations). However, in the recent *Pometon* judgment the General Court found, in similar circumstances, that the EC had not breached Pometon's rights of defence and presumption of innocence in the way it handled the case. It remains to be seen whether the EC feels directed by the ECJ's comments in the *ICAP* judgment or rather the *Pometon* judgment, which appear difficult to align.

Meanwhile the EC has appealed the part of the *ICAP* judgment relating to the calculation of the fine to the European Court of Justice (**ECJ**), arguing that if it was required to disclose its fining methodology this would undercut the deterrent effect of the fines. It will be interesting to see where the ECJ comes out on this and what impact the decision may have on the EC's discretion when imposing fines, especially in light of the *Pometon* judgment where the General Court said that the reduction it applied was justified by the EC's failure to explain sufficiently how it calculated its fine.

– **The interplay between the leniency regime and private damages actions became a hot topic.** With the EC Damages Directive now fully transposed into national law by all Member States (making it easier for victims of anti-competitive practices to obtain damages) and numerous private damages actions starting to filter through the National Courts, it is unclear what impact private damages actions may have on future leniency applications. If the real threat of follow on damages actions does discourage future leniency applications, this will pose a challenge to the EC's ability to prosecute cartels in the future. All of the 2018 cartel decisions involved an immunity applicant, confirming that historically the leniency regime has been a powerful tool in the detection and enforcement of cartels. Recognising the threat to its programme, the EC has introduced a new online 'eLeniency' tool, to make it easier for companies to submit documents as part of the leniency proceedings (protecting them against discovery in civil litigation as before).

– **A decrease in leniency applicants in the coming years** may mean that the EC will need to rely more on individual whistleblowers, a trend noted in last year's Report in the context of an anonymous online whistleblowing tool launched in March 2017. In April 2018, the EC proposed a directive on the protection of whistleblowers (which covers breaches of EU competition rules). It may incentivise individuals to come forward without fear of dismissal, demotion or other forms of retaliation. It does not, however, go so far as providing a financial reward to whistleblowers, as is done under the UK system, for example. A final deal on the directive was reached in March 2019. After much debate, the controversial obligation requiring whistleblowers to first report their concerns to their company was removed. The final text merely encourages whistleblowers to internally report problems that they find, but not if that course of action is too risky or pointless given the company culture.

Looking forward, with a second term looking unlikely, Commissioner Vestager's focus is expected to be on legacy building. However, she has confirmed that the end of her mandate does not mean there will be a downturn in enforcement and that new cases will be opened in 2019. This is supported by the numerous dawn raids that took place in 2018 in the metal packaging sector, the styrene monomer purchasing sector, and in relation to the distribution of sports media rights.

More broadly, the EC continues to focus on digitisation and the internet, and the automotive (as mentioned above) and financial services sectors. In line with this, the EC appointed three experts to look at the future challenges of digitisation for competition policy (their report was published at the beginning of April) and sent a statement of objections to four banks in the on-going investigation into the trading of U.S. dollar denominated bonds at the end of 2018. Two further statements of objections have been sent

## Key takeaway



The EC has continued its efforts to facilitate whistleblowing with the anonymous whistleblower tool, the EC directive and the introduction of the new 'eLeniency' tool.

so far in 2019: one to financial institutions in relation to the European government bonds cartel, and the other relating to car emissions.

## Vertical restraints – an increased focus in the EU

Vertical restraints such as selective distribution arrangements, geo-blocking, bans on listing products on price comparison websites or on platforms/marketplaces, and resale price maintenance (RPM) (particularly relating to online sales) appear to be moving up the priority list with antitrust authorities, especially in the EU.

At the end of 2018, the EC found that clothing maker Guess' selective distribution agreements went beyond what was permitted as they placed a number of restrictions on authorised retailers on, amongst other things, selling online without specific prior authorisation by Guess. This follows similar activity in a number of other Member States including Spain (relating to Adidas and restrictions on online sales and cross-selling) and France and Belgium (relating to Caudalie's selective distribution systems). The FCO has also been active in this area with selective distribution systems coming under particular scrutiny when they restrict online sales (the Asics appeal).

In addition to selective distribution, RPM also came under the spotlight in relation to online retail. In July 2018, the EC fined consumer electronics makers Asus, Denon & Marantz, Philips and Pioneer a total of more than EUR111m for imposing fixed

or minimum resale prices on their online retailers. The EC noted that an increasing use of price tracking algorithms exacerbates the anti-competitive effects of RPM. More cases are expected.

Increased scrutiny of selective distribution systems and RPM, a concern over ensuring a common EU approach, and the increase in online retail has been the focus of the EC's review of the Vertical Block Exemption Regulation (VBER). Among other things, the EC is assessing whether the selective distribution system exception should be abandoned, as well as whether RPM should continue to be viewed as a hardcore restriction. The EC aims to complete its review of the VBER by the summer of 2020.

