

HOT TOPIC

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INTERNATIONAL CARTEL ENFORCEMENT



PANEL EXPERTS



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R&C: Could you provide an overview of the most significant developments seen in global cartel enforcement over the past 12 months or so? In your opinion, has enforcement activity been particularly pronounced during this period?

Everett: Cartel enforcement continues to be a high priority for antitrust enforcement authorities throughout the world. Cartel fines last year topped \$7bn globally. One significant development is the continued spread of cartel enforcement across the globe. More and more countries are passing laws outlawing cartels or enforcing existing laws that make such behaviour illegal. This increases the complexity of international cartel investigations and enforcement actions, and creates an imperative for coordination of responses to investigative demands. Another significant development is the criminalisation of cartel conduct. The US has a long history of prosecuting individuals for cartel violations and seeking prison sentences in connection with such prosecutions. Criminal penalties were, however, generally not available in most other jurisdictions. That has started to change, with other major jurisdictions such as the UK, Japan, Korea, Australia and Brazil prosecuting individuals, and others, such as South Africa, recently passing laws that will allow individual criminal penalties to be imposed in the future.

Seebald: The most significant development is the Justice Department's focus on individual accountability and the application of the Yates memorandum to cartel cases. Over the last few years, the DoJ, in general, has placed a heightened scrutiny on individuals, and the Yates Memo includes six steps to combat individual corporate wrongdoing, which apply in antitrust division investigations. While some of the Yates Memo provisions relate to internal DoJ information sharing and policy regarding prioritisation of the focus on individuals, other provisions set forth requirements for companies *vis-à-vis* individual wrongdoers that companies must comply with, for example, to obtain cooperation credit. As the Memo specifies, in order for a company to be eligible to receive any cooperation credit, it must provide the DoJ all relevant facts about individuals involved in misconduct. Whereas in the past companies could provide information about culpable individuals after entering into a plea agreement, the new policy, which the antitrust division has adopted, mandates that all such facts be disclosed as a prerequisite to obtaining any cooperation credit. This policy raises a number of considerations for companies that are cooperating with the DoJ in terms of how to interact with potentially culpable individuals.

Sibon: In 2015, cartel fines were driven by a small number of large investigations, with fines totalling over \$5bn globally. As a general trend, global cartel

fines have declined by approximately 20 percent compared to the previous year. In the EU, fine levels declined materially to approximately €500m for the period January 2015 to April 2016 compared to annual fines in excess of €1.5bn in the prior years. A decline in total fines in the past year could also be observed in other jurisdictions, such as Brazil, China, Japan, South Korea and Russia. The US stands out as one of the few exceptions to this global trend, having imposed a record \$3.8bn in fines in 2015. Newer economies, such as Chile, India and Taiwan, have also stepped up cartel enforcement efforts. Following the closure of major investigations in 2014, antitrust agencies are actively pursuing investigations in a wide range of sectors, including the automotive, financial services, electronic component and consumer products sectors.

Katz: The problem with judging the state of cartel enforcement is that much of the activity takes place under the surface and behind closed doors. In the last year, for example, the level of cartel fines imposed declined in a variety of jurisdictions, a key exception being in the US where record fine levels were reached. But this by no means indicates a flagging interest by authorities in detecting and prosecuting cartels – it is simply a snapshot at a specific point in time of the stage of progress of different investigations and the breadth and scope of the particular conduct involved. There is no doubt that cartel enforcement remains the key priority

for antitrust authorities worldwide. In terms of cartel enforcement trends, antitrust authorities are continuing to push the frontiers of what constitutes anticompetitive cartel conduct beyond the prototypical agreements reached in ‘smoke-filled rooms’ – for example, ‘mere’ information exchanges, ‘invitations to collude’, use of third-party data aggregators, and so on. Authorities do not always win these cases, but their interest in expanding the definition of illegal conduct is apparent. That said, there remains no shortage of cases in which parties continue to engage in garden variety types of illegal conduct, such as colluding to fix prices, allocate markets and restrict output.

R&C: How have investigative authorities shaken up their enforcement strategies? What factors seem to determine whether or not cases are pursued?

