

A world map is shown in the background, with a magnifying glass focusing on the region of South Asia, specifically India and the surrounding waters. The map is colorful, with different countries in various shades. The magnifying glass has a dark frame and a clear lens.

Morgan Lewis

GLOBAL CARTEL ENFORCEMENT

2018 KEY TRENDS AND ISSUES

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September 26, 2018

Presenters



Global Cartel Enforcement Report



- Review key global trends
- Monitor recent fines and penalties
- Focus on key industries subject to cartel enforcement
- Identify new developments
- Subscribe: www.morganlewis.com/subscribe
(select "Cartel" on list of topics)

Overview of Discussion

- Cartel Fines
- Industries under Scrutiny
- Leniency Trends
- Asia Enforcement Issues
- Criminalization of No-Poaching Agreements and Wage-Fixing
- Algorithms and Antitrust Enforcement
- Notable Supreme Court Cases
- UK & EU Enforcement
- Extradition



GLOBAL CARTEL ENFORCEMENT REPORT

CARTEL FINES

During the first half of 2018, significant fines issued by other enforcers include:

Jurisdiction (Country)	Fine Amount	Summary
Brazil	301 million reais (\$92.8 million)	Cartel involving processors of frozen orange juice concentrate
	289.5 million reais (\$79.5 million)	18 companies, 39 individuals, and three unions for cartel conduct in the sea salt market
	42.9 million reais (\$11.6 million)	Two financial institutions and one individual for cartel conduct in the foreign exchange market involving the Brazilian real and offshore currencies
Cyprus	31 million euros (\$38 million)	Eight banks for fixing the domestic interchange fee for bank and credit cards as well as merchant service charges
Egypt	5.58 billion Egyptian pounds (\$316.2 million)	Four pharmaceutical companies for fixing prices on small-and medium-sized pharmacists
European Commission	395 million euros (\$486.5 million)	Five maritime car carriers for participating in a cartel concerning intercontinental maritime transport of vehicles
	254 million euros (\$311.6 million)	Eight producers of capacitors for coordinating future behavior and avoiding price competition
	76 million euros (\$93.6 million)	Three spark plug companies for agreeing on prices and the share of supplies to specific customers and the respect of historical supply rights
	75 million euros (\$92.4 million)	Three car part suppliers involved with hydraulic braking systems (HBS) and the supply of electronic braking systems (EBS) for coordinating pricing elements

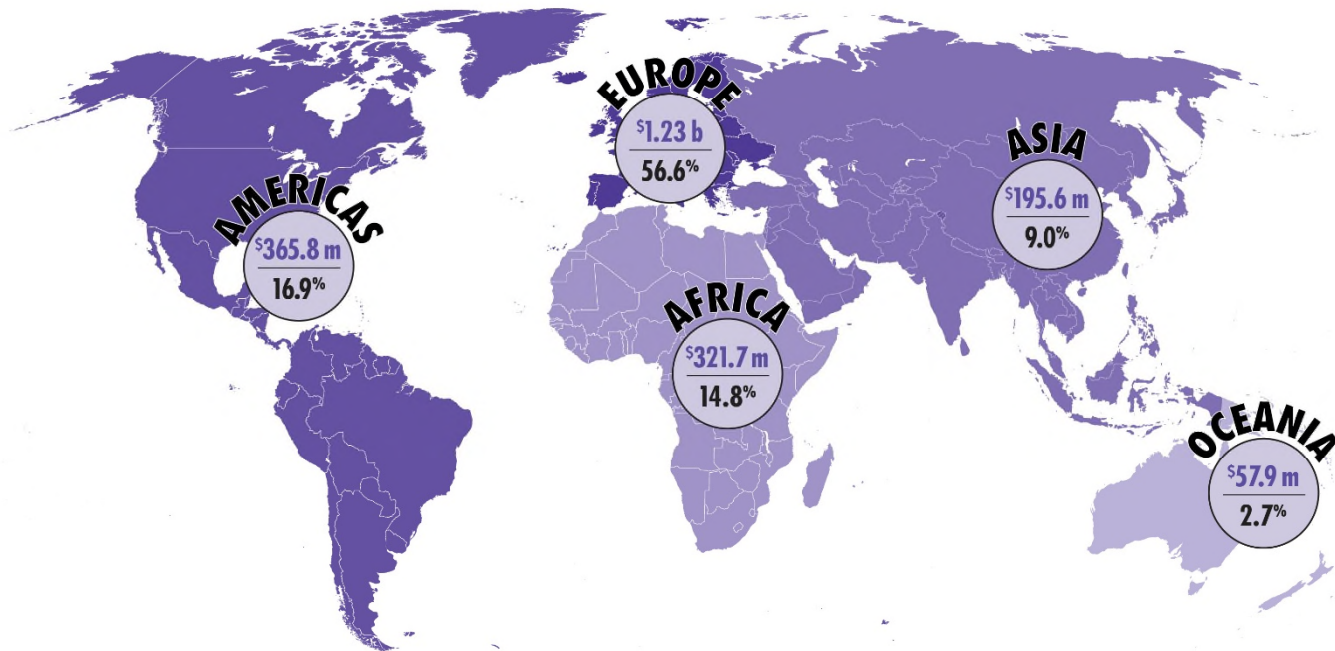
Significant fines cont.

Jurisdiction (Country)	Fine Amount	Summary
Romania	73.1 million lei (\$18.8 million)	Six companies and a local electricity holding for bid-rigging
Spain	91 million euros (\$112.8 million)	Four banks for agreeing to offer interest rate derivatives
	68 million euros (\$83.8 million)	Nine courier companies for carving up the market for courier and business-parcel delivery services
South Korea	22.7 billion won (\$20.9 million)	Five marine-cable companies for rigging bids for cables used on LNG, container, and other ships
	11.6 billion won (\$ 10.8 million)	Four wholesalers making consignment sales in agricultural product markets for farmers and others for agreeing to fix commissions for produce sold in a local agricultural produce market
	10.8 billion won (\$10.1 million)	14 companies for rigging bids to provide aerial photography services to the Korean government
United States	\$90 million	An international financial services company for conspiring in the foreign currency exchange (FX) market
	\$12 million	A Japanese automotive parts manufacturer for conspiring to fix prices, rig bids, and allocate customers for automotive steel tubes

