

V. ***U.S. Department of Justice and its Global Counterparts
Continue Aggressive Enforcement Against Cartels***

A. **Introduction**

Congress passed the Sherman Act in 1890 in order to combat anti-competitive business practices that impede free commerce “among the several States, or with foreign nations”¹ The U.S. Department of Justice (“DOJ”), tasked with enforcing antitrust laws, has recently ramped up its enforcement of the Sherman Act by aggressively pursuing cartels, waging harsher civil penalties on companies, and seeking more jail time for individuals who conspire to fix prices of products bought and sold in the United States.² The DOJ’s global counterparts have also joined the fight against cartels.³

The DOJ is unlikely to slow down its intensified cartel enforcement any time soon.⁴ With increased international support, the DOJ has been able to prosecute more conspirators from around the globe, and issue much harsher penalties.⁵ In the 1990s, the average prison term for foreign nationals convicted under antitrust laws was eight months.⁶ Average prison sentences increased in the first decade of the new millennium to nineteen months.⁷ Additionally, from 2010 to

¹ Sherman Act, 15 U.S.C. § § 1–7 (2012).

² Ray Hartwell & Djordje Petkoski, *U.S.: Anti-Cartel Enforcement*, ANTITRUST REV. AMERICAS, 2013, at 9, 9 available at http://www.hunton.com/files/Publication/c750b4ed-6d9f-434a-8c50-9cae0650ea27/Presentation/PublicationAttachment/a7c0da13-15cd-4b7a-b08b-9ddaccafd5cd/US_Anti-Cartel_Enforcement.pdf, archived at <http://perma.cc/A6CG-MVN6>.

³ *Mini-Roundtable: International Cartel Enforcement*, RISK & COMPLIANCE, July–Sept., 2014, at 4 [hereinafter RISK & COMPLIANCE], available at <http://www.shearman.com/~media/Files/NewsInsights/Publications/2014/07/International-Cartel-Enforcement-mini-roundtable--Kafele-070714.pdf>, archived at <http://perma.cc/28YY-ZG45?type=live>.

⁴ See generally Hartwell & Petkoski, *supra* note 2 (discussing the DOJ’s continuation of “aggressive” enforcement).

⁵ See *id.* at 9; RISK & COMPLIANCE, *supra* note 3, at 4, 5.

⁶ Hartwell & Petkoski, *supra* note 2, at 10.

⁷ *Id.*

2011, the average prison term increased to twenty-four months.⁸ Predictably, the DOJ has shown no signs of slowing down since 2011.⁹

This Article discusses how the DOJ has strengthened its cartel enforcement and highlights recent cases that serve as cautionary tales to future price-fixers. Part B describes the industries most likely to engage in price-fixing. Next, Part C discusses the DOJ's transition to a tougher enforcement posture. Part D then discusses recent cases where the DOJ has cracked down on cartel activity. Next, part E highlights price-fixing in global finance. Part F then describes ways in which companies can mitigate potential penalties if the DOJ is investigating their conduct. Finally, Part G offers best practices for company's moving forward in this new enforcement environment.

B. Industries and Actors Engaged in Price Fixing

Industries susceptible to price fixing and cartel behavior are industries in which competition, customer loyalty, and product differentiation are low.¹⁰ The problem is more pervasive than one might expect; historically, airline representatives have been caught meeting with each other in various airports around the world, and similar behaviors have plagued “fields as diverse as seat belts, seafood, air freight, computer monitors, lifts and even candle wax.”¹¹ Cartelists not only have the incentive to fix prices, but they now have an increased capability to do so, due to the increase in global supply chains.¹² American consumers and large companies like Ford Motor Co. and Apple Inc. (“Apple”) both fall victim to (and sometimes partake in)¹³ cartel price fixing.¹⁴ When prices of televisions or cars rise, if even by a few cents per unit as a result of price-fixing at the parts manufacturer

⁸ *Id.* (“Most recently, from 2010 to 2011, the average term of incarceration for individuals jumped to 24 months.”)