Another interesting point to note here is that the EC seems increasingly inclined to reduce fines in non-cartel cases to reward cooperation, even without an established framework for doing so. This gives the EC the discretion to go further than the 10% limit currently seen for cooperation and settlement in cartel cases (Guess benefitted from a 50% fine reduction and Nike from a 40% one). The EC has issued a fact sheet dealing with FAQs in this area but it remains to be seen whether it will look to formalise these procedures in the near future.

## European Member States

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European Member States continued their robust approach to cartel enforcement throughout 2018, with a number of dawn raids taking place in various jurisdictions. Activities were further bolstered by the adoption of Directive (EU) 2019/1 (**ECN+**). The ECN+ is aimed at harmonising outcomes of proceedings by ensuring that Member States have the appropriate enforcement tools. A number of national competition authorities (**NCA**s), such as Slovakia, have already started consulting on what this would mean in terms of amendments to their own competition laws.

### Belgium

2018 was a relatively quiet year for the Belgian Competition Authority (**BCA**) in terms of cartel enforcement, with no decisions. The BCA was forced to close two cases in the travel and cargo handling sectors (without an infringement decision) due to lack of evidence and the limitation period expiring, following a decision by the Belgian Supreme Court (**SC**). The SC upheld an earlier decision of the Brussels Court of Appeal that the dawn raids carried out in relation to these investigations in 2006 were illegal because they had been conducted without a prior judicial warrant. However, activity is going on behind the scenes: the BCA confirmed that it had carried out at least three dawn raids (one of which was in cooperation with the French Competition Authority (**FCA**)) in relation to cosmetic products, fire protection and the production of antibodies.

2018 saw the BCA turn its attention to exchanges of information through trade associations and by undertakings active in the ‘supply of market information’.

### France

In 2018, the FCA issued nine cartel decisions and imposed fines totalling EUR209.9m (significantly less than the fines imposed in 2017 which were bolstered by the conclusion of the floor covering cartel). The FCA’s efforts focussed mainly on traditional cartel infringements such as price-fixing agreements (five decisions with fines totalling EUR205.3m) but also included fines for breach of commitments (EUR4.5m), bid-rigging (EUR0.08m), and information exchange (EUR0.04m).

The major share of the 2018 fines related to a price-fixing cartel in the household appliance sector (EUR189m). The case highlighted the increased use of settlement proceedings before the FCA (introduced by the Macron Act in August 2015), and involved the combined use of the leniency procedure and settlement procedure for only the second time. The leniency applicant benefitted from a fine reduction for both the evidence it provided (which enabled the FCA to extend the infringement period) and for settling the case.

Although 2018 saw fewer fines imposed than in previous years, the FCA is likely to be very active in the wake of dawn raids recently carried out in the luxury watches, the distribution of cosmetics (together with the BCA), IT services and software editing sectors.

### Germany

Germany was one of the jurisdictions that bucked the general trend in 2018 with a significant increase in the total value of fines imposed. The FCO imposed total fines of around EUR376m and, in a shift in focus from 2017, all of the decisions related to horizontal infringements (as opposed to vertical infringements). This increase in fines may, in part, be explained by the German legislator closing the legal loophole which allowed cartellists to escape fines through restructuring – a change mentioned in our 2017 Report. The largest fine was imposed for a cartel in the steel sector (EUR205m). Investigations against further companies in the steel sector are on-going so there is potential for this figure to increase significantly in 2019.

All proceedings where fines were imposed in 2018 relied on leniency applications; however, the overall number of leniency applications continues to drop. In 2018, the FCO received only 21 leniency applications in total, compared to 37 in 2017 and 59 in 2016. This decline is arguably linked to the sharp increase in cartel damages actions in Germany.

## Italy

Italy is another country where the fines imposed in 2018 were higher than in previous years (with over EUR681m levied compared to around EUR245.5m in 2016 and EUR351m in 2017). The Italian Antitrust Authority (**IAA**) closed seven cartel investigations, opened four new ones, and six proceedings opened in 2017 remain pending, demonstrating that cartel enforcement is very much on the agenda. As with other jurisdictions, the IAA is keeping a particularly close eye on bid-rigging cases. One interesting development is the newly-introduced Article 80 of the Italian Public Procurement Code. This means that participation in a cartel may now be classified as severe professional misconduct and lead to automatic exclusion from public tenders. The introduction of this additional sanction is likely to raise significant concerns, especially for undertakings that are highly reliant on tenders.