Global Cartel Fines

Through June 2018: \$2.17 Billion

Fines by jurisdiction, with percentages of global fines

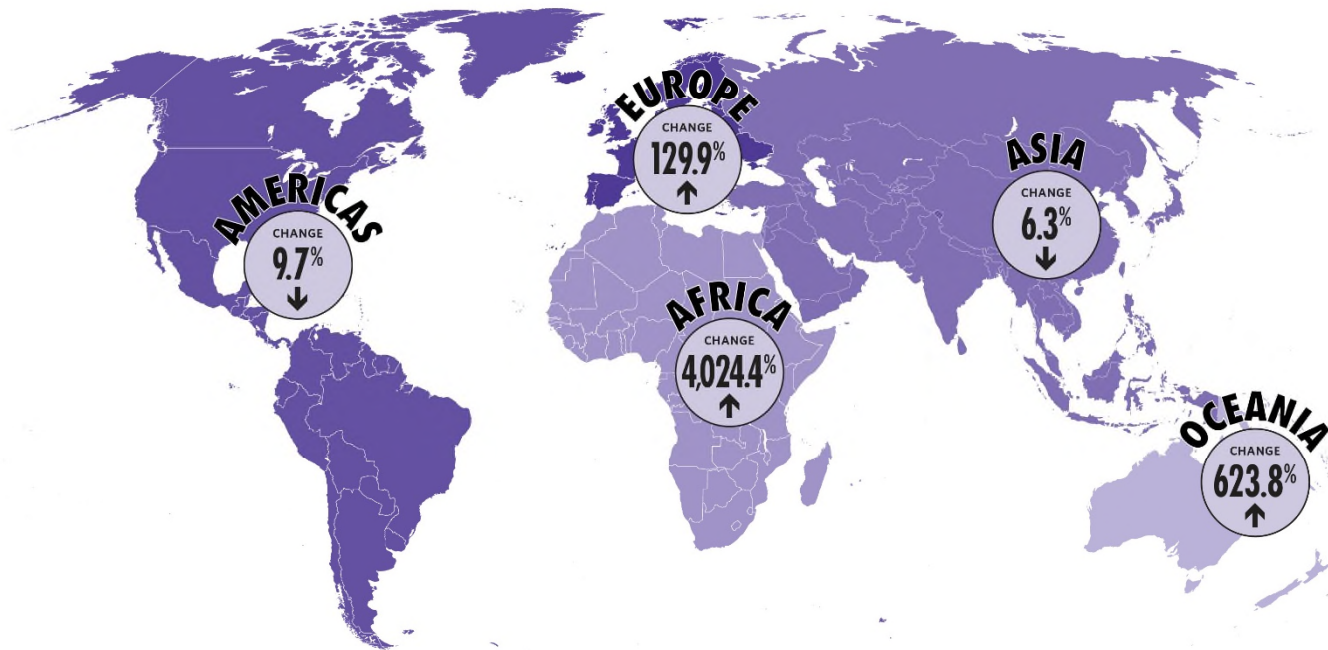


	FINES* BY JURISDICTION	% OF TOTAL GLOBAL FINES
EUROPE	\$1.23 b	56.6%
European Union	\$890.5 m	
Other	\$336.9 m	
AMERICAS	\$365.8 m	16.9%
United States	\$109.8 m	
Brazil	\$185.4 m	
Canada	\$0.1 m	
Other	\$70.5 m	
ASIA	\$195.6 m	9.0%
South Korea	\$134.0 m	
Japan	\$17.6 m	
Russia	\$11.0 m	
India	\$8.0 m	
China	\$0.5 m	
Other	\$24.5 m	
AFRICA	\$321.7 m	14.8%
Egypt	\$316.5 m	
South Africa	\$5.2 m	
OCEANIA	\$57.9 m	2.7%
Australia	\$57.9 m	

*Through June 30, 2018, and based on publicly available information where available.

Mid-Year Global Cartel Fines

How 2018 Compares with 2017



	2018	2017	% CHANGE
TOTAL GLOBAL FINES*	\$2.17 b	\$1.17 b	86.2% ↑
EUROPE	\$1.23 b	\$535.0 m	129.9% ↑
European Union	\$890.5 m	\$268.0 m	232.3% ↑
Other	\$336.9 m	\$267.0 m	26.8% ↑
AMERICAS	\$365.8 m	\$405.2 m	9.7% ↓
United States	\$109.8 m	\$182.1 m	39.7% ↓
Brazil	\$185.4 m	\$107.3 m	72.8% ↑
Canada	\$0.1 m	\$9.9 m	99.9% ↓
Other	\$70.5 m	\$105.9 m	33.4% ↓
ASIA	\$195.6 m	\$208.8 m	6.3% ↓
South Korea	\$134.0 m	\$105.2 m	27.4% ↑
Japan	\$17.6 m	\$61.4 m	71.3% ↓
Russia	\$11.0 m	\$1.2 m	816.7% ↑
India	\$8.0 m	\$31.9 m	74.9% ↓
China	\$0.5 m	\$0.5 m	0.0%
Other	\$24.5 m	\$8.6 m	184.9% ↑
AFRICA	\$321.7 m	\$7.8 m	4,124.3% ↑
Egypt	\$321.7 m	\$0.0 m	↑
South Africa	\$5.2 m	\$7.8 m	33.3% ↓
OCEANIA	\$57.9 m	\$8.0 m	623.8% ↑
Australia	\$57.9 m	\$7.0 m	727.1% ↑
New Zealand	\$0.0 m	\$1.0 m	↓

*Through June 30, 2018, and based on publicly available information where available.

GLOBAL CARTEL ENFORCEMENT REPORT

INDUSTRIES UNDER SCRUTINY

Packaged Seafood



- **Key Developments**

- Prior Convictions:
 - In May 2017, US company pled guilty for conspiring to fix the prices of shelf-stable tuna, such as canned and pouch tuna, sold in the United States during 2011 through 2013. Agreed to pay a \$25 million criminal fine.
 - In June 2017 and December 2016: two senior vice presidents of sales and a senior vice president of trade marketing pled guilty for conspiring to fix prices.

- **Looking Ahead**

- In May 2018, President and CEO of company that pled guilty was indicted in the Northern District of California and is pending trial.

Electrolytic Capacitors



- **Key Developments**

- On January 5, the Competition and Consumer Commission of Singapore (CCCS) imposed a fine of around **\$14.7 million** on five electrolytic capacitor manufacturers
- On March 21, the European Commission fined eight producers of electrolytic capacitors of around **\$311.6 million** for cartel conduct from 1998 to 2012.
- On June 27, a second executive pleaded guilty to a conspiracy to fix prices and rig bids for electrolytic capacitor sold in the US and elsewhere.

- **Looking Ahead**

- The US Department of Justice has charged a further eight companies and 10 individuals with participating in a conspiracy to fix prices of electrolytic capacitors.

Financial Services



- **Key Developments**

- **LIBOR:** Alex Pabon conviction upheld by UK Court of Appeal; settlements approved by federal judge in NY against two financial institutions of \$340 million; UK FCA fines former traders
- **ISDAFIX:** Federal judge in NY granted final approval of \$408.5 million settlement with 10 banks accused of manipulating ISDAFIX benchmark between 2006 and 2014.
- **EURIBOR:** Federal judge approved investor settlements with 3 financial institutions for \$309 million relating to allegations of a conspiracy to rig the benchmark.

- **Looking Ahead**

- **FX:** Trial of former currency trader at US bank for conspiracy to manipulate FX prices set for October 2018

Generic Drugs and Pharmaceuticals



- **Key Developments**

- Russia:
 - \$4.2 million fines were imposed on 6 pharmaceutical wholesalers for bid-rigging in state tenders for supplying medicines and medical devices to local hospitals
 - 2 pharmaceutical companies and Moscow-based state hospitals held liable for price collusion in supplying medicines, baby and dietary foods, and medical devices
- India: 2 chemist and pharmacist associations were fined \$35,000 for their anticompetitive interference with market entry of new drugs and retailers
- China: A new policy (Circular No. 20, 2018) aiming to promote generic drugs was announced by China's State Council in April, which indicates also enforcement focus

- **Looking Ahead**

- Enforcement focus on bid-rigging, price collusion, anticompetitive interference in business operations, with the pharmaceutical and medical device industry under increasing regulatory scrutiny due to the incumbent administration's agenda or recent incidents

Automotive Parts



- **Key Developments**

- DOJ Investigation Commenced Feb. 2010
- Prosecution
 - **49** corporations
 - **65** individuals
 - **30 executives** convicted with prison terms ranging from **one year and one day** to **24 months**
- Corporate fines exceeding **\$2.9 billion**
- Nov. 2017, Green Tokai acquittal (SDOH)
- May 31, Manufacturer of Steel Tubes conviction and \$12 million fine