⁹ *See id.* (highlighting the trend of increased cartel enforcement).

¹⁰ *Just One More Fix*, *ECONOMIST*, Mar. 29, 2014, at 67.

¹¹ *Id.*

¹² *See* Sarah Rackoff, Note, *Room Enough for the Do-Gooders: Corporate Social Accountability and the Sherman Act*, 80 S. CAL. L. REV. 1037, 1041–43 (2007) (analyzing global supply chain management issues in the clothing industry).

¹³ *See infra* notes 54–61 and accompanying text (recounting recent price-fixing allegations against Apple).

¹⁴ RISK & COMPLIANCE, *supra* note 3, at 9.

level, consumers are injured, and the Department of Justice intervenes.¹⁵

C. Change in the Department of Justice's Enforcement Practices

The DOJ's antitrust cartel enforcement has not always been as aggressive as it has been in recent years.¹⁶ As of July 30, 2014, the DOJ had already levied over \$1 billion in criminal fines, exceeding every historic full-year total except 2012.¹⁷ Increased international consensus among the DOJ's counterparts around the world have contributed to this surge in enforcement; agencies around the world are in agreement that cartels cause a lot of damage to consumers and economies alike.¹⁸ Additionally, the DOJ has implemented an amnesty program, which provides immunity to "first-in-the-door" whistleblowers from criminal charges and from treble civil damages.¹⁹ Finally, the DOJ has also increased its enforcement of conspiracies that take place abroad.²⁰

D. Recent Cases that have Emboldened the Department of Justice

In an unprecedented jury trial, the DOJ earned a major victory against an international price-fixing operation.²¹ *United States v. Hui*

¹⁵ See *Just One More Fix*, *supra* note 10.

¹⁶ RISK & COMPLIANCE, *supra* note 3.

¹⁷ Robert Bell & Philip Giordano, *Why the Recent Upswing in U.S. Cartel Enforcement?*, INSIDE COUNSEL (July 30, 2014), <http://www.insidecounsel.com/2014/07/30/why-the-recent-upswing-in-us-cartel-enforcement>, archived at <http://perma.cc/TN2X-LRYY>.

¹⁸ RISK & COMPLIANCE, *supra* note 3.

¹⁹ Bell & Giordano, *supra* note 17; see also ANTITRUST DIV., U.S. DEP'T OF JUSTICE, AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 13–14 (2005), available at <http://www.justice.gov/atr/public/guidelines/209114.htm>, archived at <http://perma.cc/3CZE-5M2S> (discussing how amnesty applicants are a valuable resource to DOJ agents).

²⁰ See John M. Connor & Darren Bush, *How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism*, 112 PENN ST. L. REV. 813, 856 (2008).

²¹ Hartwell & Petkoski, *supra* note 2 ("Bucking an almost universal trend, the large Taiwanese manufacturer of LCD screens, AUO, and five of its executives decided to fight the Division's allegations of criminal price fixing before a jury."); see also *United States v. Hui Hsiung*, 758 F.3d 1074, 1096 (9th Cir.

*Hsiung*²² affirmed convictions brought on by a DOJ action against a manufacturer of Liquid Crystal Display (“LCD”) panels, a Taiwanese company and its American subsidiary, along with two top executives.²³ Although the DOJ has settled for large plea bargains for over \$100 million, it has never proven the illicit gains from a conspiracy to a jury, which is required for the alternative fine provision.²⁴ The alternative fine provisions “permit[] a fine of up to twice the gross financial loss or gain resulting from a violation.”²⁵ The largest fine previously levied against a corporation was for F. Hoffmann-La Roche, Ltd.’s price-fixing scheme of \$500 million in 1999.²⁶ Accordingly, AU Optronics (“AUO”) may face an historic fine of over \$1 billion as a result of their price-fixing scheme.²⁷

Several AUO defendants appealed their jury convictions to the Ninth Circuit Court of Appeals in *United States v. Hui Hsiung*.²⁸ In a related appeal, Steven Leung, AUO’s senior manager in its Desktop Display Business Group, is attempting to exculpate himself.²⁹ On

2014) (affirming the convictions of the corporation and its executives who were engaged in price fixing).

