SLAUGHTER AND MAY

Cartel regulation in Asia and the EU

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Overview of cartel regulation in Singapore

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1. Introduction

1.1 The Competition Act Chapter 50B of Singapore (the "**Competition Act**") was enacted in 2004 and is the principal statute governing the competition law regime in Singapore. The Competition Act has the objective of promoting the efficient functioning of Singapore's markets to enhance the competitiveness of the economy.

1.2 Section 34 of the Competition Act came into force on 1 January 2006. It prohibits agreements between undertakings, decisions by associations of undertakings, or concerted practices which have, as their object or effect, the prevention, restriction or distortion of competition within Singapore unless excluded by the Third Schedule to the Competition Act or a block exemption (the "**Section 34 Prohibition**"). The Section 34 Prohibition also applies to agreements made outside Singapore, or where parties to the agreement are outside Singapore, so long as the agreement has the object or effect of preventing, restricting or distorting competition within Singapore.

1.3 As of 31 May 2016 the Competition Commission of Singapore ("**CCS**") has issued ten infringement decisions under Section 34 of the Competition Act and has publicly stated that it has received over 35 leniency applications.[1] If an investigation commenced by the CCS or leniency application made to the CCS does not result in an infringement finding, the CCS' current approach is not to publicise details of the investigation or leniency application.

Statistics on the CCS' cartel regulation regime: 1 January 2006 to 31 May 2016

Number of cartel infringement decisions	Number of cartel infringement decisions pursuant to leniency applications	Sets of fines issued	Number of active leniency application cases[2]	Number of appeals made to the Competition Appeal Board ("CAB") in relation to cartel infringement decisions
10 out of which 2 involve international cartels	3	99	35	12 made in relation to 5 cartel infringement decisions

1.4 In 2014 the CCS also issued its first two infringement decisions against international cartels, in which record financial penalties were imposed by the CCS against the infringing parties. With these decisions and the CCS' first exercise of the extraterritorial reach of its enforcement powers, the CCS has "*signal[led] [its] intent to act against international cartels that have an anti-competitive impact in Singapore*",[3] i.e. insofar as their cartel conduct affects or restricts competition in Singapore. In an interview in 2015 the CCS Chief Executive Toh Han Li had also indicated that some of the CCS' active leniency cases are international cartel cases, and that the CCS "*will announce those when [the CCS is] ready to do so*".[4]

[1] In an interview with *MLex* published on 18 April 2016 the CCS Chief Executive Toh Han Li disclosed that the CCS is currently investigating more than 10 cartel cases that have arisen from over 35 leniency applications.

[2] *Ibid.*

[3] CCS Chief Executive Toh Han Li, in the Singapore chapter of *Global Competition Review*'s Asia-Pacific Antitrust Review 2014.

[4] As disclosed by the CCS Chief Executive Toh Han Li, in an interview with *Global Competition Review* published on 9 February 2015.

1.5 The CCS takes a view that hard-core cartels are one of the most harmful forms of anti-competitive conduct, and that "*[t]he detection and enforcement against hard-core cartels will remain a high enforcement priority for the CCS*".[5]

1.6 On 25 September 2015 the CCS announced its proposed wide-ranging amendments to its existing guidelines on the enforcement of the Competition Act. Notable proposed amendments include a new fast-track procedure to expedite the investigative process for infringements under Sections 34 (prohibition against anti-competitive agreements) and 47 (prohibition against abuse of a dominant position) of the Competition Act (the **"Fast Track Procedure")**, changes to the eligibility and conditions for leniency applications, and expanding the CCS' approach in the substantive assessment of mergers. In a recent interview, the CCS Chief Executive Toh Han Li mentioned that the Fast Track Procedure, together with other amendments to the guidelines, will be put in place in the second half of 2016.[6]

1.7 The key features of the proposed Fast Track Procedure, set out in the Draft CCS Practice Statement on the Fast Track Procedure, are as follows:

- the Fast Track Procedure will enable undertakings under investigation to enter into an agreement with CCS where they will unequivocally admit their liability in an anti-competitive activity, and in return, receive a reduction of 10 per cent. on the financial penalty to be imposed;
- the Fast Track Procedure may only be initiated by the CCS in its own discretion;
- all undertakings in an investigation must unanimously indicate to the CCS an interest or willingness to utilise the Fast Track Procedure, and agree not to make extensive written representations or requests to inspect documents and evidence in the CCS' file; and
- the CCS and the undertakings involved in the Fast Track Procedure can at any point elect to withdraw from the Fast Track Procedure.

1.8 The proposed changes to the CCS Guidelines on the Section 34 Prohibition clarify, among others, the following issues:

- parties being in a vertical relationship with each other does not preclude the finding of a horizontal agreement or concerted practice between them;
- once an agreement is found to have as its object the restriction of competition, it will be regarded as restrictive of competition to an appreciable extent without the need to prove any appreciable adverse effects on competition;
- any provision and/or exchange of information, including price or non-price information, with the objective of restricting competition on the market will be considered as a restriction of competition by object; and
- a unilateral disclosure of strategic information may in itself be indicative of an agreement or concerted practice, and parties receiving the information will be presumed to be liable unless they distance themselves with sufficient clarity.

[5] *Supra* note 3.

[6] As disclosed by the CCS Chief Executive Toh Han Li, in an interview with *Global Competition Review* published on 18 April 2016.

1.9 On the proposed changes to the CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity (the **"Leniency Guidelines"**), apart from further procedural clarity on how leniency applications are to be made, conditional leniency and full immunity, other significant amendments to the Leniency Guidelines include:

- coercers and initiators of a cartel activity, who were previously prohibited from applying for leniency, are now eligible for leniency to receive a reduction of financial penalty of up to 50 per cent.;

- leniency applicants are further required to unconditionally admit the conduct for which leniency is sought and to detail the extent to which this conduct had an impact in Singapore by preventing, restricting or distorting competition; and

- leniency applicants are required to grant a waiver of confidentiality to CCS in respect of any jurisdictions where the applicants have likewise sought leniency, and any other regulatory authority which they have informed of the conduct.

1.10 On 8 June 2016 the CCS sought feedback on further proposed changes to its Guidelines on the Appropriate Amount of Penalty. The CCS proposes that the calculation of financial penalties be based on the turnover for the financial year preceding the date on which the infringing party's participation in the infringement ended, instead of relying on the turnover for the financial year preceding the date on which the CCS issues a decision. The proposed change aims to better capture the value accrued as a result of the undertaking's infringing conduct and to provide greater certainty in terms of the financial figures against which a penalty will be calculated. However, the statutory maximum penalty will be calculated having regard to an undertaking's turnover for the business year preceding the date on which the infringement decision of CCS is taken.

2. Cartel offences under the Section 34 Prohibition in Singapore

2.1 The term "agreement" in the Section 34 Prohibition covers a broad range of agreements. Agreements caught under the Section 34 Prohibition can range from hard-core cartels to concerted practices where no formal agreement or decision was reached, and include both legally enforceable and non-enforceable written and oral agreements, as well as "gentlemen's agreements". All that is required is that parties arrive at a consensus on the actions each party will, or will not, take.

2.2 The CCS has stated in the CCS Guidelines on the Section 34 Prohibition that an agreement will fall within the scope of the Section 34 Prohibition if it has as its object or effect the **appreciable** prevention, restriction or distortion of competition. These guidelines are part of the set of 13 guidelines published by the CCS to help businesses understand how the CCS will administer and enforce infringements of the prohibitions in the Competition Act.

2.3 The types of agreements caught under the Section 34 Prohibition can be broadly categorised according to:

- **"hard-core" cartel conduct**, namely:
  - price-fixing;
  - bid-rigging;
  - market-sharing; and
  - output limitations.

  The CCS has stated that an agreement involving any of the above will always have an appreciable adverse effect on competition (i.e. a "per se infringement"); and

- **other types of agreements** to which the CCS applies a "rule of reason" approach in assessing whether such agreements could have an appreciable adverse effect on competition. Examples of such agreements include:
  - fixing trading conditions;
  - joint purchasing or selling;
  - sharing information;
  - exchanging price information;
  - exchanging non-price information;
  - restricting advertising; and
  - setting technical or design standards.

  The above examples are **non-exhaustive**, and the facts and circumstances of each case will need to be considered.

2.4 Under the "rule of reason" approach, in determining whether an agreement has an appreciable adverse effect on competition, the CCS will consider a number of factors, including market shares of the parties to the agreement, market power, the substance of the agreement and the structure of the market or markets affected by the agreement, such as entry conditions or the characteristics of buyers and the structure of the buyers' side of the market.

2.5 With respect to information sharing in particular, the CCS has, in its decisional practice, adopted a strict approach, with infringement findings made on the basis of information-sharing conduct only (see case example below). The CCS has stated in the CCS Guidelines on the Section 34 Prohibition that the exchange of information on prices (or elements of a pricing policy) may lead to price co-ordination and therefore diminish competition, which would otherwise be present between the undertakings. The exchange of non-price information that enables participants to identify individual undertakings' competitive behaviour, and may reduce individual undertakings' commercial and competitive independence, may also have an appreciable adverse effect on competition.

CCS case example of an infringement in relation to information sharing

In CCS Case No. *CCS 500/006/09 - Infringement of the Section 34 Prohibition in relation to the price of ferry tickets between Singapore and Batam*, which involved two ferry operators sharing information on prices, the CCS had found that, even where information is shared unilaterally, it does not necessarily follow that there was no prevention, restriction or distortion of competition. Even a one-way provision of information by one party, or a mere receipt of information by the other party without any reciprocal exchange, raised the presumption that the recipient's future behaviour on the market would not be independent. The CCS stated in its infringement decision that "*[s]uch flow of information would have increased the transparency on the duopoly market at the material time where there was already limited opportunity for competition and thus made it easier for competitors to act in concert.*"

2.6 It should be noted that decisions by associations of undertakings can also be caught by the Section 34 Prohibition, if the object or effect of the decision (irrespective of its form) is to influence or coordinate the commercial conduct of the members. As a general principle, where there has been a decision by an association which infringes the Section 34 Prohibition, the association may be penalised independently from its individual members for an infringement of the Competition Act. This is in addition to the individual members' separate liability for participating in the infringing agreement.

Exceptions

2.7 The Section 34 Prohibition does not apply to the following:

- vertical agreements, i.e. any agreements entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services and includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers;

- agreements with a net economic benefit, i.e. agreements that contribute to improving production or distribution, or promoting technical or economic progress, without imposing on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives or affording the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question; and

- agreements which fall under a block exemption.

2.8 On 25 November 2015 following the CCS' recommendation, the Minister for Trade and Industry (Trade) announced its decision to extend the Competition (Block Exemption for Liner Shipping Agreements) Order in its current form for another five years until 31 December 2020.

3. International cooperation

3.1 The Competition Act provides a mechanism by which the CCS may enter into arrangements with foreign competition bodies to, *inter alia*, provide assistance and furnish to each other information

required by the other party for the purpose of performing its functions. The Competition Act also provides that the CCS need not furnish any information to a foreign competition body pursuant to such arrangements unless it requires of, and obtains from, that body an undertaking in writing by it that it will comply with terms specified in that requirement.

3.2 CCS' international and regional cooperation is also guided by the provisions in Singapore's multilateral and bilateral Free Trade Agreements ("**FTAs**") relating to competition. These provisions commonly require the signatories to cooperate in the development of any new competition measures and exchange information.

3.3 The CCS utilises informal cooperation mechanisms to facilitate its work. In particular, the CCS holds frequent dialogues with the Australian Competition and Consumer Commission and New Zealand Competition Commission to facilitate general information sharing between the agencies. The CCS is also a regular participant at international conferences and workshops on cartel enforcement held by the Organisation for Economic Co-operation and Development, the International Competition Network, and BRICS and ASEAN countries.

3.4 Most importantly, on a case-by-case basis, the CCS has engaged in both regional and international cooperation with other competition authorities when investigating international cartels with cross-jurisdictional elements. Such international cooperation includes, among others:

- sharing information to coordinate dawn raids for evidence preservation; and
- sharing general information such as theories of harm and general categories of information between the competition authorities. Information is shared to the extent that such information is not confidential, and where waivers had been granted to the CCS to discuss the matter with other authorities and vice-versa.

3.5 In sharing information, the CCS has regard to information provided by leniency applicants, bearing in mind the possibility of private actions, discovery obligations that a leniency applicant could be subject to, and the varying regimes which other potentially-relevant jurisdictions operate (i.e. whether civil or criminal regimes are operated).

3.6 The CCS has stated that "*[t]he growing number of cross-border competition cases highlights the importance of cooperation among competition agencies and this is one aspect [the CCS] hope[s] to work on moving forward.*"[7]

4. Investigations

4.1 The CCS has a wide range of investigative powers under the Competition Act, which are triggered when the CCS has reasonable grounds for suspecting that the Section 34 Prohibition has been infringed. An investigation can be triggered by, *inter alia*, third party complaints, media reports, leniency applications or individual whistle-blowers (please also see Part 6 below), and/or the CCS' own-initiative market-surveillance.

[7] *Supra* note 3.

4.2 The CCS' formal powers of investigation are as set out in the Competition Act, specifically:

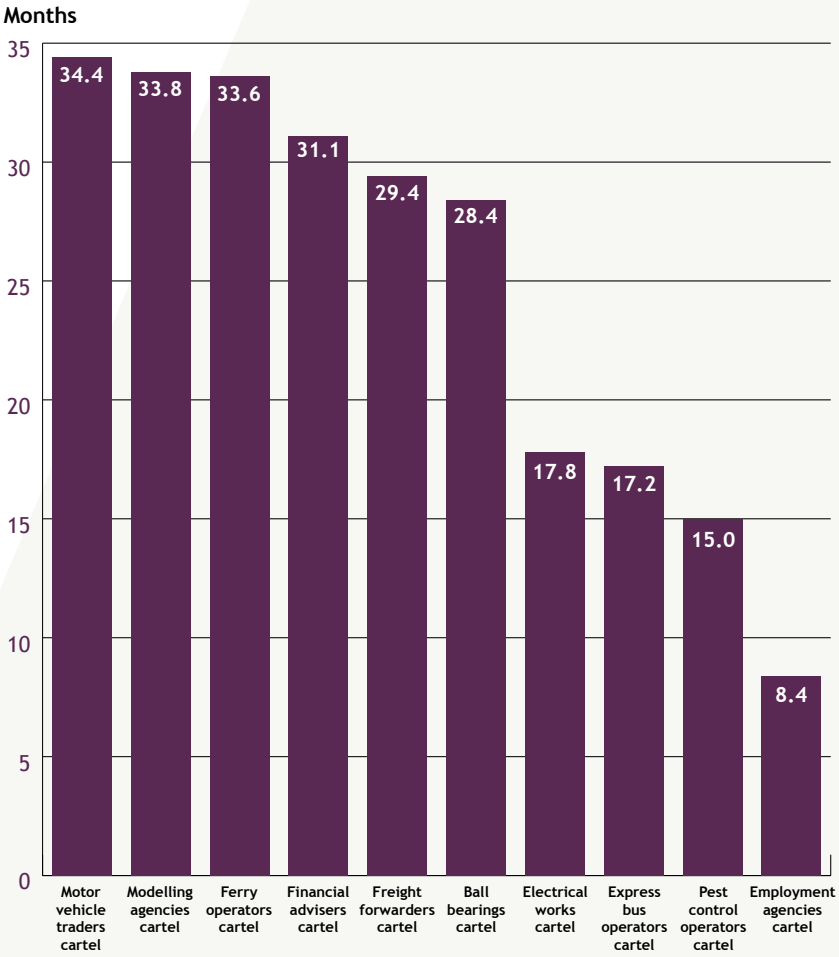
- **Section 63**: the power to require from any person the production of specified documents or information which the CCS considers to be relevant to the investigation;
- **Section 64**: the power to enter premises without a warrant; and
- **Section 65**: the power to enter and search premises with a warrant.

4.3 The CCS may also gather information through informal modes of enquiry during the course of an investigation, in addition to or in place of exercising its statutory formal powers of investigation.

4.4 Once the CCS has concluded its investigation, if the CCS proposes to make a decision that the Section 34 Prohibition has been infringed, the CCS will give written notice to the relevant investigated parties of its proposed infringement decision. The relevant parties will then be given the opportunity to make representations to the CCS, including the opportunity to inspect the documents in the CCS' case file relating to the proposed infringement decision.

4.5 There is no statutory timeframe for the conclusion of CCS' cartel investigations, which can vary according to the complexity of each case. Past cartel investigations by the CCS which concluded in infringement decisions have ranged from eight months to close to three years.

Duration of past CCS cartel investigations (published infringement decisions): 1 January 2006 to 31 May 2016



4.6 There is also no statute of limitations on when the CCS may initiate an investigation. The CCS can investigate historical cartel conduct, including cartel agreements entered into before 2006, as long as the cartel conduct was still ongoing after the Competition Act came into force, and did not cease within the transitional period between 1 January and 30 June 2006. The CCS has, in its infringement decisions to-date, also signalled a willingness to enforce against historical infringing conduct, even after significant time had elapsed since the end of the conduct.

CCS case example of *infringements involving historical cartel conduct*

In CCS Case No. *CCS 700/003/11 - Infringement of the Section 34 prohibition in relation to the provision of air freight forwarding services for shipments from Japan to Singapore*, the CCS became aware in 2011 that international freight forwarders may have been involved in anti-competitive activity that had an impact in Singapore, and made inquiries with freight forwarders. The CCS commenced its investigations in July 2012 further to leniency applications received. While the CCS ultimately did not find any evidence of collusive discussions occurring after November 2007 the CCS issued infringement findings in respect of the conduct that took place prior to November 2007, four years before the CCS first made inquiries with freight forwarders.

In CCS Case No. *CCS 700/002/11 - Infringement of the Section 34 Prohibition in relation to the supply of ball and roller bearings,* the CCS received leniency applications in 2011 to 2012 that related to anti-competitive agreements in respect of the sales, distribution and prices of ball and roller bearings to aftermarket customers in Singapore. Following investigations, the CCS issued infringement findings in respect of a single continuous infringement that took place during the period from at least 1998, seven years before the Section 34 Prohibition came into force on 1 January 2006.

Dawn Raids

4.7 The CCS has statutory powers under Sections 64 and 65 of the Competition Act to conduct unannounced on-site inspections and enter any premises in connection with an investigation (i.e. a "**Dawn Raid**"). The CCS has, at least in one instance, conducted a coordinated Dawn Raid with other competition authorities in the case of international cartels.

4.8 CCS officers and/or persons authorised by the CCS ("**CCS Investigating Officers**") can conduct a Dawn Raid under Section 64 of the Competition Act without a warrant (the "**Section 64 Dawn Raid**"), and in certain circumstances,[8] without prior notice. In particular, no prior notice is required to be provided if the CCS has reasonable grounds for suspecting that the premises are, or have been, occupied by an undertaking under investigation.

4.9 In a Section 64 Dawn Raid, the CCS has the power to, among others:

- require any person on the premises to produce, provide explanations of, and/or state (to the best of that person's knowledge and belief) the location of, any document that the CCS Investigating Officers consider as relevant;

[8] In addition to the circumstance described in para. 4.8 above, CCS Investigating Officers can also conduct a S. 64 Dawn Raid without notice if the CCS Investigating Officers have been unable to give written notice to the occupier despite taking all reasonably practicable steps to do so.

- take copies of any documents produced, including requiring electronic information to be produced in hard or soft copy to be taken away and read; and/or

- take steps that are necessary to preserve the documents or prevent any interference with them (e.g. sealing of offices or cupboards for no longer than 72 hours except where access to the documents is unduly delayed).