## Netherlands

As with its Belgian counterpart, the Dutch competition authority (**ACM**) did not impose any fines for cartel conduct in 2018. The ACM closed one cartel investigation in the fuel oil bunker sector (without issuing an infringement decision) on the basis that, although the possibility of a price-fixing arrangement was discussed by the parties involved, it did not ultimately result in a cartel being formed.

In September 2018, Martijn Snoep was appointed as the new chairman of the ACM. He has already been keen to highlight the fact that he wants a more active enforcement policy, with more fines being imposed and quicker, shorter investigations.

Since his appointment, two new investigations have been made public by the ACM. The first relates to public tenders in the roofing sector, and the second follows dawn raids at a number of companies (both producers and online retailers) active in the consumer goods sector in relation to allegations of RPM. The latter investigation indicates an apparent change of direction at the ACM following Martijn Snoep's appointment, with vertical restraints now an enforcement priority.

## Spain

The Spanish Competition Authority (**CNMC**) maintained its cartel enforcement momentum in 2018. In terms of cases decided (six) and total amount of fines levied (EUR118.4m), 2018 was in line with 2017. The lion's share of fines imposed came from just two infringement proceedings (one relating to courier express parcels and the other to IT software tenders). These two decisions represented approximately 86% of the total amount of the fines levied in 2018.

During 2018 the CNMC continued to focus on cartel cases relating to market-sharing arrangements (which have been at the top of its enforcement agenda for a number of years), with a particular emphasis on bid-rigging. Half of the cases decided by the CNMC during 2018 related to bid-rigging practices in the public sector. This emphasis has led to the creation of a "screening" unit that dedicates most of its time to identifying potential collusive practices in public bids.

There was a significant number of dawn raids carried out during 2018 (five) and six new infringement

proceedings for alleged cartel behaviour were opened. As a result, Spain looks set to see a similar pace of cartel enforcement activity in 2019 and beyond.

## UK

In 2018 the CMA only imposed one fine relating to cartels, compared to five such decisions in 2017. The decision concerned the UK's biggest solid fuel suppliers settling a market sharing cartel investigation by agreeing to pay a total fine of GBP3.4m. The CMA also opened seven new cartel investigations, five of which relate to musical instruments and equipment, while the other two relate to residential estate agency services and the financial services sector (where it has concurrent enforcement jurisdiction with the Financial Conduct Authority, which itself issued its first competition decision at the beginning of 2019 against three asset management firms who were found to have breached competition law).

2018 saw the CMA send a clear message on personal liability by securing the disqualification of two directors involved in an estate agency cartel, for three and three and a half years respectively (its only previous disqualification of a director was in December 2016). Otherwise, the CMA focused on the use of social media campaigns designed to raise awareness of the law (CMA-commissioned research revealed that only 57% of the surveyed companies were aware that price-fixing is illegal); and the encouragement of whistleblowers (the CMA received 23 whistleblower disclosures between April 2017 and 31 March 2018). The CMA also established a new data unit to further its understanding of digital markets and the use of algorithms as a means to facilitate cartels.

## *Criminal cartel investigations in the UK – a changing of the guard?*

Lord Tyrie's proposal to divest the CMA of its criminal cartel prosecution powers and pass them to another agency comes at a time when the CMA has yet to test the newly-amended cartel offence (introduced with effect from 1 April 2014), which removed the requirement for it to prove dishonesty. It is uncertain whether the Serious Fraud Office (**SFO**) or another agency would agree to take up the challenge. The SFO has always had the ability to prosecute the cartel offence pursuant to the Memorandum of Understanding between the organisations, but has chosen to leave the role to the CMA. This reflects the specialised nature of cartel investigations, the crossover with the civil competition offences and the statutory immunity from criminal prosecution that is available

to current and former employees of the immunity applicant companies. There are also the promises made in the DTI White Paper that preceded the introduction of the original cartel offence that only 'hard core cartels' would be prosecuted. This assertion is repeated in the Prosecution Guidance that accompanied the amended offence in 2014. Although the CMA's confidence in conducting criminal investigations is at a low following the acquittals in the *Steel Tanks* case (and before that, *BA/Virgin*), the cracks that have appeared over the years in the criminal investigation expertise within the CMA may be easier to fix than the task of training another agency in this specialised area of the law.

The CMA spent a significant amount of time in 2018 up-tooling in terms of personnel and skills in preparation for Brexit and the influx of cases it expects, and 2019 will undoubtedly be dominated by Brexit in terms of policy decisions. It confirmed in its 2019/20 business plan that it intends to continue to be active in cartel enforcement. As the CMA takes on the larger and more complex cases that were previously reserved to the EC, it will be interesting to see how its more discretionary powers (ie cartel enforcement) fare against the obligations that it has under statute to investigate mergers and State aid matters.