²² 758 F.3d 1074 (9th Cir. 2014).

²³ *Id.* at 1078 (affirming criminal convictions for price-fixing by members of the company’s management).

²⁴ Hartwell & Petkoski, *supra* note 2.

²⁵ ANTITRUST DIV., *supra* note 19, at 3; *see* 18 U.S.C. § 3571(d) (2012) (“If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.”).

²⁶ *Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More*, ANTITRUST DIV., U.S. DEP’T OF JUSTICE (Nov. 12, 2014), <http://www.justice.gov/atr/public/criminal/sherman10.pdf>, *archived at* <http://perma.cc/L7LJ-L25N>.

²⁷ Hartwell & Petkoski, *supra* note 2. (remarking that the “alternative fine provision” could result in \$1 billion in criminal fines for the \$500 million of AUO’s ill-gotten profits).

²⁸ 758 F.3d 1074, 1095 (9th Cir. 2014) (upholding convictions); Hartwell & Petkoski, *supra* note 2, at 10.

²⁹ Appellant’s Reply Brief at 50, *United States v. Leung*, No. 13-10242 (9th Cir. filed Apr. 8, 2014), 2014 WL 1569022; Press Release, U.S. Dep’t of Justice, AU Optronics Corporation Executive Convicted for Role in LCD Price-fixing Conspiracy (Dec. 18, 2012), *available at* <http://www.justice.gov/opa/pr/au-optronics-corporation-executive-convicted-role-lcd-price-fixing-conspiracy>, *archived at* <http://perma.cc/4EQK-LPRU>.

appeal, Leung is arguing that the Sherman Act cannot apply to his conduct because he was involved in a wholly foreign conspiracy.³⁰ Although Leung's evidentiary appeals are beyond the scope of this Article, the DOJ's response brief sheds light on how the DOJ interprets the Sherman Act, and how they may enforce its provisions in the future.³¹ In its response brief, the DOJ highlights the need for a broad application of the Sherman Act, and how a narrow, solely domestic approach frustrates what Congress originally had in mind when passing the Sherman Act.³²

The Sherman Act applies to agreements "in restraint of trade or commerce among the Several states, or with foreign nations."³³ Leung's argument that his wholly foreign conduct with a foreign corporation shields him from the Sherman Act's reach is unlikely to persuade the Ninth Circuit.³⁴ Leung relies on Congress's reigning in of section 1 of the Sherman Act by passing the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"),³⁵ an attempt to protect U.S. exporters from heavy regulation.³⁶ The FTAIA has an explicit exception for import activity, thus allowing any products imported into the United States to fall under the DOJ's jurisdiction.³⁷ Because products with AUO's LCD displays were imported to the United States, contained in products produced by companies such as "Apple, Dell, and [Hewlett-Packard]," Leung's conduct, according to the DOJ, fell within the scope of the Sherman Act.³⁸ Additionally, the DOJ points out that "[t]he FTAIA makes application of the Sherman Act turn on the type of commerce involved or affected, and not the location of the

³⁰ Brief for the United States at 11, *United States v. Leung*, No. 13-10242 (9th Cir. filed Feb. 12, 2014).

³¹ *See id.* at 17 (citing *McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980)).

³² *Id.* ("In passing the Sherman Act, Congress 'wanted to go to the utmost extent of its constitutional power' in an effort to preserve competition in or affecting U.S. commerce.") (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974)).

³³ 15 U.S.C. § 1 (2012).

³⁴ Brief for the United States, *supra* note 30, at 11.

³⁵ 15 U.S.C. § 6a (2012).