Automotive Parts



- **Key Developments**

- EU: Feb. 21, **\$93.6 million in fines** imposed on three spark plug companies for agreeing on prices and the share of supplies to specific customers and the respect of historical supply rights
- EU: Feb. 21, **\$92.4 million in fines on three car part suppliers** involved with hydraulic braking systems (HBS) and the supply of electronic braking systems (EBS) for coordinating pricing elements
- Australia: May 16, **\$34.6 million in fines** concerning wire harnesses; largest fine under Competition and Consumer Act of 2010
- Brazil: May 9, **\$778,000** in fines for two companies on various auto parts



- **Key Developments**

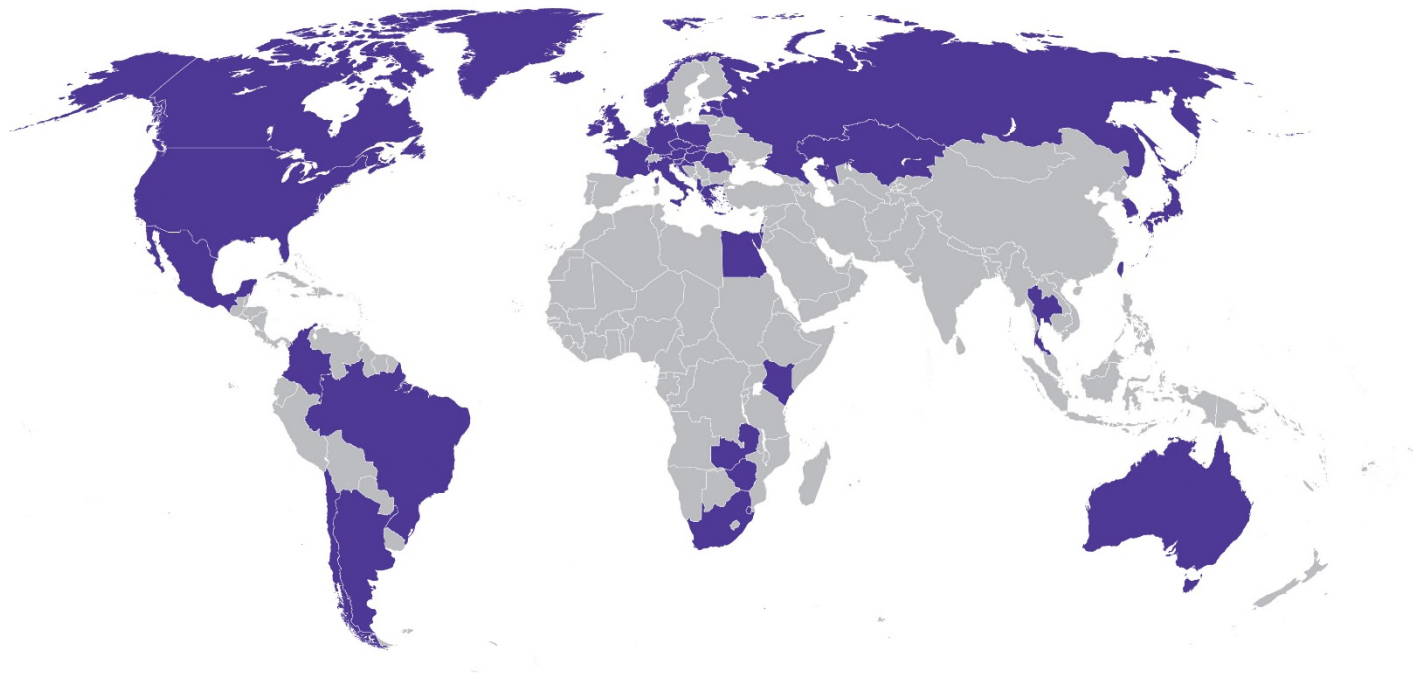
- Over 100 individuals convicted by plea agreement or following a trial in Alabama, Northern California, Florida, Georgia, Mississippi, and North Carolina
- Several trial convictions

- **Looking Ahead**

- New regions
- Aug. 20, Minnesota indictment

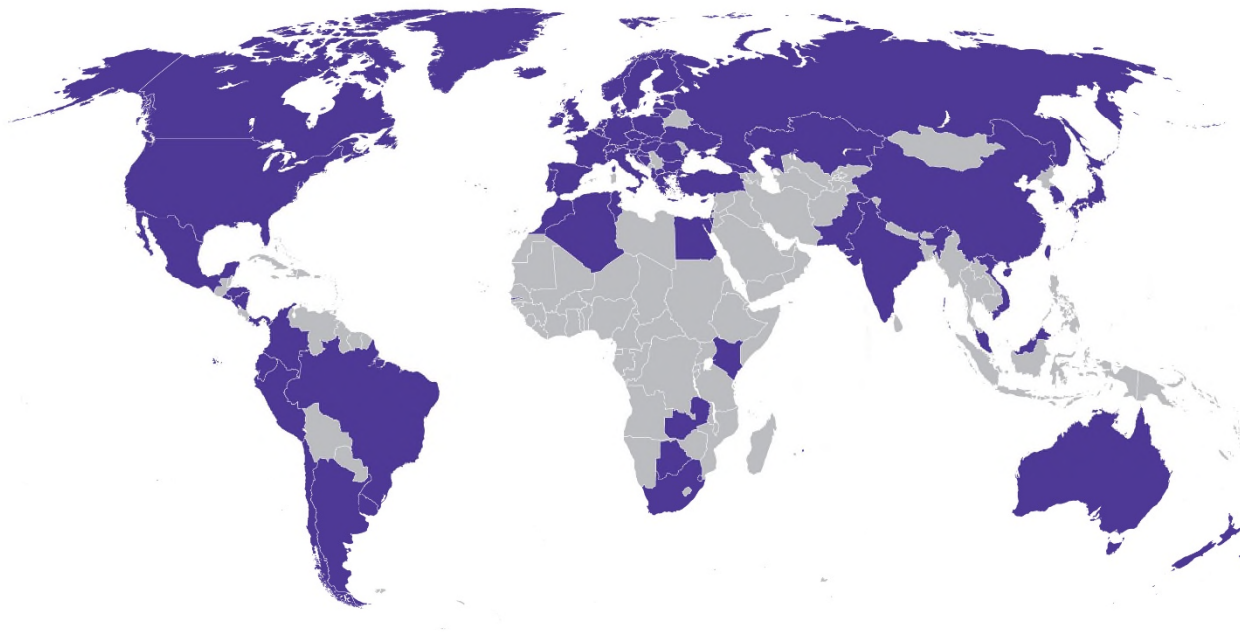
GLOBAL CARTEL ENFORCEMENT LENIENCY TRENDS

43 Countries Have Criminal Penalties For Cartel Violations or Convictions



Argentina	Japan
Australia	Kazakhstan
Austria	Kenya
Brazil	Latvia
Canada	Malta
Chile	Mexico
Colombia	Norway
Croatia	Poland
Czech Republic	Romania
Denmark	Russia
Egypt	Slovakia
Estonia	Slovenia
France	South Africa
Germany	South Korea
Greece	Swaziland
Greenland	Taiwan
Hong Kong	Thailand
Hungary	United Kingdom
Iceland	United States
Ireland	Zambia
Israel	Zimbabwe
Italy	