Sibon: Many investigative authorities have placed a strong focus on individual accountability. Antitrust agencies in Canada, Japan, South Korea and the UK have imposed prison sentences on individual executives and directors in a number of different investigations. Other jurisdictions, such as Chile, are in the process of introducing criminal penalties for individuals. Investigative authorities have continued to rely on leniency applications in their current investigations. These procedures have become increasingly popular across the globe, requiring

companies involved in international cartels to file leniency applications in multiple jurisdictions. We have also noticed stronger coordination between regulators and across borders in the past year.

Antitrust agencies continue to actively cooperate in relation to competition enforcement on the basis of bilateral cooperation arrangements. The EU Directive on Antitrust Damages Actions of December 2014, which must be implemented by Member States into their respective national laws by the end of December 2016, includes provisions that protect leniency statements from disclosure in private damages litigation.

Katz: Authorities have not so much 'shaken up' their enforcement strategies as adapted them to match the constant evolution and growing sophistication of business practices that can – at least allegedly – be used to facilitate cartel conduct. For example, the investigations into fixing of LIBOR rates indicated how important social media can be in enhancing communications between competitors. As a result, authorities are now expanding their investigations to include these vehicles of communications, much as they did with emails in the not so distant past. It is not always easy to discern why authorities take on a given case. In some instances, no doubt, they may be trying to make new laws or simply to send a message. But

the bottom line will always be – can we win? And as the cases indicate, this is not always an easy assessment to make.

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Seebald: I do not see any shake up in the US enforcement strategy. The antitrust division has been very consistent in its strategies over the last decade or more. I do see some subtle changes. For instance, we are seeing a bit more emphasis on domestic investigations compared to years prior which were focused on international cartels. The main factor for pursuing cases is the existence of an amnesty applicant that has provided substantial evidence of cartel conduct. This seems to be the biggest factor in whether a case is pursued.

Everett: The tools, techniques and focus of the antitrust enforcement agencies continue to

evolve. There is, in recent years, increasing focus on individual liability for business executives as a means of deterring cartel violations. Many countries have recently adopted laws imposing criminal liability on individuals, and others have refocused attention on individuals. In late 2015, the DoJ adopted a new policy, the Yates memo, of focusing attention on the individual executives responsible for wrongdoing. In order to receive cooperation credit from the DoJ, it is now necessary for companies to disclose, early in the investigation, as much information as is available about the particular employees and executives who committed violations of the law. Moreover, resolution of corporate liability will not, as a general rule, resolve the individual liability of responsible individuals. The Yates memo applies to all laws enforced by the DoJ, not just the antitrust laws, but it has had an impact already on antitrust prosecutions, leading to more 'carve outs' from corporate plea agreements and a different focus in investigations. In addition, the DoJ in the US has placed increasing emphasis on the use of extradition as a tool in antitrust cases. The DoJ had its first success in extraditing an individual in a cartel case in 2014, and they have since extradited two more individuals. Officials from the DOJ have in recent speeches repeatedly stressed their intention to seek more extraditions in the future.

R&C: Have there been any recent international cartel cases which have

grabbed your attention? What impact might the outcome of these cases have on global enforcement activity going forward?

Seebald: The one case that garnered the most attention is the DoJ's prosecution of Aubrey McClendon. This indictment related to Mr McClendon's leasing of oil & gas rights for Chesapeake Energy Corporation. Another interesting case relates to the DoJ's foreclosure auction investigation. At the beginning of one of the California investigations, the FBI hid microphones in planters on the courthouse step without a search warrant. The legality of the recordings and the taint associated with the recordings are in question. This case raises serious civil liberty issues that are not usually present in antitrust cases and does show that even when you think you are having a private conversation, the government may be listening.