³⁶ Brief for the United States, *supra* note 30, at 18.

³⁷ 15 U.S.C. § 6a (2012). ("Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations . . .").

³⁸ *E.g.*, Brief for the United States, *supra* note 30, at 71.

conduct.”³⁹ It is clear that with products as ubiquitous as LCD screens, Leung’s conduct had a sufficient nexus to U.S. commerce.⁴⁰

Although one of the convictions is being appealed, the DOJ was able to prove, beyond a reasonable doubt in front of a jury, that a penalty beyond the statutory maximum should apply.⁴¹ Consequently, the DOJ will have a tremendous amount of leverage moving forward when negotiating pleas with price-fixing defendants.⁴² Also, the DOJ may be more aggressive in pursuing foreign nationals whose conduct affects American commerce, and also push for fines and settlements for “conduct that may have escaped prosecution in the past.”⁴³ *United States v. Hui Hsiung* is not the only case in which huge penalties were levied and prison time were sought for price-fixers by the DOJ—several other cases will further embolden the DOJ in its enforcement efforts.⁴⁴

A cautionary tale for potential cartelists can be found in *United States v. VandeBrake*,⁴⁵ where the defendant pleaded guilty to price-fixing in the concrete mixing industry.⁴⁶ VandeBrake’s arrangement with the DOJ called for a “19-month prison sentence and a \$100,000 fine.”⁴⁷ The district court rejected the deal and issued a forty-eight-month sentence and an \$829,715.85 fine, affirmed by the Court of

³⁹ *Id.* at 21.

⁴⁰ *Id.* at 36 (listing each product in which LCD screens were sold, including “notebook computers, desktop computer monitors, and televisions in the United States and elsewhere”).

⁴¹ *United States v. AU Optronics Corp.*, No. 09-CR-0110 SI, 2012 WL 2120452, at *4 (N.D. Cal. June 11, 2012); *see also* Hartwell & Petkoski, *supra* note 2, at 10 (discussing the trial court’s citation of *Apprendi v. New Jersey*, 530 U.S. 466, 533–34 (2000), which illustrates the standard used to determine penalties for gross profits as a result of anticompetitive activities).

⁴² Hartwell & Petkoski, *supra* note 2, at 10.

⁴³ *Id.*

⁴⁴ *Id.* (discussing several other cases where the Antitrust Division sought harsh penalties); *see also* *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 647 (S.D.N.Y. 2013) (holding Apple liable for fixing e-book prices); *United States v. VandeBrake*, 679 F.3d 1030, 1040 (8th Cir. 2012) (upholding the Iowa district court’s departure from a less severe settlement reached between DOJ and the defendant).

⁴⁵ *United States v. VandeBrake*, 771 F. Supp. 2d 961 (N.D. Iowa 2011).

⁴⁶ *Id.* at 967; Hartwell & Petkoski, *supra* note 2, at 10.

⁴⁷ Hartwell & Petkoski, *supra* note 2, at 10.

Appeals for the Eighth Circuit.⁴⁸ Although there may be an *en banc* review of the sentence, *VandeBrake* shows that judges may be willing to dole out more severe punishment than even the DOJ is willing to settle for.⁴⁹ The district court in *VandeBrake* concluded that antitrust violations such as these, by people with financial means, are crimes of “greed,” and that punishment must be sufficiently “punitive.”⁵⁰

Although increased globalization has made it easier for cartels to engage in international price-fixing schemes, enforcement agencies around the globe are benefiting from similar international cooperation.⁵¹ One example of this cooperation has been between the DOJ and Germany—the DOJ succeeded in its “first-ever extradition of a foreign executive,” Romano Piscioti.⁵² Additionally, cartels have recently been pursued by more than one country’s antitrust enforcement agency simultaneously, indicating significant cooperation between international agencies, thus raising the stakes for cartel activity.⁵³