78 Countries Have Cartel Immunity/Leniency Programs



Albania	Georgia	Norway
Algeria	Germany	Pakistan
Argentina	Greece	Panama
Australia	Greenland	Peru
Austria	Honduras	Poland
Belgium	Hong Kong	Portugal
Bosnia & Herzegovina	Hungary	Romania
Botswana	Iceland	Russia
Brazil	India	Singapore
Bulgaria	Ireland	Slovakia
Canada	Israel	Slovenia
Chile	Italy	South Africa
China	Japan	South Korea
Colombia	Kazakhstan	Spain
Croatia	Kenya	Sweden
Czech Republic	Latvia	Switzerland
Cyprus	Lithuania	Swaziland
Denmark	Luxembourg	Taiwan
Ecuador	Macedonia	Tunisia
Egypt	Malaysia	Turkey
El Salvador	Mauritius	Ukraine
Estonia	Mexico	Uruguay
European Union	Morocco	United Kingdom
Finland	Netherlands	United States
France	New Zealand	Vietnam
Gambia	Nicaragua	Zambia

Leniency Program

- **Leniency Program**

- 1978: Established
- 1993: Corporate Leniency Program Modified
- 1994: Individual Leniency Program

- **Benefits**

- No criminal convictions for company, executives or employees
- No criminal fine but must make restitution
- No prison
- De-treble civil damages
 - Under ACPERA, single damages and no joint & several liability



Department of Justice

LENIENCY POLICY FOR INDIVIDUALS

On August 10, 1993, the Division announced a new Corporate Leniency Policy under which a corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting the other specified conditions. The Corporate Leniency Policy also sets out the conditions under which the directors, officers and employees who come forward with the company, confess, and cooperate will be considered for individual leniency. The Division today announces a new Leniency Policy for Individuals that is effective immediately and applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware. Under this Policy, "leniency" means not charging such an individual criminally for the activity being reported.

A. Requirements for Leniency for Individuals:

Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:

1. At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and

Leniency Costs and Benefits Under Review

- Do the benefits justify the costs?
 - Have the costs associated with seeking leniency have become too high for some cases based on the need to (1) seek leniency in multiple jurisdictions with different demands and requirements; and (2) face possible damages litigation in various jurisdictions throughout the world.
- June 5, 2018, Deputy Assistant Attorney General Richard Powers noted leniency provides substantial benefits: “As worldwide exposure increases, so do the potential benefits of leniency. The benefits of seeking leniency therefore still outweigh the increasing costs.”
- Adding that international enforcers “can increase our cooperation and our shared commitment to coordinating, where and to the extent possible, to decrease burdens on applicants” and noted the need to “engag[e] with foreign enforcers, and also the defense bar, to examine possible ways to reduce unnecessary burdens on leniency applicants.”
- Coordination areas:
 - 1) try to coordinate timelines and deadlines to allow the applicant to meet them in multiple jurisdictions;
 - 2) tailor our document demands to get the necessary evidence from the leniency applicant without unnecessary burden; and
 - 3) where possible, coordinate the timing and locations of interviews to alleviate burdens on applicants and employees.

Recent international trends

- A European Commission official recently signaled that leniency applications were “not going up”
 - but was not concerned as this may be cyclical
 - emphasized increasing effectiveness of whistleblower and other detection tools
- Officials from the US, French, Brazilian, Japanese all indicated increases in applications while in Australia applications have remained about the same and in Canada the number has gone down
- Commissioner Vestager has signaled that the European Commission would prefer coordination of leniency procedures to take place through existing institutions such as the ICN or OECD

GLOBAL CARTEL ENFORCEMENT

ASIA ENFORCEMENT ISSUES

Antitrust Developments in Asia

- Restructuring of antitrust enforcement agencies
- Amendments of antitrust laws and regulations
- Enforcement activism and dawn raids on the rise
- Increased criminal prosecution of antitrust conduct



Restructuring of Antitrust Enforcement Agencies

- **China:** Consolidation of Antitrust Enforcement Agencies

2018.3.21

The Chinese central government released its structural reform plan to consolidate antitrust agencies into one agency, the State Administration for Market Regulation ("**SAMR**"), which is directly supervised by the State Council.

2018.8.9

The final three-part plan for consolidating China's antitrust agencies under the SAMR was released. SAMR will be responsible for:

- drafting supplementary antitrust regulations and guidelines;
- carrying out antitrust enforcement actions;
- guiding enterprises to respond to and cope with antitrust investigations or litigations in foreign jurisdictions; and
- conducting and providing guidance for fair competition reviews.



The consolidation is expected to result in more unified guidance on the interpretation and application of China's antitrust laws and regulations, greater consistency in enforcement, and more enforcement activism in terms of large-scale enforcement actions.

Restructuring of Antitrust Enforcement Agencies

- **Hong Kong:** New Members of Competition Commission.
 - Members of the commission have been appointed for a new two-year term commencing May 1, 2018. Anna Wu Hung-yuk has been re-appointed as the commission's chairperson and nine new members were appointed.
- **Singapore:** Administrative Update.
 - In April, the Competition Commission of Singapore took on the new name of the Competition and Consumer Commission of Singapore to reflect its new role in enforcing the Consumer Protection (Fair Trading) Act.

Amendments of Antitrust Laws and Regulations (cont'd)

- **Hong Kong:**

- Hong Kong Competition Commission (HKCC) issued an advisory bulletin on the potential antitrust risks that could arise in the employment context under the Competition Ordinance (Cap 619).

- **Singapore:**

- The Competition and Consumer Commission of Singapore (CCCS) sought feedback on CCCS's guidance note for the competition assessment of airline alliance agreements to assist the airlines in their self-assessments and possible notification of such agreements to CCCS.
- Competition (Amendment) Act came into effect on May 16, 2018.

- **Indonesia:**

- The House of Representatives (DPR) is now putting its focus on the amendment of the Prohibition of Monopolistic Practices and Unfair Business Competition.

Amendments of Antitrust Laws and Regulations (cont'd)

- **Australia:**

- Australian Competition and Consumer Commission (ACCC) proposed to amend the Australian Consumer Law (ACL). Under the amendment, ACCC has the right to issue mandatory information collection directive to investigate whether the provisions in the agreements are fair or not.

- **Thailand:**

- Thailand's new Trade Competition Act B.E. 2560 (2017) (TCA) will come into effect on October 5, 2018. The new TCA will likely lead to many significant changes, including: i) expansion of the powers of the Office of Trade Competition Commission (OTCC), making OTCC independent from the Ministry of Commerce; ii) identification of market-dominant business operators; iii) merger control; and iv) interpretation and guidance on TCA.

- **Korea:**

- On April 3, 2018, the Korea Fair Trade Commission (KFTC) promulgated the Regulations on the Collection, Analysis and Management of Digital Evidence as well as guidelines that set forth greater details on the KFTC's forensic review procedures.

Amendments of Antitrust Laws and Regulations (cont'd)

- **Vietnam:**

- Vietnam is undertaking a major overhaul of its competition law framework to bring it in line with current international practices. The fifth draft Law on Competition has been submitted to the Standing Committee of the National Assembly for review. It is expected to become effective on January 1, 2019, replacing the current Law on Competition.
- Under the current law, many cartel arrangements are only prohibited if the combined market share of the parties is 30 percent or more. Under the draft law, hardcore cartels between competitors (e.g., price fixing, customer allocation, restrictions on output, bid rigging) are strictly prohibited, regardless of market shares.

- **Indonesia:**

- The key amendment to Prohibition of Monopolistic Practices and Unfair Business Competition is the introduction of extraterritorial jurisdiction, which will allow competition law enforcement agencies to exercise jurisdiction over extraterritorial activities of foreigners that could impact Indonesia's economy.

