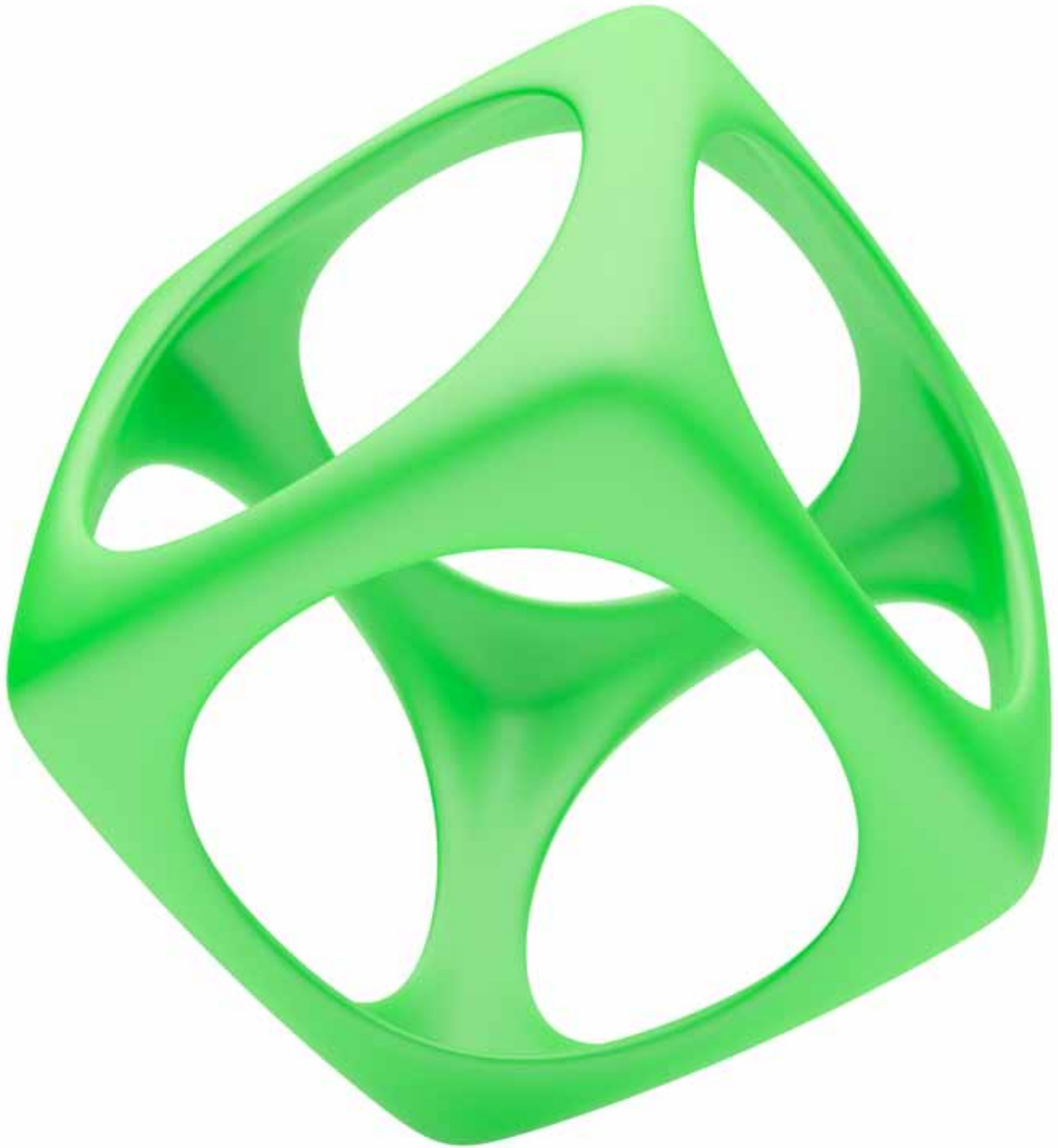


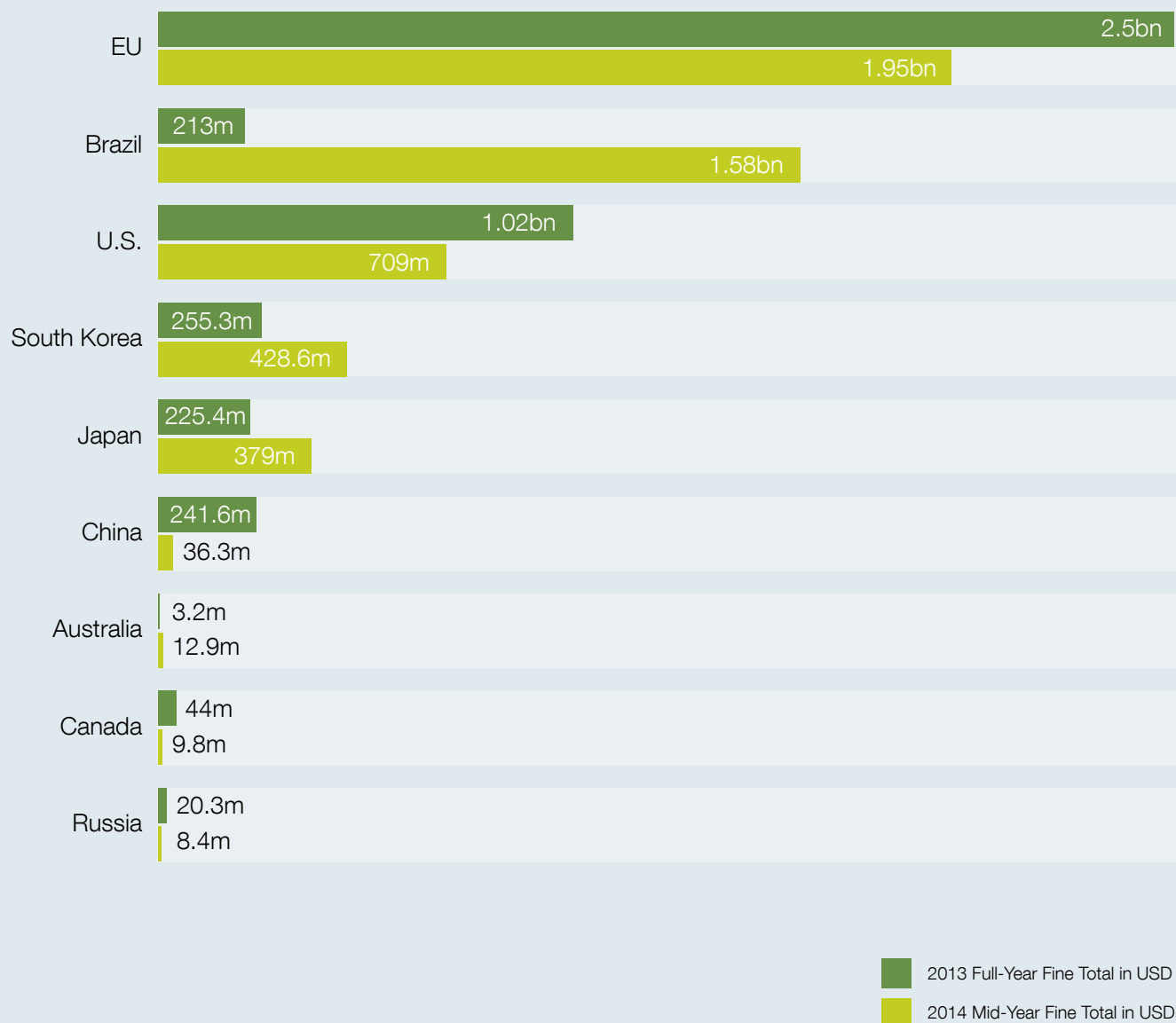
# ALLEN & OVERY



## Global Antitrust Enforcement

2014 (Mid-Year) Cartel Report

# Select cartel fine comparison



Statistics from selected jurisdictions are approximate and reflect fine levels and exchange rates at the time of writing and may not be exhaustive. 2013 U.S. statistics are for the U.S. fiscal year which ran from October 1 2012 to September 30 2013. All other countries' statistics cover the 2013 calendar year.