Everett: The European Court of Justice's decision in the *Air Cargo* matter has the potential to impact significantly how cartel offences are evaluated and prosecuted. The Court in that decision overturned the Commission's decision fining various airlines for engaging in a single alleged conspiracy to fix or maintain prices for air cargo services. The Court held that the evidence described in the Commission's decision demonstrated several different and distinct,

cartels, rather than a single continuous violation. It will be interesting to see if and how the Commission adjusts its decision following the instructions from the Court, and how this will affect prosecutions more generally in the future. Both the Commission and other enforcement authorities around the world, including the US DoJ, have relied heavily on the concept of a 'single continuous infringement' to expand the scope of the underlying violation, to ease their evidentiary burden, and to increase the fine exposure of the targets. That practice is now called into question by the *Air Cargo* decision. Another interesting development is the increasing incidence of joint investigations by different enforcement authorities within the same jurisdiction concerning the different legal implications of the same course of conduct. The various financial benchmark investigations are a good example of this. In those cases, manipulations of financial benchmarks were investigated and prosecuted as antitrust violations by antitrust authorities, as fraud violations by prosecutors, as banking violations by banking regulatory authorities, and as securities violations by securities regulatory authorities. Likewise, there have been several recent investigations, including in Brazil, of conduct that violates both bribery law and antitrust law.

Katz: Two relatively small cases to me illustrate some key trends. First is the US prosecution of an e-commerce executive for conspiring with other

sellers of posters to allegedly fix the price of certain posters sold on Amazon Marketplace. The executive agreed to plead guilty and pay a fine of \$20,000. The amounts are insignificant and at first glance one wonders why US authorities would even bother to take the case on. But the case illustrates that authorities continue to examine how new areas and ways of doing business may lead to anticompetitive conduct. First, the case involved the digital economy, which is of great interest to authorities. Second, the alleged illegal conduct focused on the adoption by the parties involved of a pricing algorithm that was purportedly used to coordinate the fixing of prices. The second case is somewhat more prosaic but illustrates the fundamental point that, in many jurisdictions at least, no matter how far authorities try to push the boundaries of cartel enforcement, they still must prove illegal coordinated conduct. In this instance, the Australian antitrust authority sued the egg industry's national association and various members for allegedly entering into an agreement to limit domestic egg production in order to achieve an increase in prices. Although there was evidence of the industry association encouraging egg producers to reduce supply, the court held that the authority had failed to prove that steps taken by members to limit supply were the result of collective conduct based on reciprocal obligations as opposed to discrete decisions made by individual producers.

Sibon: The capacitors investigation has drawn scrutiny from regulators around the world, including the EU, Brazil, China, Japan, South Korea, Taiwan and the US, with agencies coordinating closely. This investigation has already expanded in many jurisdictions in related electronic component markets, such as resistors and diodes. Global investigations in the car parts industry, specifically related to alternators and starters, as well as in the financial services area, specifically related to the manipulation of the Libor and other foreign exchange benchmarks, are also noteworthy, as they account for the majority of the 2015 fines worldwide. In December 2015, the EU Commission suffered a major defeat when the EU General Court overturned a landmark 2010 decision that had imposed 800m of fines on some of the world's largest airlines for colluding on air cargo prices. The General Court found that the EU Commission had relied on contradictory arguments because it accused the airlines of running a single cartel but only provided price fixing evidence for smaller groups of companies on specific routes. The ruling could potentially change the way the EU Commission handles its current investigations, especially where the scope of the infringement is not self-evident. In addition, the EU Commission dropped its four-year inquiry into collusion in the credit default swaps

(CDS) market in December 2015, clearing 13 major banks under investigation for illicit exchange of information. The EU Commission announced that the evidence it had gathered was insufficient to confirm its original concerns, reflecting significant barriers that exist in investigations based on exchanges of information.

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R&C: In your experience, what are the first steps a company should take when it learns it is being investigated for possible cartel-related activity? What benefits can companies derive from engaging external counsel to assist the process?

Katz: The first step that any company should take is to determine whether there is any truth to the





HOT TOPIC

allegations. Many, if not most, jurisdictions operate leniency or amnesty programmes where favourable treatment is based on how quickly parties approach the authority with evidence of illegal conduct. So there is a real 'need for speed' in order to obtain the most advantageous position in line, should the company decide to take the cooperation and disclosure route. Even for the biggest companies, retaining experienced external counsel should be an essential element of an internal investigation, particularly if it appears that multiple jurisdictions may be involved. Apart from anything else, the company will want to be well-advised on its options should evidence of potentially anticompetitive conduct be disclosed. Despite what the antitrust enforcement authorities say, the best option may not be to approach the authorities for leniency. This can be a difficult decision to make, and companies should ensure that they are receiving the best advice when considering different strategies and possible outcomes.