Increased Enforcement Activism and Dawn Raids

Enforcement Snapshots

- **Penalty statistics**

Up to May 2018, antitrust regulatory agencies in China have imposed a total of CNY 1.57 billion (USD 23.6 million) for pricing-related anticompetitive activities.

- **Industries under scrutiny**

Antitrust enforcement cases focused on companies in the gas, electricity, water supply, and other industries that are closely related to public welfare.

Dawn Raids

- **Cooperation in Investigations**

Entities and individuals are required to cooperate with enforcement agencies during a government inspection/investigation. Protection of trade secrets is not an acceptable ground for refusal to cooperate.

- **Legal consequences**

Resisting enforcement action may result in fines or criminal penalties under the PRC Anti-Monopoly Law (first case in Guangzhou)

Increased Enforcement Activism and Dawn Raids (cont'd)

- **China:**

- On March 21, 2018, 6 household appliances and furniture stores were fined ¥100,000 (approx. USD 15,150) by the Shandong AIC for entering into a monopolistic agreement to boycott third-party trade shows (agreement entered into but not performed).
- On March 26, 2018, 13 security door manufacturers in Shanxi Province were ordered by the Shanxi Anti-Monopoly Bureau to cease cartel activities, and all were fined 1% of the previous year's sales (approx. USD 557,476)
- On May 4, 2018, the price department in Dalian, Liaoning Province, proposed to impose heavy penalties on the suspected price collusion of 19 car companies. This case is pending.
- On May 31, China's National Development and Reform Commission (NDRC) dawn raided offices of Micron Technology, Samsung, and SK Hynix in Beijing, Shanghai, and Shenzhen. This was a follow-up action of NDRC's December 2017 investigation of the three companies for suspected price-fixing collusion.
- On August 14, 2018, two river sand companies in Guangdong were ordered by the Guangdong Development and Reform Commission to stop the illegal activities due to the implementation of the a price-fixing agreement, and were fined 1% of the previous year's sales, i.e., ¥293,103.61 (approx. USD 42,717) and ¥15,544,468.06 (approx. USD 2,265,462).
- On August 4, 2018, the Guangdong Development and Reform Commission ordered Zhongshan Gas Association to cease its illegal activities related to market allocation, and imposed a fine of ¥150,000 (approx. USD 21,861).

Increased Enforcement Activism and Dawn Raids (cont'd)

- **Singapore:**

- On January 5, the Competition and Consumer Commission of Singapore (CCCS) imposed financial penalties totaling \$19.6 million Singapore (\$14.7 million) on five capacitor manufacturers for fixing prices and exchanging confidential sales, distribution, and pricing information for aluminum electrolytic capacitors. This fine is the highest financial penalty imposed by CCCS to date.

- **Japan:**

- On April 18 2018, the Japan Fair Trade Commission ("JFTC") conducted a dawn raid against Combi Corporation and Aprica Children's Products for alleged resale price maintenance. The two companies, which manufacture strollers and child seats, are suspected of setting resale prices and instructing their distributors to increase the resale prices with an implied threat that they would otherwise stop selling to the distributors. Combi and Aprica have a combined market shares of around 70% in the stroller market.

- **South Korea:**

- On January 25, 2018, KFTC announced its 2018 enforcement program, which includes: 1) providing exemptions for SMEs under certain conditions; 2) proactively detecting abuse of market dominance and focusing on innovative markets (such as pharmaceutical companies, life sciences industry, big data market, etc.)
- South Korean regulators focused its enforcement actions on marine-cable companies, ready-mix concrete companies, agricultural product companies, and aerial photography services providers, etc.

Increased Criminal Prosecution of Antitrust Conduct

- **Japan:**

- On March 23, the Japan Fair Trade Commission (JFTC) filed a criminal complaint against four major contractors for their alleged involvement in bid-rigging over contracts related to a Tokyo-Osaka maglev train link.
- Individuals sentenced to imprisonment for bid-rigging in Japan: On May 29, 2018, a former public officer who was in charge of Chiba Civil Engineering Department was criminally prosecuted and later sentenced to 22 months of imprisonment by Chiba County Court for conspiracy in the bidding process for road and bridge construction. Employees of relevant construction companies were also sentenced to 18 months of imprisonment.

- **South Korea:**

- On June 18, Seoul Central District Court imposed a fine totaling from approximately 800 million won (approx. USD 723,500) to 950 million won (approx. USD 859,100), with executives from three companies issued prison sentences from 10 months to 1 year.
- On August 21, 2018, Korean Ministry of Justice and KFTC abolished KFTC's exclusive Criminal Referral Right and began sharing concurrent jurisdiction over cartel conduct.

Increased Criminal Prosecution of Antitrust Conduct (cont'd)

- **Australia:**

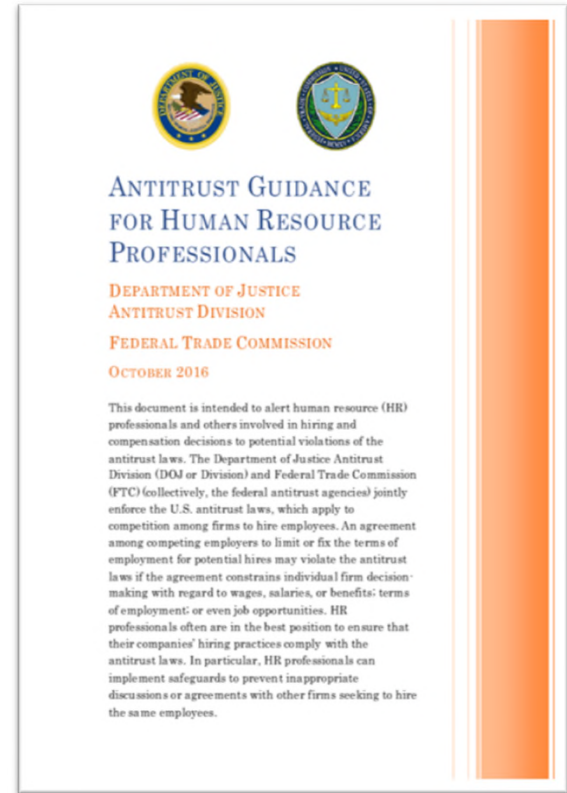
- In February 2018, the Australian Competition and Consumer Commission (ACCC) brought criminal charges against the Country Care Group Pty Ltd., its managing director, and a former employee. This marks the first criminal prosecution of an Australian corporation under the criminal cartel provisions of the Competition and Consumer Act 2010 against individuals.
- ACCC is preparing criminal cartel charges against the country's third-biggest bank and underwriters Deutsche Bank and Citigroup over a \$2.3 billion share issue, in an unprecedented move with potential implications for global capital markets. The case was heard in the District Court of Downing Center in Sydney on July 3, 2018.

