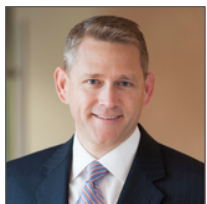


**Morgan Lewis**

# GLOBAL CARTEL ENFORCEMENT

Clay Everett, Mark Krotoski, Omar Shah, & Dora Wang  
March 1, 2018

# Our Presenters



**J. Clayton "Clay" Everett, Jr.** has represented corporate and individual defendants in dozens of international cartel investigations and related litigation. He has acted as global coordinating counsel in multijurisdictional cartel investigations, secured leniency for multiple clients and declinations for others, and defeated follow-on damages claims on successful motions to dismiss, motions for summary judgment and oppositions to class certification.



**Omar Shah** represents clients in complex global cartel and anticorruption investigations and civil proceedings for damages for breach of antitrust laws. 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.



**Mark L. Krotoski**, 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 investigating and 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.



**Dora Wang** advises multinational corporations in a broad range of industries on regulatory and compliance matters, government and internal investigations, and complex cross-border litigation and commercial dispute resolution involving antitrust and anti-corruption laws, cybersecurity and data privacy laws, due diligence in mergers and acquisitions, compliance audit and policy formulation and implementation.

# Cartel Enforcement Reports

Morgan Lewis



## 2017 GLOBAL CARTEL ENFORCEMENT REPORT

### CARTEL FINES REMAIN LOW DESPITE ACTIVE ENFORCEMENT

Cartel fines were significantly lower in 2017 than in recent years. **Global fines totaled a little more than \$4.2 billion in 2017**, about half the \$7.8 billion of fines in 2016. The lower fine total, however, are not indicative of the level of enforcement activity. Enforcement authorities around the world remain extremely active, with a significant number of new investigations and substantial enforcement actions. The trend toward globalization of cartel enforcement was evident in 2017, with new enforcement authorities becoming active and more established authorities coordinating investigations and enforcement actions in international cartel matters.

Unlike in recent years, there were no blockbuster multimillion dollar fines in 2017, but the overall level of enforcement activity was consistent with prior years. More enforcement attention has been focused on domestic cartels and individual prosecutions. Several new major investigations were launched in 2017, and significant potential enforcement actions are in the pipeline.

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- 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](http://www.morganlewis.com/subscribe)  
(select "Cartel" on list of topics)

# Overview of Discussion

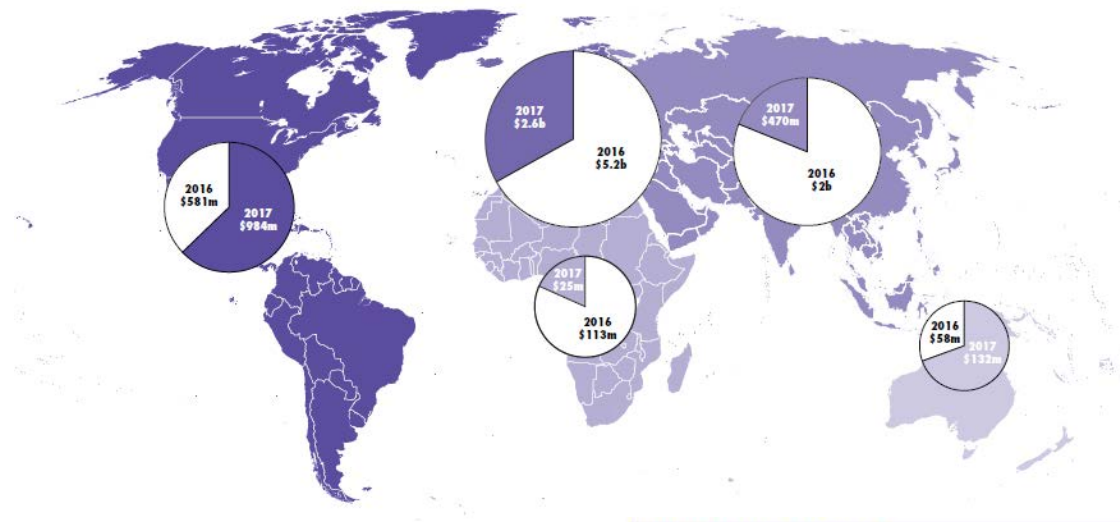
- Cartel Fines
- Industries under Scrutiny
- Asia Enforcement Issues
- Criminalization of No-Poaching Agreements and Wage-Fixing
- Notable Supreme Court Cases
- UK & EU Enforcement