Sibon: When a company is being investigated for a potential cartel infringement, it should immediately take the necessary steps to preserve documents. These steps include suspending document retention policies and instructing employees not to delete or destroy documents and emails. The company, supported by outside counsel, should consider whether to commence an internal investigation with a view to applying

for leniency, to the extent still available, should the investigation confirm wrongdoing. It is important for companies to maintain a solid and effective compliance programme. The US DOJ in the foreign exchange manipulation cartel for the first time issued fine reductions to infringers for the existence of antitrust compliance programmes. Regulators in Brazil, Canada, Colombia, France and the UK have also recently announced incentives for compliance programmes. For example, in Brazil, new antitrust compliance guidelines provide for fine reductions of up to 50 percent for the adoption of antitrust compliance programmes. External counsel should be engaged very quickly and should be called immediately when authorities conduct a dawn raid at the company's premises. External counsel will ensure that the authorities are not acting beyond the scope of their powers. Moreover, communications between the company and its external counsel are legally privileged. Authorities will not be able to use such communications as evidence to support cartel fines.

Seebald: I always say that you can never win on the first day of an investigation, but you can sure lose on the first day. The first step that comes to mind is that the company should make sure that evidence is being preserved. You most definitely want to take care that employees during a raid do

not destroy evidence. Obstruction of justice is a very serious offence and it can lead to much higher fines. Also employees must understand that they do not have to talk to FBI agents and Justice Department

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attorneys during a raid and can wait to do so until they have counsel present. If an employee talks during the raid and says things that are not true, this is devastating to the company and can subject the witness to prosecution for making false statements to a federal agent.

Everett: As a first step, it is essential that a company immediately take action to assure that all documents and other potentially relevant evidence is preserved. The penalties for obstruction of justice are severe, and may in some cases exceed the penalties for any underlying antitrust violation. Several companies in recent years have suffered

penalties as a result of destroying evidence after being alerted to an antitrust investigation. Second, the company should immediately undertake an investigation to understand the underlying facts and potential exposure in the investigation. Most antitrust authorities now have immunity or leniency programmes that provide significant benefits to companies that quickly identify potential violations and disclose them to the authorities. The first company to disclose a violation may be entitled to complete immunity. 'Second in the door' cooperators may receive significant fine reductions. These policies are designed to create a race to the authorities, so time is of the essence. It is important to engage external counsel in the effort to investigate the underlying conduct in order to maintain privilege and to assess the legal and strategic implications of the evidence discovered. The European Commission and many other countries do not recognise a legal privilege for communications with or advice provided by in-house counsel.

R&C: Could you outline any major legal and regulatory developments in the cartel arena? What kinds of penalties might companies expect to suffer if they are found guilty?

Sibon: Criminal enforcement of cartels has increased worldwide. Individuals face longer prison

sentences and the number of jurisdictions that can impose these punishments is increasing. For instance, in the UK, a former UBS and Citigroup derivatives trader was sentenced to 11 years in prison for his involvement in the rigging of the LIBOR interest rates. With respect to administrative fines in the EU, cartel infringers face fines of up to 10 percent of the consolidated group turnover in the most recent financial year. The European courts have also participated in changing cartel enforcement strategies. Recent EU case law has validated 'hybrid' cartel settlements, where some parties agreed to settle the investigation with the EU Commission, while the EU Commission continued to pursue its case in the normal procedure against non-settling parties.