4.10 Section 65 of the Competition Act further empowers the CCS Investigating Officers to, pursuant to a warrant, enter the specified premises, including with the use of such force as is reasonably necessary for such entry, and to conduct a search (the **"Section 65 Dawn Raid"**). In such cases, in addition to the powers under a Section 64 Dawn Raid, the CCS Investigating Officers are also authorised to, among others:

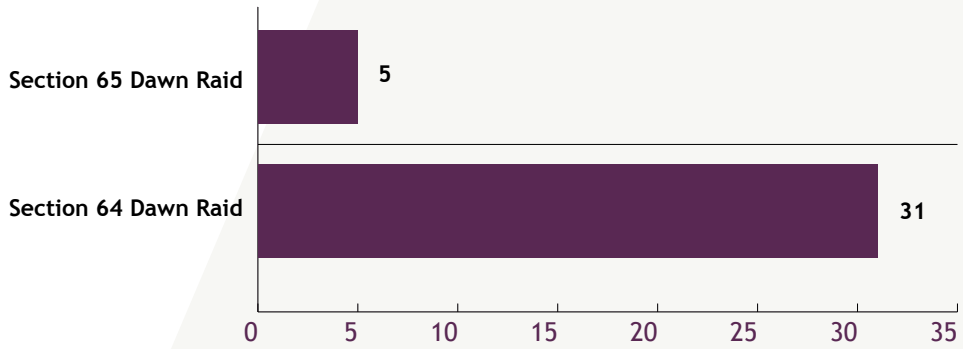
- search the premises and any person on the premises for relevant documents;

- take possession of relevant documents (original or otherwise) or any other step necessary for preserving the documents or preventing interference with them; and/or

- remove from the premises for examination any relevant equipment or article, or impose conditions on the retention of such equipment or article on the premises.

4.11 As of 31 May 2016 more than two-thirds of the CCS' published cartel infringement decisions had involved the CCS commencing investigations with a Dawn Raid. If an investigation commenced by the CCS does not result in an infringement finding, the CCS' current approach is not to publicise details of the investigation, including any Dawn Raids conducted.

Dawn Raids* in CCS'cartel infringement decisions:
1 January 2006 to 31 May 2016



*Based on publicly available information.

Information requests

4.12 Under Section 63 of the Competition Act, the CCS has the power to require, by way of written notice, any person to produce specified documents or to provide specified information which relates to any matter relevant to the investigation (**"Section 63 Notice"**). The CCS may also conduct formal interviews with persons pursuant to a Section 63 Notice requiring that person to provide specified information or an explanation of a specified document in person (**"Section 63 Interview"**).

4.13 Section 63 Notices may be issued at any point in time during the course of the investigation, including prior to or after a Dawn Raid. They can be issued not only to the suspected parties to the infringement, but also to third parties such as complainants, suppliers, customers and competitors.

4.14 It is important to note that the term "document" as defined under the Competition Act includes "information recorded in any form". This includes records, such as invoices or sales figures, stored in any form, electronic or otherwise, for example, on a computer. The documents required to be produced commonly include invoices, agreements and minutes of meetings. Under Section 63 of the Competition Act, the CCS can also require the information to be compiled and produced if it is not already in recorded form.

Non-compliance

4.15 It is vital that investigated parties, including their employees, are aware of what constitutes an offence in relation to the CCS' powers of investigation and the consequences of such offences. All offences are punishable, on conviction, with a fine, imprisonment or both.

4.16 Examples of criminal offences include:

- obstructing, by refusing to give access to, assaulting, hindering or delaying, any agent of the CCS;
- intentionally or recklessly destroying or otherwise disposing of or falsifying or concealing a document of which production has been required or causing or permitting its destruction, disposal, falsification or concealment;
- providing information that is false or misleading in a material particular knowingly or recklessly, either to the CCS or to another person such as an employee or legal adviser, knowing that it will be used for the purpose of providing information to the CCS; and
- failing to comply with any requirement imposed pursuant to the CCS' formal powers of investigation, including refusal to provide any required document or information, unless such compliance is reasonably not practicable or a reasonable excuse for failure to comply can be provided.

Limitations on the use of powers of investigation

4.17 In conducting investigations, the CCS and CCS Investigating Officers are not entitled to:

- use force against any person during a Dawn Raid;
- examine and/or copy documents which are not relevant to the purpose of the Dawn Raid; and/or
- examine and/or copy documents which are marked to be legally privileged (please see below).

Rights to legal advice and protection of legal professional privilege

4.18 During the course of the CCS' investigations, an undertaking has certain rights to legal advice and the protection of legal professional privilege, including:

- in a Dawn Raid, the right to request for a reasonable time to be allowed for a professional legal adviser (including in-house legal advisers) to arrive at the premises; and
- in a Section 63 Interview, the right to be accompanied by a professional legal adviser.

4.19 The CCS' investigative powers to require the disclosure of information or documents also do not extend to any communication:

- between a professional legal adviser and his client; or
- made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings,

which would be protected from disclosure in proceedings in a court on grounds of privilege.

4.20 This right to legal professional privilege extends to communications with in-house lawyers as well as lawyers in private practice including foreign counsel, including such communications made for the purpose of giving or seeking legal advice.

4.21 A person or undertaking is not excused from disclosing any information or documents to the CCS under a requirement made of him pursuant to the CCS' investigative powers under the Competition Act on the ground that the disclosure might tend to incriminate him. A statement that is claimed by a person to be self-incriminatory shall be admissible in evidence against him in civil proceedings (but not criminal proceedings), including proceedings under the Competition Act.

5. Sanctions

5.1 Under the Competition Act, the CCS has the power to issue directions, including interim measures, and impose financial penalties on undertakings for infringing the Section 34 Prohibition.

Directions and interim measures

5.2 The CCS can issue directions to bring an infringement to an end, which includes modifying or terminating the relevant agreement for parties to cease the cartel conduct. Directions can also include requirements to report back periodically to the CCS on certain matters, or even structural changes to an undertaking's business. Directions may also be imposed on entities other than the infringing parties. For example, directions may be addressed to a parent company which, though not the actual instigator of the infringement, has a subsidiary which is the immediate party to the infringement.

5.3 The CCS can also issue directions on interim measures, prior to the completion of its investigations into a suspected infringement, if the CCS considers it necessary to act urgently either to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest.

5.4 If there is non-compliance with a direction, including on interim measures, the CCS can apply to register the direction with a District Court in accordance with the Rules of Court (Chapter 322, Rule 5). Any person who fails to comply with a registered direction without reasonable excuse will be in contempt of court, where normal sanctions for contempt of court will apply, i.e. the court may impose a fine or imprisonment.

Financial penalties

5.5 The CCS has powers to impose financial penalties on undertakings which have intentionally or negligently infringed the Section 34 Prohibition, of up to 10 per cent. of the business turnover of that undertaking in Singapore for each year of infringement up to a maximum of three years (the **"Statutory Maximum Financial Penalty"**).[9]

5.6 Before exercising the power to impose a financial penalty, the CCS must be satisfied that the infringement has been committed *intentionally* or *negligently*:

- **intention**: the CCS may find an infringement to have been committed intentionally if:
  - the agreement has as its object the restriction of competition;
  - the undertaking in question is aware that its actions will be, or are reasonably likely to be, restrictive of competition but still wants, or is prepared, to carry them out; or
  - the undertaking could not have been unaware that its agreement would have the effect of restricting competition, even if it did not know that it would infringe the Section 34 Prohibition.

  The intention relates to the facts, not the law. Ignorance or a mistake of law (i.e. ignorance that the relevant agreement is an infringement) is not a bar to a finding of an intentional infringement; and

- **negligence**: the CCS is likely to find that an infringement of the Section 34 Prohibition has been committed negligently where an undertaking ought to have known that its agreement would result in a restriction or distortion of competition.

5.7 The CCS has stated that it will impose severe financial penalties on serious infringements where appropriate, particularly in respect of "hard-core" cartel activities.

5.8 The financial penalty will be calculated taking into consideration:

- the seriousness of the infringement;
- the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year (the "**Relevant Turnover**");
- the duration of the infringement;
- other relevant factors, e.g. deterrent value; and
- any further aggravating or mitigating factors.[10]

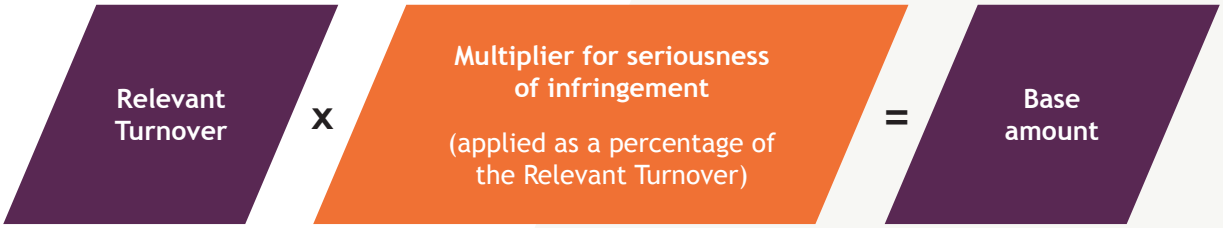
[9] S. 69(4) of the Competition Act.

[10] See para. 2.1 of the CCS Guidelines on the Appropriate Amount of Penalty.

The CCS' methodology for setting the appropriate amount of penalty

5.9 **Step 1 – Base amount**: The CCS will first arrive at the **base amount** of the penalty, taking into account both:

- the seriousness of infringement;[11] and
- the Relevant Turnover.



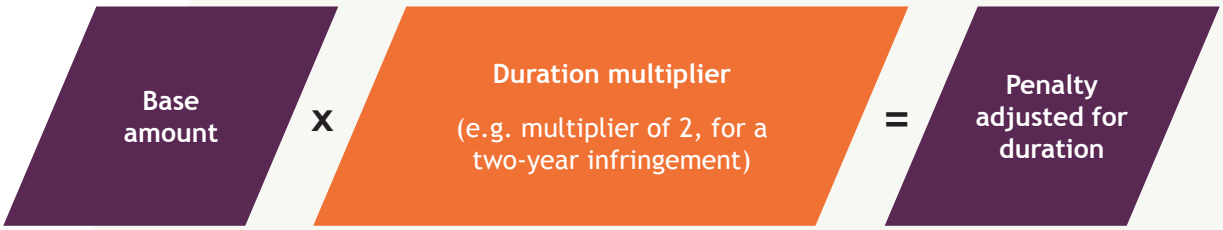
5.10 The CCS has the discretion to deviate from the use of the Relevant Turnover in calculating the base amount of a financial penalty.

CCS case example of *deviating from the use of the Relevant Turnover in calculating the base amount of a financial penalty*

In CCS Case No. *CCS 500/003/10 – Bid Rigging by Motor Vehicle Traders at Public Auctions of Motor Vehicles*, the CCS took the approach of setting the base amount of the financial penalty for certain infringing parties to be 2 per cent. of the infringing parties' *total* turnover of the last business year.

The CCS was of the view, in this case, that if an undertaking's Relevant Turnover was less than 2 per cent. of its total turnover, the base amount in Step 1 derived from the Relevant Turnover would not act as a sufficient deterrent.

5.11 **Step 2 – Duration of infringement**: The CCS will next consider adjusting the base amount to account for the duration of the infringement.



5.12 The CCS has the discretion to apply a duration multiplier that corresponds to the infringing period in excess of three years, *so long as* the resultant final penalty amount does not exceed the Statutory

[11] In assessing the seriousness of the infringement, the CCS will consider a number of factors, including the nature of the product, the structure and condition of the market, the market shares of the undertakings involved, the effect on competitors and third parties, and the impact and effect of the infringement on the market more generally.

Maximum Financial Penalty (see Step 5 below). This is to ensure that there is sufficient deterrence against cartels operating undetected for a protracted length of time.

5.13 An infringement over a *part* of a year may be treated as a *full* year for the purpose of calculating the duration of the infringement.[12] The CCS also has the discretion to round down the duration of the infringement to the nearest month (subject to a minimum of 1 month). The CCS has stated that "*[t]his provides an incentive to undertakings to terminate their infringements as soon as possible*".

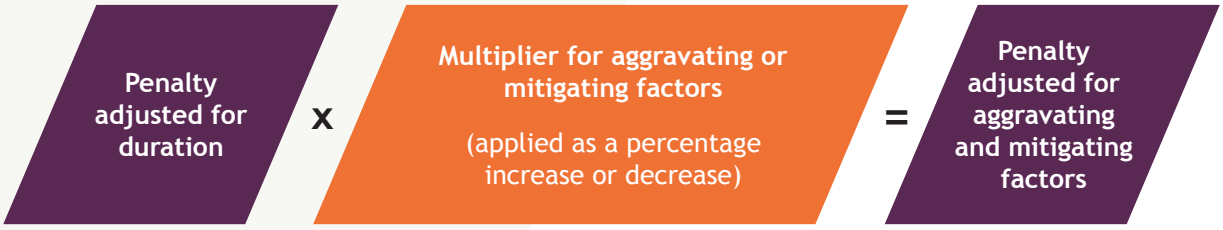
CCS case example of *decisions to impose a penalty amount corresponding to a duration multiplier which exceeds three years*

In CCS Case No. *CCS 550/002/09 - Price-Fixing in Modelling Services*, the CCS applied a duration multiplier of 3.5 to the individual fines imposed on eight out of the eleven infringing modelling agencies, which colluded to fix the price of modelling services for the period from 1 January 2006 to 17 July 2009.

In its infringement decision, the CCS considered it "*appropriate for penalties for infringement which last for more than one year to be multiplied by the number of years of the infringement. This therefore means that* the ***base penalty sum will be multiplied for as many years as the infringement remains in place***. *This ensures that there is sufficient deterrence against cartels operating undetected for a protracted length of time.*" (emphasis added)

The CCS had similarly, in CCS Case No. *CCS 700/002/11 - Infringement of the Section 34 Prohibition in relation to the supply of ball and roller bearings*, applied a duration multiplier of 5.5 for the calculation of fines for infringing parties.

5.14 **Step 3 – Aggravating or mitigating factors**: The CCS would also consider the presence of any aggravating or mitigating factors in increasing or reducing the level of the financial penalties.



[12] With regard to bid-rigging in particular, the CCS has stated that "*[e]ven though the actual collusive tendering or bid-rigging arrangements lasted for significantly less than one year, the anti-competitive effects are irreversible in respect of that tender and may affect future tendering processes by the same bidders if an infringing party wins and gains the advantage of incumbency*", and that "*the effects of the infringements were not restricted to the actual, usually very short, period during which the collusion took place.*"

Key examples of aggravating and mitigating factors

Aggravating factors

- role of the undertaking as a leader in or an instigator of, the infringement;
- involvement of directors or senior management;
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuance of the infringement after the start of investigation;
- repeated infringements by the same undertaking or other undertakings in the same group;
- infringements which are committed intentionally rather than negligently; and
- retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant

Mitigating factors

- role of the undertaking, for example, that the undertaking was acting under severe duress or pressure;
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- adequate steps taken with a view to ensuring compliance with the Section 34 prohibition, for example, existence of any compliance programme;
- termination of the infringement as soon as the CCS intervenes; and
- co-operation which enables the enforcement process to be concluded more effectively and/or speedily

CCS case example of *increasing the level of financial penalties due to aggravating factors*

In CCS Case No. *CCS 500/003/13 - Infringement of the Section 34 Prohibition in relation to the distribution of individual life insurance products in Singapore*, the CCS considered that Financial Alliance acted as a leader in the infringements, and consequently increased its financial penalty in this regard.

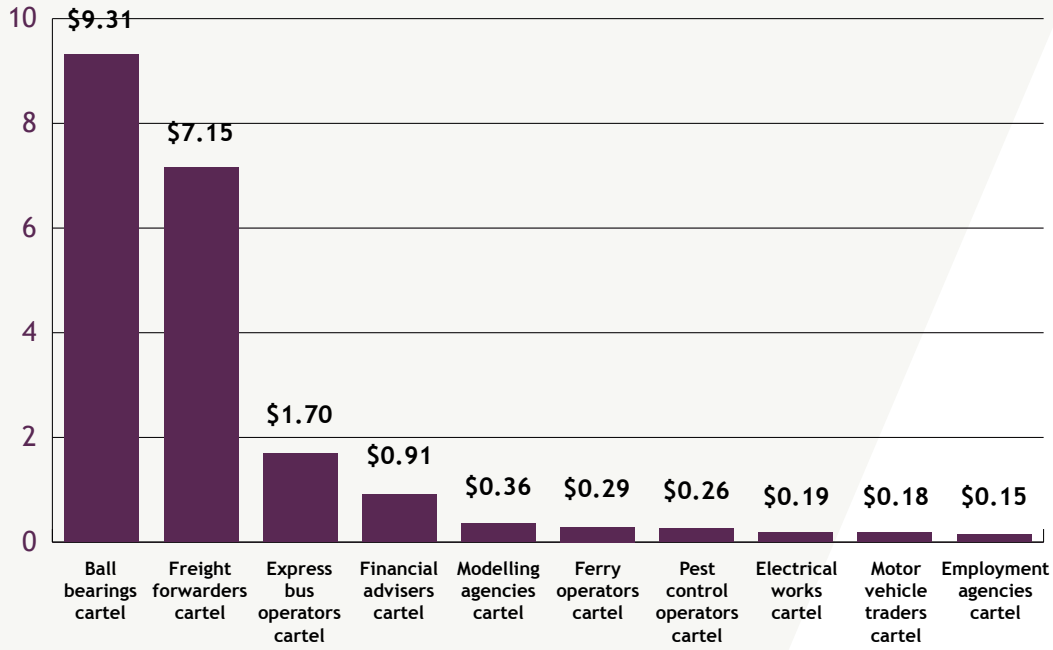
CCS case example of *reducing the level of financial penalites due to mitigating factors*

In CCS Case No. *CCS 550/002/09 - Price-Fixing in Modelling Services*, the CCS considered that Ave, Bees Work, Diva, Electra, Impact, Linsan, Looque, Phantom and Quest were "*cooperative in replying to CCS' request for documents via the section 63 notices and during the subsequent interviews*" and accordingly, reduced their financial penalties for co-operation.

5.15 **Step 4 – Other considerations**: The CCS may further adjust the amount of financial penalty to achieve its policy objectives, including deterrence. For example, if the CCS considers that the financial penalty arrived at after Step 3 is insufficient as an effective future deterrent, the CCS will adjust the penalty accordingly.

5.16 **Step 5 – Check against the Statutory Maximum Financial Penalty**: At the final stage, the CCS will assess if the financial penalty arrived at after Step 4 may exceed the Statutory Maximum Financial Penalty. If this is the case, the penalty will be adjusted downwards.

Financial penalties* imposed by the CCS: 1 January 2006 to 31 May 2016



* Before deductions (if any) by the CAB.

Rights of private action

5.17 Parties suffering loss or damage directly arising from an infringement of the Section 34 Prohibition are entitled to commence a civil action against the infringing undertaking to seek relief.

5.18 Such rights of private action can only be exercised after the CCS has made an infringement decision, and after the appeal process has been exhausted. There is a two year limit for the taking of such private actions from the time that the CCS made the decision or from the determination of the appeal, whichever is later.

Appeals to the Competition Appeal Board

5.19 There is a right of appeal to the CAB against any decision by the CCS, or any direction imposed by the CCS (including interim measures, the imposition of any financial penalty or as to the amount of any such financial penalty). Any relevant party to an agreement may make an appeal against the CCS' decision, while an appeal against a direction may be made by the person to whom the CCS gave the direction. An appeal in relation to the Section 34 Prohibition must be lodged within two months of the date on which the appellant was notified of the contested decision, or the date of publication of the decision, whichever is earlier.

5.20 The CAB has wide powers in determining appeals and may, among others, confirm or set aside all or part of the CCS' decision, remit the matter to the CCS, or impose, revoke or vary a direction by the CCS (including increasing or decreasing the amount of a penalty). A decision by the CAB can be further appealed to the High Court and then to the Court of Appeal, but only on a point of law arising from a CAB decision or from any decision of the CAB as to the amount of a financial penalty. Such a further appeal can only be made by a party to the proceedings in which the decision of the CAB was made.

5.21 As of 31 May 2016 the CAB has received 12 appeals relating to cartel infringement decisions, and issued its appeal decisions in seven of these appeals. A number of these appeals have also been withdrawn by the appellants. In the appeal decisions issued, the CAB had generally upheld the findings and decisions on liability of the appellants by the CCS, but reduced the financial penalty that was imposed by the CCS. The reductions of financial penalties by the CAB had been on the basis of, among others, the following grounds:

- that an alternative definition of the market, and consequently a different Relevant Turnover, should be used for the purposes of calculating the financial penalty;
- that the "high turnover, low margin" characteristic inherent in certain profit models should be considered in determining whether the penalty was excessive or disproportionate; and
- that the involvement of directors and senior management should not necessarily always be considered as an aggravating factor, subject to the specific facts of the case.