GLOBAL CARTEL ENFORCEMENT REPORT

# ANTITRUST LEGAL DEVELOPMENTS AND ENFORCEMENT TRENDS

# Total Global Cartel Fines 2016-2017



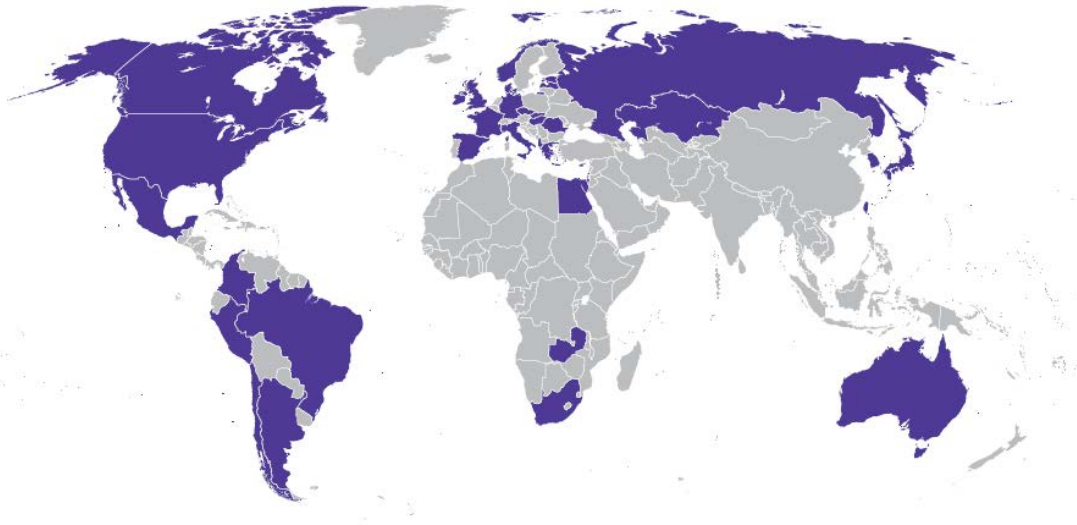
2017 TOTAL GLOBAL FINES: \$4.2b													
AMERICAS: \$984m				EUROPE: \$2.6b		ASIA & RUSSIA: \$470m					AFRICA: \$25m	AUSTRALIA AND OCEANIA: \$132m	
UNITED STATES	BRAZIL	CANADA	OTHER	EU	OTHER	CHINA	JAPAN	SOUTH KOREA	RUSSIA	OTHER	SOUTH AFRICA	AUSTRALIA	NEW ZEALAND
\$603m	\$149m	\$10m	\$222m	\$1.3b	\$1.3b	\$82m	\$61m	\$259m	\$18m	\$50m	\$25m	\$130m	\$2m

2016 TOTAL GLOBAL FINES: \$7.9b													
AMERICAS: \$581m				EUROPE: \$5.2b		ASIA & RUSSIA: \$2b					AFRICA: \$113m	AUSTRALIA AND OCEANIA: \$58m	
UNITED STATES	BRAZIL	CANADA	OTHER	EU	OTHER	CHINA	JAPAN	SOUTH KOREA	RUSSIA	OTHER	SOUTH AFRICA	AUSTRALIA	NEW ZEALAND
\$337m	\$141m	\$10m	\$93m	\$4.1b	\$1.1b	\$5m	\$88m	\$766m	\$8m	\$1.0b	\$113m	\$46m	\$12m

# 2017 Takeaways

- Fines down, but consistent level of enforcement activity
  - Lacking huge blockbuster case
  - U.S. focusing more on domestic cartel investigations
  - Blockbuster cases from past years produced fines in other jurisdictions
- Criminalization trend continues
  - Additional jurisdictions impose criminal penalties
  - First corporate criminal prosecution in Australia
- More trials in the U.S.
- Member state enforcement in Europe
- New investigations: transportation; chemicals