GLOBAL CARTEL ENFORCEMENT

**CRIMINALIZATION
NO-POACHING AGREEMENTS
AND WAGE-FIXING**

Antitrust Guidance for HR Professionals

- Jointly issued by US Department of Justice (DOJ) and Federal Trade Commission (FTC) in **Oct. 2016**
 - “[I]ntended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws.”
 - Addresses conduct that can result in criminal or civil liability
 - Announces for the first time that the DOJ will pursue certain HR-related agreements criminally, instead of civilly, as it has historically done



Criminalizing Wage-Fixing & No-Poaching Agreements

- **DOJ and FTC Joint Announcement**

- **DOJ** for the first time will **criminally investigate and prosecute employers**, including individual employees, who enter into certain “naked” wage-fixing and no-poaching agreements

- ***Per se unlawful***

- Naked wage-fixing
 - Agreement “about employee salary or other terms of compensation, either at a specific level or within a range”
- No-poaching agreements
 - Agreement “to refuse to solicit or hire that other company’s employees”

Potential Legal Avenues

- **Criminal Prosecution**

- Against individuals, the company, or both

- **Civil Enforcement**

- Against individuals, the company, or both

- **Private Litigation**

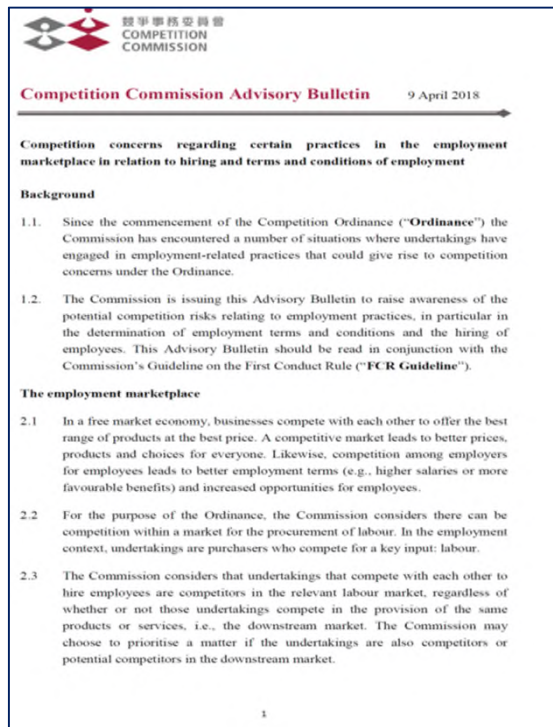
- Subject to treble damages
- Joint and several liability
- Injunctive relief
- Attorneys' fees and interest

- **Potential Plaintiffs**

- Department of Justice
- Federal Trade Commission
- State Attorneys General
- Private Parties
 - Class Actions
 - Employee Suits

International Issues

- Hong Kong Competition Commission Guidance (April 2018)
- Japan Fair Trade Commission, Report of Study Group on HR and Competition Policy (Feb. 2018)
- Europe
 - “[C]ourts and competition regulators in Europe (Spain, the Netherlands, and Croatia) have all made major findings in the last eight years against companies in relation to national no-poaching agreements made in the freight forwarding, hospitals, and IT employment sectors”



HR-related Antitrust Risks in Asia

- Considerable pressure on employers to engage in wage-fixing or no-poaching agreements in some of the Asian countries:
 - high turnover rate and increasing HR-related costs in an employee-friendly jurisdiction
 - competitive labor market for talent and specialized workforce
- Growing concerns expressed by competition authorities and increased enforcement activism against unfair competition and restraint of trade
- Increased acceptance by legal professionals that wage-fixing and no-poaching agreements or sharing of sensitive HR information violate competition laws

Legal Developments in Asia

- China
 - General prohibition of agreements, decisions or concerted actions eliminating or restricting competition or otherwise constitute unfair competition under PRC Amended Anti-Unfair Competition Law and Anti-Monopoly Law
 - Broad discretion of regulators to impose penalties on companies for engaging in unfair competition
- Singapore
 - General prohibition under Singapore Competition Act against agreements, decisions or concerted practices by object or effect of preventing, restricting or distorting competition
- Taiwan
 - General prohibition under Fair Trading Law in Taiwan against concerted actions that limit competition (such as an agreement among competitors limiting the price, quantity, counterparty, etc. that may affect the market order)

Legal Developments in Asia (cont'd)

- Hong Kong
 - Advisory Bulletin issued by HK Competition Commission in April 2018 providing guidance
 - No-poaching and wage-fixing agreements or sharing of sensitive HR information among employers listed as examples of practices that would contravene HK Competition Ordinance (Sec. 3.4 of Advisory Bulletin)
- Japan
 - General prohibition under Japan Anti-Monopoly Act against unreasonable restraint of trade through contract, agreement or other means
 - Japan Fair Trade Commission, Report of Study Group on Human Resource and Competition Policy (Feb. 2018)
- India
 - General prohibition under Indian Competition Act against anti-competitive agreement
 - Non-solicitation clause between two commercial parties that does not prohibit lateral hiring was held valid by court (Wipro Ltd. v. Beckman Coulter)
 - India's competition authority closed several employment-related cases (such as predatory hiring, non-compete clauses) by terming them merely as employment issues
 - Although Indian Competition Act does not expressly cover no-poaching or wage-fixing agreements, some legal professionals in India held the view that these practices may fall within the purview of Indian Competition Act and foreign competition law jurisprudence might impact the development of Indian competition law in this regard

Enforcement Trends in Asia

- Japan
 - No reported case of penalty imposed on employers for no-poaching agreements, wage-fixing or exchanging HR information
- Taiwan
 - No reported case of penalty imposed on employers for no-poaching agreements, wage-fixing or exchanging HR information
- India
 - No reported case of penalty imposed on employers for no-poaching agreements, wage-fixing or exchanging HR information

Enforcement Trends in Asia (cont'd)

- China
 - In November 2016, 46 private schools in Wenzhou (Zhejiang Province) were found to have entered into an agreement containing a no-poaching clause
 - Some legal professionals view it as violating anti-monopoly law while local education bureau encouraged it
 - No report of invalidation of such agreement or penalty imposed on the schools
- Hong Kong
 - No reported case of penalty imposed on employers for no-poaching agreement, wage-fixing or exchanging HR information
 - Several human resources trade associations warned by Competition Commission in 2016 that publication of industry-specific salary forecasts could violate HK Competition Ordinance
- Singapore
 - No reported cases against employers for non-poaching/wage-fixing or exchanging HR information
 - 16 employment agencies fined by Competition Commission in 2011 for fixing the salary of new Indonesian Foreign Domestic Workers (“FDWs”), which is a component of the placement fee charged to the employers of such FDWs

HR-related Antitrust Issues in Europe (1)

- No-poaching or “naked” wage fixing agreements are restrictive **by object** under EU law (similar to per se in the US)
- In addition, forward-looking information exchange regarding levels of compensation between competitors is restrictive **by object**, assuming it reduces strategic uncertainty in the market.
 - Such illegal “concerted practices” can arise even where only one party discloses strategic information to a competitor who “accepts” it, in which case the competitor will be deemed to have accepted the information (and adapted its market strategy accordingly), unless it responds with a clear statement that it does not wish to receive the information.

