

2018 Global Cartel Enforcement Report

January 2019

In a continuation of the downward trend seen in 2017, cartel fine totals declined again in 2018 in both the United States and abroad. The Department of Justice imposed only two corporate fines in fiscal year 2018, totaling a mere \$96 million, while the European Commission imposed fines totaling \$927 million. This trend held consistent across most countries, with notable exceptions including Brazil, which imposed over \$389 million in fines in 2018 stemming largely from settlements with construction firms involved with the Petrobras bid-rigging scheme, and Germany, which imposed over \$435 million in fines in 2018 compared to approximately \$76 million in 2017.

Though the fine totals indicate a slower-than-average year, antitrust regulators were busy promoting cross-border cooperation on antitrust enforcement. For example, Department of Justice and European Commission officials each completed a spree of meetings with their counterparts in countries like South Korea, China, Europe and India, and antitrust regulators from Brazil, Mexico, Peru, Argentina and Chile developed a set of shared principles designed to harmonize and guide the implementation of leniency programs across Latin America. These and other regulators continued to emphasize international engagement as a top priority of antitrust enforcement.



2019: What to Watch for

Technology Under the Microscope: Recent trends point to technology giants (Google, Amazon, Facebook, Apple) facing increased scrutiny by antitrust enforcement agencies. A meeting of state attorneys general and federal enforcement officials at the DOJ in September 2018 focused on consumer protection issues and, some news media sources hinted, the result may be new investigations into unfair competition practices by the tech companies. This follows the already intense spotlight European and Asia-based enforcers have placed on the sector, with the likes of the European Commission fining Google \$5 billion for abuse of dominance this past year and national authorities, like Germany's Bundeskartellamt, announcing further inquiries into large market players.

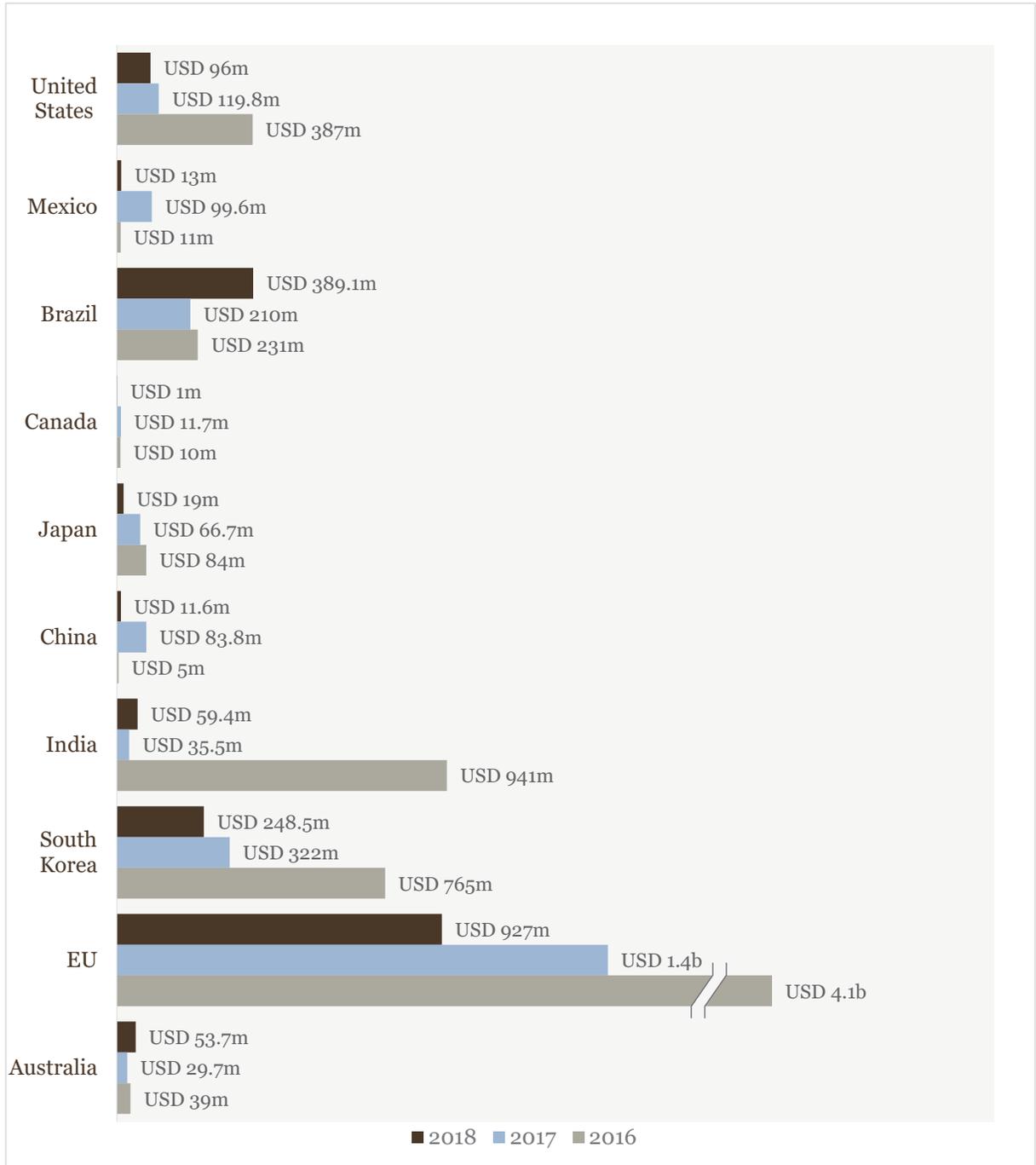
A Shifting Leniency Landscape: Despite the incentives, authorities around the world this past year signaled that companies may be increasingly wary of seeking leniency due to the costs of cooperation, as well as the growing exposure to civil damages and reputational harm. This shift in perception is driving authorities to look for ways to further sharpen their enforcement stick and, at the same time, sweeten the leniency pot, all in an effort to continue to fuel a race for leniency. Already this past year, we saw the Canadian Competition Bureau and Australian Competition and Consumer Commission, both of which have some of the longest-tenured leniency policies, embark on substantial revisions to their programs.