The cartel enforcement landscape in the UK is also likely to be impacted by Lord Tyrie's proposed reforms to the CMA's powers, which included enhanced powers for enforcement generally around individual responsibility, whistleblowing and investigation and information-gathering powers. One key proposed reform is that the CMA's criminal cartel enforcement powers should be transferred to a different agency. Some commentators suggest

that this is perhaps in response to a lack of appropriately skilled personnel and/or to make way for the increased workload in other areas expected as a result of Brexit. So far no single body has stepped forward to take on this role.

### **CEE Region**

Antitrust authorities in the CEE region continued to direct their cartel enforcement activities in 2018 towards bid-rigging. These included: several dawn raids conducted across the region (Poland, Slovakia), specific awareness campaigns and training programmes aimed at public officers (Poland), and cooperation agreements with other state administrative bodies in order to increase the efficiency of control of public procurements (Slovakia). Antitrust authorities in the region also continued to expand their remit. For example, the Polish competition authority initiated its first proceedings against an individual (since the power was introduced in 2015) who was alleged to have been involved in market-sharing and market access restriction practices in the fitness sector.

In Hungary, a number of Supreme Court decisions look set to impact cartel enforcement policy in 2019.

In particular, the Hungarian competition authority suffered a significant set-back at the beginning of 2018, with the Supreme Court ruling that the authority cannot find an infringement based solely on potential anti-competitive effects (a trend that had been on the rise in Hungary).

For Poland, at least, the focus in 2019 is likely to be on the financial sector as new legislation on enhanced supervision of the sector and protection for investors in the financial markets came into force at the end of 2018.

## Russia

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In a significant increase from 2017 (five cases), 2018 saw 33 criminal cases opened under Article 178 of the Criminal Code for restricting competition, largely against top executives at various companies and state officials. Many more cases were closed relating to relatively minor collusions in regional markets in the course of public tenders.

Andrey Tenishev, the Head of the Federal Antimonopoly Service (**FAS**)'s Anti-Cartel Department (**ACD**),

stated that 118 companies were exempt from liability for cartel activity due to whistleblowing in 2018.

This has helped to reduce the rate of appeal for cartel decisions from 90% in 2017 to 46% in 2018. Russia is also noticing a trend towards the implementation of antitrust compliance policies, which is having a positive impact on corporate culture.

International cooperation remained a key aim of the FAS in 2018. ACD representatives participated in an OECD international workshop on “complex examination of anti-cartel cases”, and the FAS announced continued cooperation with other regulators within the BRICS.

# Americas

## United States

September 2018 marked the first full year as the head of the Department of Justice (DOJ)'s Antitrust Division (Division) for Makan Delrahim, a year that has been defined by three main developments. *First*, the DOJ increased its enforcement activity in relation to no-poach agreements, ie agreements by companies not to hire each other's employees (a move also seen in Mexico). *Second*, in a speech in November 2018, Mr Delrahim stated that there would be a revitalisation of the government's Section 4A authority. Under Section 4A of the Clayton Act, the U.S. government may recover treble damages for antitrust injuries it has suffered, as demonstrated by the fines imposed on three South Korea-based companies for their involvement in a bid-rigging conspiracy (they agreed to pay USD154m in civil damages to the U.S. government in addition to the criminal fines). *Third*, in October 2018, StarKist Co. agreed to plead guilty for its role in a conspiracy to fix prices of packaged seafood. The amount of StarKist's fine will be determined at a sentencing hearing that will likely occur in 2019.

More generally, the U.S. continued to experience a general decline in the quantum of criminal enforcement in FY2018. The DOJ filed a total of 18 criminal cases, which is the lowest total number of cases it has filed in one fiscal year in the last decade. While there was a modest increase over the prior year in the total amount of corporate fines imposed, it is nowhere close to the numbers previously seen in 2014 to

2016. Specifically, in FY2018, the DOJ imposed corporate fines on seven entities amounting to USD186m, which includes the USD90m BNP Paribas USA Inc. fine for participating in a price-fixing conspiracy in the foreign currency exchange (FX) market; the USD54.6m fine Nichicon Corporation was ordered to pay for conspiring to fix prices for electrolytic capacitors; and the USD12m fine Maruyasu Industries Co. Ltd paid for participating in a conspiracy to price-fix, rig bids, and allocate customers for automotive steel tubes. In addition, 28 individuals were charged in FY2018, up from the 27 in FY2017 but in sharp contrast to the 52 charged in FY2016.