HR-related Antitrust Issues in Europe (2)

- Market-wide restrictions such as deferred compensation plans may be restrictive **by effect** (similar to rule of reason) if there is an agreement or concerted practice to enforce them
- Restraints **ancillary** to e.g. a merger, joint venture or outsourcing may be enforced if they are narrowly defined and limited in time
 - See the German and Hungarian investigations featured on the next slide

Europe – enforcement cases in several sectors

- Ireland – **asset management** – ongoing investigation into alleged no-poaching agreement among 3 Italian firms
- Netherlands – **hospitals** – no-poaching and wage-fixing agreement among 15 Dutch hospitals held to restrict competition among anaesthesiologists
- Spain – **freight-forwarding** – agreement between 8 road transport forwarding agents on conditions for hiring workers
- Hungary – **aluminium car parts** – merger agreement between 2 suppliers which included a no-poaching covenant
- Germany – **commercial vehicles** – German courts upheld a no-poaching covenant between 2 distributors not to directly or indirectly hire each others' employees for the duration of, and for 3 years following, a joint distribution agreement between the 2 parties

Europe – penalties and leniency

- Up to 10% of consolidated worldwide turnover under EU law
- Civil damages actions
- Criminal sanctions in e.g. the UK
- Potential exclusion from public procurement contracts
- Leniency programs available similar to US and Asia

GLOBAL CARTEL ENFORCEMENT

ALGORITHMS AND ANTITRUST ENFORCEMENT

Mind your Algos – online posters and beyond

- In June 2018, the **US** Department of Justice confirmed in a court filing that it is pursuing extradition proceedings of a UK citizen in Spain who was charged in the US with using algorithms to fix the prices of posters sold through Amazon.com's Marketplace and disqualified as a director in the UK for the same conduct.
- In April 2018 the **Russian** Federal Antimonopoly Service opened an investigation into two suppliers of expendables, reagents and diagnostic products who were alleged have engaged in bid-rigging of electronic tenders by using "auction robots" to file price bids. The robots were pre-programmed for anti-competitive conduct at the auctions.
- In June 2018, **Luxembourg's** competition authority considered a complaint concerning the use of algorithms to set rates used by horizontal taxi competitors. After balancing the restriction of competition with pro-competitive benefits, the authority concluded that the agreement was pro-competitive.

A Brave New World

- US Federal Trade Commission is holding hearings to address whether technological developments and changes in the economy require adjustment to competition laws, enforcement priorities, and policy. One focus of these hearings is the consumer welfare implications of algorithmic decision tools and artificial intelligence.
- European Commission has appointed an external panel to advise on the effect of algorithmic and big data technology on markets, and is undertaking a study to raise awareness about algorithms
- Joint project between competition authorities of France and Germany to develop a typology of algorithms and to examine their potential anticompetitive effects
- The UK has also appointed a panel looking more generally at competition in the digital economy

Robocop

- Antitrust agencies are beginning to appreciate the potential of algorithms to detect aberrant pricing levels across industries as a potential indicator of cartel conduct
- Competition authorities from Brazil, India, Switzerland, the United Kingdom, and the European Union have begun the use of algorithms to detect suspected collusion
- Can we expect the first case of investigational algorithms detecting collusion algorithms any time soon?

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NOTABLE SUPREME COURT CASES

Notable Supreme Court Cases

- *In Re: Vitamin C Antitrust Litigation*, 837 F.3d 175 (2d Cir. 2016) (No. 16-1220)
- What deference is given to a foreign sovereign's interpretation of its domestic law?
- Trial:
 - Chinese manufacturers of Vitamin C alleged collusion on export prices and volumes violating Sherman Act.
 - Companies argued that Chinese laws and regulations required them to coordinate
 - China's Ministry of Commerce (MOFCOM) submitted an amicus brief providing an interpretation of Chinese law.
 - Trial court rejected MOFCOM's interpretation of Chinese law, concluding based on other legal sources that Chinese law did not require the collusion alleged by plaintiffs.
 - At trial, jury awarded \$147 million in damages
- Second Circuit reversed



Notable Supreme Court Cases

- On January 12, the Supreme Court granted certiorari review:
 - Whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law (as held by the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits), or whether a court is "bound to defer" to a foreign government's legal statement, as a matter of international comity, whenever the foreign government appears before the court (as held by the opinion below in accord with the Ninth Circuit).
- On June 14, Supreme Court reversal:
 - Holding that "[a] federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements."
 - "[I]n ascertaining foreign law, courts are not limited to materials submitted by the parties, but may consider any relevant material or source."
 - Remanded case for further consideration based on the Supreme Court standard and clarification as to how much weight to give to a foreign government's statement.

Notable Supreme Court Cases

- *US v. Microsoft*, 829 F.3d 197 (2d Cir. 2016) (No. 17-2)
- Authority to seize data through legal process stored in another country?
- Proceedings
 - Search warrant for email content and records of a suspect in a drug trafficking investigation under the Stored Communications Act (SCA) of 1986
 - Some data was stored in Microsoft computers in Ireland
 - Noncontent data provided stored in US
 - Motion to quash the search warrant for customer content data stored in Ireland
 - Government lacked authority to compel the production of data stored outside the United States



Notable Supreme Court Cases

- April 25, 2014, federal magistrate judge ruled that company must produce the emails stored on the Ireland-based computers
 - SCA warrant is more akin to a subpoena than a search warrant
 - A properly served subpoena would compel production of any material, including customer content, so long as the material is stored at premises “owned, maintained, controlled, or operated by” the company.
- On July 31, 2014, the district judge upheld the search warrant but stayed the ruling pending appeal.
 - District judge concluded that “the structure, language, legislative history, Congressional knowledge of precedent, . . . all lead to the conclusion that Congress intended in this statute for ISPs to produce information under their control, albeit stored abroad, to law enforcement in the United States.”
- July 14, 2016, Second Circuit reversed
 - SCA’s Warrant Provisions do not give investigators the ability to force the company to produce data stored on overseas servers.
 - Presumption against extraterritorial application of US statutes
 - Congressional legislation is presumed to apply only within the territorial jurisdiction of the US unless a contrary intent clearly applies.

US v. Microsoft, 829 F.3d 197 (2d Cir. 2016) (No. 17-2)



Notable Supreme Court Cases

- Certiorari review granted Oct. 16, 2017
- Question Presented:
 - Whether a United States provider of email services must comply with a probable-cause based warrant issued under 18 U.S.C. 2703 by making disclosure in the United States of electronic communications within that provider's control, even if the provider has decided to store that material abroad.
- Argument: **February 27, 2018**

US v. Microsoft, 829 F.3d 197 (2d Cir. 2016) (No. 17-2)



Notable Supreme Court Cases

- March 23, Clarifying Lawful Overseas Use of Data Act (CLOUD Act) enacted as part of the Consolidated Appropriations Act, 2018, Pub. L. 115–141.
- **New Provision:**
 - “A [service provider] shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider’s **possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States.**” CLOUD Act §103(a)(1).
- Government obtained a new search warrant under new law.
- April 17, case mooted
 - “No live dispute remains between the parties over the issue with respect to which certiorari was granted.”
 - “[C]ase is remanded to the United States Court of Appeals for the Second Circuit with instructions first to vacate the District Court’s contempt finding and its denial of Microsoft’s motion to quash, then to direct the District Court to dismiss the case as moot.”