6. Leniency

6.1 The CCS regards "hard-core" cartel agreements as the most serious type of infringement due to their detrimental effects on business and end consumers. As a matter of CCS' policy, undertakings found to have participated in cartel agreements are likely to incur sizable financial penalties.

6.2 The CCS has implemented a leniency programme to incentivise cartel members to come forward and inform the CCS of the cartel activities. Three of the ten cartel infringement decisions issued by the CCS as of 31 May 2016 have been pursuant to leniency applications, including the CCS' first two infringement decisions against international cartels, which warranted record financial penalties.

First-to-the-door: total immunity from financial penalties or up to 100 per cent. reduction

6.3 An undertaking stands to benefit from total immunity from financial penalties if the undertaking is the first-to-the-door in providing the CCS with evidence of the cartel activity *before* an investigation has commenced,[13] and provided that the CCS does not already have sufficient information to establish the existence of the alleged cartel activity.

6.4 The undertaking must also satisfy the following general conditions:

- provides the CCS with all the information, documents and evidence available to it regarding the cartel activity;
- maintains continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CCS arising as a result of the investigation;
- refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the CCS (except as may be directed by the CCS);
- must not have been the one to initiate the cartel; and
- must not have taken any steps to coerce another undertaking to take part in the cartel activity.

[13] By the exercise of the CCS' formal investigative powers under Ss. 63 to 65 of the Competition Act (please see Part 4 above).

6.5 If an undertaking does not qualify for total immunity because the CCS has already commenced an investigation,[14] it may still stand to benefit from a reduction in the financial penalty of up to 100 per cent. if:

- the undertaking is still the first-to-the-door in providing the CCS with evidence of the cartel activity;
- this information is provided before the CCS has sufficient information to issue a proposed infringement decision; and
- the undertaking must also satisfy the general conditions in paragraph 6.4 above.

6.6 Any reduction in the level of the financial penalty under these circumstances is discretionary, and the CCS will take into account:

- the stage at which the undertaking comes forward;
- the evidence already in the CCS' possession; and
- the quality of the information provided.

Subsequent leniency applicants: reduction of up to 50 per cent. in level of financial penalties

6.7 If an undertaking is not the first-to-the-door, but provides evidence before the CCS issues a proposed infringement decision, the undertaking may still be granted a reduction of up to 50 per cent. of the financial penalty, if the general conditions in paragraph 6.4 above are satisfied.

6.8 Any reduction in the level of the financial penalty under these circumstances is also discretionary, and the CCS will take into account the factors set out in paragraph 6.6 above.

Procedure for seeking leniency

6.9 An undertaking can make initial contact or "feelers" to the CCS on an anonymous basis, to ascertain if immunity or leniency is available. This "feeler" would usually be made by way of a telephone call. An authorised representative of the undertaking (e.g. external legal counsel) can also reach out to the CCS to place the anonymous "feeler" on behalf of the undertaking.

6.10 For the immunity or leniency application proper to be recorded and proceeded with, the undertaking's name must be given to the CCS. The application should also include a description of the market concerned, the conduct involved and the relevant time period. Applications can be made either orally or in writing, and through an authorised representative.

6.11 The applicant should immediately provide the CCS with all the evidence relating to the suspected infringement available to it. If this is not feasible, the applicant may alternatively apply for a marker to secure a position in the immunity or leniency queue. A marker protects the applicant's place in the queue for a limited period of time, to allow it to gather the necessary information and evidence in order to perfect the marker. For an applicant to secure a marker, it must provide its name and a description of the cartel conduct in sufficient detail to allow the CCS to determine that no other undertaking has applied for immunity or a reduction of up to 100 per cent. for such similar conduct.

[14] *Ibid.*

6.12 If the applicant fails to perfect the marker, the next undertaking in the marker queue will be allowed to perfect its marker, to obtain immunity or a reduction of up to 100 per cent. in financial penalties.

6.13 If the marker is perfected, the subsequent leniency applicants in the marker queue will be informed so that they can decide whether to submit leniency applications for a reduction of up to 50 per cent. in financial penalties. The marker system will not apply to such leniency applications and such applicants should immediately provide the CCS with all the evidence relating to the suspected infringement available to it at the time of the submission.

Leniency plus

6.14 The CCS also has a "leniency plus" programme to encourage cartel members cooperating with an investigation by the CCS in one market (the first market), to also report their involvement (if any) in a completely separate cartel activity in another market (the second market).

6.15 Under "leniency plus", an undertaking may be granted a *further reduction* in the financial penalties imposed on it in relation to the first market, *in addition to* the reduction which it would have received for its cooperation in the first market alone. The undertaking need not have applied for or received leniency in the first market, and can benefit from "leniency plus" so long as it is receiving a reduction in the first market by way of cooperation as a mitigating factor.

6.16 An undertaking can qualify for leniency plus if the CCS is satisfied that:

- the evidence provided by the undertaking relates to a completely separate cartel activity; and
- the undertaking is first-to-the-door in relation to the cartel activities in the second market, and would qualify for total immunity or a reduction of up to 100 per cent. in the amount of the financial penalty for such activities in the second market.

Reward scheme for individuals

6.17 The CCS offers a reward scheme for individuals with useful information on cartel activity in Singapore. In appropriate cases, the CCS offers a monetary reward to informants for information that leads to infringement decisions against cartel members.

Confidentiality

6.18 The CCS will endeavour to keep the identity of immunity or leniency applicants confidential throughout the course of its investigation, to the extent consistent with its obligations to disclose or exchange information. This will apply up until the point at which the CCS issues a proposed infringement decision.

6.19 After this point, the identity of any leniency applicants may potentially be disclosed in:

- the proposed infringement decision issued to the relevant investigated parties. The CCS' practice to-date has been to not identify any leniency applicants *publicly* at this stage, other than in the proposed infringement decision; and
- the final infringement decision issued by the CCS, a copy of which would typically be published on the CCS' public register.

6.20 The CCS also undertakes to keep confidential the identity of individuals providing information on cartel activities under the CCS' reward scheme for individuals.

Effect of leniency

6.21 Leniency does not protect the undertaking from the other consequences of infringing the law, which include the infringing cartel agreement or provision being voided pursuant to Section 34(3) of the Competition Act, and third party private action. Leniency also does not provide immunity from any penalty that may be imposed on the undertaking by other competition authorities outside of Singapore.

6.22 Parties should consider carefully the strategy and approach in deciding to apply for leniency, and how to mitigate any risks of such exposures, for example, whether a leniency application should be made orally only, and whether leniency applications to competition regulators in other jurisdictions should also be made as soon as practicable (or simultaneously, if necessary).

6.23 Parties should be aware that there are various possible disclosure scenarios through which third parties may gain access to written submissions made to the CCS, including:

- **disclosure to other regulators**: this may occur if the leniency applicant has granted a substantive waiver to the CCS where the scope of such waiver allows for the CCS to do so. Waivers granted to the CCS could be scoped to manage this disclosure risk;

- **disclosure to other defendants**: once the CCS has issued a provisional infringement decision, access to files will be granted for defendants to make representations against the provisional infringement decision. The files would set out the materials which the CCS has relied on in arriving at its decision.

  However, the CCS may withhold any document from the inspection files to the extent that it (i) contains confidential information, or (ii) is an internal CCS document. Internal documents may include the notes recorded by the CCS when leniency applications are made orally only. It may be possible, however, for a defendant to attempt to seek a court order to require the CCS to release such documents, though this has not been tested in practice; or

- **disclosure to third parties seeking rights of private action for damages**: the CCS does not grant access to files by third parties seeking rights of private action for damages. However, there is the possibility of third parties applying for discovery against defendants (i.e. those referred to in the preceding paragraph) to require such defendants to furnish copies of documents taken or copied by these defendants from the CCS' inspection files, or to apply for third party discovery against the CCS to require the CCS to disclose such documents referred to in the preceding paragraph, though this has not been tested in practice.

6.24 It may accordingly be advisable to make leniency statements on an oral basis only, in particular in cases involving international cartels and the risk of third party private action in other jurisdictions (e.g. the United States, where claimants may potentially be awarded treble damages).

6.25 For international cartels, it may also be advisable for parties to restrict their statements and evidence to activities in Singapore only, with a view to avoiding admission of infringing conduct with effects outside Singapore.

7. Settlement

7.1 There are no provisions under the Competition Act or CCS guidelines on formal settlement procedures for cartel activity. However, the CCS has in practice accepted voluntary undertakings or assurances from parties to cease, or not enter into, agreements which may potentially infringe the Section 34 Prohibition, in the absence of any proposed or final infringement finding by the CCS.

7.2 In such cases, the CCS had exercised its discretion not to pursue the matter in light of the voluntary undertakings or assurances received, as the objective of preventing or deterring the parties from participating in anti-competitive arrangements was achieved. The CCS had, in one instance, stated the view that preventing an anti-competitive agreement from taking effect was a "*better outcome*" in that case, than pursuing the investigation to its conclusion. The CCS has in all such cases monitored the parties for any breach of the assurances thereafter.

CCS case example of *an informal settlement*

Following the CCS' investigations into a cartel involving six pest control companies that resulted in an infringement decision in January 2008 (CCS Case No. *CCS 600/008/06 - Collusive Tendering (Bid-Rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore*), the CCS separately investigated the parties' practice of charging minimum prices for providing certain pest control services.

In a media statement issued in September 2008, the CCS announced that it had received assurances from the parties that the prices for their services would be decided independently. The CCS had decided not to pursue the matter as the objective of deterring the parties from participating in anti-competitive arrangements was achieved with the penalties imposed on them pursuant to the earlier infringement decision. However, the CCS had informed the parties that appropriate action would be taken if it was subsequently found that there had been a breach of the assurances.

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Cited as the "most highly nominated practitioner" and "a real expert, according to rivals" in the inaugural Competition chapter of Who's Who Legal: Singapore (2008), Daren has also been recommended as a leading antitrust practitioner in The International Who's Who of Competition Lawyers and Economists and the Euromoney Guide to the World's Leading Competition and Antitrust Lawyers since 2006 when Singapore's competition law was enacted.

In 2012, Daren was named by Global Competition Review as one of the world's most talented competition lawyers under the age of forty in its 40 Under Forty survey, and is the only South-east Asian lawyer recognised in the history of the list. Who's Who Legal (2013) cites Daren as being "very skilled", and "one of the finest lawyers in the region", and Chambers Asia-Pacific (2014) ranks him in Band 1 as a "star performer". Daren has worked in London and Brussels competition practices on European Commission and Office of Fair Trading matters. He presently sits on the Competition Roundtable of the Competition Commission of Singapore (CCS), and has been appointed Singapore's first non-governmental advisor at the International Competition Network (ICN).

Daren's deal book of groundbreaking competition transactions undertaken with the practice, which is described by Chambers Global (2010) as "market-leading", covers general antitrust as well as sectoral regimes such as media, electricity, gas and airports. He has successfully advised on a significant majority of Singapore's public competition law cases, including Thomson/Reuters, Glencore/Chemoil, Volkswagen/MAN, Johnson & Johnson/Synthes, Nippon Steel/Sumitomo Metal, and close to 75% of merger filings lodged with the CCS. He has also advised parties on the first international cartel investigation by the CCS, and the only abuse of dominance appeal to Singapore's Competition Appeal Board. Daren is also a commissioned trainer of the high-level ASEAN Experts Group on Competition (AEGC), and has unparalleled experience in competition law and policy in South-east Asia.

He is the Principal Examiner (Competition Law) for the Singapore Institute of Legal Education's Foreign Practitioners Examinations, and lectures on competition law for the course leading to Part B of the Singapore Bar Examinations.

Daren graduated on the Dean's List of the National University of Singapore, and is District Councillor of the Central Singapore District.

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Elsa is Partner in the Corporate & Commercial Department, and is Deputy Head of the Firm's Competition & Antitrust practice. She is also Co-Head of the Firm's Public Policy practice.

In 2013 and 2016, Elsa was featured in the 100 elite women globally in the field of competition law by Global Competition Review (GCR) in their Women in Antitrust 2013 and 2016 peer-nominated surveys. Elsa is also regularly recognised as a leading competition economist in Who's Who Legal Competition: Economists since 2010, Who's Who Legal Consulting Experts: Economic Consulting – Competition Economists, Euromoney Guide to the World's Leading Competition and Antitrust Lawyers and Economists, and Expert Guides' Women in Business Law.

Elsa regularly assists clients on complex antitrust matters, including global cartel and abuse of dominance investigations. Her record includes the first and only Provisional Infringement Decision of Competition Commission of Singapore (CCS) to be successfully overturned (Greif/GEP) and the first CCS conditional merger clearance requiring local commitments (SEEK/JobStreet). In 2013, Elsa led the team in a matter which was conferred the GCR Award 2013: Behavioural Matter of the Year (Asia-Pacific, Middle East and Africa).

Elsa's public policy experience ranges from formulating regulatory policies, advocacy to governments and businesses, and assisting on legislative changes, such as the drafting of the Competition Act, Block Exemption Order, and regulations for other sectoral regimes. Elsa was previously Assistant Director at the Ministry of Trade and Industry of Singapore, and was also a pioneer member of the CCS.

A recipient of the Prime Minister's Book Prize, Elsa graduated summa cum laude with a double degree in Economics and International Relations from Tufts University, Massachusetts, and was placed yearly on the Dean's List. She holds a postgraduate degree from the London School of Economics and Political Science, and an LLM with a specialisation in Competition Law.

Practice Areas
Competition & Antitrust, Public Policy

Overview of cartel regulation in India

Shardul Amarchand Mangaldas, India

1. Introduction

1.1 Competition law in India is governed by the Competition Act, 2002 (**"Competition Act"**) and associated rules and regulations. The Competition Act aims to prevent anti-competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade in markets. The Competition Commission of India (**"CCI"**) is the relevant authority for the monitoring, enforcement and implementation of competition law in India and the Competition Appellate Tribunal (**"COMPAT"**) is the appellate authority, with a further appeal lying to the Supreme Court.

1.2 Section 3 of the Competition Act prohibits anti-competitive agreements which cause or are likely to cause an appreciable adverse effect on competition (**"AAEC"**) in India. Such agreements include horizontal agreements between competitors, including cartels, which are presumed under the Competition Act to have an AAEC.

1.3 The enforcement provisions of the Competition Act came into force in May 2009. Since then, the CCI has investigated a number of industries for alleged cartelization and, where it has established breach, has often imposed significant financial penalties on the enterprises and individuals involved. On appeal, the COMPAT has largely upheld the substantive decisions of the CCI, though it has sometimes allowed appeals on natural justice grounds and has frequently reduced the level of penalties imposed by the CCI. A tabular representation of the number of CCI and COMPAT decisions and the fines imposed since 2011 may be found at Annex 1.

2. Anti-cartel legislation and enforcement

2.1 Section 3(1) of the Competition Act prohibits agreements between persons, enterprises or associations of persons or enterprises, in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an AAEC in India.

2.2 The term 'agreement' is broadly defined to mean any arrangement, understanding or action in concert, irrespective of whether it is formal, written or intended to be enforceable by legal proceedings. In the 2012 ***LPG Cylinder Manufacturers Case***, the CCI endorsed the well-known view of the English judge Lord Denning that '*a nod or a wink will do*' to show the existence of an agreement.

2.3 Section 3(1) of the Competition Act contains a general prohibition on anti-competitive agreements, while Section 3(3) addresses specific types of prohibited horizontal agreements, including cartels, to which a presumption of an AAEC applies.

Horizontal agreements (Section 3(3) of the Competition Act)

2.4 Section 3(3) of the Competition Act provides that certain categories of agreements between enterprises or persons in identical or similar trade of goods or provision of services, including cartels (**"horizontal agreements"**), are presumed to have an AAEC. This presumption is rebuttable and the parties to the agreement can try to prove that their agreement does not or is not likely to cause an AAEC. This shifting of the burden of proof, once the CCI has established that there is an agreement between the parties, is an important weapon in the CCI's anti-cartel armoury.

2.5 Four categories of horizontal agreements are covered by the presumption of an AAEC. These are agreements which:

- directly or indirectly determine purchase or sale prices;
- limit or control production, supply, markets, technical development, investment or the provision of services;
- share the market or source of production or provision of services by way of allocation of the geographical area of the market, type of goods or services, or number of customers in the market or in any other similar way; or
- directly or indirectly result in bid rigging or collusive bidding.

2.6 Unless the presumption of an AAEC is rebutted, such horizontal agreements will be prohibited under Section 3(1) of the Competition Act.

2.7 The Competition Act defines a cartel to *include* an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of goods or services. Whether or not an agreement involves a cartel is important in two ways. First, the leniency regime under the Competition Act applies only to cartels. Second, enterprises and individuals involved in a cartel may be subject to more stringent penalties than those applying to non-cartel activity. A breach of Section 3 of the Competition Act ordinarily attracts a penalty of up to 10% of average annual turnover for the last three financial years. However, Cartel participants are alternatively liable to penalties of up to three times of their profit or 10% of their turnover (whichever is the higher) for each year of the continuance of the agreement; this may result in substantially high penalties.

Standard of proof

2.8 Although horizontal agreements are presumed to cause an AAEC, the CCI bears the burden of proving that there is an agreement. Since penalties are administrative rather than criminal in nature, the CCI can apply a lower standard of proof than that of "beyond reasonable doubt" required in criminal cases. The CCI's current position is that the standard of proof is "preponderance of probability". The COMPAT has favoured a possibly higher standard of "strong probability": the application of this standard will differ from case to case, with unlikely or particularly serious events requiring more convincing proof.

Circumstantial evidence

2.9 Given the secretive nature of cartels, direct evidence of an agreement is often hard to find. In early cases, the CCI held that precise and coherent proof of an agreement had to be produced. More recently, it has accepted the need to rely on circumstantial evidence, holding that, in the absence of direct "smoking gun" evidence, "*the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of the existence of an agreement*". A wide range of circumstantial evidence has been considered in the cases, including unexplained identical or similar pricing, meetings between the parties, trade association meetings, common errors in tender documentation, and the demonstrated collective interest of the parties. The CCI has even referred to past violations of earlier legislation. The CCI has also identified a number of general industry features tending to collusion, including the small number of players, predictability of demand and the absence of significant technological change.

2.10 There are, of course, limits to the usefulness of circumstantial evidence. The CCI and COMPAT have accepted that parallel pricing in itself is not good evidence of collusion, but that "supporting factors" are required. In other cases, there is simply no, or insufficient, evidence of an agreement. For example, in the 2012 ***Travel Agents Case***, the COMPAT held that decisions of the airline companies, taken on different dates, to reduce the commission to be paid to travel agents was not indicative of an agreement between the firms but constituted their independent decisions.

Efficiency enhancing joint venture exception

2.11 The presumption of an AAEC under Section 3(3) of the Competition Act does not apply to "*any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services*". This provision was considered by the CCI in a 2016 case involving the creation of a captive third party administrator in the form of a joint venture by the ***Public Sector General Insurance Companies***. The CCI concluded that, far from being a cartel, the third party administrator appeared to be an efficiency-enhancing joint venture facilitating the effectiveness of the health insurance sector and with clear benefits for policy-holders, insurance companies and healthcare providers.

Exceptions to the Section 3 prohibition

2.12 Section 3(5)(i) of the Competition Act permits parties to restrain any infringement of, or to impose reasonable conditions *as may be necessary* for the protection of rights conferred upon them by specified Indian intellectual property laws. The CCI has adopted a strict approach to this exception. In the 2014 ***Autoparts Case***, it held that Section 3(5) could not justify car manufacturers preventing parts suppliers from selling into the open market, as such manufacturers could contractually protect their intellectual property rights in the absence of such a restriction. In the 2016 ***K Sera Sera Case***, the CCI held that a number of Hollywood film production houses and a joint venture were justified in requiring cinemas showing their films to use equipment that was compliant with their digital cinema technology: in finding that this protected the parties from piracy, the CCI stated that they "*must be entitled to reasonably protect their properties from being exploited in the market*".

2.13 Section 3(5)(ii) of the Competition Act provides that nothing contained in Section 3 is to restrict the right of any person to export goods from India to the extent that an agreement relates exclusively to the production, supply, distribution or control of good, or provision of services, for such export.

3. Different categories of cartels

3.1 As seen above, Section 3(3) lists a number of different categories of horizontal agreements, including cartels, which are presumed to have an AAEC. These cover agreements which fix prices, limit production, allocate markets, or result in bid-rigging or collusive bidding. Each of these is briefly considered in turn below.