More recently, Apple has gotten into trouble with the DOJ for the alleged price-fixing of e-books.⁵⁴ The United States District Court for the Southern District of New York found that “Apple played a central role in facilitating and executing [the] conspiracy” to help publishers raise e-book prices, while attempting to eliminate Amazon from the e-book market.⁵⁵ Surprisingly, even Steve Jobs, when talking to a reporter right after unveiling the iPad and its iBookstore feature, alluded to price fixing.⁵⁶ As a result of Apple’s conduct, e-book prices were more expensive for consumers because of Apple’s collusion with the six publishers with whom they met.⁵⁷ As a result of this decision,

⁴⁸ *VandeBrake*, 679 F.3d at 1040 (affirming the district court’s decision to increase the penalty after rejecting the plea bargain); *VandeBrake*, 771 F. Supp. 2d at 1019 (departing from sentencing guidelines and ordering the higher prison term).

⁴⁹ Hartwell & Petkoski, *supra* note 2, at 10.

⁵⁰ *VandeBrake*, 771 F. Supp. 2d at 1006, 1012.

⁵¹ RISK & COMPLIANCE, *supra* note 3.

⁵² *Id.* at 7.

⁵³ *Id.* at 8.

⁵⁴ Michael Calia, *Apple to Pay Up to \$400 Million to Settle E-Books Suit*, WALL ST. J. (last updated July 16, 2014, 12:44 PM), <http://online.wsj.com/articles/apple-to-pay-up-to-400-million-to-settle-e-books-suit-1405527754>.

⁵⁵ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 647 (S.D.N.Y. 2013).

⁵⁶ *Id.* at 679 (indicating that Amazon’s more competitive \$9.99 price “won’t be the case” and acknowledged that he knew the publishers were not happy with Amazon).

⁵⁷ *Apple Inc.*, 952 F. Supp. 2d at 647.

there has been a class action lawsuit, which claimed “Apple overcharged customers by \$280 million for e-books”⁵⁸ Accordingly, plaintiffs sought treble damages totaling \$840 million.⁵⁹ Pending continuing litigation, the district court judge granted her preliminary blessing of Apple’s plans to settle with the class-action plaintiffs for \$450 million.⁶⁰ Apple’s success and popularity were not enough to shield it from DOJ antitrust enforcement efforts.⁶¹

E. Price-Fixing in Global Finance

The electronics and manufacturing industries are not the only sectors plagued by price-fixing.⁶² Global finance has fallen victim to the fixing of the London Interbank Offered Rate (“LIBOR”), which allowed banks to “improve their profits and deflect scrutiny about their health,” harming depositors and investors.⁶³ The DOJ has issued criminal fines to several banks and their subsidiaries, and the DOJ has indicated that there will be more prosecution to come.⁶⁴ This in addition to the \$550 million of fines already issued by the DOJ and the \$4 billion of fines already collected by authorities worldwide arising from the LIBOR scandal.⁶⁵ Certainly in the wake of the 2008 financial crisis, law enforcement officials want to ensure that such collusion is adequately deterred and punished because of the harm it causes to the public.⁶⁶ If the DOJ decides to charge traders and other employees with

⁵⁸ Calia, *supra* note 54.

⁵⁹ *Id.*

⁶⁰ Jonathan Stempel, *Apple \$450 Million E-book Settlement Wins Court Approval*, REUTERS (Aug. 1, 2014, 3:41 PM), <http://www.reuters.com/article/2014/08/01/us-apple-ebooks-idUSKBN0G14YQ20140801>, *archived at* <http://perma.cc/F7DR-KGD2>.

⁶¹ *See, e.g., Apple Inc.*, 952 F. Supp. 2d at 654.

⁶² *See* Ben Protess & Mark Scott, *U.S. Is Building Criminal Cases in Rate-Fixing*, N.Y. TIMES, July 15, 2012, at A1.

⁶³ *Id.* at A4.