US v. Microsoft, 584 U.S. ___ (2018) (No. 17-2) (Per Curiam)



GLOBAL CARTEL ENFORCEMENT REPORT

EUROPEAN ENFORCEMENT

Europe: Enforcement Trends (1)

- Expansion of enforcement powers available to national authorities
 - Provisional agreement reached between the European Parliament and European Council on the EC's proposal of March 2017 to grant further financial and human resources
- Wider array of detection methods being employed by national authorities
 - New economic intelligence unit launched by NCMC (Spain) to carry out an array of market screening activities, with a special focus on bid-rigging detection in public procurement activities
 - UK CMA campaign to generate information on cartels
 - Use of LinkedIn by the ACM (Netherlands) to approach more than 6,500 individuals in the Dutch harbour sector in relation to cartel conduct between harbour towage service providers
- Increased push for “second generation” cooperation agreements with non-EU countries, allowing exchange of confidential company information between regulators, bypassing the need for waivers from the investigated parties
 - Switzerland; Japan under negotiation
 - Agreement between EC and Mexico as to a “framework of dialogue” on issues such as information exchange, enforcement coordination and cross-referrals

Europe: Enforcement Trends (2)

- Continued focus on obstruction of justice
 - On September 25, 2018, the European Commission issued a Statement of Objections to a Slovak rail company alleging:
 - obstruction of June 2016 dawn raid by the Commission of its premises in Slovakia during investigation in the rail passenger transport sector
 - incorrect information provided to European Commission inspectors on the location of the laptop of one of its employees.
 - failure to provide requested data from this laptop by allowing its re-installation with a new operating system, which led to an “irrecoverable loss of the stored data”.
 - Commissioner Vestager:
 - *“Companies have the obligation to provide correct information when we investigate. Also during inspections. They should not tamper with the requested data in any way. Such behaviour would threaten the integrity and effectiveness of our investigations. We want to make sure that companies comply with our rules.”*

Europe: Ongoing investigations

- **European Commission**

- Kraft paper
- Metal Packaging
- Sports Media Rights
- Styrene Monomer

- **Poland:** photographic equipment; compressors; trucks; marketing services; electronic surveillance systems; fitness clubs; musical instruments; sports gear
- **Spain:** rail electrification systems; petrochemical/energy infrastructure; broadcast advertising; technical services; waste management
- **Italy:** private security services; horse racing; blood collection services; telecom.
- **France:** air transport; tobacco; freight transport
- **UK:** estate agents; musical instruments; roofing material; energy

GLOBAL CARTEL ENFORCEMENT REPORT

EXTRADITION

Pending Extradition

- On June 21, DOJ's Antitrust Division confirmed it is pursuing extradition proceedings of a UK citizen in Spain who was charged in the US with using algorithms to fix the prices of posters sold through Amazon.com's Marketplace.
- This would be the sixth individual extradited in a case prosecuted by the
- DOJ's Antitrust Division continued focus on extradition.
 - Since 2010, five foreign executives have been extradited and convicted.
 - In the last four years, three foreign executives have been extradited and later convicted.

Antitrust Division Extraditions Since 2010

No.	Name/Citizenship	Date/Country of Extradition	Charges Originally Filed	Investigation	Resolution	Notes
1	Ian P. Norris/British Citizen	Mar. 23, 2010/United Kingdom	Sept. 24, 2003, original counts filed; superseding charges filed Oct. 15, 2003 included four counts: (1) conspiring to fix prices for certain carbon products sold in the United States (Sherman Act); (2) conspiring to obstruct justice; (3) corruptly persuading and attempting to corruptly persuade other persons with intent to influence their testimony; and (4) corruptly persuading other persons to alter, destroy, mutilate, or conceal documents with the intent to impair their availability for use in an official proceeding	Carbon Graphite investigation	Extradited from the UK to face prosecution on only Counts (2) through (4); July 27, 2010 trial conviction on one count of conspiring to obstruct justice; acquitted on remaining counts; sentenced to 18 months in prison, a three-year term of supervised release, and a \$25,000 fine; conviction was affirmed on appeal	Fought extradition for six-and-a-half years, contending that the charges were not covered under prior UK extradition law; conviction based on obstruction of justice charge and not Sherman Act charge
	David Porath/ Israeli and US citizen	Feb. 16, 2012/ Israel	Feb. 18, 2010, charged with (1) conspiring to rig bids, (2) conspiring to defraud the Internal Revenue Service, and (3) filing a false tax return	New York Presbyterian Hospital investigation concerning award of contracts	July 11, 2012, pled guilty as charged; sentenced to time served (just under one year) and a one-year term of supervised release with three months of home confinement, and ordered to pay a \$7,500 fine and \$78,980 in restitution	Extradition based on Sherman Act and other non-antitrust charges

Antitrust Division Extraditions Since 2010

No.	Name/Citizenship	Date/Country of Extradition	Charges Originally Filed	Investigation	Resolution	Notes
3	Romano Piscioti/ Italian citizen	Apr. 3, 2014/ Germany	Mar. 28, 2011, sealed indictment charging one count of rigging bids, fixing prices, and allocating market shares involving sales of marine hose; indictment unsealed by court order on Aug. 5, 2013	Marine Hose investigation	Apr. 24, 2014, pled guilty to sole Sherman Act count; sentenced to 24 months in prison (including credit for nine months and 16 days held in custody during extradition proceedings in Germany) and a \$50,000 fine	Arrest warrant (under an Interpol Red Notice) based on sealed charges while traveling in Germany; described by the DOJ as "the first successfully litigated extradition on an antitrust charge"
	John Bennett/ Canadian citizen	Nov. 14, 2014/ Canada	Aug. 31, 2009, charged with two counts: (1) kickback and fraud conspiracy and (2) major fraud against the United States	Federal Creosote Superfund site investigation	Mar. 16, 2016, trial conviction on two counts for (1) committing major fraud against the United States and (2) conspiring to provide kickbacks and to commit major fraud; sentenced to 63 months in prison, two years of supervised release, a \$12,500 fine, and \$3.8 million in restitution	Fought extradition for more than five years; trial conviction followed three-week jury trial

Antitrust Division Extraditions Since 2010

No.	Name/Citizenship	Date/Country of Extradition	Charges Originally Filed	Investigation	Resolution	Notes
5	Yuva Marshak/ Israeli citizen	Oct. 14, 2016/ Bulgaria	Jan. 21 2016, sealed indictment charging two counts of wire fraud, one count of mail fraud, one count of major fraud against the United States, and one count of international money laundering	Foreign Military Financing program investigation	Mar. 13, 2017, pled guilty to mail fraud, two counts of wire fraud, and major fraud against the United States; sentenced to 30 months in prison, a \$7,500 fine, and \$41,170 in restitution	Arrest warrant (under an Interpol Red Notice) while traveling in Bulgaria

GLOBAL CARTEL ENFORCEMENT QUESTIONS?

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Mark L. Krotoski is former Assistant Chief of the National Criminal Enforcement Section in the DOJ's Antitrust Division, supervising international criminal antitrust cartel investigations and successfully leading trial teams in prosecuting antitrust and obstruction of justice cases involving corporations and executives.

- His experience includes every phase of the cartel enforcement process.
- In addition to other DOJ leadership positions, he has nearly 20 years of experience as a federal prosecutor.
- Mark represents and advises clients on antitrust cartel investigations; cybersecurity and privacy matters; trade secret; fraud matters; white collar and government investigations.

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Omar Shah represents clients in complex global cartel and anticorruption investigations and civil proceedings for damages for breach of antitrust laws, as well in merger control procedures and on antitrust matters, particularly those involving the intersection of competition law with media/communications regulation.

- His practice involves representing clients before UK, EU, and other competition authorities, courts, and tribunals and in commercial and regulatory litigation proceedings, including judicial reviews.
- *Chambers UK* 2016 describes him as a "charming and effective partner who instantly wins the client's confidence and respect." Omar is admitted in England & Wales and Ireland only.

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Dora routinely represents multinational clients in international dispute negotiations, and counsels clients on responses to government investigations in China, the United States, and Europe. She also regularly conducts internal investigations and compliance trainings for US, European, and Chinese multinational companies in both English and Mandarin with native proficiency.

- Dora was involved in US Securities and Exchange Commission (SEC) and US Department of Justice (DOJ) investigations, as well as US federal court proceedings and cross-border civil litigation.
- Dora's practice combines an in-depth knowledge of the legislative and legal developments with a keen understanding of the business environment in Greater China to provide practical and effective strategic counselling to clients.

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