Several factors play a role in the general downward trend in the number of cases filed, fines and individual charges, including the fact that investigations are cyclical – several of the Division's long-running cartel investigations, including ocean shipping and foreign currency exchange are either successfully resolved or headed for trial. The FY2018 trials include: (i) an October 2018 trial against three London-based traders (formerly at Barclays, Citigroup, and JPMorgan Chase) for their roles in the FX conspiracy, which resulted in a jury-acquittal; and (ii) another October 2018 trial against two former Deutsche Bank employees for their roles in a scheme to manipulate the LIBOR, which resulted in convictions. Fewer investigations also results from the reduction in new leniency applications being filed, as we have seen elsewhere across the world.

### Key takeaway



Treble damages under Section 4A of the Clayton Act look set to make a comeback for antitrust injuries that the U.S. government has suffered.

In terms of personnel changes, Richard Powers, a former prosecutor in the Division's New York field office, was appointed in March 2018 as the Deputy Assistant Attorney General in charge of criminal enforcement. Mr Powers has significant experience prosecuting financial services firms. He fills a long-vacant hole at the DOJ but his appointment is unlikely to significantly change the direction of the agency.

## Brazil

In 2018, the Administrative Council for Economic Defense (CADE) increased the total value of fines imposed by approximately 40%, with a total of USD461m, compared to USD264m levied in 2017. The execution of 16 settlement agreements, in the context of the “Operation Car Wash” Petrobras investigations, was a milestone of CADE’s enforcement activity.

Through these agreements, construction companies agreed to pay fines totalling USD238.2m, which had a major impact on the overall level of fines for 2018.

Compared to the 31 leniency agreements in 2017, only five leniency agreements were signed in 2018. It is unclear to what extent the downturn is linked to a ruling

on what documents from leniency agreements can be disclosed to third parties seeking damages. While this measure promises to bring greater predictability for would-be leniency applicants, it weakens the protection offered to such sensitive materials that may be needed in order to ensure the success of the leniency regime going forward.

2018 saw CADE working hard to overcome problems related to inter-agency cooperation in Brazil, in particular signing a cooperation agreement with the Federal Audit Court, seeking greater efficiency in cartel enforcement for bid-rigging. CADE was also successful in its application to join the OECD’s

### Key takeaway



Value of 2018 fines imposed by CADE increased by 40% compared to 2017

Competition Committee as an associated member in early 2019, following a peer review process that ran throughout 2018.

**With thanks to TozziniFreire Advogados for their contribution.**

## Canada

Canada saw a significant decrease in the number of fines issued for cartel conduct in 2018: only one fine of CAD1.3m (USD975,637) – imposed on INOAC Corporation – compared to seven fines in 2017 (totalling USD11m). INOAC Corporation was fined for its role in the international bid-rigging conspiracy amongst auto parts manufacturers. The INOAC fine concluded the Competition Bureau’s lengthy investigation into the auto parts case, which resulted in thirteen guilty pleas in Canada and over CAD86m imposed in fines between 2013 and 2018.

Having said that, the Competition Bureau remains engaged in several high-profile cartel investigations, including 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.

It will be interesting to see how the Competition Bureau’s revisions to the Immunity and Leniency Program impact the number of leniency applications, especially in the face of increased pressure from private damages actions around the world. The revised programme includes a number of key changes, such as no longer providing automatic immunity for directors, officers and employees of first-in leniency applicants, the introduction of “interim immunity” status, and a change in the method for calculating cooperation credits.

### Key takeaway



Revisions to the Competition Bureau’s Immunity and Leniency Program look set to impact the fine reductions companies receive.

Matthew Boswell was appointed for a five-year term as the new Commissioner of Competition in early 2019. He had been serving as interim Commissioner since May 2018.

**With thanks to Blake, Cassels & Graydon LLP for their contribution.**

## Mexico

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After the upward trend in activity in previous years, there was a significant decrease in the fines imposed by Mexico's Federal Economic Competition Commission (**COFECE**) in 2018. It concluded only two cases, with fines amounting to USD12.3m. In the first case, five firms active in the latex sector (producers of condoms and foley catheters) were fined USD5.8m for manipulating public health sector tenders. The second case involved seven cash transport companies who were found guilty of practices such as

coordination of the minimum reference price, market segmentation through non-aggression pacts and tariff coordination on infrastructure access (USD6.4m in fines). COFECE's activity remains focused on public procurement cartels, with a case relating to public sector tenders for toothbrushes currently under investigation. Until June 2018, COFECE was running three different cases for collusion in the market for 'tortilla', one of which has since been closed without an infringement decision.

In an interesting development, COFECE opened an investigation into possible cartel activity between a number of soccer clubs relating to the transfer of professional soccer players between clubs. This investigation appears to be a 'no-poach' case, similar to those pursued in the U.S..