## 2014 Mid-year global cartel fine levels

	EU	Brazil	U.S.	South Korea	Japan	China	Australia	Canada	Russia
USD	1.95bn	1.58bn	709m	428.6m	379m	36.3m	12.9m	9.8m	8.4m
EUR	1.41bn	1.16bn	522m	311m	275m	26.3m	9.4m	7.1m	6m

# Antitrust authorities on the offensive

The mid-year trends in global antitrust enforcement paint a daunting picture for businesses currently caught in the crosshairs of a cartel investigation:

- the insatiable appetite of mature regimes for ever-increasing fines continues unabated, with the U.S., EU, Brazil, South Korea, Japan and Australia on pace to surpass their 2013 fine levels, and overall global cartel enforcement totals on pace to hit record levels for 2014
- there is also little end in sight for the growing number of authorities looking to punish international cartel conduct, with new regimes like China, Singapore and Russia joining the long list of authorities seeking to prosecute cartel conduct occurring beyond their borders
- filling a void left by U.S. and EU authorities bent largely on the pursuit of international cartels, regional enforcers in the U.S. and Europe have grown more aggressive

While we expect to see global antitrust fines hit a high-water mark yet again in 2014, we also see signs that the piling-on phenomenon at the root of these massive fine figures may be close to reaching its tipping point. Signaling that tensions are on the rise over which sovereign is most appropriately placed to punish cartelists, earlier this year, authorities from Taiwan and South Korea joined Japan in taking issue with legal positions advanced by the U.S. Department of Justice and Federal Trade Commission on the proper reach of U.S. antitrust laws.

## *What to watch for*

In the Americas – A push by U.S. authorities to conclude as many lingering cases as possible before the close of its fiscal year (Sept. 30, 2014), and additional extradition requests, possibly including Japan.

In EMEA – A rush by the European Commission (EC) to conclude long-standing matters as a result of the expiration of Commissioner Almunia's term.

In APAC – A record year for fines and prosecutions in Japan and continued shows of strength by authorities in China in international cartel cases.

# Americas

## United States

The Antitrust Division of the U.S. Department of Justice (the Division) has imposed total fines of USD709 million for the first half of FY14. This is not only a significant increase over its mid-year FY13 levels, it also suggests that the United States is on track to top its FY13 year-end total (USD1.02bn).

The Division continues to focus primarily on prosecuting foreign corporations and individuals, with a particular focus on Japan. To date, the Division has only imposed fines on foreign corporations, with seven out of eight of the fines being imposed on Japanese corporations.

The Division's most substantial fine so far this year is a USD425m penalty resulting from a guilty plea by Japanese-based Bridgestone Corp. for bid rigging and price fixing in the market for auto parts involving anti-vibration rubber. The severity of Bridgestone's fine is due in part to the "repeat offender" enhancement it received for its failure to disclose its involvement in this conspiracy in 2011, when Bridgestone pleaded guilty to violations in the marine hose industry. Other foreign auto parts makers were also subject to substantial fines in the last six months, including seatbelt maker Takata (USD71.3m), anti-vibration rubber part maker Toyo (USD120m), and lamp ballast and lighting fixture maker Koito (USD56.6m).

The Division's international reach was further demonstrated in April, with the extradition from Germany of an Italian national, Romano Piscioti, who had been charged with rigging bids, fixing prices and allocating market shares in the marine hose industry. On April 24, Piscioti pleaded guilty and was sentenced to two years in prison and a USD50,000 fine. The Division may secure another extradition in the coming months. In April, a Canadian court of appeals ruled to permit a Canadian national, John Bennett, to be extradited to face trial for bid rigging on government contracts related to the Environmental Protection Agency's Superfund Program.

Although international enforcement has driven the Division's enforcement statistics in the last few years, the Division's largely extraterritorial pursuit of cartels has come under fire both abroad and at home. Earlier this year, in a follow-on class action of liquid display panel purchasers, authorities from Taiwan and South Korea urged the U.S. Seventh Circuit Court of Appeals to limit the Sherman Act's reach, see *Motorola Mobility LLC v. AU Optronics Corp.*, et al., No. 14-8003, 7th Cir. Specifically, citing the existence of antitrust laws and robust enforcement in their own jurisdictions, Taiwanese and Korean authorities questioned the appropriateness of U.S. antitrust law being applied to cartel conduct affecting products other than those sold directly into the U.S. market, such as products that are integrated into complex goods and later sold into the U.S. Japanese authorities made similar arguments in a brief filed with the district court in October 2013.

