

# THE ANTITRUST REFRESHER YOU REALLY MIGHT NEED

Understanding and Managing Risk

Jane C. Luxton

(202) 572-8674

[jluxton@clarkhill.com](mailto:jluxton@clarkhill.com)

Linda M. Watson

(248) 988-5881

[lwatson@clarkhill.com](mailto:lwatson@clarkhill.com)

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# OVERVIEW

- Why is this important? Understanding the risk
- It's not just the United States
- Review of the antitrust laws
- Managing risk
- The view ahead

# WHY IS THIS IMPORTANT TO YOUR COMPANY?

ANTITRUST DIVISION\*

Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More

Defendant (FY)	Product	Fine (\$ Millions)	Geographic Scope	Country
Citicorp (2017)	Foreign currency exchange	\$925	International	U.S.
Barclays, PLC (2017)	Foreign currency exchange	\$650	International	United Kingdom of Great Britain and Northern Ireland
JPMorgan Chase & Co. (2017)	Foreign currency exchange	\$550	International	U.S.
AU Optronics Corporation of Taiwan (2012)	Liquid Crystal Display (LCD) Panels	\$500	International	Taiwan
F. Hoffmann-La Roche, Ltd. (1999)	Vitamins	\$500	International	Switzerland
Yazaki Corporation (2012)	Automobile Parts	\$470	International	Japan
Bridgestone Corporation (2014)	Anti-vibration rubber products for automobiles	\$425	International	Japan
LG Display Co., Ltd LG Display America (2009)	Liquid Crystal Display (LCD) Panels	\$400	International	Korea
Royal Bank of Scotland (2017)	Foreign currency exchange	\$395	International	Scotland (United Kingdom)
Société Air France and Koninklijke Luchtvaart Maatschappij, N.V. (2008)	Air Transportation (Cargo)	\$350	International	France (Société Air France) The Netherlands (KLM)

Source: <https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more>  
Updated Feb. 2, 2017

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# WHY IS THIS IMPORTANT TO YOU?

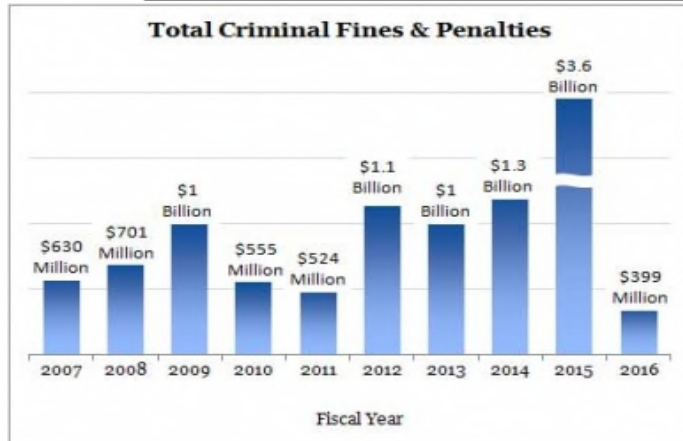
## FELONY CONVICTION

- Criminal fines for individuals up to \$1 million or twice the resulting gain or loss (even if > \$1 Million)
- Incarceration – Prison time up to 10 years, can be sequential to sentences for other crimes
- For corporations: Criminal fines up to \$100 million or twice the resulting gain or loss – largest \$500 million, 10 fines > \$100 million, restrictions on future business

# UNDERSTANDING RISK

## CRIMINAL ENFORCEMENT

Trends Charts Through Fiscal Year 2016 \*



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## IT'S NOT JUST THE U.S.

- Investigations in multiple countries – with fines totaling billions of dollars. Agencies share information and look for patterns.
- Informal cooperation between U.S. and EU, Japan, Canada and others (Interpol, border watches, letters rogatory for both documents and witness questioning, extradition)
- More and more countries are implementing leniency programs that create incentives for early disclosure and cooperation (at least 50 countries and counting)
- EU – Very active enforcement
- Canada – criminal penalties – individuals: 14 years and C\$25 million (U.S. 10 years, \$1 million or 2x gain/loss), C\$25 million for corporations (U.S. \$100 million or 2x gain/loss; 26> \$100 million)

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## INTERNATIONAL ANTITRUST ENFORCEMENT – 2016