Price fixing (Section 3(3)(a) of the Competition Act)

3.2 Section 3(3)(a) read together with Section 3(1) of the Competition Act prohibits horizontal agreements which directly or indirectly determine purchase or sale price.

3.3 The CCI has established price-fixing in a number of high-profile cases. In the 2012/2016 ***Cement Cartel Cases***, for example, the CCI found that a number of cement companies had acted in concert to fix prices of cement, resulting in high prices for consumers and high profit margins for the companies.

3.4 The CCI and the COMPAT have made it clear that price parallelism in itself is not sufficient to prove the existence of a cartel, and that, in the absence of direct evidence showing collusion, regard must be had to other "plus" factors. In the 2014 ***Steel Manufacturers Case***, the CCI found that independent manufacturers had simply mimicked their rivals' conduct; independent behaviour where pricing decisions were arrived at independently, taking account of the reactions of rival enterprises, could not lead to a finding of a cartel. In the 2012/2016 ***Cement Cartel Cases***, on the other hand, the CCI was able to establish a cartel on the basis of price parallelism supported by other factors, including the exchange of information on prices, common under-utilisation of capacity and high profit margins.

Limiting of production, etc. (Section 3(3)(b) of the Competition Act)

3.5 Section 3(3)(b) read together with Section 3(1) of the Competition Act prohibits horizontal agreements that limit or control production, supply, markets, technical development, investment or provision of goods or services.

3.6 The CCI has addressed a number of cases involving limitation of production. In the 2012/2016 ***Cement Cartel Cases***, for example, the CCI found that cement companies had used a platform provided by their trade association and shared details on prices, capacity utilisation, production and dispatch, thereby restricting production and supplies in the market. Where a number of ***explosives manufacturers*** had collectively boycotted an electronic auction held by Coal India, the CCI held this involved a breach of Section 3(3)(b). In other cases, the CCI has found that activities of trade associations and their members have resulted in the exclusion or disadvantaging of other market players, thereby limiting or controlling production. In the ***pharmacy sector***, for example, a number of chemists' associations have been penalised for requiring chemists or stockists to have non-objection certificates or to pay unjustified charges in order to operate.

Market sharing amongst competitors (Section 3(3)(c) of the Competition Act)

3.7 Section 3(3)(c) read together with Section 3(1) of the Competition Act prohibits market-sharing agreements between competitors involving the allocation of geographic areas, types of goods or services, or customers.

3.8 There have been relatively few cases involving market sharing. In the 2015 ***Bajaj Case***, the CCI found that a distributor association in the FMCG sector had instructed its members to sell only in the areas allocated to them and that this constituted market-sharing.

Bid rigging or collusive bidding (Section 3(3)(d) of the Competition Act)

3.9 Section 3(3)(d) read together with Section 3(1) of the Competition Act prohibits collusive bidding or bid rigging that has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. "Bid rigging" is broadly defined as any agreement between competitors "*which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding*".

3.10 Heavily relying on circumstantial evidence, the CCI has established bid rigging or collusive tendering in a number of cases. Objectionable behaviour has included identical or near-identical pricing of bids, limitation of quantities in bids despite having the capacity to bid for larger quantities, market sharing, collective boycotts of electronic auctions, bid rotation (or cover-bidding), and forced re-tendering of contracts.

4. Trade associations

4.1 Trade associations are an important part of Indian industrial and commercial life. The CCI recognizes that they have an important and legitimate role to play in areas such as standard-setting, innovation, health and safety, and environmental protection. However, it has recognized that trade associations can themselves engage in anti-competitive behaviour or act as a platform for collusion by members.

4.2 In a number of cases, the CCI has penalised trade associations for price-fixing or other anti-competitive activities. In the 2015 ***All Indian Motor Transport Congress*** case, for example, the CCI found that a transport association direction to its members to increase the prices of trucking services by 15% following an increase in the price of diesel was anti-competitive. The CCI has addressed widespread anti-competitive practices in the ***pharmacy sector***, including the requirement of non-objection certificates to carry on business, the allocation of geographic markets, collective boycotts and fixing of retail margins. In the ***film sector***, the CCI has acted against agreements imposing restrictions on the supply of films in other languages and on dubbed versions of films in other languages. The CCI has also found that agreements restricting the exhibition of movies by number of screens, and requiring new movies to be shown only in theatres with modern facilities, infringed Section 3 since they controlled and limited the distribution of the movies.

4.3 Trade associations can also act as a vehicle for exchanges of information between members. Such exchanges may be part and parcel of cartel activity. In the 2012/2016 ***Cement Cartel Cases***, the CCI found that an industry association had provided a platform for sharing information on costs, prices, production and capacities; this facilitated the member companies in determining prices in a concerted and collusive, rather than competitive, manner. Even in the absence of a cartel, the CCI is likely to look askance at exchanges of confidential competitor information which reduce strategic uncertainty about competitors' future plans.

5. International cooperation

5.1 The CCI has signed Memoranda of Understanding ("**MOU**") to enhance cooperation in competition matters with the US Federal Trade Commission ("**FTC**") and the Department of Justice ("**DOJ**"), the European Commission's Directorate-General for Competition, the Australian Competition and Consumer Commission, the Competition Bureau of Canada and the Federal Antimonopoly Service of Russia. In November 2013 the CCI entered into the Delhi Accord with the BRICS (Brazil, Russia, India, China and South Africa) competition agencies. The CCI is also a member of the International Competition Network and participates regularly in its meetings and conferences.

5.2 These MOUs are intended to increase cooperation and communication between the competition authorities. In particular, the MOU with the US FTC and DOJ recognizes that when the US and Indian competition agencies are investigating related matters, it may be in their common interests to cooperate. It also establishes a framework for the US antitrust agencies and the CCI to consult on matters of competition enforcement and policy.

5.3 Given the widespread globalization of business and trade, with companies often having a presence in multiple jurisdictions, it is particularly important for all group companies to be compliant with local competition laws as cartels can be discovered and penalised in any jurisdiction. Section 32 of the Competition Act confers jurisdiction on the CCI where an agreement has been entered into outside India, parties are outside India, or any other matter or practice or action arising out of such agreement is outside India, provided that the agreement has, or is likely to have, an AAEC in the relevant market in India. Although the CCI has not yet made any final orders in respect of any international cartel, it is only a question of time before it does so.

6. Investigations

6.1 An investigation into alleged anti-competitive conduct can be initiated by the CCI either on its own motion, on the basis of a complaint (information) or following a reference from the Central Government, a State government or a statutory authority. Cartel investigations can also be initiated further to a leniency application (see Part 9 below).

6.2 If the CCI, on the basis of the evidence available before it, forms a *prima facie* view that a breach of the Competition Act has occurred, it will order a detailed investigation into the matter by the office of the Director General ("**DG**"), which is the CCI's investigative wing. In carrying out its investigation, the DG has been vested with the same powers as a civil court under the Indian Code of Civil Procedure, 1908 in respect of matters like summoning and enforcing the attendance of any person and examining him on oath, requiring the discovery and production of documents, receiving evidence on affidavit, and issuing commissions for the examination of witnesses or documents. In addition to the informant and the enterprise(s) accused of contravening of the Competition Act, the DG will usually send information requests to competitors, suppliers, customers and consumers.

7. Dawn Raid powers

7.1 The CCI has the power to carry out unannounced visits of an enterprise (often called "Dawn Raids") to investigate allegations of a cartel. Dawn Raids are considered by more mature competition authorities an effective tool in investigating cartels. The powers of search and seizure are quite extensive and parties being raided have an obligation to cooperate with the CCI during the search. The DG may invoke the power of search and seizure only with the approval of the Chief Metropolitan Magistrate, New Delhi, if he has reasonable grounds to believe that the books and papers which are useful for evidentiary purposes may be destroyed.

7.2 The requirement to obtain a warrant from the Chief Metropolitan Magistrate means that the Dawn Raid powers have been used sparingly. Two Dawn Raids have been publically known to have been conducted to date. The first against JCB in an abuse of dominance case: the CCI proceedings were later stayed by the Delhi High Court on the basis of arguments that the CCI had misused its Dawn Raid powers and restrained the CCI from using the seized documents. The matter is now pending before the Supreme Court. The second Dawn Raid has been conducted against Eveready Industries. According to media reports, the company has confirmed that the Additional DG visited its office to "ascertain business related information" and the company officials cooperated and responded to all such queries as were raised by him and his staff during such visit. The company also confirmed that it was not aware about the nature or purpose of the collection of information by the Additional DG, including investigation of the same.

8. Penalties

8.1 If the CCI after inquiry finds that an agreement is in breach of Section 3 of the Competition Act, it may, amongst other things:

- pass "cease and desist" orders;
- impose a penalty not exceeding 10% of average turnover for the last three financial years. In case of cartels, the penalty is higher and can be up to three times of the profit or 10% of the turnover, whichever is higher, of each participant; and
- modify any offending agreement.

8.2 Contravention of the CCI's orders can lead to further penalties and the CCI can file a criminal complaint against such contravention which could result in the imposition of additional fines or even imprisonment for up to three years.

8.3 Individuals may also be liable to penalties where a company has contravened the Competition Act. Under Section 48 of the Competition Act, a person "in charge" of the company will be deemed to be guilty of the breach and liable to be punished unless he or she can show that he had no knowledge of the breach or that he had exercised all due diligence to prevent it. Other directors, managers, secretaries or other officers will be liable where it is proved that the breach took place with their consent or connivance, or that it was attributable to their neglect. The CCI is increasingly penalizing responsible individuals and office bearers for their involvement in breaches by their companies/ associations. It should also be noted that a person will not be eligible for appointment as a managing director, a full-time director or a manager of a company if he or she has been fined more than INR 1000 under the Competition Act.

8.4 The CCI has not yet issued any guidelines on calculating penalties and its approach must be gleaned from individual decisions. However, it should be noted that the CCI has not been hesitant to impose significant penalties for violations of the provisions of Section 3 of the Competition Act. It has on occasion imposed the maximum penalty of 10% of the annual turnover of the parties for a breach of Section 3, where the breach has been particularly serious or there has been a repeat breach. It has only rarely imposed the special penalties applicable to cartels. In the 2012/2016 ***Cement Cartel Case***, the CCI imposed a penalty of 50% of the profit of the companies for the two years of the cartel's existence, resulting in a total penalty of INR 6,300 crores (around USD 1,174 million), the highest penalty imposed in any case by the CCI so far. It should be noted that a number of penalties imposed by the CCI have been reduced by the COMPAT on the grounds that the CCI has not given reasons for imposing the level of penalty and has not properly taken into account aggravating and mitigating factors.

8.5 The CCI has taken the position that penalties should be calculated on the basis of an enterprise's entire turnover and not just the turnover attributable to the products covered by the infringement. In the 2013 ***Aluminium Phosphide Appeal***, the COMPAT held that, when deciding on penalty for multi-product companies, the CCI should only consider '*relevant turnover*', that is, turnover for the products covered by the infringement. The CCI has appealed the decision of COMPAT to the Supreme Court. Pending a decision by the Supreme Court, the CCI has, in later cases, continued to apply the total turnover test to multi-product companies, and the COMPAT, on appeal, has again rejected this approach.

9. Leniency regime

9.1 Section 46 of the Competition Act read with The Competition Commission of India (Lesser Penalty) Regulations, 2009 (No. 4 of 2009) (**"Lesser Penalty Regulations"**), prescribes when, how and to what extent the CCI can reduce the penalties for members of a cartel that make vital disclosure to the CCI.

9.2 It is important to consider the risks inherent in filing a lesser penalty application. The main risks that may arise are: (i) no guarantee of a reduction (the leniency regime in India is discretionary and provides a reduction in penalty of *up to* 100% to the first applicant, 50% to the second applicant and 30% to the third applicant); (ii) continued uncertainty whether the lesser penalty benefit will extend to individuals employed by a leniency applicant; and (iii) confidentiality concerns.

9.3 The law and practice on leniency are not yet developed in India and there are no published decisions of the CCI dealing with leniency applications. We are aware of only two applications for leniency before the CCI at present (in the broadcasting and conveyor belts sectors). In our experience, the CCI treats the leniency applicant as a "guilty" party, and may be somewhat aggressive in dealing with a leniency application.

Assessment and extent of reductions

9.4 Any reduction in the monetary penalty is a matter of discretion of the CCI which is to be exercised having due regard to: (i) the stage at which the applicant comes forward with its disclosure; (ii) the evidence already in the possession of the CCI; and (iii) the quality of the information provided by the applicant; and (iv) the entire facts and circumstances of the case. The amount of the reduction is capped depending on the applicant's position in the queue.

- ***First Applicant***: The first party to make a vital disclosure to the CCI can benefit from a reduction in penalty of up to or equal to 100%, if the disclosure enables the CCI either: (i) to form a *prima facie* opinion regarding the existence of a cartel, where the CCI did not have sufficient evidence at the time of the application to form such an opinion; or (ii) to establish contravention of the Competition Act by providing evidence which the DG or the CCI did not have in their possession in a matter under investigation.

- ***Second Applicant***: The second applicant can obtain a reduction up to or equal to 50% where the disclosure of evidence provides *significant added value* to the evidence already in the possession of the CCI or the DG.

- ***Third Applicant(s)***: The third applicant(s) in line may get a reduction of up to or equal to 30%, upon making a disclosure of evidence that provides *significant added value* to the evidence already in the possession of the CCI or the DG.

9.5 It is important to note that the parties cannot apply for leniency where the report of the DG in relation to the alleged infringement(s) has already been received by the CCI.

Conditions for grant of lesser penalty

9.6 A party seeking lesser penalty must fulfill the following essential conditions, as set out under the Lesser Penalty Regulations, in order to obtain a reduction in penalty:

- cease further participation in the cartel, unless otherwise directed by the CCI;

- provide vital evidence to the CCI;

- extend genuine, full, continuous and expeditious cooperation with the CCI throughout its investigation and other proceedings; and

- not conceal, destroy, manipulate or remove any relevant documents which may establish the existence of a cartel.

9.7 Where the leniency applicant fails to comply with the conditions listed above, the CCI shall be free to use the information and the evidence submitted by the leniency applicant in the proceedings before it.

Procedure on making an application

9.8 Any party applying for lesser penalty under the Competition Act can either:

- contact the designated authority (that is, the Secretary of the CCI) at the CCI orally, by email or by fax; or
- make a written application in the format set out in a schedule to the Lesser Penalty Regulations.

9.9 If a party communicates information orally or via email/fax, it will be required to submit a written application within a maximum period of 15 days. Where there has been a failure to submit an application within this period or such extended period as the CCI grants, the party may have to forfeit its claim for priority status and consequently the benefit of lesser penalty.

Evaluation of application and priority status

9.10 Until the CCI evaluates the evidence submitted by the first applicant, the CCI will not consider any other application for leniency. Applications filed subsequent to an application that is rejected by the CCI will move up in order of priority for the reduction in penalty. The CCI will mark the priority status of the application and will convey it to the party by phone, email or fax. The CCI will also provide a written acknowledgment on receipt of the application, informing the party of its priority status.

9.11 If the CCI finds that a party has not furnished full and true disclosure of the information or evidence as required under the Lesser Penalty Regulations or by the CCI from time to time, the CCI may reject the application; however, before doing this, the CCI is required to provide the party with the opportunity of being heard.

9.12 If an applicant has been granted immunity under the leniency provisions, such immunity will not extend to any compensation claims by third parties. This means that a successful applicant can still be made a party to a compensation claim before the COMPAT.

Confidentiality of lesser penalty applications

9.13 The identity of applicants as well as the information disclosed will remain confidential. However, the requirement on confidentiality can be dispensed with if: (i) disclosure is required by law; (ii) the party has agreed, in writing, to such a disclosure; or (iii) there has been a public disclosure by the party.

9.14 As seen above (Part 5), the CCI has the power to enter into memoranda or arrangements with foreign authorities to share information in relation to, among other matters, cooperation in the investigation of international cartels. The CCI can share information, which may include leniency applications, with other authorities with the prior written permission of the leniency applicant.

10. Interim relief at appellate stage

10.1 The COMPAT is empowered to grant interim relief against the orders passed by the CCI. However, the practice has so far been to not grant a blanket stay against the penalties and instead, order that a part penalty be deposited in an interest bearing account until the final disposal of the appeals.

10.2 In the absence of proper fining guidelines in India and considering the heavy fines imposed by the CCI, the COMPAT is usually liberal in awarding an interim stay (with a partial deposit of the penalty) until the final outcome of the cases.

Annex 1

Number of CCI and COMPAT decisions by year (since 2011)

As of 21/09/2016	Number of orders against cartels	Total fines imposed before appeals	Total fines imposed after appeals	% of orders set aside in whole or in part
2011	3	3,000,000	3,000,000	0%
2012	8	7,779,193,927	895,563,709	42%
2013	7	68,432,838	5,343,103	29%
2014	8	2,512,046,613	1,840,869,816	63%
2015	14	40,354,362,250	36,390,580,591	36%
2016	2	1,477,491,000	No appeals decided	No appeals decided
Total	**43**	**52,194,526,628**	N/A	N/A

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Mr. John Handoll is the National Practice Head, Competition Law with the Firm. He also works as the Senior Advisor, European and Competition Law. John is a specialist competition and regulatory lawyer with extensive experience of 35 years. Since arriving in India, John has developed expertise in a wide range of competition matters. Bringing his European and international experience to bear, he has worked with Indian lawyer members of the New Delhi competition team in a number of matters before the Competition Commission of India, the Competition Appellate Tribunal and the Indian courts. This has included working on merger notifications (including multi-jurisdictional filings), antitrust (including cartel investigations and leniency applications), and alleged abuse of dominance. John has also advised a number of Indian and multinational companies on compliance programmes and on preparing for dawn raids.

Over his career, John has worked for a wide range of international clients in a wide spectrum of economic activity. In India, he has worked with household names such as Vodafone (telecommunications) and Maruti Suzuki (motor vehicles). He has worked in a number of European jurisdictions – notably the UK, Belgium and Ireland. In addition to day-to-day practice in a range of national and EU areas, John has also published and lectured widely in the area of EU law. He has also acted as non-governmental adviser in the International Competition Network, working in the areas of mergers, cartels and unilateral behaviour.

Widely acclaimed as a top practitioner of European and Competition Law by a number of international media and legal publications, John is also the author of two full length volumes: Capital, Payments and Money Laundering in the European Union (Richmond Law & Tax, 2006) and Free Movement of Persons in the EU (Wiley Chancery, 1995).

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Mr. Naval Satarawala Chopra is a Partner in the Firm's Competition Law Practice, focusing on both contentious and non-contentious competition law matters. He is recognised as a leading practitioner of competition law and his clients include both private and government enterprises, including Microsoft, Facebook, Monsanto, National Stock Exchange, Uber, Singapore Airlines and VeriFone. Naval also worked closely with the Ministry of Corporate Affairs and the Competition Commission of India in the finalisation of the Indian merger control regime.

Naval was recently inducted by Global Competition Review in its list of top "40 under 40" competition lawyers worldwide. He is acknowledged by Chambers & Partners, 2015 as a "master strategist" who is known for his "very sound handle on Indian law" and his "ability to think out-of-the-box and find solutions by balancing the law and commercial considerations". The Indian Lawyer 250 has recognised him as "a very impressive young lawyer", who shows "a great level of responsiveness and client sensitivity", particularly in merger control matters. Naval has also featured in Global Competition Review's *The International Who's Who of Competition Lawyers & Economists* 2012, 2013, 2014 and 2015.

In 2014, Naval instituted a course on competition law at ILS Law College, Pune, where he teaches part time. His article, titled "The Curious Case of Compulsory Licensing in India", was declared as the best article in the business category, unilateral conducts section, at the World Antitrust Writing Awards 2013.

Naval is the author of the India Part of the Global Antitrust and Competition Law Compliance Handbook published by Oxford University Press and the India Part of the Wolters Kluwer publication, Competition and Patent Law in the Pharmaceutical Sector. He has also authored the India Part of the upcoming Private Equity Antitrust Handbook which will be published by the American Bar Association. His other publications include "Merger Control in India: A mixed bag" published in Euromoney, 2013 and "To Dub or Not to Dub" published in FICCI FRAMES Entertainment Lawbook, 2014.