The Division's international focus has also been the subject of criticism by the U.S. Congress, with some suggesting that the Division is neglecting the pursuit of domestic cartels. In response to this issue, the Division recently signaled a renewed commitment to domestic enforcement with the launch of Washington Criminal II, a new office dedicated to domestic cartels.

Interestingly, however, state enforcers appear to be increasingly stepping forward to fill the domestic void left by the Division's largely international focus. The Michigan Attorney General recently brought charges against companies for alleged bid rigging on oil and gas leases (even though the Antitrust Division decided not to prosecute the same conduct). Other state agencies have also been active in 2014, with the Connecticut Attorney General settling a case against snow removal businesses for alleged bid rigging in January. Also, in early June, the Puerto Rican antitrust authority brought its first cartel prosecution, imposing fines totaling USD70,000 against 14 school bus companies for colluding on school transportation services.

## Canada

Canada's Competition Bureau (the Bureau) had a slow start to 2014, collecting a cumulative USD9.8m in cartel fines, and thus falling short of last year's mid-year mark (USD39m). The majority of its current total came from fines imposed on participants in the global auto parts cartel, including a USD4.3m fine on switch-maker Panasonic, and a USD4m fine on ball bearing maker, NSK, which is the second company to plead guilty to bid rigging in the Canadian auto parts investigation. In May, Commissioner John Pecman signaled that the Bureau's 2014 progress may continue to be slowed by budgetary pressures and restructuring challenges. On the other hand, Pecman said class actions may be on the rise, describing private enforcement as "the biggest growth area in antitrust in Canada."

While the fine statistics are relatively low, the Bureau's enforcement against individuals has remained steady. Canadian law enforcers are, for the first time, seeking the extradition of an individual to face antitrust charges. The individual, a U.S. citizen, is accused of involvement in a conspiracy to rig bids on government IT contracts and has been charged along with five others. Also, in April, two individuals pleaded guilty to fixing the price of ocean freight surcharges and received conditional prison sentences of between six and eight months.

## Mexico

In April, the Mexican Congress approved legislation giving the Federal Economic Competition Commission (CFCE) broad new powers to investigate anticompetitive market structures and to remove barriers to competition. Specifically, the new law will allow the CFCE to investigate and regulate markets before illegal conduct is detected. The law also increases the maximum jail sentence to between five and ten years for criminal antitrust offenses. The CFCE is

off to an aggressive start in 2014, which marked its first prosecution of an international cartel following a leniency application. The prosecution yielded a USD16.9m fine on four multinational refrigerator companies for conspiring to fix the price of refrigerator compressors. CFCE head Alejandra Palacios recently announced that the Mexican authority will focus its efforts on the financial services sector.

## Brazil

Brazil's Administrative Council for Economic Defense (CADE) had a record-breaking start to the year with total cartel fines already at USD1.58bn, putting Brazil second behind the EU for total fines imposed for the first half of 2014. The significant enforcement figures for 2014 are almost entirely due to the unprecedented USD1.39bn fine imposed on six cement manufacturers that colluded for decades to manipulate the price of concrete. This is the second-largest cartel fine ever to be imposed by an antitrust regulator. CADE also imposed structural penalties for the first time on the cement manufacturers, including a requirement to cut installed capacity in concrete services by 20%. In addition, six individuals are facing potential imprisonment for their participation in the cartel.

Substantial fines were also handed down in the air cargo sector. In February, two Brazilian airlines were fined USD35m for bid rigging. In the same month, an executive was sentenced to over ten years in prison and ordered to pay a USD156m penalty for his participation in the air cargo cartel.

We expect aggressive enforcement to continue in the second half of 2014. In a pending subway bid-rigging investigation, the Brazilian authorities recently recommended a USD1.1bn fine. Also, CADE president Vinícius Carvalho warned that CADE will continue to prioritize cartel conduct and devote more resources to enforcement. CADE has already made progress on this goal, with the creation of a new cartel intelligence team in March that will focus on detecting cartels and bid rigging activity in government procurement contracts.

## Other developments

Other emerging antitrust regimes in Latin America may have an impact in 2014. Already this year, Chile's competition tribunal upheld a record fine of USD1.35m

against two bus companies for price fixing, signaling an appetite for further cartel enforcement.