Seebald: I think we will see a greater focus on prosecuting individuals and the government asking for more jail time in those prosecutions. One possible outcome of this, though, is that you may see more individuals going to trial as the DoJ increases the demands for jail time. We are also seeing the DoJ increase the demands on foreign individuals to serve time in US jails. In the past, the DoJ would offer foreign nationals shorter sentences in order to incentivise individuals coming to the US to serve jail time. We now see the DoJ regularly asking foreign nationals to serve long jail sentences. I think you will see fewer pleas as a result of this as people decide that they are better off staying in their

home country rather than serving an extended jail term in the US. In terms of corporate penalties, the government can seek fines equal to twice the gain or loss caused by the conspiracy. This regularly leads to fines of more than \$100m. In addition, one new trend we are seeing is the imposition of probation or even a monitor. Having the Justice Department seek probation of a company was very rare until recently. We are seeing more and more examples of the Justice Department seeking probation in cases.

Everett: It is now common for international cartel investigations to be coordinated across multiple jurisdictions, with simultaneous dawn raids and parallel efforts to gather evidence. Penalties can be severe, particularly if they are imposed by multiple enforcement authorities. The largest fines in cartel cases run into the hundreds of millions of dollars, in some cases with fines of that magnitude levied in multiple jurisdictions. And individuals are increasingly at risk of imprisonment. The average prison sentence in the US for cartel offences has climbed to 24 months, and the longest sentence imposed in the US is five years. An individual in Brazil was recently sentenced to a 10 year prison term in a cartel case.

Katz: There are potentially enormous consequences for engaging in cartel conduct. Depending upon the jurisdiction, these can include fines – criminal or civil, imprisonment, disqualification from serving as a director or officer,

inability to bid on government contracts, and civil damages in follow on private – class actions. Also not to be ignored are the costs in terms of lost time to deal with the matter and damage to reputation, not to mention potentially massive legal bills. One point that should be obvious from the above but that must be emphasised nonetheless is that cartel sanctions are not reserved for companies – depending upon the jurisdiction involved, individuals are at significant risk as well. People will be fined, will go to jail, will be demoted or terminated, will have career options limited, will suffer damaged reputations, and will have their travel curtailed. Even if individuals reside in a jurisdiction where individual sanctions are not available, they will need to be concerned about possible extradition to ones where such sanctions do exist. In short, participation in a cartel is fraught with many potential legal hazards, for companies and individuals alike.

R&C: To what extent does the extraterritorial reach of international cartel enforcement laws serve to complicate coordination efforts and increase the risk of duplicative penalties?

Seebald: You always worry about duplicative penalties in international cartel cases. It is particularly complicated when you are talking about a component part in a consumer product where the sale of the price fixed part is abroad but the

ultimate customer is in the US. Is this commerce that the Justice Department should consider when calculating a fine? This tends to be a difficult issue in cartel cases. That being said, my experience is that the DOJ has generally been respectful of other countries and has tried to avoid double counting. As a practical matter, this issue, while certainly a matter of concern, has typically not been an impediment to getting cases resolved.

Katz: Given the global expansion of anti-cartel laws and anti-cartel enforcement, the issue of extraterritorial enforcement is not anywhere near as acute as it may have been even 25 years ago. Moreover, agencies now work assiduously to coordinate their efforts so as to reduce possible areas of enforcement friction. What this means is that a company that engages in cartel conduct will now be facing authorities operating on a coordinated basis and the prospect of sanctions across a multitude of jurisdictions.

Everett: Many antitrust authorities, including in the US, have taken an increasingly expansive interpretation of the extraterritorial scope of their jurisdiction. With multiple enforcement authorities investigating and prosecuting the same international cartel conduct – and with each taking an expansive

view of its jurisdiction – there is frequently substantial overlap both in investigative focus and on the sales used to calculate penalties. In some cases this may lead to multiple, inefficient interviews of the same witnesses by different enforcement authorities and to duplicative penalties. While the proliferation of cartel enforcement is a positive reflection of the increased appreciation of competition as a beneficial

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force, the dark side of this proliferation is the 'piling on' that has the potential to occur. Many antitrust enforcement authorities are, I think, sensitive to the need to coordinate their efforts to minimise duplication of effort and prevent duplicative penalties, but the mechanisms for such coordination are imperfect.