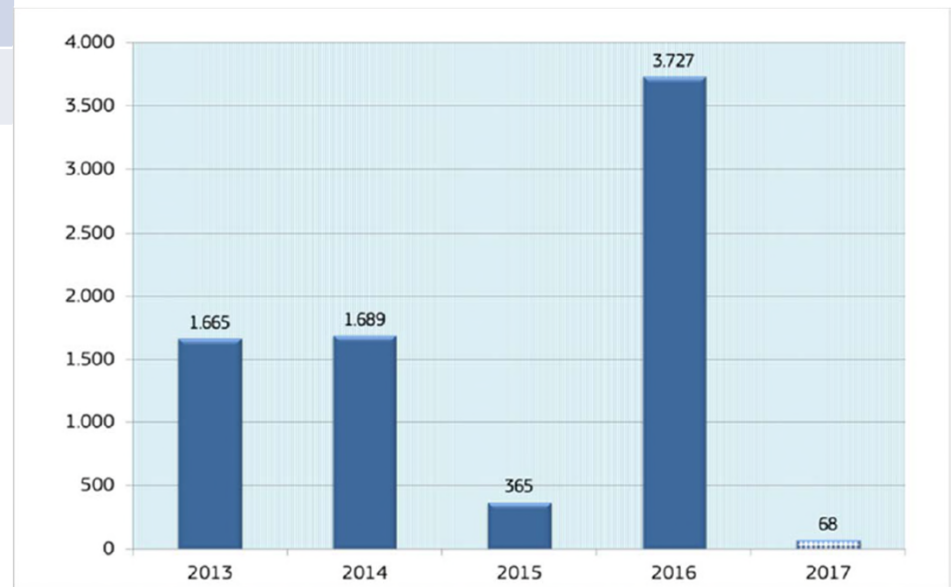
- EU – 2016 continued a trend of very high penalties €3.561 billion (\$3.75 billion). One fine, on truck manufacturers, totaled nearly €3 billion.
- India fined cement manufacturers the equivalent of \$1 billion
- South Korea fined 13 companies bidding on LNG construction contracts \$321 million
- Criminal penalties continue to grow
- South Africa and Chile passed laws in 2016 making antitrust violations criminal offenses
- Australia filed its first criminal enforcement action, against a shipping company





## EU FINES REMAIN HIGH\*

Year	Amount in €* in million
2013	1 664 809 000
2014	1 689 497 000
2015	364 531 000
2016	3 726 976 000
++2017++	67 609 000
<b>total</b>	<b>7 513 422 000</b>



Source: <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>

++Current as of Feb. 8, 2017

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# REVIEW OF THE ANTITRUST LAWS

- Sherman Act § 1
- Criminal Law Violations
- Civil Law Violations
- Sherman Act § 2
- FTC Act § 5
- Robinson-Patman Act
- State Antitrust Laws
- Private Antitrust Actions

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# SHERMAN ACT SECTION 1

“Every contract, combination... or conspiracy in restraint of trade or commerce... is declared to be illegal”

- Formal agreement not required
- Written agreement not required
- Implied agreements
- Common purpose or understanding



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## “PER SE” ILLEGAL AGREEMENTS – CRIMINAL LAW VIOLATIONS

- Price-Fixing
- Bid-rigging
- Restrictions on output or sales volume
- Customer or territorial allocations
- Agreements not to compete

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# “RULE OF REASON” – CIVIL LAW ANTITRUST CONDUCT

## AGREEMENTS IN UNREASONABLE RESTRAINT OF TRADE

- Resale price maintenance
  - Note: this is per se illegal in some States (e.g., CA and NY)
- Non-price vertical restraints (territorial or customer restrictions in a distribution agreement)
- Tying agreements
  - Two products
  - Tied to one another
  - Seller has market power
  - Substantial amount of commerce foreclosed
- Exclusive dealing agreements
- Price Signaling
- Most favored nation provisions

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## SHERMAN ACT SECTION 2

- Prohibits monopolization, attempted monopolization, and conspiracy to monopolize
- Regulates unilateral actions of firms with market strength
  - Predatory pricing
  - Monopoly leveraging
  - Attempts to monopolize markets
- Provides for same criminal penalties as § 1
  - Rarely prosecuted as criminal violation

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# FEDERAL TRADE COMMISSION ACT

- Section 5: “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful”
- Concurrent authority with Department of Justice for prosecution of anticompetitive conduct that falls under civil (not criminal) law – different procedures
- FTC pursuing “invitations to collude”

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# FTC STATEMENT OF ENFORCEMENT PRINCIPLES (AUG. 13, 2015)

- “Section 5’s ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act”
- Principles for challenging an unfair method of competition:
  - FTC will be guided by public policy, namely, promotion of consumer welfare
  - Acts and practices will be evaluated using a “rule of reason,” i.e., the act or practice “must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications”
  - FTC is less likely to challenge an act or practice on a standalone basis (not covered by the Sherman or Clayton Acts) if Sherman or Clayton Act enforcement is sufficient to address competitive harm
- No guidance on specific application of these principles – is this sufficient notice to the public of “appropriate standards”?