He is qualified to practice in New York, England & Wales and India. He holds an L.L.B. from ILS Law College, Pune and an L.L.M. from University of Michigan, Ann Arbor. Prior to joining the Firm, Naval was an Associate in the India Group at Freshfields Bruckhaus Deringer, London for almost 5 years.

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Ms. Shweta Shroff Chopra is a Partner in the Firm's Competition Law Practice, and has over 12 years' experience in advising on financing, corporate and competition law matters. Shweta has been practising competition law since its early days in India, having been involved in several high profile cases relating to abuse of dominance, cartels and merger control. Shweta's clients encompass prominent names, including Temasek, Mitsui, BHP Billiton, ExxonMobil, Alstom, Blackstone, Vodafone, JK Group, Coal India, LafargeHolcim, Tata Chemicals, Hiranandani Hospitals and PVR Cinemas.

Shweta has been engaged in leading high profile enforcement cases before the Competition Commission of India (CCI) and the Competition Appellate Tribunal (COMPAT) including representing Hiranandani Hospitals in the Stem Cell Banks case, SpiceJet in the Fuel Surcharge case, Holcim group companies, ACC Limited and Ambuja Cements Limited, in the Cement cartel case, JK Tyre in the Tyres cartel case, Coal India Limited in abuse of dominance and cartel cases in relation to procurement of explosives, Tata Chemicals in the soda ash cartel case and Vodafone India Limited in an anti-competitive tie-in in a case involving the sale of Apple iPhones.

On the merger control front, Shweta was involved in two out of three seminal Phase II merger clearances in India, in relation to Holcim Ltd in its "merger of equals" with Lafarge S.A. and PVR's acquisition of DT Cinemas. Shweta has successfully obtained unconditional merger clearances from the CCI for various big ticket global and Indian transactions, including in relation to GE's acquisition of Alstom's energy business, JK Tyre's acquisition of Kesoram's tyre unit, Blackstone's acquisition of majority shareholding of Mphasis, Zuari (Adventz) Group's open offer for shares of Mangalore Chemicals & Fertilisers Limited, Temasek group's acquisition of majority shareholding in Olam Industries Limited, Huhtamaki Group's acquisition of Positive Packaging group, Beckman Coulter's acquisition of Siemens' Microbiology Technology business, Axiall LLC's joint venture for PVC compounds with DCM Shriram Limited and Nestle's acquisition of Pfizer's infant nutrition business, among others.

In Chambers and Partners Rankings 2016, she was the youngest Indian competition practitioner to be ranked in Band 2 and has been praised by interviewees for her proactive approach, and ability to "take the bull by the horns". According to Chambers and Partners Rankings 2015, Shweta is described by market sources as "a very smart lawyer with an in-depth approach, who has worked on big-ticket cases." She has been consistently "highly recommended" for her "impressive reputation"' as "a bright young legal talent of extraordinary quality". Shweta has also been recognized, based on an international peer review, for her professional achievements in the *International Who's Who of Competition Lawyers and Economists* every year since 2013 (by Global Competition Review and Law Business Research Ltd). She was also profiled in the *Asialaw Leading Lawyers* and the *Euromoney Guide to Leading BRIC Practitioners*. Shweta has also won the *"Young Lawyer of the Year (Female)"* Award at the Legal Counsel Congress & Awards 2014 (Mumbai) and selected by the international in-house counsel community as an outstanding practitioner in the Euromoney Guide to the *World's Leading Competition and Antitrust Lawyers/ Economists* 2014. Recently, in 2016, Shweta was featured by Legal Era in its list of *"Under 40 Rising Stars"*.

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Overview of cartel regulation in Japan

Anderson Mori & Tomotsune, Japan

1. Introduction

1.1 The Japan Fair Trade Commission (the "**JFTC**") has been particularly active in the area of cartel enforcement during the past ten years under the leadership of the current chairman, Mr Sugimoto, who was appointed in 2013, and his predecessor Mr. Takeshima, who was appointed in 2002. In Japan, cartels and bid-rigging have been traditionally common practices in certain sectors of the economy (such as the construction industry), partly because of established business practices in those sectors as well as the general harmonious and non-litigious Japanese culture. The JFTC has stated that rigorous enforcement of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Law No. 54 of 1947, the "**AMA**") with a view to swiftly eliminating cartels and bid-rigging is essential for the achievement of sound competition and providing increased benefits to consumers.

1.2 An important element of this increased focus on enforcement has been the ongoing strong take-up of the leniency programme which encourages cartel participants to voluntarily disclose to the JFTC their participation in cartel activities. During the 2015 fiscal year (1 April 2015 to 31 March 2016), the JFTC dealt with 102 leniency applications, meaning that a total of 938 leniency applications have been submitted to the JFTC since the leniency programme was introduced in January 2006.

1.3 The JFTC issued a formal administrative order in 7 cartel cases during the 2015 fiscal year (2 related to cartels and 5 related to bid rigging cases). The surcharges imposed for violations of the AMA (mainly cartels) totalled approximately JPY 8.5 billion (about USD 80 million)[1] (the 2010 fiscal year saw the highest surcharges to date being imposed by the JFTC at JPY 72 billion (approximately USD 680 million)). As a general observation, the level of enforcement has slowed down. In terms of number of orders issued and the total amount of surcharges, they are the lowest for the past five fiscal years.

1.4 Regarding criminal investigations, the JFTC has issued a policy paper that makes it clear that criminal penalties will be applied to serious violations that are likely to have a widespread influence on the domestic economy or involve firms or industries that are repeat offenders, and for which an administrative investigation would not be sufficient. Therefore, the criminal prosecution of cartels tends to be limited to the most serious types of illegal conduct such as repeated bid-riggings. There have been just 22 criminal accusations so far.

1.5 For additional statistics on JFTC cartel enforcement, please see the Annex 1.

2. Anti-cartel legislation and enforcement

Cartel regulations

2.1 The substantive provisions of the cartel prohibition are contained in the AMA.

2.2 Under the AMA, three types of conduct are prohibited with respect to cartels:

- entering into a contract or an agreement among business entities (this term includes companies and individuals) which eliminates or restricts competition among them, and that substantially restrains competition in a particular field of trade;
- the substantial restraint of competition in any particular field of trade by a trade association; and

[1] Using an approximate Japanese yen to US dollar exchange rate of 106 yen for 1 US dollar throughout this article.

- entering into an international agreement which amounts to an unreasonable restraint of trade or unfair trade practice.

The principal enforcement agencies

2.3 The JFTC is the sole competition agency in charge of the AMA's enforcement, except in the case of criminal investigations, where the public prosecutor's office is in charge of prosecution. Even in such cases, however, the Prosecutor General may indict parties for criminal offences only after the JFTC submits a criminal accusation.

International cooperation

2.4 In terms of cartel regulation, the JFTC has been one of the most sophisticated competition authorities in Asia and has increased its international profile through its recent vigorous enforcement against international cartels. This has resulted from parallel investigations and from cooperation with foreign authorities including the Department of Justice in the US and the European Commission. The JFTC plays an active role in international efforts toward strengthening links and cooperation among competition authorities, in particular in Asia, and has been active in training other Asian competition agencies, including those in China and in ASEAN countries.

Cross-border enforcement

2.5 Article 3 of the AMA does not expressly stipulate any limitations on the scope of the JFTC's jurisdiction. It is understood that the JFTC considers that it has jurisdiction over any activities that affect the Japanese domestic market, irrespective of where cartel agreements have been concluded.

2.6 For example, the JFTC issued a cease-and-desist order against a number of European companies in the marine hose case in 2008. In addition, the JFTC issued a cease-and-desist order and surcharge payment orders against foreign corporations in the CRT (cathode ray tubes for televisions) case in 2009/2010. The CRT case marks the first time the JFTC sanctioned wholly extraterritorial price-fixing cartel practices in which foreign companies with no subsidiaries or branches in Japan were ordered to pay a surcharge. After that, in May 2015, the JFTC hearing department adopted its long-awaited decision on appeal in the case which confirmed that the global cartel substantially restrained competition in Japan, including because competition in the field of sales of CRTs took place mainly over customers, the TV manufacturers, which were based in Japan. Both cases were the result of parallel investigations and cooperation with foreign authorities including those in the US and Europe.

2.7 Generally, however, the JFTC is usually reluctant to exercise its powers outside of Japan.

The scope for international cooperation regarding investigations

2.8 The AMA includes provisions which allow the JFTC to exchange information with foreign competition authorities. In addition, the JFTC has entered into bilateral cooperation agreements with the US and the European Commission which are mainly focused on general cooperation between the agencies, such as the exchange of information.

2.9 Disclosure of confidential investigative information and evidence is a violation of government officials' secrecy obligations and are subject to criminal sanctions. Therefore, during the course of the administrative procedure (discussed below), JFTC officials cannot exchange information which includes business secrets of the companies under investigation without prior permission or waivers to do so from the said companies.

2.10 In examining leniency applications, however, it is understood that the JFTC exchanges confidential information with foreign competition authorities including the contents of leniency applications, with the applicants' permission.

3. Investigation

The principal procedural steps of an investigation

3.1 Two types of investigative procedures are available to the JFTC: the administrative procedure, and the criminal procedure. For criminal proceedings, in addition to the JFTC's criminal procedure, public prosecutors can also conduct their own investigations if deemed necessary. As mentioned above, however, they cannot indict the target companies and their employees unless the JFTC requests them to do so.

3.2 The basic steps in both procedures available to the JFTC are as follows:

- preliminary investigation (based on various sources such as leniency applications);
- commencement of a formal investigation, which typically begins by the JFTC conducting on-site inspections at the premises of the target companies and on-site interviews with executives and employees. On-site inspections generally take one or two days;
- issuance of a report order against target companies and, if deemed necessary, customers and other third parties, and interviews with executives and employees. The companies are generally given two or three weeks to respond to report orders;
- issuance of draft orders (similar to the European Commission's Statement of Objections) to the target companies after the JFTC has concluded its investigation, which gives the companies an opportunity to ask questions and to submit opinions as well as relevant materials orally or in writing. Generally, it takes six months or more for the JFTC to issue draft orders, and the target companies are given two weeks to submit their opinions. The JFTC will examine these opinions and make amendments to the draft order, if deemed necessary; and
- issuance of cease-and-desist orders and surcharge payment orders.

3.3 Investigations usually take less than one year from the commencement of on-site inspections. The statute of limitations for cease and desist orders and surcharge payment orders is five years.

3.4 In terms of its powers of search and seizure, the JFTC may seize original documents and materials, including IT equipment, held at the offices of companies and private premises such as employees' homes. When investigating IT equipment, however, the JFTC generally chooses not to remove the original equipment (e.g. hard disk drives) and prefers to make copies of stored data instead for further examination.

3.5 As to the right of access to the JFTC's file, companies under investigation are given, at the time of delivery of draft orders, an explanation of the contents of the supporting evidence in the JFTC's file by investigators. However, companies under investigation have no access to exculpatory documents. Due to the rapid pace of the Japanese proceedings and the limitation on "rights of defence" described below, hard and intensive work of external attorneys is required to defend the targeted companies.

Key issues

3.6 The key issue in relation to JFTC investigations is the relatively weak "rights of defence" for companies under Japanese law. For example, there is no attorney/client privilege in Japan. Attorneys must keep client's information confidential, but the client cannot refuse to provide information based on attorney/client privilege. Particular attention should therefore be paid to documents possessed by a client containing attorney/client communications as these would normally be subject to disclosure. The same applies to documents held by or correspondence with in-house legal staff – such documents can be (and most likely will be) obtained by the JFTC during the dawn raid and used for the investigation.

3.7 Attorneys are not usually allowed to be present at interviews. During an investigation, the JFTC has the authority to question witnesses, and it will normally conduct a so-called "voluntary interview" on-site on the day of the dawn raid or later at the JFTC's premises. The JFTC may also issue a formal order to request a "compulsory interview".

3.8 The same limitations to companies' rights of defence apply in the case of a criminal investigation conducted by the public prosecutor's office.

3.9 In this regard, the JFTC issued the "Guidelines on Administrative Investigation Procedures under the Antimonopoly Act" in December 2015.[2] In the guidelines, the JFTC did not change its long-standing position that the concept of attorney-client privilege is not recognized in Japan. The guidelines recognize the right for outside counsel to be present during JFTC interviews under very limited circumstances, such as during interviews with foreign nationals.

4. Administrative penalties and criminal sanctions

Administrative penalties

4.1 For companies, the applicable sanctions are administrative orders and criminal fines, which can be applied cumulatively. The former includes cease and desist orders as well as administrative fines called "surcharges". In addition, companies may be subject to suspension of nomination by various governmental authorities regarding tendering for government contracts, which in practice is a significant punishment for large Japanese conglomerates that rely heavily on such government contracts.

4.2 For surcharges imposed against companies, the rates of the surcharge are fixed by the AMA and therefore the JFTC has no discretion as to the rate to be applied to the relevant sales amount. The base rates vary depending on the main type of business conducted in connection with the violation, and the maximum base rate is 10% of the sales amount of the relevant products or services in Japan for the period of infringement. In cases of infringements lasting more than three years, surcharges are calculated based on the most recent three years' sales amount only.

4.3 Specifically, the base rates of the surcharge are 10% for manufacturers, 3% for retailers and 2% for wholesalers. Lower surcharge rates apply to medium and small-sized companies with lower capital and fewer employees. The lower rates are 4% for manufacturers, 1.2% for retailers and 1% for wholesalers.

[2] JFTC press release of 25 December 2015, available at: http://www.jftc.go.jp/en/pressreleases/yearly-2015/December/151225.html

4.4 The surcharge calculation rate will be increased to 150 per cent of the original rate if the relevant company has been the subject of a different surcharge imposed within the past 10 years (i.e. in case of recidivism). In addition, the calculation rate for the surcharge will also be increased to 150 per cent of the original rate if the company played a major role in an "unreasonable restraint of trade" within the past 10 years. If a company falls under both of the above cases, the calculation rate for the surcharge will be doubled.

4.5 On the other hand, the surcharge calculation rate will be reduced by 20 per cent if:

- a company ceases its violation one month before the JFTC commences an investigation;
- the company does not fall under any of the cases for which the rate of the surcharge is increased; and
- the period for which the company has been in violation is less than two years.

4.6 Such aggravation or mitigation of the surcharge calculation rate is determined in accordance with the rate described at Annex 2.

Right of appeal against administrative liability and penalties

4.7 In Japan, prior to the recent amendment to the AMA, any appeal against the JFTC's administrative orders must first be subject to the JFTC's administrative hearing procedures. However, the amendment fundamentally revises the appeal procedure for JFTC decisions by: (i) abolishing the JFTC's hearing procedure for administrative appeals; (ii) abolishing the jurisdiction of the Tokyo High Court as the court that reviewed any appeal suits pertaining to decisions of the JFTC in the first instance; (iii) introducing a system where any first instance appeal pertaining to cease-and-desist orders and other matters shall be heard by the Tokyo District Court only (with a panel of three or five judges); and (iv) developing procedures for a hearing prior to issuing a cease-and-desist order or other orders to ensure due process.

4.8 Under the past system, if the JFTC issued a decision, the addressees usually declined the opportunity to lodge an appeal because the JFTC's administrative hearing procedures was seen as being essentially a rubber stamping process with a certain level of binding effect upon the court. However, under the new system, the opportunities for judicial review of the JFTC's decision will increase, and due process prior to the issuance of the JFTC's decision will become more important.

Criminal sanctions

4.9 For companies, the maximum criminal fine is JPY 500 million (approximately USD 4.7 million). For individuals, the maximum prison term is five years and the maximum fine is JPY 5 million (approximately USD 47,000). In judgments with prison terms of no longer than three years, probation (i.e. a suspended sentence) is possible at the courts' discretion. The maximum prison sentence handed down to date is three years (with probation) in the bearings cartel case. There are no fining or sentencing guidelines.

4.10 Other related offences may apply in relation to cartel investigations. The JFTC generally requests the party under investigation to submit a report relating to the violation as well as the sales revenues of the relevant products. Obstruction of justice (such as false reporting, resistance to the JFTC's inspections and destruction of relevant documents) could have serious negative effects including a criminal fine of up to JPY 3 million (approximately USD 28,000) and a one year jail term for the individual who destroyed evidence.

4.11 It should be noted that Japan has entered into criminal extradition treaties with only two countries: the US, and Korea. Under the treaty with the US, individuals can only be extradited for cartel conduct, and not for any related obstruction of justice charges.

4.12 Under both treaties, the government of Japan is not bound to extradite Japanese nationals, but may do so at its discretion. The government of Japan has not, to date, extradited any Japanese individuals for cartel violations.

5. Leniency/amnesty regime

Overview

5.1 Importantly, the JFTC has no discretion in determining the order of leniency applications and the percentage of reduction granted for cooperation. A maximum of five companies will be granted immunity from or a reduction in the surcharge. Once these maximum five slots have been filled, the JFTC cannot offer any kind of leniency to other companies, irrespective of whether they make a useful contribution to the JFTC's investigation. The timing of the application is therefore critical in Japan.

5.2 In principle, the leniency programme only offers leniency with respect to surcharges. Leniency is not available for criminal enforcement and civil litigation. However, regarding criminal procedures, the JFTC has published a policy paper stating that it will not request the public prosecutors' office to indict the first leniency applicant (including the officers and employees) who applies for leniency before the start of the JFTC's investigation. In this regard, the Japanese Ministry of Justice has also issued a statement stating that the public prosecutors' office will pay due respect to the policy of the JFTC. Japan has no amnesty plus regime.

The principal conditions for leniency

5.3 Under the leniency programme in Japan, a maximum of five companies (or group of companies) acting independently will be granted immunity from, or a reduction in, surcharges, by declaring their participation in a cartel.

5.4 The first applicant to apply for leniency before the start of a JFTC investigation is granted full immunity. The second applicant is granted a 50% reduction and the third, the fourth and the fifth are granted 30% reductions in the surcharge.

5.5 All applicants who apply for leniency after the start of the JFTC's investigation are granted the same 30% reduction, as long as: (i) the number of applicants, whether having applied before or after the start of the JFTC's investigation, does not exceed five; (ii) the number of applicants after the start of the JFTC's investigation does not exceed three; and (iii) the applicant provides the JFTC with evidence relating to facts that the JFTC has not already ascertained through its own investigation.

5.6 In addition to the above, leniency will not be granted if any of the following factual circumstances arises:

- the report or materials submitted by the leniency applicant contain false information;
- the leniency applicant fails to submit the requested reports or materials or submits false reports or materials (where the JFTC requests the leniency applicant to submit additional reports);
- the leniency applicant has coerced other cartel participants to engage in the given cartel, or has prevented cartel participants from leaving it; or
- the leniency applicant continued its participation in the cartel after the day of the commencement of the JFTC's on-site inspections (or, in the case of leniency applications after the JFTC's on-site inspections, the leniency applicant continued its participation in the cartel after the day of the submission of its application).

Marker system

5.7 Where leniency applications are made before the commencement of the JFTC's investigation, the ranking of each applicant will be determined based on the timing of the receipt of the Form 1 by the JFTC. A detailed report as to the cartel agreement is only required to be made in Form 2, which is required to be submitted within two to three weeks of the receipt of Form 1 by the JFTC. The submission of Form 1 functions as a quasi "marker".

Oral applications and other procedures to reduce the disclosure risk for leniency statements

5.8 The JFTC accepts, in special circumstances, oral statements from the applicant in respect of most parts of the relevant Form and the required attachments. However, it is still the case that the JFTC requires some of the information requested in the relevant Form to be provided in writing at the time of sending the Form by fax.

5.9 Up until 1 June 2016 the JFTC would disclose the identity of successful leniency applicants only if the applicants agreed to such publication. However, starting from 1 June 2016 the JFTC changed its policy and decided to automatically disclose the identity of all successful leniency applicants at the time it issues its order.

5.10 Despite the JFTC's new policy, the JFTC will not disclose the content of leniency application documents to other defendants or interested parties. In addition, applicants are generally able to keep the fact of the application for leniency confidential, if desired, up to the time when the JFTC issues its order.

6. Administrative settlement of cases

6.1 In Japan, there are no settlement and/or plea bargaining procedures outside the established leniency/amnesty policies because (as discussed above) the JFTC has no discretion in setting the amount of the surcharge or in determining the order of leniency applications and the percentage of the reduction granted for cooperation. Although it is possible to negotiate with the JFTC with regards to the scope of the relevant products or services or the scope of the sales revenues in Japan, the amount of surcharges is very predictable and therefore easy to estimate in Japan, compared to other jurisdictions.