**With thanks to SAI Law & Economics for their contribution.**

# Asia Pacific and South Africa

## Australia

The Australian Competition and Consumer Commission (ACCC) demonstrated an increased appetite for the enforcement of criminal cartel provisions in 2018 and continued its lobbying efforts for higher penalties to be awarded by the Courts. In February, it announced that it had made five referrals to the Commonwealth Director of Public Prosecutions (CDPP) and had a portfolio of investigations at an “advanced stage”. In the same month, the ACCC announced its referral of Country Care, its managing director, and a former employee, to the CDPP, which marked the first-ever criminal cartel proceedings against an Australian corporation and individuals. In June, the ACCC announced a second criminal cartel prosecution against Citigroup, Deutsche Bank and ANZ, and several senior executives. The charges involve alleged cartel arrangements relating to ANZ shares. A third series of criminal cartel charges, against the Construction, Forestry, Maritime, Mining and Energy Union and one divisional branch secretary, were announced in August. All three cases are before the courts at the time of publication.

Another first for the ACCC was the commencement of a “gun jumping” case against biotech company Cryosite. The ACCC alleged that Cryosite engaged in cartel conduct through entering into and giving effect to an asset sale agreement with competitor Cell Care, which contained provisions designed to restrict or limit supply and to allocate potential customers, prior to actual completion of the transaction. In February 2019, the Federal Court

found that Cryosite engaged in cartel conduct and imposed civil penalties of AUD1.05m, which the trial judge found to be sufficient to achieve specific deterrence in light of Cryosite’s precarious financial position.

One of the ACCC’s 2018 enforcement priorities was to ensure that penalties given to large companies were proportionate to their size in order to achieve deterrence. This was particularly relevant in light of the 2018 OECD Report “Pecuniary Penalties for Competition Law Infringements in Australia”, which found that in Australia, the maximum and average penalties imposed by the Courts for competition law breaches (including in relation to cartel conduct) are significantly lower than those imposed in other comparable OECD jurisdictions. In May, Japanese company Yazaki Corporation was ordered to pay increased penalties of AUD46m, following an appeal by the ACCC, for coordinating with a competitor on quotes that they would submit to Toyota for the supply of wire harnesses. The penalties ordered were a significant increase from the original penalties of AUD9.5m and are, to date, the highest penalties the Federal Court has ordered for breaches of competition law. Yazaki’s special leave application to appeal the decision was dismissed by the High Court.

In a recent speech on the ACCC’s compliance and enforcement priorities for 2019, ACCC Chairman Rod Sims stated that the ACCC aims to have “two to three criminal cartel investigations come to conclusion and prosecutions commence each year.” This follows the

Australian Government’s December 2018 announcement of increased budget support to the ACCC, which will result in the appointment of six new Cartels Unit investigators to assist with further prosecutions of criminal cartels. With a strong mandate to deter “egregious and damaging collusive conduct,” it is clear that criminal cartel prosecutions will be an enduring priority for the ACCC in 2019.

### Key takeaways



2018 saw the ACCC bring its first-ever criminal cartel prosecution against an Australian corporation and individuals (the *Country Care* case).



An increased budget to support the ACCC, which will result in the appointment of six new Cartel Unit investigators, means that criminal cartel prosecutions will remain a focus in 2019.

## China

2018 saw the consolidation of China's antitrust enforcement agencies into the State Administration for Market Regulation (**SAMR**). As the reforms are still being finalised, with very few officials currently sitting in the SAMR's anti-monopoly bureau, it appears likely that cartel enforcement at a national level will remain relatively limited in 2019. Rather, the SAMR's time will likely be taken up with updating guidelines and setting up internal procedures as the two teams from the former State Administration for Industry and Commerce and the National Development and Reform Commission work together for the first time. Other factors that are likely to hamper cartel enforcement in the immediate term are the relative lack of use of the leniency regime and

competing priorities in RPM cases. The SAMR is also enforcing the Fair Competition Review System (ensuring that local governments do not put in place anti-competitive rules or policies, eg preferential local treatment or subsidies), and trying to further decentralise the enforcement activities to local agencies who will need to up-skill in order to carry out these activities. Enhancing cooperation in competition policies and law enforcement with other countries and improving antitrust enforcement capacity also feature on the SAMR's list of priorities for 2019.

Another area to watch is any outcome from the dawn raids carried out in the DRAM sector last year, with Samsung, SK Hynix and Micron being investigated

### Key takeaway



China's cartel enforcement is likely to be relatively limited in 2019 while the newly-established SAMR finds its feet.

(as well as a trade association). If this investigation lasts the course, it may result in significant fines.