# Jurisdictions with Criminal Penalties for Cartel Activities



## 36 COUNTRIES HAVE CRIMINAL PENALTIES FOR CARTEL VIOLATION OR CONVICTIONS:

- Argentina
- Australia
- Brazil
- Canada
- Chile
- Colombia
- Cyprus
- Czech Republic
- Denmark
- Egypt
- Estonia
- France
- Germany
- Greece
- Hungary
- Ireland
- Israel
- Italy
- Japan
- Kazakhstan
- Latvia
- Malta
- Mexico
- Norway
- Peru
- Romania
- Russia
- Slovakia
- Slovenia
- South Africa
- South Korea
- Spain
- Taiwan
- United Kingdom
- United States
- Zambia

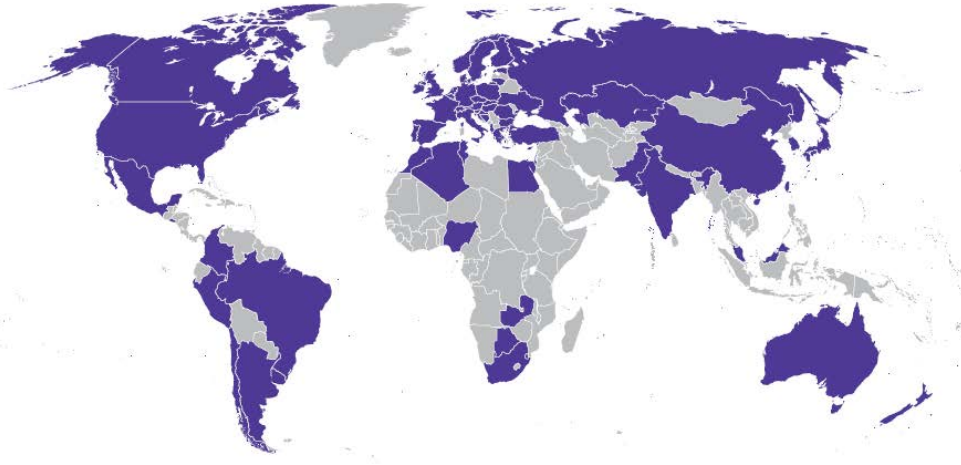


# 2018 Trends

- Enforcement saturation
  - Asia antitrust enforcement on the rise
  - Leniency losing steam?
  - Balancing penalties
- More trials
- Rise of the machines
  - Investigation techniques
  - Collusion by algorithm
- Criminal Restitution
- Continued maturation of damages litigation

# Jurisdictions with Cartel Immunity/Leniency Programs

## 66 COUNTRIES HAVE CARTEL IMMUNITY/LENIENCY PROGRAMS:



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

GLOBAL CARTEL ENFORCEMENT REPORT

# INDUSTRIES UNDER SCRUTINY

# Automotive Parts



- **Key Developments**

- DOJ Investigation Commenced Feb. 2010
- Prosecution
  - **48** 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**
- Green Tokai acquittal

- **Looking Ahead**

- Marayasu Trial

# Automotive Parts



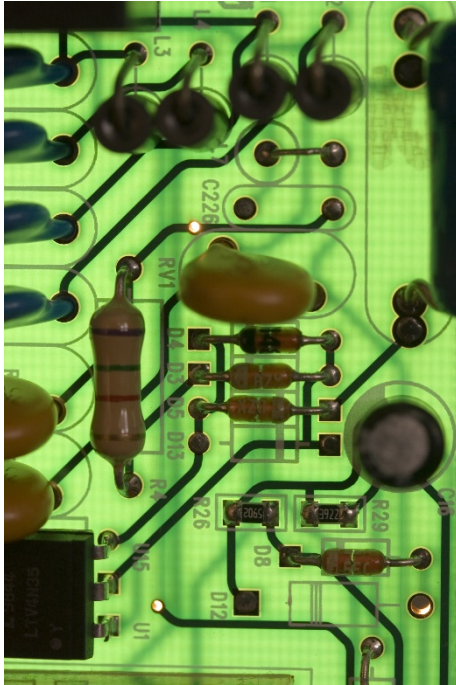
- **Key Developments**

- EU: **\$1.9 billion fines** imposed in relation to wire harnesses, foam, parking heaters, thermal systems, airbags, car lights and engine starters
- Canada: **Nine guilty pleas** and **\$54 million in fines**
- South Korea: over **\$10 million in fines**