Growing Pains for “No-Poach” Enforcement: In April 2018, the Department of Justice resolved its first post-guidance “no-poach” case, against rail equipment suppliers Knorr-Bremse AG and Westinghouse Air Brake Technologies

Corporation (“Wabtec”), as a civil settlement. However, leadership has indicated in multiple public statements that they are pursuing several active criminal investigations related to no-poach agreements. The rise in the Department's first criminal no-poach investigations may face some head winds, however, with one court set to evaluate whether such agreements are properly considered *per se* violations of the antitrust laws in a pending class action lawsuit; a ruling in favor of “rule of reason” treatment for the offense would no doubt severely hobble the Department's criminal agenda in this space.

Increasing Antitrust Risks for Financial Investors: This year marked the beginning of a developing trend of courts, authorities and private claimants stretching concepts of corporate ownership and control to hold financial investors accountable for the actions of their portfolio companies. In July, the EU's General Court ruled in *Goldman Sachs Group v. Commission* that financial investors that exercise all of the voting rights of a subsidiary are presumed to be liable for any antitrust crimes of the subsidiary, akin to the “decisive influence” doctrine that holds parent companies presumptively liable for the actions of a wholly-owned subsidiary. Similarly, in September, in *In re Packaged Seafood Products Antitrust Litigation*, the private equity firm Lion Capital was dragged into a US civil class action by virtue of its active management—and thereby alleged participation in—its portfolio company's cartel activity. A California federal judge was not persuaded that Lion Capital had no economic incentive to participate in the alleged conspiracy, finding that Lion stood to reap the benefits of any unlawful conduct through the eventual resale value of the business.

Select Year-to-Year Comparison*†



* Statistics from selected jurisdictions are approximate and reflect fine levels and exchange rates at the time of writing and may not be exhaustive. Statistics reflecting penalties for the U.S. include those in the U.S. fiscal year, October 1, 2017 to September 30, 2018. All other statistics include enforcements in the 2018 calendar year.