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# CIVIL ANTITRUST CONDUCT: ROBINSON-PATMAN ACT § 2 (A)

## PRICE DISCRIMINATION – SELLER LIABILITY

- Commodities of like kind and quality
- Sold at different prices to different competing buyers at about the same time
- The price discrimination is likely to harm competition
  - Functional discounts are not unfair price competition
  - Other defenses: meeting competition, cost justification, changing conditions

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# ADDITIONAL CONCERNS

## PRIVATE LITIGATION

- Follows government enforcement action (plaintiffs let DOJ do the work for them)
- Some private cases filed where no government action
- Direct customers/Customers of customers/Class Actions
- Treble damages, attorneys' fees
- Joint and several liability
- Some recoveries exceed \$1 Billion
- Distraction to business (time and resources dedicated to lawsuit rather than business)



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# CRIMINAL ANTITRUST INVESTIGATIONS

## INVESTIGATIVE TOOLS

- Search warrants
- Consensual recording of conversations/meetings
- Pen register & trap & trace devices (wire tap authority)
- Police (FBI) field questioning—drop-in interviews
- Subpoenas for documents
- Subpoenas for testimony under oath
- Compulsion orders—18 U.S.C. § 6002
- Grand Jury—secret proceeding—no lawyers present
- Several offices throughout the country dedicated to enforcement

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# TYPICAL ANTITRUST EVIDENCE

DOCUMENTS (E.G. EMAILS, FAXES, TEXT MESSAGES, HANDWRITTEN DOCUMENTS AND SOCIAL MEDIA)

- Communications with competitors
- Discussion of specific customers or territories
- Exchange of pricing information
- Internal company communications
- Meeting agendas/travel document



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# MANAGING RISK

- Adopt and reinforce a strong corporate antitrust policy
  - Training
  - Certification of adherence
  - No one is exempt
- Be particularly vigilant of high risk situations
  - Trade associations
  - Trade shows
- Consider a hotline
- Remember that emails are documents
- Monitor antitrust enforcement trends for special focus on relevant industry sectors
- Document legitimacy of conduct in circumstances that might appear questionable
- Take pro-active measures in anticipation of risk

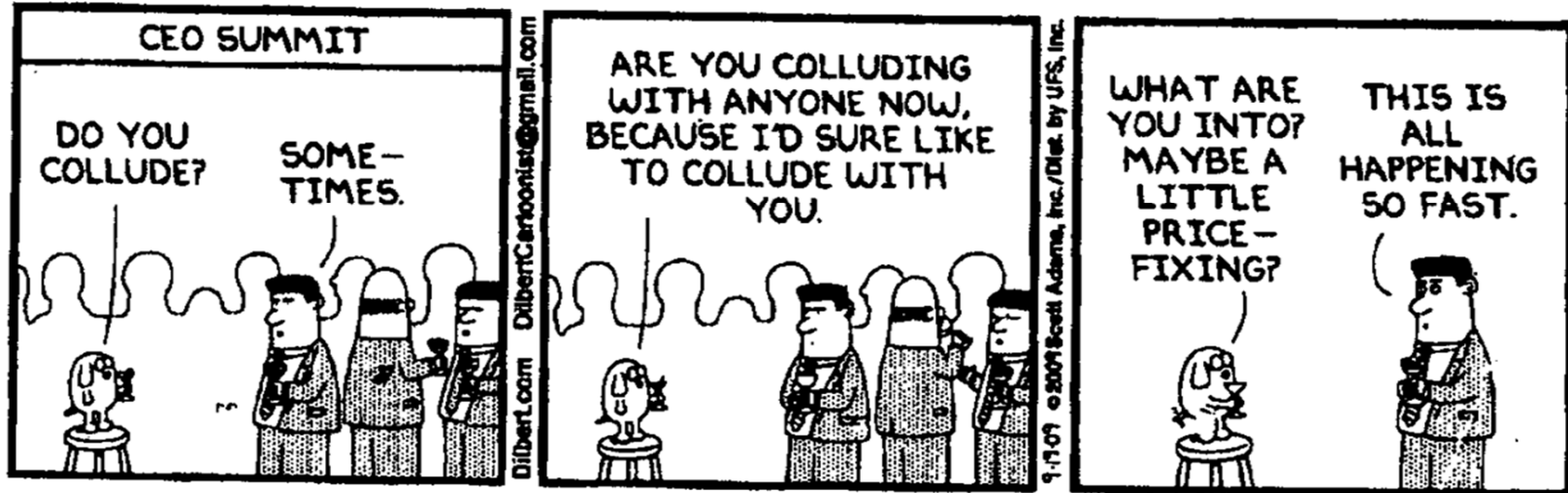


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## THE VIEW AHEAD

- Attorney General Sessions and DOJ Antitrust transition team are likely to continue strong enforcement efforts against cartels
- International enforcement will remain vigorous
- High risk industries will continue to receive attention
  - Currency exchange rate operations
  - Auto parts
  - Ocean shipping
  - Capacitors
  - Mortgage foreclosures
  - Pharmaceuticals
- Incentives will remain high for self-reporting of antitrust violations

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## QUESTIONS?



**Jane C. Luxton**

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[jluxton@clarkhill.com](mailto:jluxton@clarkhill.com)



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