## India

India witnessed a steady growth in cases prosecuted and number of fines imposed in 2018, a trend that looks set to continue in 2019. Overall the total amount of fines imposed by the Competition Commission of India (**CCI**) was INR 4.78bn (approximately USD66.9m) which is an increase of around 50% on 2017. The highest individual fine imposed by the CCI was in the industrial and manufacturing sector (INR2.13bn, approximately USD29.85m).

Interestingly, and bucking the trend of many other jurisdictions, 2018 saw a record year for decisions involving

leniency, which includes the first decision of 100% immunity. This highlights the CCI's continued focus on developing the jurisprudence under the leniency regime in order to encourage more certainty and cartel disclosures.

As highlighted in our 2017 Report, the CCI focussed on the healthcare sector and in October 2018 issued a Policy Note on "Making Markets Work for Affordable Healthcare". The CCI has suggested various policy changes that are required to be implemented by other government bodies to ensure fair competition in the sector.

### Key takeaway



The CCI 2018 fine totals increased by around 50% from 2017.

With thanks to Khaitan & Co for their contribution.

## Japan

The Japan Fair Trade Commission (JFTC) imposed fines amounting to USD19.4m in 2018, representing a decrease from the previous year's total of USD66.2m. Half of these fines were imposed in a price-fixing case involving two Japanese companies and their Hong Kong and Thai subsidiaries regarding suspension systems for hard drives. Another major investigation from 2018 involved the construction sector, with the JFTC filing a criminal accusation with the Public Prosecutor's Office against the four largest construction companies, as well as their executives, for alleged bid-rigging in relation to a high-speed train project by Central Japan Railway Company. The criminal court proceedings are on-going.

In March 2019, the Cabinet approved the draft bill to amend the fining system based on the report published in 2017 by The Study Group on the Antimonopoly Act. Among other things, the bill seeks to increase the flexibility of the JFTC's fine-setting discretion by increasing the level of fines that can be imposed to deter violations and, at the same time, allowing the reduction of fines where firms provide meaningful cooperation. The bill also seeks to introduce attorney-client privilege in the context of cartel enforcement. The bill is expected to be submitted to the Diet later in the year.

The JFTC remains active in cooperating with overseas competition authorities, with a key focus on the

### Key takeaway



In a move to deter antitrust violations and incentivise firms to cooperate, the JFTC is looking to increase the level of fines it can impose.

digital economy and high technology/innovation markets.

**With thanks to Mori Hamada & Matsumoto for their contribution.**

## South Korea

Cartel enforcement has remained very much on the agenda for the KFTC, despite having received a slightly lower star enforcer rating in 2018 from Global Competition Review (4.5 instead of 5 stars). Overall, the KFTC imposed fines totalling USD151.6m in 2018, which is broadly in line with the 2017 figure (approximately USD172m). The largest fine (USD32.5m) was imposed on nine condenser product manufacture and sales companies who were found to have fixed the prices of aluminium and tantalum condensers. The balance of cases between international and national cartels shifted in 2018, with the number of international cartel decisions decreasing from six to two

and the majority of fines imposed by the KFTC relating to domestic bid-rigging cases, which made up approximately 64% (USD96.8m) of the total fines. The manufacturing sector was high on the list of priorities for the KFTC, accounting for USD76.2m of the fines.

In November 2018, the government proposed a number of amendments to the Monopoly Regulation and Fair Trade Act. Previously, the maximum fine that could be imposed on companies was 10% of the relevant revenue. This was seen as not sufficiently high to deter companies from breaching competition law and will increase to 20% under the proposed amendments.

### Key takeaway



New amendments to the Monopoly Regulation and Fair Trade Act will increase the maximum fine that the KFTC can impose from 10% to 20% of relevant revenue.

In addition, information exchange, which was previously not regulated, was added as a new type of collusion.

**With thanks to Shin & Kim for their contribution.**

## Singapore

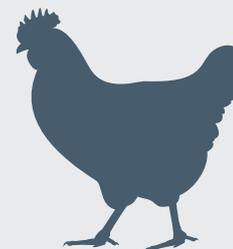
The Competition and Consumer Commission (CCCS) continued to take action against cartels in 2018 with two cases decided, bringing the total number of concluded cases to 14 since the relevant provisions of the Singapore Competition Act came into force in 2006. The first case was the conclusion of the auto parts cartel, where the CCCS imposed penalties totalling SGD19.55m (approximately USD14.47m). This is the third international cartel that the CCCS has investigated, and it had the longest potential duration of infringement that the CCCS has investigated since its inception. In the second case, the CCCS imposed its highest fine total to date of close to SGD27m (approximately USD19.6m) on 13 poultry distributors for engaging in anti-competitive agreements to coordinate the amount and timing of price increases, and agreeing not to compete for each other's customers in the market for the supply of poultry products in Singapore.