- **Looking Ahead**

- Australia, Brazil, Canada, Mexico, Germany, Spain, India, South Africa, South Korea continues investigations into several different products

# Electronic Components



- **Key Developments**

- Investigations into capacitors in the US, China, EU, Japan, South Korea, Brazil and Taiwan
- US: 8 companies and 10 individuals charged
- Taiwan: \$177 million in fines
- Japan: \$68 million in surcharge payment orders
- Brazil: \$327K in fines

- **Looking Ahead**

- EU to impose infringement decision
- South Korea to issue charges
- US sentencing issues; criminal restitution
- Nippon Chemicon trial

# Generic Drugs and Pharmaceuticals



- **Key Developments**

- Multiple US investigations and litigation
  - 2 executives convicted in US in 2017
    - Doxycycline hyclate, an antibiotic, and glyburide, a diabetes medication
  - Dawn raids in US in 2017
- Dawn raids in Belgium, Germany
- Investigation in the UK and Spain
- Considerable political pressure for more enforcement due to increased reimbursement costs

- **Looking Ahead**

- Further investigations in more jurisdictions
- Tension between regulation and antitrust enforcement
- New legislation in relation to generics in Europe?
- Possible damages action by U.S. government?

# United States: Key Issues

- Individual Accountability and Focus
  - “[D]eters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.” [DOJ Yates Memo]
- International Focus
  - “[I]n our criminal program, roughly half of our investigations are international in scope.” [AAG Delrahim]
- Extradition
  - Five foreign executives have been extradited and convicted since 2010
  - June 2017, 30 month prison term on a former Israel-based defense contractor for falsifying bid documents extradited from Bulgaria in October 2016
- Extraterritoriality
  - “direct, substantial and reasonably foreseeable effects” on US commerce and “gives rise to a claim ”
  - “Involves” U.S. import commerce
- Transitioning to New Investigations

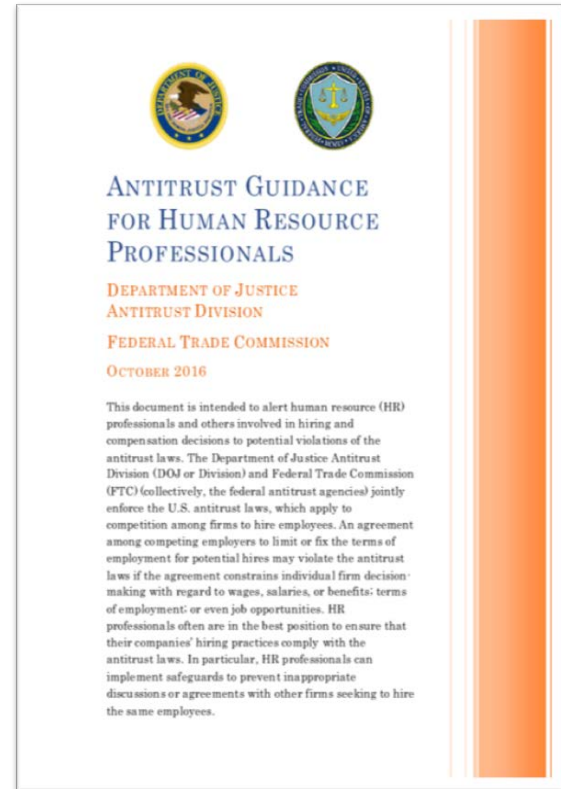


GLOBAL CARTEL ENFORCEMENT REPORT

# CRIMINALIZATION NO-POACHING AGREEMENTS AND WAGE-FIXING

# Antitrust Guidance for HR Professionals

- Jointly issued by United States Department of Justice (DOJ) and the Federal Trade Commission (FTC) in **October 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 antitrust or civil liability
  - Provides notice for the first time that the DOJ will pursue certain employment-related agreements criminally, instead of just civilly, as it has historically done



# Criminalizing Wage-Fixing & No-Poaching Agreements

- **DOJ and FTC Joint Announcement**

- DOJ for the first time may **criminally investigate and prosecute** employers, including individual employees, who enter into certain 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”

# Criminal Cases Under Investigation

## Delrahim Says Criminal No-Poach Cases Are In The Works

By **Matthew Perlman**

Law360, New York (January 19, 2018, 5:18 PM EST) -- The U.S. Department of Justice's antitrust chief said Friday that the division has a handful of criminal cases in the works over agreements by companies not to hire each other's workers, signaling that a focus of the Obama administration is continuing.