⁶⁴ Bill Baer, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, *International Antitrust Enforcement: Progress Made; Work to be Done*, Remarks as Prepared for Delivery at the 41st Annual Conference on International Antitrust Law and Policy 3 (Sept. 12, 2014), *available at* <http://www.justice.gov/atr/public/speeches/308592.pdf>, *archived at* <http://perma.cc/QYE9-KWSL>.

⁶⁵ *Id.*

⁶⁶ *Id.*

criminal fraud, they could be subject to imprisonment.⁶⁷ According to the DOJ, much of the increased enforcement efforts centered on LIBOR fixing is a result of the Financial Fraud Enforcement Task Force, which President Obama tasked with proactively “prosecut[ing] financial crimes.”⁶⁸

F. How Can Companies Mitigate Penalties?

The DOJ has given companies the opportunity to receive reduced fines and immunity through their “amnesty plus” program.⁶⁹ This program allows for companies caught price fixing in one area to “receive a fine reduction in [that] product area if they disclose violations in another product.”⁷⁰ If the company “is the first to report a violation in a second product line, it receives amnesty or immunity for that conduct and a fine reduction on the initial product”⁷¹ The amnesty program has proven very helpful to many companies.⁷² For example, in *United States v. Hui Hsiung*,⁷³ Samsung Electronics Co. (“Samsung”) filed for amnesty and the DOJ accepted its application; as a result, Samsung did not face severe fines and its executives avoided prison sentences that management at AUO and its American subsidiary faced.⁷⁴ Deutsche Lufthansa AG (“Lufthansa”) was also a beneficiary of the amnesty program.⁷⁵ By bringing the air cargo cartel to the attention of international authorities, Lufthansa was able to avoid all

⁶⁷ Protess & Scott, *supra* note 62, at A4.

⁶⁸ Press Release, U.S. Dep’t of Justice, Former Rabobank LIBOR Submitter Pleads Guilty For Scheme to Manipulate Yen LIBOR (Aug. 18, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/308101.pdf, *archived at* <http://perma.cc/MC32-KX6J>.

⁶⁹ Hartwell & Petkoski, *supra* note 2, at 10.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *E.g., id.* at 9; Bell & Giordano, *supra* note 17; RISK & COMPLIANCE, *supra* note 3, at 6.

⁷³ 758 F.3d 1074 (9th Cir. 2014); *see supra* notes 22–28 and accompanying text (describing the criminal prosecution of a price-fixing ring that conducted business with Samsung).

⁷⁴ Hartwell & Petkoski, *supra* note 2.

⁷⁵ Commission Press Release, IP/10/1487 (Nov. 9, 2010); *see also* Bell & Giordano, *supra* note 17 (summarizing how Lufthansa avoided criminal prosecution).

criminal prosecution.⁷⁶ Finally, UBS and Barclays were able to avoid fines by the European Commission by utilizing a similar program, dodging potential fines of €2.5 billion and €690 million respectively.⁷⁷ These immunity programs have proven to be a useful tool for the DOJ.⁷⁸ Perhaps by ruffling some feathers, the DOJ can force more companies, fearing severe fines and prison sentences for their executives, to fess up to any price-fixing that they are aware of, or have been a part of.⁷⁹ Usually, “it is far better to be the amnesty applicant than the unfortunate recipient of a subpoena or search warrant.”⁸⁰ The DOJ may have instilled enough fear in cartelists that price-fixing conspirators themselves can do most of the work for the DOJ by pointing out violators.⁸¹

G. Best Practices Moving Forward in This New Climate of Enforcement

Companies, especially multinational companies, should implement policies in all of the countries in which they operate to prevent cartel behavior.⁸² Although some companies have locations in countries where antitrust enforcement is lax,⁸³ the products they produce can enter the stream of commerce in countries that take a stricter approach to antitrust violations, such as the United States.⁸⁴ Additionally, the AUO convictions have emboldened the DOJ, where the court held individuals criminally liable in the United States despite the foreign character of the activity.⁸⁵ Some legal practitioners suggest instituting across-the-board policies to ensure that a company is compliant with all global antitrust laws, while others suggest that each

⁷⁶ Commission Press Release, IP/10/1487 (Nov. 9, 2010).