6.2 In this regard, in 2015 Japan entered into an agreement in principle on the Trans Pacific Partnership (TPP). The JFTC is proceeding in making necessary amendments to the AMA in order to ensure that the TPP agreement will smoothly take effect in Japan, including through the introduction of a "commitment" system to be potentially used in relation to abuse of dominance cases and mergers. Furthermore, the JFTC has started to consider the introduction of a discretionary surcharge system to enhance the JFTC's investigative capabilities.

6.3 On this matter, the JFTC considers that if the "rights of defence" are enhanced, the JFTC's investigative capabilities should also be enhanced in order to properly enforce the AMA.

7. Developments in private enforcement of antitrust laws

Overview

7.1 As to private enforcement in Japan, although there is a risk of potential civil damages claims from customers, the number of such damage suits has so far been small in Japan (partly due to the historic aversion by Japanese companies to use the court system for such claims). Courts do not apply treble damages and there are no class actions in Japan.

Courts/tribunals that have jurisdiction to hear cartel damages claims

7.2 The most frequently used grounds for private actions for damages in relation to violations of the AMA are article 25 of the AMA and article 709 of the Civil Code. Article 25 of the AMA stipulates that any business entity that has committed a violation of the AMA shall be liable for damages suffered by another party, while article 709 of the Civil Code stipulates that a person, who has intentionally or negligently infringed any right or legally protected interest of another, shall be liable to compensate any resultant losses.

7.3 Private actions brought pursuant to article 25 of the AMA must be brought solely before the Tokyo District Court, acting as the court of first instance, after the JFTC's relevant orders become final. Actions brought pursuant to article 709 of the Civil Code should be brought in the relevant district court. An appropriate nexus for the choice of district court in article 709 actions is generally the place where the conspiracy or act occurred (or where the tortious loss arose), or the location of the defendant's headquarters.

Proof of violations and damages

7.4 In the case of litigation based on article 25 of the AMA, there is a rebuttable presumption, based on the JFTC's relevant decision, that the defendant violated the AMA and, in practice, it is difficult for the defendant to rebut this presumption. Article 709 litigation may be brought without a final decision of the JFTC concluding that the defendant has violated the AMA, in which case the plaintiff must prove the existence of a violation.

7.5 In addition, in relation to litigation based on article 25 of the AMA, plaintiffs are exempt from the requirement to prove the defendant's wilful or negligent violation of the AMA (although this is still required for actions based on article 709 of the Civil Code). Plaintiffs must, however, prove the amount of damages and the existence of a causal relationship between the losses and the illegal conduct.

7.6 Regarding measures allowing plaintiffs to collect evidence, a party to a lawsuit may request the court to commission, or order, the holder of a specific document (e.g. evidence in the JFTC's case file) to send that document into court, so that the plaintiff may, under certain conditions and subject to certain exceptions, use it as evidence.

The general rules for damage calculation and cost for civil damages claims in cartel cases

7.7 In general, damages are limited to actual losses that have a reasonable causal link to the harmful act or conspiracy. With regard to the calculation of damages, article 248 of the Code of Civil Procedure stipulates that where this calculation is extremely difficult owing to the nature of the losses, the court may determine a reasonable amount of damages, based on the evidence and oral submissions.

7.8 In addition, for litigation based on article 25 of the AMA, the court may ask for the JFTC's opinion as to the amount of damages. Essentially, the JFTC bases its opinion on a comparison of prices before and after the cartel conduct.

7.9 Both direct and indirect purchasers can claim cartel damages. To date, there are no precedents where the courts have explicitly allowed a 'passing-on defence' by that name in Japan, though such defence may be taken into account by the courts as one of the considerations for evaluating damages. There are provisions for joint and several liability in the Civil Code and this general principle has also been applied to damages claims in cartel cases.

7.10 As to costs, the general rule is that the defeated party bears the costs of the proceedings in civil lawsuits (which usually do not include each party's attorneys' fees) pursuant to the Code of Civil Procedure, and this also applies to damages claims in cartel cases.

Shareholder derivative suits

7.11 As to civil liability, directors of companies who are involved in cartels should be aware of the risks they face through shareholder derivative suits. In a number of recent cases, the plaintiffs have argued that directors who failed to apply for leniency properly and failed to establish a compliance system, breached their fiduciary duties. In May 2014 in the Sumitomo Electronics wire harness case, directors of the company paid the highest ever settlement (JPY 520 million which is approximately USD 4.9 million) following a shareholder derivative suit. This case is noteworthy in that the management of Sumitomo actually applied for leniency and obtained immunity, but the JFTC took a very narrow and rigid view as to the delineation of the scope of leniency and only granted leniency on a customer by customer basis. This meant that Sumitomo obtained immunity for products sold to one large customer but not for products sold to two other key customers.

Annex 1: Statistics on JFTC cartel enforcement

A. Changes in annual surcharge amounts over the last decade (the amounts are mainly for cartels but also cover abuse of superior bargaining position)

Fiscal Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Amount (JPY Billion)	9.26	11.29	27.03	36.07	72.08	44.25	25.07	30.24	17.14	8.51

B. Number of cases for which the JFTC took legislative action and, among those, the number of cases and the number of companies for which leniency was applied

Fiscal Year	Number of cases of bid rigging and price cartels, etc., for which legislative action was taken	Number of cases in which the application of the leniency system was publicly disclosed	Number of companies for which the application of the leniency system was publicly disclosed
1 April 2005 - 31 March 2006	17	0	0
1 April 2006 - 31 March 2007	9	6	16
1 April 2007 - 31 March 2008	30	16	37
1 April 2008 - 31 March 2009	11	8	21
1 April 2009 - 31 March 2010	22	21	50
1 April 2010 - 31 March 2011	10	7	10
1 April 2011 - 31 March 2012	17	9	27
1 April 2012 - 31 March 2013	20	19	41
1 April 2013 - 31 March 2014	17	12	33
1 April 2014 - 31 March 2015	7	4	10
1 April 2015 - 31 March 2016	7	7	19
Total	**167**	**109**	**264**

C. Number of applications for leniency for each fiscal year

Fiscal Year	Number of leniency applications
4 January 2006 – 31 March 2006	26
1 April 2006 – 31 March 2007	79
1 April 2007 – 31 March 2008	74
1 April 2008 – 31 March 2009	85
1 April 2009 – 31 March 2010	85
1 April 2010 – 31 March 2011	131
1 April 2011 – 31 March 2012	143
1 April 2012 – 31 March 2013	102
1 April 2013 – 31 March 2014	50
1 April 2014 – 31 March 2015	61
1 April 2015 – 31 March 2016	102
Total	**938**

Annex 2: Commission's method of setting fines

Calculation rate for surcharge

	General base rate (medium and small-sized companies)	Mitigated rate	Aggravated rate	Rate where several aggravating requirements are satisfied
General	10% (4%)	8%	15%	20%
Retailers	3% (1.2%)	2.4%	4.5%	6%
Wholesalers	2% (1%)	1.6%	3%	4%

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- "Parallel Importation and Patent Protection", International Commercial Litigation (Euromoney, Publishers)
- PLC Cross-border Competition Handbook 2006/07 Volume 2: Leniency (Practical Law Company, 2006) (co-author)
- "Leniency Regimes", (Japan Part) (European Lawyer Reference, 2007, 2010) (co-author)
- "Getting the Deal Through – Private Antitrust Litigation 2009", Getting the Deal Through, Japan Part, October 2008 (co-author)
- "Recent Developments in Merger Review: New Jurisdictions, New Rules, New Challenges" (Speaker) (IBA, April, 2009)
- "Recent Trends in Private Antitrust Litigation in Japan", Global Competition Litigation Review (GCLR), Volume 3 Issue (January 2010) (co-author)
- "Japan: Merger control" (The Asia Pacific Antitrust Review 2010) (Global Competition Review) (co-author)
- "Global Legal Insights – Cartels (1st Edition)", Global Legal Group, Japan Part, November 2012 (co-author)
- "Introduction to Japanese Business Law & Practice", LexisNexis Hong Kong, December 2012 (co-author)
- "Q&A: Strategies for Corporate Law Practice in Asia and Emerging Countries", Shoji Homu, 2013 (co-author)
- "Introduction to Japanese Business Law & Practice Second Edition" (LexisNexis Japan, 2014) (co-author)
- "Japanese Anti-monopoly Act – Annotated", Koubundou, 2014 (co-author)
- "2014 Antitrust Year In Review", ABA International Law Section, International Antitrust Committee, Japan Part, May 2015 (co-author)

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Recent Publications/Lectures
- "An unlikely union: a Greek lawyer in Japan", Asahi Online (Asahi Judiciary), July 2015
- "International Licensing and Technology Transfer: Practice and the Law (ILTT) #12", Competition Law, Japan Part, Kluwer Law International, June 2015 (co-author)
- "The Merger Control Review, Sixth Edition", Japan Part, Law Business Research, July 2015 (co-author)
- "World trends in enforcement of antitrust/competition law – recent developments in the EU and US and increased enforcement activity in Asia", The Lawyers (December 2014) (co-author)
- "Private Enforcement and Leniency in Japan: Towards a "European" Model for Reform?", Global Competition Litigation Review (GCLR), Volume 7 (Issue 1, 2014) (co-author)
- "EU Competition Law", lectured at the seminar held by EUIJ Kansai and Osaka University Law Faculty (28 May 2014)
- Took part at a hearing of the Cabinet Office of the Government of Japan on the investigative procedures of the Japan Fair Trade Commission and made a comparative presentation with the applicable procedures at EU level (11 April 2014)

Overview of cartel regulation in China

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1. Introduction

1.1 Before the Anti-Monopoly Law (the "**AML**") came into effect on 1 August 2008 cartels among competitors (or "horizontal monopoly agreements") were either regulated by the Price Law or the Anti-Unfair Competition Law. The former covers price related cartels while the latter focuses on bid-rigging. Compared to the AML, the penalties under these two statutes are far less severe. After the AML entered into force, the competition authority in charge of the anti-cartel provisions, following a period of "internal testing", became active in the enforcement of such provisions and, since 2013 has imposed significant fines on cartelists. Apart from dealing with cartels, which have been investigated and fined in other jurisdictions, we have also witnessed the competition authority in China demonstrating its ambition to participate in global on-going investigations and play a significant role, similar to its counterparts in other jurisdictions. As to recent cartel cases handled by the competition authorities in China, please refer to the brief summary shown in Annex 1: Recent enforcement in cartel cases in China.

2. Anti-cartel legislation and enforcement

Article 13 of the AML

2.1 Article 13 of the AML expressly prohibits competitors from reaching "monopoly agreements" with respect to price fixing, output restriction, market allocation, boycotts and restrictions on new technology. "Monopoly agreements" refers to agreements, decisions or other concerted behavior that may eliminate or restrict competition. Overseas cartels that eliminate or restrict competition in a domestic market are also subject to this Article.

2.2 There are two authorities in charge of anti-cartel enforcement in China under the AML, one is the National Development and Reform Commission (the "**NDRC**") and the other is the State Administration for Industry and Commerce (the "**SAIC**") (collectively, the "**Authority**"). The former is responsible for price-related cartels, such as price fixing, while the latter deals with non-price-related cartels, such as output restriction. In the case of a cartel involving both price-related and non-price-related cartels, the two authorities have mutual jurisdiction and/or conduct joint enforcement.

Enforcement of price-related cartel

2.3 The NDRC is the competent authority for detecting, investigating and sanctioning price-related monopolies, including, among others, price fixing. It has promulgated two relevant regulations for substantive and procedural issues, respectively. Several provincial level DRC and Price Bureaus authorized by the NDRC also have the authority to deal with price-related cartels and their powers of investigation are identical to those of the NDRC. In practice, the NDRC or their local counterparts are aggressive in enforcement and have imposed significant fines in several landmark cases.

Enforcement of non-price-related cartel

2.4 Compared to the NDRC, the SAIC is in charge of non-price-related cartels, for instance, output restrictions and market allocation. Two relevant regulations have been issued by the SAIC concerning the substance and procedures in cartel cases. Local AIC offices at the provincial level can be authorized by the SAIC to investigate cartels on a case-by-case basis. In practice, for nationwide cases with significant effects on the market, SAIC will be responsible for investigation with assistance from various local AICs concerned.

New guidelines

2.5 In order to enhance the transparency and consistency of the investigations conducted by the NDRC and the SAIC in monopoly cases, the Anti-monopoly Commission of the State Council (the **"Anti-monopoly Commission"**) has been working on various draft guidelines, among which the following three drafts are most relevant with respect to cartel cases: (i) Guideline on Leniency Policies in Horizontal Monopoly Agreement Cases (the **"Draft Cartel Leniency Guideline"**), (ii) Guideline on Determination of Undertakings' Illegal Gains from Monopolistic Conducts and Determination of Fines (the **"Draft Illegal Gains and Fines Guideline"**), and (iii) Guideline on Monopoly Agreement Exemption Procedure (the **"Draft Exemption Procedure Guideline"**). These drafts are seeking comments from the public at present. Once implemented, these guidelines will contribute to a more consistent and predictable application of the AML in China.

International cooperation

2.6 As of now, the NDRC and the SAIC have reached Memorandums of Understanding for antitrust cooperation with various major jurisdictions, notably the US, UK, Korea and Brazil. The Memorandum of Understanding with Competition Directorate-General of the European Commission was signed in 2012 and covered legislation, enforcement and technical cooperation regarding cartels, other restrictive agreements and abuse of dominant market positions.

2.7 In addition to the Memorandums of Understanding, high level dialogues and forums between the agencies are held regularly and a series of training seminars allowing officials to visit their counterparts in other jurisdictions are also available annually.

2.8 In practice, we have witnessed an increase in cases; the NDRC and SAIC maintain close communications with their counterparts in other jurisdictions, especially for cartel cases.

3. Investigations

3.1 The NDRC and SAIC have wide powers of investigation and investigations against cartels are primarily triggered as a result of:

- A voluntary disclosure by one or more of cartelists by virtue of a leniency policy
- An ex officio action initiated by an authority
- A complaint of a third party, such as a customer, competitor or anyone aware of the cartel
- A media report.

3.2 Once the Authority preliminarily suspects there might be a cartel, it will usually conduct an on-site investigation without any advance notice at the location(s) of the undertakings concerned i.e. "dawn raids". The authority might have also collected preliminary data from the whistleblower or the complainant.

3.3 Neither the NDRC nor SAIC will, as a matter of practice, announce publicly that they have decided to open a formal proceeding. However, after they have compiled sufficient evidence, they may make a brief statement to the public, sometimes via the media, that they are investigating the case formally.

3.4 The investigated undertaking has the right to state opinions as well as the right to a hearing. Nevertheless, the law does not provide for any right to access the Authorities' files or any right to legal professional privilege.

3.5 In the course of the investigation, the investigated undertakings may apply for a suspension of investigation and make a commitment to adopt measures to eliminate the influence of the alleged conduct. If the Authority accepts the commitment, they may decide to suspend the investigation and monitor the fulfillment of the commitment.

3.6 The final decisions of the NDRC and SAIC are released publicly on their official websites, with commercial information redacted.

3.7 It is difficult to summarize the timing for cartel cases, which largely depends on the scale, complexity and other practical reasons, which vary from case to case. Usually, for domestic cartels, the investigation may last one or two years, while for international cartels the timeframe will be longer.

Dawn raid

3.8 Recently, dawn raids have become a very useful tool for antitrust investigations in China. Both the NDRC and the SAIC enjoy broad and significant powers in the course of dawn raids. Specifically, they are entitled to 1) enter and investigate the business location(s) of the undertaking in question and/or other related locations; 2) interview the investigated undertaking and/or other interested or related entities or individuals and request statements of relevant information; 3) make copies of files and documents, such as relevant vouchers, agreements, accounting books, business letters, and electronic data; 4) seize or confiscate related evidence; and 5) access information on bank accounts.

3.9 In most cases, dawn raids mainly target the premises of the investigated undertakings. In the case of dawn raids of various subsidiaries in multiple locations, the Authority will seek assistance from and coordinate with its local counterparts in order for the raids to proceed at the same time.

3.10 We have also witnessed, however, a few cases in which the Authority entered the premises of a related entity to seize necessary documents.[1]

3.11 The AML requires that at least two investigating officials participate in a dawn raid. Usually, the investigation team consists of one or two officials from the NDRC/SAIC and several officials from local offices. The officials must present their certificates of enforcement.

3.12 Under the AML and the procedural regulations issued by the SAIC and NDRC, the investigated undertaking or any interested or related entities/individuals subject to the investigation have the obligation to cooperate with the Authority and are not allowed to refuse or hinder the investigation. Individuals or entities that refuse or obstruct investigations in any manner, including refusing to provide relevant documents or information, submitting fraudulent documents or information, and/or concealing, destroying or removing evidence, may be required to rectify such actions and may be fined an amount less than RMB 20,000 (individuals) or RMB 200,000 (entities). In serious circumstances, the Authority may impose a fine from RMB 20,000 to RMB 100,000 on an individual, and a fine from RMB 200,000 to one million RMB on an entity.

3.13 The Authority has the power to interview and take statements from any employees of the investigated undertaking or any related/interested individuals; such individuals are obliged to fully cooperate as indicated above. Nevertheless, the Authority is not empowered to have such persons detained for testimony. In international cartels where the concerned individuals are present outside

[1] In the investigation against Microsoft, SAIC entered the premises of Accenture, which maintained Microsoft's financial data.

China, the Authority may request that the individuals be interviewed personally in China. How such persons react will be regarded as an indicator of whether and to what extent the undertaking is cooperating with the Authority.

Information request

3.14 The extensive antitrust enforcement powers enjoyed by the Authority include requesting information from the investigated undertakings or related parties at any time in the course of the investigation.

3.15 In most cartel cases, a Request for Information ("**RFI**") is issued after the dawn raid and addressed to the investigated undertakings. Compared to an RFI, it seems that the Authority prefers to consult third parties using other methods, for instance, by letter. In practice, an RFI does not have any fixed format and may be sent piecemeal by the Authority, based on the interests of efficiency. Refusing to reply to the RFI or submitting fraudulent documents or information is subject to the penalties as indicated in paragraph 3.12 above.

3.16 As to multinational companies, RFI will be sent to their subsidiaries in China, while the addressees may include both the parent company and the subsidiaries.

Additional investigation tool

3.17 In addition to collecting information via dawn raids or RFI, the Authority may be able to obtain information from its counterparts in other jurisdictions with bilateral cooperative relationships with the Authority in China. This data sharing scheme is not only present in the cases in other jurisdictions where fines have been issued, but increasingly in ongoing cases. Mutual understanding memorandums are exchanged among the competition authorities globally, including China.

Right to state opinions

3.18 The concept of a "right to defense" does not exist in China, but the investigated undertakings have the right to state their opinions. It is understood that the implications of the "right to state their opinions" are similar to those of the "right to defense."

Legal professional privilege

3.19 There is no corresponding concept with the "legal professional privilege" in China; therefore, in principle, the Authority is entitled to obtain written information exchanged between the investigated undertaking and its in house counsel/external counsel.

Confidentiality

3.20 Under the AML, the Authority and its officials have the duty to keep confidential all business secrets that they have obtained during the course of the enforcement.

3.21 The Draft Cartel Leniency Guideline provides that the leniency documents submitted by the undertakings should not be used as evidence in relevant civil litigations except as otherwise required by law. However, given that the guideline is only an informative guiding document which is not binding on the People's Court's adjudication behaviors as the statutory code, there are some uncertainties on whether and to what extent the undertakings can keep their leniency documents from being collected by the People's Court in related private litigations.

4. Sanctions

Administrative sanctions

4.1 Under the AML, the sanctions that the Authority may impose on cartelists include: 1) ordering to cease violations; 2) confiscating illegal gains and; 3) imposing fines. The Authority has no right to impose criminal sanctions on the involved individuals.

4.2 In practice, the NDRC and SAIC have different preferences in their enforcement. It appears that in most cases handled by the SAIC, confiscation of illegal gains and fines were jointly used; while the NDRC preferred to solely impose fines.