† Fine amounts were based on the local currency and converted to U.S. dollars using the currency exchange rates reported by the United States Treasury's Bureau of the Fiscal Service, available at <https://fiscal.treasury.gov/reports-statements/treasury-reporting-rates-exchange/current.html> (as modified in December 2018).

Select Jurisdiction Commentary

United States

The Department of Justice demonstrated a focus on domestic cartel prosecutions in 2018. The DOJ's wide-ranging investigation into bid rigging in public real estate auctions grew to encompass conspiracies occurring online and in person in Alabama, California, Florida, Georgia, Mississippi and North Carolina, and has led to charges against over 130 individuals and dozens of guilty pleas. The DOJ's generic drug investigation also continues to grab headlines, although the investigation itself has yet to produce much by way of actual prosecutions.

The DOJ has also continued its trend of requiring the use of external compliance monitors to ensure that companies alter their illegal conduct. Compliance monitors were first used in 2012 in the AU Optronics case, and have since been used more generally as a condition of probation. In February 2018, the DOJ appointed an independent compliance monitor for Norwegian shipping company Høegh Autoliners AS, which had pleaded guilty in 2017 to participating in a conspiracy to fix prices for "roll-on, roll-off" cargo. As part of the plea deal, the monitor will be responsible for ensuring that Høegh implements effective controls for corporate compliance and ethics programs over a period of three years. Monitors can prove to be a costly and invasive remedy for corporate defendants, and in the case of Høegh, the use of a compliance monitor was in addition to a \$21 million dollar fine and a requirement to report on its antitrust compliance efforts to the DOJ once per year.

The DOJ had a challenging year in the courtroom in 2018. In October, the DOJ was unsuccessful in its prosecution of three former London-based foreign exchange ("FX") traders accused of price-fixing via chatroom communications. After witnesses testified that the traders were unaware at the time that their conduct was prohibited and that in numerous instances the traders competed against each other, a jury in the Southern District of New York found that there was not enough evidence to convict the traders. The same month, the DOJ won a partial victory in its case against heir-locating company Kemp & Associates Inc., which allegedly conspired with a competitor to allocate customers, when the Tenth Circuit reversed the lower court's finding that the government's suit was time-barred. However, the Tenth Circuit declined to reverse the lower court's determination that the unique conduct in a little-known industry warranted an assessment under the "rule of reason," as opposed to a *per se*, standard. Though the DOJ filed a motion for reconsideration in December 2018, the opinions illustrated potential

weaknesses in the government's application of the *per se* rule.

European Union

The European Commission imposed four corporate fines in 2018, totaling approximately \$926 million, down from \$1.4 billion in 2017 and the record high of \$4.1 billion in 2016. The EC imposed a combined fine of \$175 million against spark plug suppliers and braking systems suppliers, continuing its enforcement pattern in the automotive parts industries, and a fine of \$294 million against electrolytic capacitors manufacturers for a long-running conspiracy that lasted from 1998 to 2012. The EC's largest fine of the year was \$458 million imposed against four maritime car carriers for customer allocation and price fixing for deep sea transport of cars and other vehicles.

Highlights from EU member countries:

- The UK Competition and Market Authority (CMA) Chief stated that the agency will continue to cooperate with the European Commission on competition matters following the UK's departure from the EU. Though parallel merger reviews are common and are likely to continue in the same fashion post-Brexit, cartel enforcement may be trickier, as the CMA was previously barred from pursuing actions that the EC decided to take on. In October 2018, the CMA issued guidance on its role in a "no deal" scenario in an effort to clarify the applicability of EC decisions and precedent, but uncertainty will undoubtedly remain up to and following the March 29, 2019 exit date.
- Multiple EU member states, including Portugal, Germany, France, the UK and the Netherlands, focused on the use of pricing algorithms by companies to engage in anticompetitive coordination, which could lead to an abundance of analysis and guidance on digital pricing issues. On the other hand, some EU enforcement agencies, such as the Polish Office of Competition and Consumer Protection and the Hungarian Gazdasági Versenyhivatal (GVH), indicated an intent to leave antitrust enforcement in digital markets to the EC and other regulators who may have the resources and capacity to handle such matters.