Assistant Attorney General Makan Delrahim laid out the division's recent work and current initiatives while speaking at a conference hosted by the Antitrust Research Foundation at the Antonin Scalia Law School at George Mason University. He pointed to a **joint guidance issued** by the DOJ and Federal Trade Commission in 2016 — that warned employers that so-called no-poaching agreements would receive the same criminal treatment as traditional price-fixing — and said the agency remains active in the area.

"In the coming couple of months you will see some announcements, and to be honest with you, I've been shocked about how many of these there are, but they're real," Delrahim said at the conference.

# Recommended Steps for Companies and In-House Counsel

- Evaluate post–October 2016 conduct
  - Distinguish “naked” and legitimate wage-fixing and no-poaching agreements
- Expand antitrust compliance training to HR personnel
- Caution with information exchanges
  - Permissible only if carefully designed to conform with antitrust laws
- Consult with experienced antitrust counsel if wrongdoing is detected, particularly for conduct occurring after October 2016

GLOBAL CARTEL ENFORCEMENT REPORT

# 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).
- Argument: **April 24, 2018**

*IN RE: VITAMIN C ANTITRUST LITIGATION*, 837 F.3d 175 (2d Cir. 2016) (No. 16-1220)





# 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.



# 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)



GLOBAL CARTEL ENFORCEMENT REPORT

# ASIA ENFORCEMENT ISSUES

# Legislative and Enforcement Trends in Asia

- Increased multilateral cooperation and coordination
  - Oct. 2017 bilateral meetings between JFTC and EU Competition authority; Dec. 2017 bilateral meetings between JFTC and China's MOFCOM, NDRC, SAIC in Beijing
  - Feb. 2018 bilateral meetings between US and China competition authorities (US FTC, US DOJ, China's NDRC, SAIC, MOFCOM) in Beijing
- Moving towards criminalizing cartel conduct and prosecution of individuals
  - Taiwan: seeking to criminalize antitrust violations and empower its competition authority to carry out criminal investigations
  - South Korea: seeking to streamline criminal prosecution against individual defendants and to allow private actors to seek punitive damages in cartel cases
- More enforcement activism and larger fines
  - China ("Antitrust Guidelines for Automotive Industry"; draft "Price Conduct Guidelines on Operators of Drugs prone to Shortages and APIs"), Taiwan, Hong Kong, Japan, Korea
- More focus on antitrust issues involving digital economy and IP rights

# Recent Cases in China

- In Nov. 2017, the Chinese over-the-counter equity trading system began vetting companies issuing new equities for their compliance with competition law
- In Oct. 2017, NDRC imposed fines totaling RMB 457 million (\$69.2 million) on 18 PVC resin enterprises due to repeated price collusion that pushed up market prices significantly
- In Aug. 2017, Shangxi Province DRC fined 23 power companies (including 4 SOEs) a total of RMB 72.9 million (\$11 million) for price-fixing agreement
- In July 2017, NDRC shut down the Hangzhou Fuyang District Paper-Making Association and imposed a combined fine of RMB 7.8 million (\$1.2 million) on 17 paper companies for price-fixing agreement on white paper roll
- SAIC commenced 18 new antitrust investigations with local AICs also took enforcement actions against companies in the energy and construction industries

# Recent Cases in Taiwan

- In Oct. 2017, TFTC imposed a fine of NT\$23.4 billion (\$774 million) on Qualcomm
  - Violations found: (1) abuse of monopolistic position by refusing to license SEPs, (2) unfair terms in contracts, (3) exclusive rebate arrangement with a specific company
  - Chinese and Korean authorities already imposed significant fines in 2015 and 2016, respectively
  - Highest fine that TFTC has ever imposed on a single company
- In Nov. 2017, TFTC confirmed investigation into suspected collusion between Taiwanese medical distributors and foreign manufacturers of continuous positive airway pressure (CPAP) machines
  - An anonymous petition posted on a government website in February alleged price-fixing to set the prices of the devices at abnormally high levels