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# Europe, Middle East & Africa (EMEA)

## European Union

European cartel fines have already reached EUR1.41bn so far in 2014, the highest total of any enforcement agency for the first six months of the year. The EC's early progress suggests that it is likely on track to match or exceed its 2013 total (EUR1.95bn), as fine totals tend to spike closer to the end of each year. The EC's staggering mid-year figures are almost entirely due to the EUR953m fine imposed on six companies for their participation in an automotive ball bearings cartel. JKETK, a Japanese company, received full immunity for blowing the whistle on the cartel, which is yet another example of the EU's successful leniency program in action. In fact, Commissioner Joaquín Almunia recently announced that the EC receives "on average four leniency applications per month." Meanwhile, the Commission's settlement procedure faced its first challenge by Société Générale, which has appealed the settlement of charges related to Euribor manipulation.

In April, the Commission fined makers of high-voltage power cables a harsh collective penalty of EUR302m.

## Russia

The Russian Federal Antimonopoly Service (FAS) has imposed fines totaling USD8.4m in the first half of 2014 and may be on course to meet its 2013 total (USD20.3m). Notably, in February FAS also entered the global enforcement arena, with its first extraterritorial application of Russian law on two non-Russian mobile services

To arrive at this number, the Commission used an alternative fining methodology based on worldwide sales, rather than mere European sales. The penalty also reflected the Commission's expansive view of investors' responsibility for the cartel conduct of their investees. Almunia warned that those at the highest level of corporate management must "take a careful look at the compliance culture of the companies they invest in." Other notable developments for the first half of the year include a EUR114m fine in January against three makers of car seat foam, as well as a EUR31m fine against four steel abrasives producers.

We predict further significant fines from the EC in the second half of 2014. There will be a great deal of political pressure in the EC to conclude long-pending matters, such as auto parts and various financial services investigations, before the expiration of Commissioner Almunia's term in November. Also, we expect private enforcement to gain momentum in Europe, after the European Court of Justice recently ruled to expand liability for cartel participants under an "umbrella theory" of damages.

companies for conspiring to boycott a competitor. We expect further activity from the FAS in the coming months, especially in light of its April raid in the pharmaceuticals industry and pending investigations into the road building and container shipping industries.



## South Africa

Although South Africa's Competition Commission has imposed no fines so far, we expect that enforcement will pick up under the new leadership of Tembinkosi Bonakele in the second half of 2014. This year, the Competition Commission has already referred two cartels to the

Competition Tribunal: a cartel between four power cable suppliers and a fishing cartel. It also conducted its first dawn raid in the edible oils industry in April. Nevertheless, the Competition Commission seems far from last year's record-breaking fine of USD148.6m.

## Other developments

Not to be outdone by the EC, other European authorities have proven aggressive this year as well. Germany's competition authority has already handed out EUR635m in fines this year (double the 2013 total), which includes penalties against a German beer cartel (EUR338m) and a sugar cartel (EUR280m). Also, Poland's Office of Competition and Consumer Protection imposed penalties against bread makers (EUR22m) and printing-ink manufacturers (EUR168m) in the last six months. We expect more to come in light of the Polish parliament's recent approval of legislation that reforms the leniency program and enhances penalties against individuals. Elsewhere, Italy's competition authority imposed a hefty EUR182.5m fine on two pharmaceutical companies for agreeing to block the entry of a less expensive drug on the Italian market. Also the Hungarian competition authority has imposed fines

of EUR10.75m on geological inspection firms and EUR3.3m on stationary suppliers for bid rigging. Other notable fines were imposed in Switzerland on 11 airlines for price fixing (EUR8.9m), in Romania on electrical companies for fixing the level of discounts (EUR12.4m), and in Spain on car rental companies for sharing commercially sensitive information (EUR3.1m).

Of particular note is the recent progress made by the UK's criminal cartel enforcement authority. In June, the Competition and Markets Authority obtained a guilty plea from an executive charged with fixing prices, allocating customers, and rigging bids in the market for water-storage tanks. This marks the UK's first successful prosecution in the four years since its failed prosecution of Virgin Airways executives in 2010.



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# Asia Pacific (APAC)

## Australia

After a slow enforcement year in 2013, the Australian Competition and Consumer Commission (ACCC) had a solid start to 2014, imposing fines of nearly USD13m. This includes the USD10.2m against the Flight Centre travel agency for attempting to enter into price-fixing arrangements with three international airlines. In May, the ACCC also imposed a USD2.8m fine on NSK Australia for its participation in the automotive bearings cartel.