Mexico

Fines in Mexico totaled approximately \$12.9 million in 2018, a sharp decrease from the nearly \$100 million in fines imposed in 2017. Enforcement was primarily focused on cartel activity in narrow industries, such as securities holding providers and

latex for health and hospital products. According to reports, Mexico's competition authority, COFECE, may also be getting into the "no-poach" area. COFECE reportedly launched a broad "no-poach"-style investigation at the end of 2018 into potential cartel activity among soccer clubs, which may have conspired to restrict players' wages and ability to transfer between clubs.

Brazil

Brazil saw a notable increase in fines, from around \$210 million in 2017 to approximately \$389 million in 2018. This increase coincides with the Brazilian competition enforcer's (CADE's) resolution of several long-term investigations, including a five-year and twenty-company investigation into the salt industry, as well as settlement of investigations stemming from the massive Petrobras and Odebrecht investigations.

Canada

Canada saw little enforcement activity in 2018, imposing only one fine of nearly \$1 million to conclude a widespread auto parts cartel investigation, which led to some of the largest fines ever imposed in Canada in prior years. In September 2018, the Canadian Competition Bureau and the Public Prosecution Service of Canada (PPSC) launched a reformed and updated Immunity and Leniency Program. Some of the key new features include no automatic coverage for directors, officers, and employees and a cooperation credit of up to 50% applied to the base fine.

South Korea

Fine totals in South Korea in 2018 totaled \$248.5 million, nearly half of which was imposed in a settlement with steel manufacturers for bid-rigging for the prices of steel reinforcement products. In September 2018, the South Korean competition authority (KFTC) announced two major developments in its cartel enforcement regime: its intent to introduce a private right of action for cartel conduct as an additional deterrent against anticompetitive behavior, and revisions to allow for treble damages for cartel conduct.

Japan

With fines totaling approximately \$19 million, Japan has seen a large decrease from their 2017 total of approximately \$67 million in fines. Investigations in Japan focused on local conspiracies and most often involved bid-rigging for government-supported

contracts in the railroad and aviation space. Japan's new plea bargaining law came into effect in June 2018, allowing additional prosecutorial discretion in criminal proceedings including cartel enforcement and offering enforcers a new source of direct evidence of misconduct.

China

China's 2018 fine total was approximately \$11.6 million, a steep drop off from the nearly \$84 million collected in 2017, and spanned an array of industries including energy, construction, transportation, financial services and retail. Beyond cartel enforcement, China took steps throughout 2018 to concentrate antitrust authority into a single agency, the State Administration for Market Regulating, consolidating resources and authority from the Ministry of Commerce, the National Development and Reform Commission, and the State Administration of Industry and Commerce.

India

India saw an increase in cartel related fines from \$35 million in 2017 to nearly \$60 million in 2018. The Competition Commission of India (CCI) came under fire in 2018 for the disclosure of pricing information obtained through a leniency application, and for inconsistent penalty calculations. In an order related to a battery cartel, the CCI described how cartel members priced products, which may assist private claimants in calculating and justifying damages claims, and which raised concerns for companies about the confidentiality of materials submitted to the CCI. The orders released by the CCI in 2018 also revealed that the Commission calculated fines against three cartels using a percentage of turnover or a multiplier of profit, illustrating the lack of set criteria to determine penalties.

Australia

Australia had a strong year in cartel enforcement, with fines totaling over \$53 million, an increase from \$29.7 million in 2017. In 2018, the Australia Competition and Consumer Commission (ACCC) initiated its first criminal prosecution of a domestic corporation and its first criminal prosecution of an individual in its case against Country Care Group, an in-home personal care and support services company. The ACCC also announced the establishment of a new two-way whistleblower portal, which will be available initially to members of the agriculture and commercial construction industries.

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