Sibon: 2015 also marked an increase in the number of requests for extradition. The US DOJ has indicted several foreign nationals in its auto parts investigation, with the intention of extraditing them for trial in the United States. Given that most extradition treaties require dual criminality in each jurisdiction for an extradition to be permissible, barriers to extradition will slowly diminish as the number of jurisdictions with criminal penalties increases. Both the EU and Japanese authorities have investigated and sanctioned extraterritorial conduct by imposing fines on foreign companies, for example, in the offshore cathode ray tubes cartel, products were incorporated into finished products outside of Japan. Similarly, extraterritorial reach of cartel enforcement continues to be an issue in the US, where the Supreme Court declined the opportunity to provide clarity when it denied petitions for review arising out of the LCD cartel matters in 2015. International investigations such as the LIBOR or the air cargo cartels also brought about increased risks of duplicative penalties, as some jurisdictions do not recognise the principles of double jeopardy or successive prosecution.

CD: Do you expect to see a rise in cartel related enforcement actions over the coming months and years? What advice can you offer to firms in terms of how to manage and mitigate the risk of violating global anti-cartel laws?

Everett: There is no sunset to cartel enforcement on the horizon. Efforts to discover and prosecute cartels will remain an important policy focus of antitrust enforcement authorities around the world for the foreseeable future. If anything, cartel enforcement is likely to become an even bigger enforcement risk for companies as more and more countries adopt laws, regulations and enforcement infrastructure to combat cartel violations. The key message for companies is that an ounce of prevention is worth a pound of cure. Strong and effective compliance programmes are essential to preventing the occurrence of cartel violations, and also, if properly structured, can provide an early warning mechanism of any potential problematic conduct, putting companies in the best position to limit the risks associated with such conduct. Moreover, various antitrust enforcement authorities have expressed an increased willingness to account for the benefits of a robust compliance policy in assessing penalties if a violation does occur. To be effective, an antitrust compliance policy must have buy in from and the support of the top level executives of the company. It needs to provide concrete incentives for employees to comply. And it needs to be bolstered by periodic audits to assess the continued effectiveness of the policy.

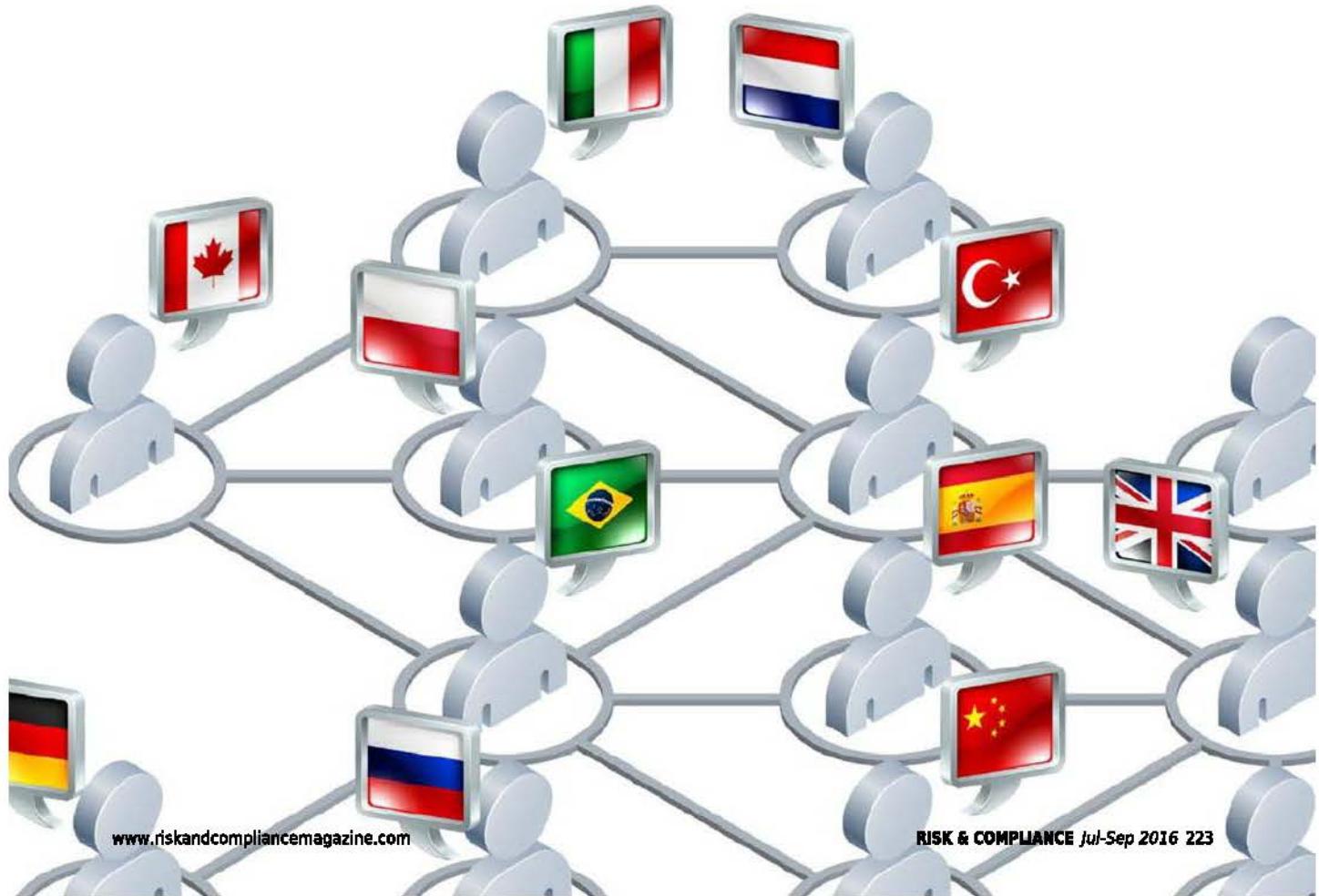
Sibon: As antitrust agencies have stepped up their cartel related enforcement actions, we are expecting more widespread private damages actions