4.3 The Draft Illegal Gains and Fines Guideline intends to achieve balance among these different practices and aims at providing more guidance to both the Authority and the public. Under the draft guideline, illegal gains refer to the income increased or the expense reduced of the undertaking as result of the cartel. In determining the amount of the illegal gains, the Authority will consider the caused changes in the price of relevant products, the market share, the sales volume and the profit margin, as well as the characters of the industry comprehensively, and where necessary, apply economics methodology in conducting the analysis. The Authority may conclude that the undertakings have no illegal gains if the cartel has not resulted in distinct changes of the sales volume, price or competition status of the market. Moreover, if it is impossible to precisely determine the amount of illegal gains due to objective reasons, the Authority may determine not to confiscate such illegal gains and such non-confiscation should be taken into consideration when determining the amount of fines.

4.4 A rough range of fines is set forth in the AML, i.e. 1% up to 10% of the turnover of the undertaking in the last financial year.

4.5 In practice, the NDRC and SAIC have used as the basis for calculation the turnover of the cartelist's relevant products in China in the last financial year. In the latest Qualcomm case handled by NDRC, which is not relevant to cartels, the calculation base was not limited to the turnover generated by the relevant products, but the overall turnover of Qualcomm within China.

4.6 According to the Draft Illegal Gains and Fines Guideline, normally the Authority uses the turnover in the financial year preceding the launch of the investigation as the base for its calculation. Where the cartel has ceased before the investigation, the turnover of the financial year preceding the ceasing of the cartel shall be used instead. In addition, the turnover used as the base for calculation will generally be limited to that generated from relevant products within the territory scope of the cartel, with an exception that if the territory scope exceeds China, the Authority will generally use the turnover generated from relevant products sale within China.

4.7 Under special circumstances where the turnover determined based on the above is not sufficient to reflect the damages caused by the violator to the market competition and consumers' interest, and thus the fines so determined are not proportionate to the fault of the violator or do not realize the deterrent effect of the law enforcement, the Authority may determine an amount of less than the multinational's global turnover as the base for calculation. Specifically, the Authority may exercise such discretion under the following circumstances (not exclusive): (i) where the global turnover of the undertaking is far beyond its turnover in the relevant territorial market, and the turnover in the relevant territorial market is not sufficient to reflect the degree of the damage caused by the violating behavior (in view of the nature of the cartel and the severe damage it caused to competition and consumers' interest); (ii) where a multinational that has entered into and implemented a cross-border cartel does not have (or has minimal) turnover in China, which cannot reflect the extent of the damage caused by the cartel.

4.8 To determine the specific amount of fines, the Authority may consider factors such as the nature, extent and duration of the violations according to the AML. In practice, the Authority will also take account of the extent to which the undertaking concerned cooperated with the investigation and, therefore, what level of leniency will be granted to such undertaking.

4.9 As mentioned in Part 4.4 above, the AML provides a broad range of fines, i.e. from 1% up to 10% of the turnover of the undertaking in the last financial year. Accordingly, the Draft Illegal Gains and Fines Guideline provides detailed instructions on determination of the exact percentage of turnover to be adopted. Such percentage includes the initial percentage and various adjustment factors. If the cartel lasts for less than one year, where the undertakings implement cartels prohibited in items (1), (2) and (3) of Article 13 of the AML (i.e. price fixing, limitation of production or sales volume, and allocation of market among competitors), the initial percentage is set at 3%; for other kinds of horizontal agreements, the initial percentage is 2%. Where the cartel lasts for more than one year, 1% shall be added to the initial percentage for every additional year. If the additional time of duration is less than 6 months, 0.5% shall be added to the initial percentage; and if more than 6 months but less than one year, 1% shall be added.

4.10 The Authority may impose a fine of less than RMB 500,000 where a monopoly agreement has been reached, but not implemented, by the undertakings. If a trade organization facilitates or organizes a monopoly agreement among industry members (notably, the members of the trade association), the Authority may impose a fine of less than RMB 500,000.

Follow-up private litigation

4.11 Under Article 50 of the AML, where any undertaking causes damage to others through monopolistic behavior, such operator may incur civil liabilities. China has seen a substantial increase in private actions since the AML came into effect in 2008.

4.12 For tort claims under the AML in China, the general rule according to the Civil Procedure Law is that the plaintiff should prove the elements of monopolistic behavior, causation, and damages; while the defendant must provide proof of all defenses invoked. Therefore, the burden of proving the existence of a cartel is on the plaintiff.[2] As it is usually difficult for individuals to detect and prove the existence of a cartel, an administrative decision that confirms the existence of a cartel may be regarded as prima facie evidence for the court.

4.13 In the case of claims for damages, upon requirement by the plaintiff, the court may also include the reasonable expenses incurred by the plaintiff in investigating and preventing the defendant's monopolistic behavior. But, neither the AML nor the regulations provide any rules on how to calculate damages. Under the Civil Procedure Law, since the plaintiff claims the damages, the plaintiff should prove the amount of the damages. Under the Tort Liability Law, in case of infringement of property, the damages incurred due to such infringement are calculated based on the prevailing market prices thereof or in other ways, and without further statutory clarification, such other ways should be further determined by the court in private litigation cases.[3] Therefore, no punitive damages, such as treble damages, are assessed in China.

[2] The Supreme Court promulgated the Regulations of the Supreme Court on Several Issues on the Application of Law to Civil Disputes Caused by Monopolistic Behaviors on 3 May 2012 which provides that "for tort claims against certain horizontal monopolistic agreements including fixation of price, restriction of outcome, division of market, restriction of new technology and boycott, the burden of proving that the agreement does not have exclusive and/or restrictive effect on competition is on the defendant."

[3] See Art. 19 of Tort Liability Law of the People's Republic of China (PRC Tort Liability Law).

5. Leniency

5.1 In China, leniency applications have become the most efficient way to detect cartels, especially international cartels involving multinational companies with negative effects on the domestic market.

Overview of the leniency policy

5.2 The Authority is empowered by the AML to grant immunity or mitigate the penalties assessed on an undertaking engaged in a monopoly agreement where the undertaking voluntarily discloses information about the monopoly agreement and provides critical evidence to the Authority.[4]

5.3 The procedural regulations issued by the NDRC and SAIC, respectively, provide the general principles for leniency. Generally speaking, in granting leniency, the Authority usually considers the time of the leniency application, the importance of the evidence provided and the extent of cooperation. The detailed rules may vary between the NDRC and the SAIC. The Draft Cartel Leniency Guideline, if implemented, will reduce the inconsistency of the current leniency policies of the Authorities.

Leniency policy of NDRC

5.4 Under the procedural regulations issued by the NDRC, it is expressly provided that full immunity may be granted to the first undertaking to report relevant information on the existence of a cartel and to provide critical evidence; the second undertaking to report relevant information on the existence of a cartel with critical evidence, may have its fine reduced by 50% or more; as to others that take the initiative to report relevant information on the existence of a cartel and provide critical evidence, the fines may be reduced by 50% or less. "Critical evidence" refers to the evidence that is critical for the NDRC to determine the existence of a price monopoly agreement.

5.5 In practice, the extent of cooperation by the applicant in the course of an investigation will be largely taken into account by the NDRC in granting immunity/reduction of fines.

Leniency policy of SAIC

5.6 In contrast to the NDRC, the order of applications is not specified as an important factor for leniency in the procedural regulations issued by the SAIC. The SAIC only emphases its discretion in granting immunity and reduction of fines and clearly provides that the organizer of the cartel is not qualified for leniency.

Leniency policy under the Draft Cartel Leniency Guideline

5.7 The Draft Cartel Leniency Guideline provides that the Authority shall determine priority sequence of the leniency applicants mainly based on time sequence of their applications. The Authority may grant immunity or mitigate by no less than 80% of the penalties to the first qualified undertaking, and the first undertaking which reported the cartel prior to the commencement of the investigation shall be granted 100% immunity. The Authority may mitigate the penalties for the second applying undertaking by 30% to 50%, and for the third (and afterwards) applying undertaking by no more than 30%. Generally, the Authority may apply leniency policies to up to three undertakings in one case except for some special circumstances.

[4] This rule is not only applicable to cartels but also applies to vertical monopoly agreements. We have witnessed that in vertical restraints, the Authority has granted to certain undertakings immunity from fines.

5.8 The Authority generally will not grant any immunity to the undertaking who coerces other undertakings to participate in the cartel or prevents them from ceasing the cartel, but the Authority may reduce the penalties on such undertaking when appropriate.

Procedure for leniency application

5.9 Before the Draft Cartel Leniency Guideline is implemented, there is no procedural rule, either formally promulgated or drafted, for leniency applications in China. In practice, the undertaking wishing to apply for leniency needs to submit evidence to the Authority. However, whether the evidence is ultimately crucial for the undertaking to be qualified for leniency may not be known until the investigation comes to an end. Moreover, there is also no clear scheme to mark or flag the order of applicants.

5.10 The Draft Cartel Leniency Guideline provides detailed procedural rules on leniency applications. Undertakings shall submit (i) a report expressly admitting that it has concluded the cartel; and (ii) all important evidential materials in the possession of such undertaking, which includes: if the Authority has not yet obtained any clue or evidence of the case, evidence which is sufficient for the Authority to commence investigation; if the Authority has already commenced investigation, evidence which has significant added value, including: (a) evidence showing the existence of the cartel with more probative value; (b) evidence proving the contents, time of conclusion and implementation, scope of the products or services involved and participants of the cartel; and (c) any other evidence which may enhance the evidential weight.

5.11 Undertakings who are unable to provide all the materials at the time of application for leniency may submit preliminary reports initially. The undertakings have no longer than thirty (30) days (which may be extended to sixty (60) days) to complete their reports. The time when the Authority receives the preliminary reports shall be deemed as the time of application. If the undertakings failed to complete the reports within the time limitation, it will be deemed as not having submitted the application. The sequential orders will be determined by the time of applications.

6. Suspension of investigation

6.1 Article 45 of the AML provides for the "suspension of investigation". In the course of an investigation, if the investigated undertaking promises to eliminate the effects of the conduct through the use of concrete measures within the time limit accepted by the Authority, the Authority may decide to suspend the investigation. The decision suspending the investigation will state the concrete measures promised by the investigated undertaking.

6.2 It is worth noticing that according to the Draft Guideline on Commitments, for monopoly agreements of price fixing, limitation of production or sales volume, and allocation of market among competitors, the suspension of investigations does not apply.

7. Judicial review

7.1 In China, there is no special rule authorizing judicial review of antitrust decisions. Nevertheless, as a general matter of law, an antitrust decision is a type of administrative decision, which is subject to further administrative reconsideration or an administrative lawsuit. Therefore, where the undertaking is not satisfied with the decision made by the Authority, it may apply for administrative reconsideration or bring an administrative lawsuit.

8. Exemption

8.1 Under the AML, certain agreements are exempted from the general prohibition on monopoly agreements if specific conditions are met. Examples are agreements which improve product quality, operational efficiency and competitiveness of small and medium-sized undertakings, encourage R&D, enhance public welfare (such as conserving energy, protecting the environment, providing disaster relief, etc.), mitigate severe economic decline during economic recessions, or are necessary to protect legitimate interests in international trade. The undertakings shall also prove that the agreement in question will not substantially restrict competition in the relevant market and can benefit the consumers by the agreement exempted.

8.2 The Draft Exemption Procedure Guideline specifies the general conditions and procedures for exemption from the prohibitions on cartel or other kinds of monopoly agreements. There are two kinds of procedure available: (i) general procedure for applying for exemptions after the initiation of investigations, and (ii) exemption consultation procedure available under limited circumstances.

8.3 The Draft Exemption Procedure Guideline provides the procedures to apply for exemptions, which are available after investigations of the Authority have started (but before the investigations are completed). In such procedures, the undertakings need to submit the application documents including the general information of all the applicants, the agreement in question, the reasons and evidence for the application, the contact information of any third parties affected by the agreement and information on whether a similar application has been made or awarded in other jurisdictions. The Authority will consult with third parties on the exemption request. Generally, the Authority needs to consult with other undertakings and consumers, and when necessary, also consult with industry supervision authorities, industry associations and experts. If public interests are at stake, the Authority may consider publishing the exemption request for public consultation for 20 working days before making any decision. If the request is awarded, the decision will be published. Undertakings may apply for confidential treatment of any business secrets prior to the publication.

8.4 The Draft Exemption Procedure Guideline also provides an exemption consultation procedure, which is separate from the exemption application procedures as mentioned above and available under very limited circumstances, where a consultation request is submitted by:

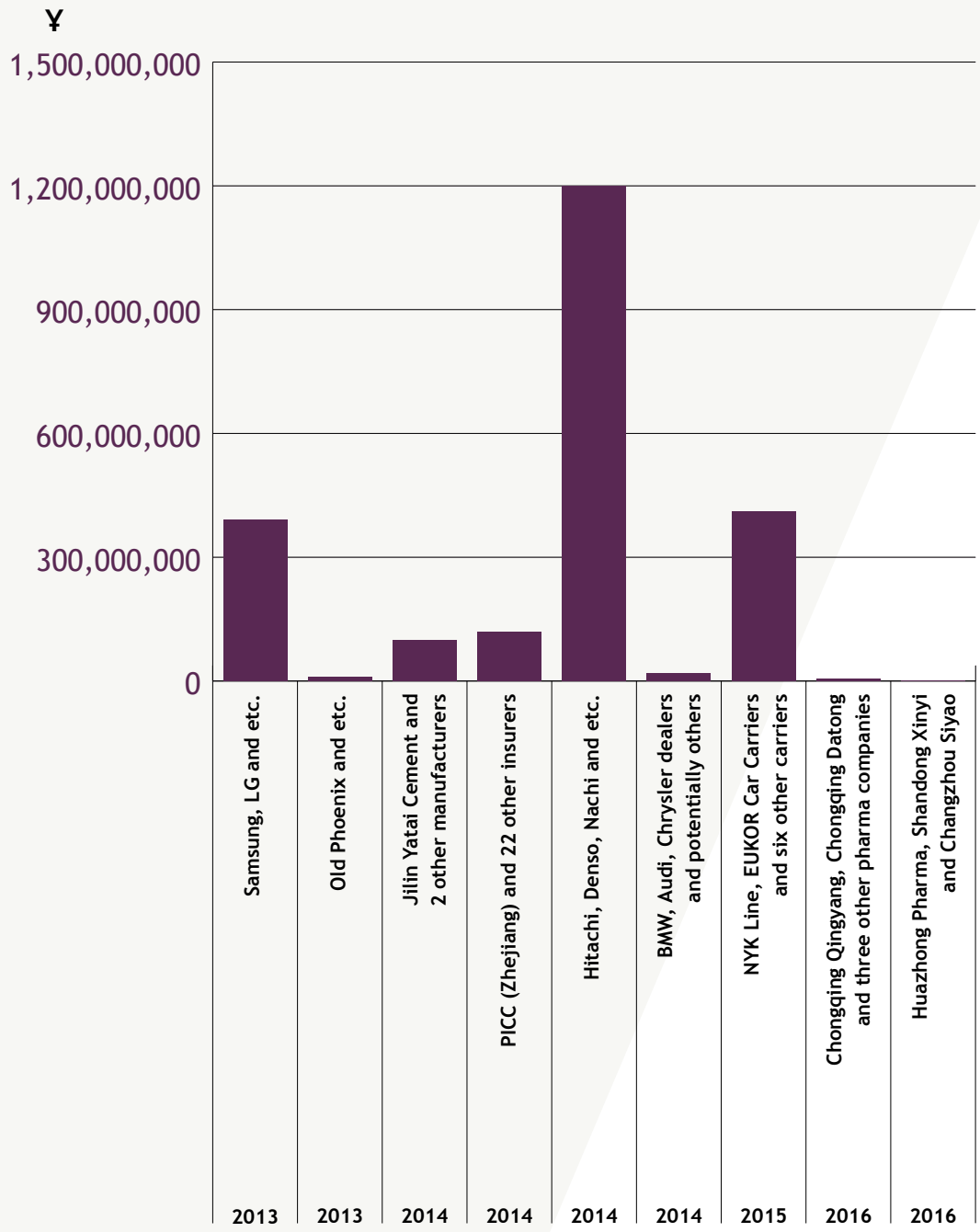
- undertakings or relevant industrial associations which intend to enter into an agreement which may impact the competition in the markets of various countries/regions (including China) and the parties plan to seek an exemption in other jurisdictions; or

- a nationwide industrial association representing the whole industry, for agreements that affect the whole industry extensively or significantly.

8.5 The Authority will normally provide its advice within 60 working days under the exemption consultation procedure. However, even if the response of the Authority is positive, such advice does not preclude the Authorities from later alleging that the agreement violates the AML.

8.6 To our knowledge, the NDRC has considered the exemption of cartels in the civil aviation and new energy automobile industries.

Annex 1: Recent enforcement in cartel cases in China



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Ms. Wei has extensive experience in financial institutions, real estate, energy, telecommunications, retail, automobile, Hi-Tech and traditional manufacturing industries and represents various multinational companies, Chinese companies, investment banks, and private equity funds in their merger and acquisition transactions. She has provided advice on various aspects of such projects including design of transaction structure, due diligence investigation and drafting and negotiation of complicated legal documents in connection with such projects. She has also advised many domestic and international clients from different industries in corporate financing, commercial transactions and general corporate matters since she joined the firm in 1994. Ms. Wei also has extensive experience in the private fund formation area and has represented various fund managers or investors in such deals.

Since the effectiveness of the PRC Anti-Monopoly Law, Ms. Wei has represented various multinational companies and Chinese companies in their merger control filings and provided AML advice on cartel, RPM as well as AML compliance issues. Ms. Wei has also been invited by the PRC AML enforcement agencies for the formulation of a variety of regulations and Ms. Wei has deep awareness of both the agencies' rules and practice.

In 2011, Ms. Wei has been honored with the awards of the "Beijing Excellent Lawyers Returning from Overseas Study". In 2012 and 2013, Ms. Wei was nominated as a China leading lawyer in the Mergers and Acquisitions by EuroMoney Legal Media Group. In 2015, Ms. Wei was highly recommended by Legal 500 in the fields of Anti-trust and anti-unfair competition. In 2015, Ms. Wei was elected as one of the top lawyers by Asialaw Profiles and IFLR 1000.

Ms. Wei worked at the Hong Kong office of Mallesons Stephen Jaques from 2002 to 2003 where she advised clients on investment projects in China as well as international transactions.

Ms. Wei is currently the head of the International Trade and Anti-trust & Competition Group of JunHe.

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LL.B., China University of Political Science and Law, 1993.
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Admissions
Member of the All-China Bar Association, Beijing Bar Association and New York State Bar Association.

Languages
Fluent in English and Mandarin

Representative Cases - Competition and Antitrust Law

- Represented Broadcom in a SAIC investigation
- Represented Cypress Technology in a MOFCOM investigation
- Represented various multinational or Chinese companies in their ongoing NDRC investigation cases
- Represented Glodon Software Company Limited (as the third party) in China's first administrative monopoly lawsuit of Shenzhen Sware vs. the Education Department of Guangdong Province
- Advised tens of multinational companies in antitrust compliance issues
- Represented Wuthelam Holdings Limited in its merger control filing for its acquisition of Nippon Paint Co., Ltd.
- Represented NXP Semiconductors N.V. (Netherland) in its merger control

- filings for the establishment of its joint venture with Datang Telecom
- Represented Zhejiang Futong Scientific Technology in its merger control filings for acquisition of Shanghai Hitachi Cable
- Represented Ericsson in its merger control filing for its acquisition of certain assets of CDMA business and LTE assets of Nortel
- Represented Lenovo in its merger control filing for the establishment of a joint venture with EMC
- Represented Broadcom in the merger control filing for its merger with Avago Technologies
- Represented PAG Asia Capital in its merger control filing for its acquisition of Inner Mongolia Yili Animal Farming
- Represented Nippon **Paint** in its merger control filing for its acquisition of **Guangzhou** Supe **Chemical**

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Ms. Hui is a partner at JunHe's Hong Kong office and is based in Beijing. She is an antitrust and M&A lawyer, specializing primarily in cross border antitrust and mergers and acquisitions, foreign investment and general corporate matters.

Ms. Hui has more than 25 years of experience in providing legal services to clients in different industries, particularly in areas such as telecommunications and media, hotels and real estate related legal practice.