We expect more fines in the second half of 2014.

ACCC Chairman Rod Sims warned that there are currently numerous cartel investigations pending, including an investigation into the markets for laundry detergent and eggs. In addition, the ACCC has proposed to simplify its immunity and cooperation policy by streamlining the immunity application process and providing increased certainty for immunity applicants, which may lead to more investigations and prosecutions.

## China

So far this year, the National Development and Reform Commission (NDRC) has imposed fines totaling USD36.3m, including fines against three cement companies for collusion (USD18.5m) and providers of automotive insurance (USD17.8m). The NDRC also launched investigations into price fixing in the capacitor and auto parts industries after receiving several leniency applications from manufacturers. In fact, NDRC's Director General of the Price Supervision and Anti-monopoly Bureau (PSAB) Xu Kunlin announced that the vast majority of Chinese antitrust investigations now begin with leniency applications.

We anticipate that Chinese enforcement will increase in the second half of 2014 and beyond, as the NDRC has announced aspirations to expand its enforcement team tenfold. In the meantime, the NDRC has continued to advance on the international stage. In May, the Chinese government and the American Bar Association co-sponsored an antitrust conference in Beijing, where the Chinese vowed to strive for more transparency and predictability in accordance with international standards.

## India

In the first half of 2014, the Competition Commission of India (CCI) has imposed total fines of USD12.8m, including a substantial USD9.8m fine on engine part suppliers for rigging bids on a government railway project. This fine total surpasses India's 2013 total (USD1m). Nevertheless, it remains unclear whether India will see

further cartel enforcement in 2014. CCI Chairman Ashok Chawla recently expressed hesitation, stating that the CCI continues to face challenges stemming from the lack of antitrust awareness among the Indian business and regulatory communities.

## Japan

Aggressive cartel enforcement has persisted in Japan, with fines for the first half of the year coming to USD379m. In fact, this mid-year total already surpasses previous year-end totals for 2012 (USD235m) and 2013 (USD225.4m). The Japanese Fair Trade Commission (JFTC) imposed its second-largest total cartel fine of USD224m on four ocean carriers for their participation in an automotive shipping cartel. Ocean service provider, NYK Line, received the highest fine ever imposed by the JFTC on a single company of USD129m for its involvement in the conspiracy. Fines were also imposed on producers of cardboard products for concerted pricing practices

(USD130m), engineering companies (USD23m) and civil engineering and pavement construction companies (USD2m) for bid rigging.

Japanese authorities have also been aggressive against individuals. In April, five Japanese executives were sentenced to between a year and a year and a half in prison for colluding to obstruct the bidding process on the Kochi prefecture public contracts.

In a New Year's speech, JFTC chairman Kazuyuki Sugimoto vowed to continue to focus on combatting cartels in 2014, which he said have a "huge impact on people's lives."

## South Korea

The South Korean Fair Trade Commission (KFTC) has already made waves in the first part of 2014 with fines totaling USD428.6m, a significant increase compared to its 2013 total (USD255.3m). In addition to imposing a large fine against auto parts manufacturers (USD108m), this year the KFTC has demonstrated a keen focus on prosecuting bid rigging on government contracts. For example, the KFTC imposed fines against construction companies

for rigging bids on a city subway project (USD125m) and on a state-run waterway (USD94m). Also, in May, Korean authorities obtained their first prison sentences on three individuals for rigging bids for cables used in nuclear power plants. A day later, a court imposed a two-year prison sentence on a senior executive who played a leading role in rigging bids for government river restoration projects.

## Other developments

Other emerging antitrust regimes in the APAC region have made an impression in 2014. The Competition Commission of Singapore (CCS) imposed the largest fine in its history (USD7.4m) on four Japanese manufacturers and their subsidiaries for colluding to fix prices on automotive ball bearings. This arose out of a leniency application, and was also the first time the CCS issued an infringement decision against an international cartel. Also, the New Zealand

Commerce Commission has seen progress in the first half of the year, imposing fines on participants in an air freight cartel (USD2.7m) and a timber cartel (USD1.58m), while also joining the global foreign exchange probe. Meanwhile the Malaysian Competition Authority imposed its second cartel fine of USD86,000 against 26 ice manufacturers for price fixing.

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