in the EU and increased prison sentences for top executives around the world. To mitigate risks of a cartel infringement, companies should implement an effective antitrust compliance programme. The benefits of a compliance programme are twofold; it can prevent cartel violations before they occur and it can allow for early detection of unlawful conduct, thus enabling a company to take advantage of

leniency programmes. In addition, a compliance programme can be a factor taken into account by certain agencies when calculating the fine for a cartel infringement.

Seebald: The last 15 years have been very active in cartel cases. I expect that this will continue in the near future. Antitrust enforcement has been



largely consistent in Republican and Democratic administration so I do not think even with a new president we will see any sea changes in enforcement. Obviously, having a strong antitrust compliance programme is important to mitigate the risk of violating the law. The DoJ has been emphasising that it is important for companies to have an active and vibrant antitrust compliance policy. The DoJ has further emphasised the need for companies involved in cartel cases to change their corporate culture by having the most senior officers of the company fully embrace antitrust compliance. From my perspective, the most important element of a strong compliance policy is auditing. It is very important for companies to regularly review the emails of key pricing people within the company to see if there are any red flags. If there are red flags, then it is important for the company to proactively take further steps to see if there are serious problems.

Katz: Although there is a certain ebb and flow to how many proceedings are announced in a given year, the one constant is that anti-cartel enforcement is and will continue to remain the top priority for antitrust authorities worldwide. As

such, companies must make avoidance of antitrust violations a top priority of their own. And there is really no secret as to how this should be done. Companies – large and small – must establish and implement effective antitrust compliance programmes. It is generally accepted that any such programme must involve a commitment from management to make antitrust compliance a top corporate priority. Also important is the adoption of a relevant and well thought out compliance policy and an ongoing educational component, such as in-person training or online training. Regular monitoring and updating is key. The programme must encourage employees to ask about or report possibly illegal conduct, including protection for whistleblowers. It must include sanctions for those found to have violated company policy and the law. Compliance efforts need not be onerously expensive. There is no shortage of materials – public and private – that can be relied upon to assist in this effort, not to mention advice from experienced antitrust counsel. In the end, though, it must be recognised that the costs of compliance are an investment and are substantially outweighed by the potential costs of non-compliance. **RC**