# Recent Cases in Hong Kong

- In Aug. 2017, HK Competition Commission issued a 5-year block exemption order for vessel sharing agreements (“VSAs”) for the Hong Kong Liner Shipping Association
  - The Order declares that activities usually undertaken pursuant to VSAs are excluded from the application of the First Conduct Rule in the HK Competition Ordinance subject to certain conditions
- In Aug. 2017, HK Competition Commission commenced proceedings in Competition Tribunal against 10 construction and engineer companies seeking pecuniary penalties and corrective remedies
  - Alleged violations: market-sharing and price-fixing, and engaging in concerted practices of the same nature in relation to the provision of renovation services



# Recent Cases in Japan

- On Jan. 12, 2018, Japan Fair Trade Commission (“JFTC”) imposed a fine of 1.96 million yen (\$18,300) on J.Front Retailing due to violation of antitrust law
- On Oct. 5, 2017, JFTC raided Airbnb’s offices to investigate allegedly violations asking users not to list properties on rival sites
- On June 1, 2017, JFTC closed its investigation of Amazon due to voluntary remedial measures taken by Amazon
  - Alleged violation: restrict business activities of sellers in Amazon Marketplace by including price parity clauses and selection parity clauses in the seller contracts
  - JFTC recognized that the remedial measures would eliminate the suspected violation and decided to close the investigation

# Recent Cases in Korea

- 9 International Shipping Companies (Aug. 2017):
  - 43 billion won (\$37.8 million) for colluding to participate in auctions arranged by carmakers between 2002 and 2012
- 3 South Korean and Japanese Auto Parts Suppliers (Nov. 2017):
  - fined a total of 37.1 billion won (\$34 million) for colluding to affect bids for gas pumps by exchanging bid prices and predetermining the winner of the bids from 2007 to 2009
- 7 Local Cable Makers (Dec. 2017):
  - sanctions along with a penalty surcharge of 16.06 billion won (\$14.7 million) for colluding to win bids in high-voltage cable supply tenders conducted by three cable manufacturers and referred all of them to prosecution
- 6 Steel Pipe Manufacturers (Dec. 2017):
  - corrective orders along with a penalty surcharge of 92.1 billion won (\$84 million) for bid rigging (i.e., agreeing in advance who will submit a winning bid)

GLOBAL CARTEL ENFORCEMENT REPORT

# EU ENFORCEMENT TRENDS

# European Union: Enforcement Trends

- Very large EU Commission fines for infringements covering large markets for a long duration
  - E.g. Trucks
- Increased national enforcement complementary to EU Commission
  - Italy and Spain in particular have joined Germany, France and UK as very active enforcers
  - UK CMA will have to ramp up parallel cartel enforcement post-Brexit: we have already seen increased resources, use of dawn raids (NB Court of Appeal hearing in Concordia case) but a successful track record of criminal enforcement has so far proved elusive
- Follow-on civil damages litigation will impact on EU Commission and national authority enforcement practice in relation to the concept of “single and continuous infringement”
  - E.g. Air Cargo
- Continued development of accessory / facilitator liability

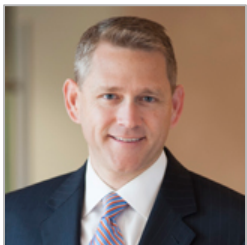
# European Union: Recent Cases

- Trucks (2016/7)
  - Fines of €2.93 billion on the 5 companies who settled and €880 million on the company that did not settle
  - Damages actions in UK, Ireland, Netherlands, Italy
  - Price fixing, collusion over emissions standards
  - Long duration, conduct found right up to CEO level
- Cars (2017)
  - Investigation into VW, BMW, Daimler regarding potential collusion over emissions standards, technology and costs
  - Could be on the same scale as trucks if proven as conduct allegedly dates back to 1990s
- LIBOR (2017)
  - ICAP wins appeal
  - Hybrid settlements infringe presumption of innocence
  - Facilitator or accessory liability
- Intel (2017)
  - Extraterritorial application of EU law
  - CJEU establishes that correct test is qualified effects test

GLOBAL CARTEL ENFORCEMENT REPORT

# QUESTIONS?

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