⁷⁷ RISK & COMPLIANCE, *supra* note 3, at 6.

⁷⁸ See *Just One More Fix*, *supra* note 10, at 68.

⁷⁹ See generally Bell & Giordano, *supra* note 17 (touting the effectiveness of the amnesty program).

⁸⁰ *Id.*

⁸¹ See *id.* (discussing instances when participants in price-fixing notified authorities in order to avoid penalty).

⁸² RISK & COMPLIANCE, *supra* note 3, at 12–13.

⁸³ Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and their Effects*, 74 ANTITRUST L.J. 271, 293 (2007).

⁸⁴ RISK & COMPLIANCE, *supra* note 3, at 13.

⁸⁵ Hartwell & Petkoski, *supra* note 2, at 9–10. See *United States v. Hui Hsiung*, 758 F.3d 1074, 1078 (9th Cir. 2014).

company create a policy tailored to each locale in which they operate.⁸⁶ Another widely agreed-upon approach includes frequent employee training, which will make employees aware of antitrust “red flags” and teach them when to report prohibited activity to in-house counsel.⁸⁷ By educating employees about what constitutes cartel-like activity, and making it clear that certain types of interactions are problematic, companies and executives can avoid liability in countries where they have never visited.⁸⁸ Employees should also know what steps to take in case there is an investigation by an enforcement agency so that they do not do anything to exacerbate the penalties the company and its executives may face.⁸⁹

H. Conclusion

The DOJ has scored some major wins in anti-cartel enforcement in recent months.⁹⁰ As such, it has earned substantial leverage in negotiating settlements, and now has precedent to cite to in court.⁹¹ Whether conduct is taking place in the United States or abroad, it seems more and more likely that the DOJ will be able to prosecute alleged cartelists under the Sherman Act, and will not hesitate to seek hefty fines and lengthy prison sentences.⁹² These penalties have also made it more likely that cartelists will turn on each other in order to receive immunity or reduced penalties.⁹³ Consequently, cartels will be more dangerous to form, because it will be much more difficult to place one’s trust in fellow cartel members who may put their own interests

⁸⁶ RISK & COMPLIANCE, *supra* note 3, at 13 (asking Mark Jones and Heather Irvine about what companies should do to avoid antitrust violations, Mr. Jones called for companies to set policies across locations, while Ms. Irvine called for an approach tailored to the jurisdiction in which the business or subsidiary is operating.).

⁸⁷ *Id.* at 13–14.

⁸⁸ *See id.* at 13 (“The most important step a company can take is to develop an antitrust compliance program early on and to ensure that employees receive regular, relevant training.”).

⁸⁹ *Id.*

⁹⁰ *See supra* notes 22–61 and accompanying text (discussing DOJ enforcement victories).

⁹¹ *United States v. Hui Hsiung*, 758 F.3d 1074, 1074–96 (9th Cir. 2014).

⁹² *See supra* notes 22–61 and accompanying text (highlighting DOJ victories, and increased punitive measures).

⁹³ *Bell & Giordano*, *supra* note 17; *see also* ANTITRUST DIV., *supra* note 19.

above the cartel's.⁹⁴ The principal beneficiary in this new enforcement climate are consumers around the globe who will be less likely to overpay for goods priced higher than what the free market is willing to tolerate.⁹⁵

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⁹⁴ See *supra* notes 69–81 and accompanying text (discussing amnesty programs run by the DOJ and the European Commission).

⁹⁵ See *supra* notes 15, 57–58, and accompanying text (discussing customer injury caused by price-fixing in the television, automobile, and e-book industries).

⁹⁶ Student, Boston University School of Law (J.D. 2016).