Both cases saw the CCCS rely on leniency applications for information regarding the cartels, confirming that

the leniency programme continues to be a crucial tool for the CCCS in detecting and enforcing cartels. This is in line with a notable increase in the publicised instances of parties applying for immunity or leniency under the CCCS' leniency programme. As at February 2019, the leniency programme has led to infringement decisions in six cases. This represents more than 40% of all publicised infringement decisions.

Several noteworthy amendments were made to Singapore competition legislation in 2018. These have involved the CCCS taking on the additional role of consumer protection and giving enforcement officers extra powers to interview any individual on the premises during an investigation (without the need for a written notice). The CCCS is now empowered to accept binding and enforceable commitments relating to anti-competitive agreements, which it is able to enforce in the Courts (previously it was only able to accept voluntary undertakings).

### *Key takeaway*



The CCCS imposed its highest fine to date (around USD19.6m) in relation to the poultry cartel.

Looking ahead to 2019, we can expect more cartel enforcement activity from the CCCS in sectors such as transportation, logistics, hospitality, wholesale retail/trade, food and beverage, and e-commerce/big data. In line with this objective, the CCCS has commenced two market studies: one into the online travel sector, and another on data portability in Singapore.

**With thanks to Allen & Gledhill LLP for their contribution.**

## Taiwan

The fines imposed by the Taiwan Fair Trade Commission (**TFTC**) in 2018 for cartel infringements remained low at NTD600,000 (around USD20,000). This is a slight increase from 2017, but a significant decrease from the record-breaking amount in 2015 when the TFTC handed down a NTD 5.8bn (around USD194m) fine on ten international capacitor suppliers for price-fixing. In 2018, the TFTC closed only one cartel case, which involved two local port service providers engaged in bid-rigging activities. No leniency case was reported this year.

In the past few years, the TFTC has continued to advocate that it should be equipped with the power to search and seize (ie conduct dawn raids). This proposal was first raised as an amendment to the Taiwan Fair Trade Act (**TFTA**) in February 2015 but failed to pass the Legislative Yuan's final review due to concerns that it was unconstitutional. Although the majority of other global competition authorities have the power to conduct dawn raids, whether the TFTC will benefit from this power remains to be seen as there are strong objections to it on the grounds of the separation of

powers between administrative agencies and judicial authorities. Another interesting development was the proposed draft bill to amend Article 41 of the TFTA regarding the statute of limitations. The proposed amendment would significantly prolong the time period for the TFTC to conduct investigations and impose sanctions on anti-competitive conduct, including cartel activities. The draft bill is subject to the approval of the Executive Yuan and will then undergo three readings by the Legislative Yuan.

**With thanks to Lee and Li, Attorneys-at-Law for their contribution.**

## South Africa

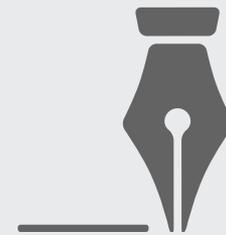
Cartel enforcement remains a key focus of the Competition Commission, with 36 consent orders/settlement agreements confirmed by the Competition Tribunal and around USD19.7m worth of fines imposed (a slight increase on the 2017 figures). The 2018 cases related to a wide range of industries/sectors, including advertising, manufacturing, transport and construction.

The Competition Commission has several cases that are currently underway or that have been referred to the Competition Tribunal for prosecution (for example, in the automotive components, agricultural processing, liquefied petroleum gas, blankets and banking/foreign exchange trading sectors). All of these cases involve a leniency or immunity applicant, a process which has been formalised in

key amendments to the Competition Act in 2018. These also include increasing the penalty for repeat offenders to 25% (previously 10%) of annual South African turnover and exports from South Africa and allowing the inclusion of holding company turnover in calculating penalty amounts. All of these are likely to have an impact on the amounts of fines that the Competition Commission levies going forward.

Although cartel enforcement remains relatively low in other African countries, many are introducing or revising their antitrust rules, with Botswana, Namibia and Angola leading the way.

### *Key takeaway*



The Competition Commission's leniency policy received statutory authorisation in 2018.

**With thanks to Werksmans Attorneys for their contribution.**

## Global cartel practice

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We represent clients in the most high-profile international and national cartel investigations and subsequent litigation. Cartel and other behavioural investigations are often now carried out simultaneously across different jurisdictions and regulators are increasingly coordinating approaches, while sanctions for cartellists 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 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.

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

Global Competition Review 2017

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*“The cracks in the criminal investigation expertise within the CMA may be easier to fix than training another agency in this specialised area of law.”*

Eve Giles, Partner, White Collar Crime – Allen & Overy LLP

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## GLOBAL PRESENCE

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