Ms. Hui has extensive experience in handling complicated merger control filings (for example, Thermo Fisher's acquisition of Life Technologies, and Shell's acquisition of BG Group) and compliance work in China, including:

- Defending antitrust investigations on alleged anti-competitive practices in China;
- Applying for leniency for certain infringement actions under the Anti-Monopoly Law; and
- Providing compliance advice and training to multinational companies in different industries including automobiles, semi-conductors, electrical appliances, luxurious goods, pharmaceuticals, medical devices, hotels and food and beverage packaging.

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Competition Law
M&A
Corporate

Education
Second Chinese Law Degree, Tsing Hua University, Beijing, PRC, 2004.
Master of Business Administration, University of Hull, United Kingdom, 1995.
Postgraduate Certificate of Laws, University of Hong Kong, 1988.
LL.B., University of Hong Kong, 1987.

Languages
Fluent in English, Mandarin, Cantonese and Taiwanese dialects.

Representative Cases - Competition and Antitrust

- Acted merger control filing for acquisition of the displays business of Philips by TPV Technology Limited
- Acted merger control filing for acquisition of Times Ltd. by Lotte Shopping Holding (Hong Kong) Co., Limited
- Acted merger control filing for acquisition of Yangtze Delta Manufacturing Co. Ltd. and GIS Steel&Aluminium Products Co. Ltd by Siemens
- Acted merger control filing for acquisition of ADC Telecommunications, Inc. by Tyco Electronics Ltd.
- Acted merger control filing for acquisition of Nu Horizons Electronics Corp. by Arrow Electronics Inc.
- Acted merger control filing for acquisition of 50% shares in LG-Dow Polycarbonate by LG Chemical
- Acted merger control filing for establishment of joint venture by BASF and Jining Hock Mining & Engineering Equipment Co., Ltd
- Acted merger control filing for establishment of joint venture by BASF and INEOS
- Acted merger control filing for acquisition of 50% share in JM Energy Co., Limited by Mitsui & Co. Ltd.
- Acted merger control filing for establishment of joint venture by Samsung and Sumitomo
- Acted merger control filing for establishment of joint venture by Siemens China and RXPE
- Acted merger control filing for acquisition of Solutia, Inc. by Eastman Chemical Company
- Acted merger control filing for acquisition of Synthes Inc. by Johnson & Johnson
- Acted merger control filing for establishment of joint venture by Siemens China and Shanghai Electricity Group

- Acted merger control filing for establishment of joint venture by Anqing Zhongchuan and Caterpillar
- Acted merger control filing for acquisition of Oerlikon Solar by Tokyo Electron Limited
- Acted merger control filing for acquisition by Caterpillar (China) Investment Co., Ltd. of 34% of the Equity Interest of Suzhou Liaoan Machinery Co., Ltd.
- Acted merger control filing for acquisition of Invensys plc by Schneider Electric
- Acted merger control filing for acquisition by Carlsberg Brewery Hong Kong Limited of equity interest of Chongqing Beer (Group) Asset Management Co., Ltd.
- Acted merger control filing for acquisition of Covedien by Medtronic
- Represented several multinational companies in handling antitrust investigations/review in China.
- Provided many multinational companies with in-house compliance antitrust training in China.

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Since Mr. Wang started his legal career in 1999 he has represented clients in a broad range of industries, including infrastructure, energy, real estate, manufacturing, media, internet, etc. and he has developed an extensive practice with several Fortune 500 corporations and top players in relevant industries, advising clients on a variety of regulatory and transactional matters with respect to due diligence, project structuring, financing and other general corporate issues. In the past years Mr. Wang has also represented several Chinese state-owned enterprise and private enterprises in their overseas projects.

In particular, Mr. Wang has substantial experience in infrastructure investment, including water supply and waste water treatment; sea water desalination; and municipal solid waste incineration and treatment. Mr. Wang also has extensive experience in representing both purchasers and sellers in complex M&A transactions in such sectors.

In recent years Mr. Wang has also been involved in the antitrust area. He has represented multinational corporations in PRC merger-control notifications, and also provided clients with counseling on antitrust compliance.

In addition to enterprise clients, Mr. Wang has worked with government agencies in various cities including Beijing, Qingdao, Jinan and Lanzhou. In the past few years, Mr. Wang has also been acting as lead lawyer of the team serving Beijing Transportation Commission, Beijing Water Bureau and Beijing Municipal Commission of City Administration and Environment.

Before joining JunHe, Mr. Wang worked as a partner at Junyi Law Office. In 2011, Mr. Wang worked in Fenwick & West LLP in California as a visiting lawyer.

Mr. Wang has been recognized by the Asia Law & Practice as a leading practitioner in China in the field of Project Finance and Real Estate in 2016.

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M&A
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Lacy (Ziqing) Zheng

Ms. Zheng is a partner in the Beijing office of JunHe. She specializes in Chinese antitrust and competition law and policy, and has handled various antitrust matters on merger filings (including high profile filings approved with conditions), governmental investigations, dawn raids, leniency applications, antitrust private litigations, staff trainings and compliance programs. Industries include telecommunication, pharmaceutical, machinery manufacturing, automobile, precision instrument, household electrical appliances, food, beverages and consumer goods, etc.. Ms. Zheng is one of the handful of Chinese lawyers who had been focusing on Chinese antitrust law even before the AML came into effect.

Ms. Zheng has unique experiences of working at both the PRC Ministry of Commerce ("**MOFCOM**") and the US Federal Trade Commission ("**FTC**") as an intern or consultant. She frequently attended the legislative consultation meetings held by Chinese antitrust agencies and the State Council since 2009, and has a deep understanding of antitrust policies, laws, regulations and guidelines.

Prior to joining JunHe, Ms. Zheng was an intern in MOFCOM for 6 months, attorney in King & Wood Mallesons' Beijing office for 8 years, foreign consultant in the Office of International Affairs of the FTC for 5 months, and attorney in the antitrust practice group of Latham & Watkins LLP's Washington DC office for 6 months.

Practice Areas
Antitrust
Competition

Education
Master of Laws on "competition, innovation and information", New York University School of Law, 2015
Juris Master, 1st Rank Scholarship for Juris Master Graduates, Peking University, 2006

Admissions
China and New York

Languages
Chinese (native); English (proficient); Japanese (reading, listening and speaking).

Overview of cartel regulation in Korea

Kim & Chang, Korea

1. Statute

1.1 Article 19(1) of the Monopoly Regulation and Fair Trade Act ("**MRFTL**") prohibits entities from engaging in cartels that unfairly restrain competition. The same Article further specifies that no entity shall agree with another entity to jointly engage in any acts to: (i) fix, maintain, or alter prices; (ii) determine the terms and conditions for trade in goods or services or for payment of prices; (iii) restrict the production, shipment, transportation, or trade in goods or services; (iv) restrict the territory of trade or customers; (v) hinder or restrict the establishment or expansion of facilities or installation of equipment necessary for manufacturing or provision of services; (vi) restrict the types or specifications of the goods at the time of production or trade; (vii) establish a corporation or the like to jointly conduct or manage important parts of businesses; (viii) determine a successful bidder, bidding prices, contracting prices or certain other factors in an auction; or (ix) hinder or restrict the business activities or the nature of the business of other enterprises, thereby substantially restraining competition in a relevant area of trade.

1.2 The cartel will be deemed to exist when an agreement to do the above-mentioned activities was entered into, which agreement does not have to be written. Importantly, whether or not the agreement was actually implemented does not affect the legality of the cartel, even though in practice the sanction imposed by the KFTC will likely be less severe if the parties withdrew before implementing the agreement.

Per se v. rule of reason

1.3 The MRFTL's cartel provision prohibits "improper concerted acts", which are defined as "unduly or improperly restricting competition". Court decisions, as well as the statutory language, do not mention whether *per se* illegality or rule of reason analysis applies to cartels. The KFTC has declared its enforcement policy of challenging hard-core cartels by utilizing *a per se* rule.[1] However, the statutory language does not fully sustain the authorities' resolve.

1.4 A system of authorizing certain concerted acts is provided in Article 19(2) of the MRFTL. This provision empowers the KFTC to authorize certain concerted acts that meet the conditions prescribed in the provision: the cartel in question is organized for achieving industry rationalization, research and development, or overcoming economic depression. The enforcement decree on this provision details the prerequisites for the authorization by the KFTC. The KFTC has been hesitant to authorize concerted acts proposed by participants based on these exceptions. Nevertheless, Korean anti cartel enforcement may hardly be classified as applying a *per se* rule.

1.5 As a condition for utilizing the authorization system, the cartel participants are required to file an application for authorization to the KFTC prior to conducting the concerted act. If the concerted act in question is performed and challenged by the KFTC, the itemized list of acts eligible for authorization cannot be invoked as a defense in the court proceeding or in relation to KFTC proceedings.[2]

1.6 In interpreting the language "improper" concerted acts, competing views have been asserted. One view considers improper to mean situations in which the anti-competitive effect of a cartel outweighs its pro-consumer effect. For instance, if the participants agree to standardize the volume and size of their products, consumers can easily compare actual prices. The other view considers that a cartel is not improper when the anticompetitive impact is relatively small or negligible and contends that the MRFTL outlaws only those concerted acts organized by enterprises with significant

[1] KFTC, Fair Trade White Paper 22 (1999) (on file with author).

[2] In one exceptional case, the Korean Supreme Court pardoned a price fixing arrangement among the tourism agencies in Jeju Island by invoking the legislative intent of the authorization system. See re Jeju Island Tourism Agents' Improper Concerted Acts, 2003Du 11841(Sup.Ct.Sept.9, 2005).

market power, i.e. whose anticompetitive effect is considerable. The latter view emphasizes the limited resources of the KFTC, contending that it needs to concentrate on cases of significant value.

Article 19(5)

1.7 Many of the provisions and principles contained in the MRFTL are similar to the anti-trust laws of other countries, particularly those of the United States, European Union and Japan. However, one atypical provision in the MRFTL is Article 19(5), which provides that if two or more entities commit any of the acts listed in Article 19(1) and – after taking into account totality of circumstances such as the characteristics of the relevant area of trade, products or services, economic incentive and ripple effect of relevant acts, and frequency and modes of contact between entities – there exists "considerable probability" that the entities have collaboratively committed the acts, the KFTC can presume that the parties have agreed on collusively committing such act.

1.8 Based on Article 19(5), the KFTC has in the past ruled that there was a cartel when two or more competitors increased the price at the same or similar rate or amount at the same or similar time when other facts and circumstantial evidence supported the probability of existence of a cartel – even though the KFTC was not able to find sufficient evidence of an actual agreement. In this regard, the KFTC's Guidelines on Unfair Collaborative Acts elaborates on circumstantial evidence and facts that can support the presumption: (i) communications or information exchange between the entities; (ii) the fact that if pursued independently, the act may be against the interests of participating entities; (iii) evidence that there is no reason for price increase other than collusion; (iv) evidence that paralleled acts cannot be explained by market situation (e.g., difference in costs of each entity); and (v) evidence that paralleled acts cannot be carried out without agreement based on industry characteristics, such as substantial difference in products and low transaction frequency. If the cartel is presumed, then the burden shifts to the parties to prove that there was in fact no agreement among the parties and the incident is merely a result of legitimate parallel activities.

1.9 As the wording of the cartel provisions requires a meeting of minds, by way of contract, agreement, or resolution among participants, proof of formal agreement is not required for challenging a concerted act. Still, the burden of proof lies on the KFTC, or on the plaintiff in a damages suit. In order to alleviate the evidentiary difficulties, an earlier amendment of the MRFTL adopted a presumption clause.[3] An agreement is presumed where two or more enterprises are more likely to collaborate in one of the itemized types of concerted acts, in view of the characteristics of the business sector concerned, the nature of the goods or service, the economic background of the act in question, or the number and types of contacts among participants.

1.10 The language of the presumption clause was adjusted in a 2007 amendment. Previously, the presumption clause had not mentioned "plus factors", and so the Korean Supreme Court held that showing a plus factor is not required in order to invoke the presumption provision.[4] However, the Court allowed the rebuttal of the presumption on the ground that the participants' business policy of "adopting higher prices helps satisfy consumers' luxurious tendency,"[5] which contributed to the spiral price hikes in the domestic coffee market.

Enforcement practice

1.11 It is hard to find a KFTC decision clearly demonstrating a rule of reason approach in cartel cases. At times, industrial difficulties or unavoidable circumstances have been taken into consideration

[3] MRFT Act, Art.19, para. 5.

[4] In re Dongsuh Food Co., 99Du 6514/6521 (Sup.Ct.Mar.15, 2002).

[5] *Ibid.*

when calculating the amount of administrative fines. However, such considerations did not turn an improper concerted act into a justifiable one.

1.12 Almost all cartel cases are closed by the KFTC with an order to discontinue the illegal act, an order to undertake corrective measures, the imposition of an administrative fine, and the publication of the adverse decision. Quite recently, the yearly total amount of surcharges or administrative fines imposed by the KFTC against cartels doubled compared to the previous year: 769.4 billion won (approximately US$ 661 million) in 2014 compared to 364.7 billion won (approximately US$ 313 million) in 2013.

1.13 As the KFTC has more stringently enforced the cartel provision in recent years, the number of criminal cases prosecuted has also increased. In Korea, the power to indict criminals lies exclusively with the National Prosecutor's Office. A complaint filed by the KFTC is the prerequisite for the indictment for the major MRFTL violations. The KTFC has often filed such complaints with the National Prosecutor's Office, and the violators have been indicted. However, prison sentences against individuals have never been imposed; criminal sanctions for antitrust violations have been limited to criminal fines imposed on companies or their officers.

2. Cooperation with foreign competition authorities

2.1 Given the global nature of business and competition, the KFTC has over the past few years focused more of its attention on establishing cooperative relationships with a number of foreign competition authorities, either in the form of bilateral agreements or multilateral platforms among competition authorities. These efforts have been generally aimed at increasing the information exchanged for purposes of competition policy enforcement as well as consumer protection policies.

2.2 In particular, the KFTC maintains a close cooperative relationship with both the US and the EU competition authorities. The KFTC also executed an MOU with the European Commission (**"EC"**) in 2004 which culminated in May 2009 in a bilateral governmental agreement on cooperation in antitrust investigations between Korea and the EU. In 2011 the KFTC announced its participation in a network of competition authorities that will allow for sharing of information on trends of competition policies and results of individual cases and also announced that it will cooperate closely through regular bilateral meetings with competition authorities in 13 different countries, including Japan, China, Australia, France and Germany. On 8 September 2015 the U.S. Department of Justice ("**USDOJ**"), the U.S. Fair Trade Commission ("**USFTC**"), and the KFTC announced that they have entered into an MOU to increase the extent of cooperation and communication on competition enforcement in the United States and Korea.

2.3 This increasing trend towards cooperation is also evident in the KFTC's recent cartel investigations, which were marked by cooperation and coordination with other competition authorities. In 2006 the KFTC, along with the USDOJ and EC coordinated their investigations of 21 airline carriers from 16 countries on charges of global price-fixing of freight rates. The investigation marked the first time that the KFTC worked cooperatively with other competition authorities in an international cartel investigation. These cooperative efforts included most notably coordination by the KFTC with the EC and other competition authorities to conduct "dawn-raids" that were timed to coincide with raids in other jurisdictions. The cooperation included sharing of information collected through regular consultations on the status and overall direction of the investigation through in person meetings, conference calls, and e-mail exchanges. In fact, the KFTC noted the successful cooperation in its decision, stating that the investigation had been a successful platform for "more heightened

cooperation", with the aim of increasing the KFTC's "investigative capabilities with regard to international cartels by cooperation with competition authorities of other nations". Given the KFTC's success in this investigation, we can expect that the KFTC will continue its cooperative efforts in cross-border cartel cases.

2.4 While the trend in greater cooperation and coordination by the KFTC with the competition agencies of other countries is clear, such cooperation and coordination does not – at least as of this present time – entail the sharing of confidential information submitted by leniency applicants and extradition of Korean nationals. As the KFTC is required under the MRFTL to keep information submitted by leniency applicants confidential, the KFTC will have a basis to reject any request for such information. For extradition, the Korean extradition system is governed by the Extradition Law of 1988, under which Korea has entered into bilateral treaties on extradition with over 20 countries, including the US.

3. Jurisdictional limitations

3.1 The MRFTL was amended in April 2005 to authorize the KFTC to exercise extraterritorial jurisdiction against the foreign companies located overseas with no physical presence in Korea if the activities at issue affected the Korean market (Article 2-2 of the MRFTL). Prior to this 2005 amendment, there was greater controversy surrounding the KFTC's exercise of extraterritorial jurisdiction to investigate cartel cases as the overseas companies had no physical presence in Korea, the only presence being sales to Korean companies or consumers. While there was no explicit provision under the MRFTL allowing extraterritorial application when the KFTC first launched an extraterritorial investigation of graphite electrode companies in 2002, the KFTC took the position that the extraterritorial application of the MRFTL is permitted as a tacit acknowledgement of the basic spirit of the MRFTL to protect competition in the domestic market and to protect consumers. When challenges to the KFTC's exercise of extraterritorial jurisdiction was made, the Korean court resoundingly ruled in favor of the KFTC on this issue even prior to the 2005 amendment of the MRFTL explicitly granting extraterritorial jurisdiction.

3.2 Since the KFTC first exercised its extraterritorial jurisdiction in 2002 the KFTC has been active in investigating and sanctioning international cartels that affect the Korean market. The KFTC established an "International Cartel Division" in 2008 within its Cartel Investigation Bureau, which division handles exclusively international cartel cases. Since its creation, this Division has been very active in investigating and enforcing the MRFTL against various international cartel cases, such as copy paper cartel in December 2008 and marine hose investigation in 2009. With regard to the copy paper cartel, the KFTC issued corrective orders and surcharges to 4 foreign copy paper companies, the first international cartel case that the KFTC handled through its own investigations. For the marine hose cartel, the KFTC imposed corrective orders and surcharges on 6 manufacturers. This is the first case of international bid-rigging that the KFTC detected and took sanctions against.

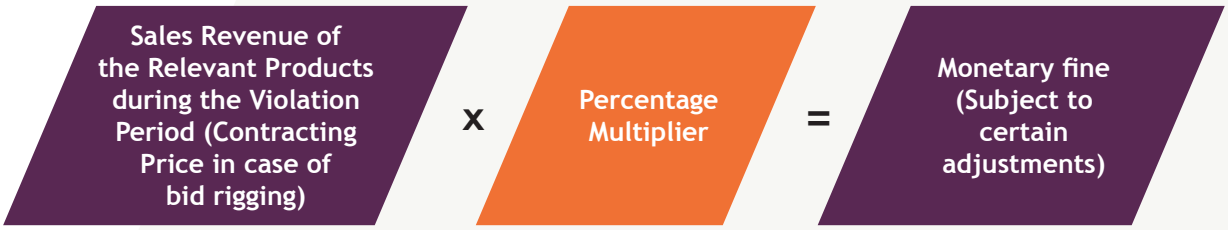
3.3 In 2010 the KFTC imposed corrective orders and surcharges of 119.5 billion won on 26 air cargo carriers for fixing air cargo rates for international inbound and outbound shipments. This is the largest international cartel case that the KFTC has handled in terms of the number of cartel participants, the number of foreigners questioned during the investigations, the amount of related sales, and the amount of surcharges. More than anything else, this case has become a milestone in the history of the KFTC in that ex-officio investigations were simultaneously conducted across the world for the first time in collaboration with foreign competition authorities, such the US and the EU, that this is the first case in the world in which the KFTC took actions against all participants through the official case handling proceedings, and that it is the largest-ever international cartel case the KFTC has handled in terms of the size.

3.4 In this case, the KFTC and the Korean Supreme Court have both addressed the issue of what constitutes "an effect on the Korean market." The KFTC determined that it had jurisdiction with respect to inbound routes into Korea based on the deemed impact on the Korean market: while the higher fuel surcharge were charged in other countries (e.g., the US, the EU and Hong Kong). With respect to the direct impact of such activities borne by foreign companies exporting goods into Korea (i.e., higher freight costs), the KFTC found that such foreign companies would have passed down the higher freight costs in terms of end prices to the Korean domestic market.

3.5 Some of the airlines appealed the KFTC's decision to the appellate court, and then to the Supreme Court. The Supreme Court elaborated on the scope of the KFTC's jurisdiction, outlining two prongs for the extraterritorial application of the MRFTL: (i) the acts falling under such agreement must have a direct, substantial and reasonably foreseeable effect on the Korean market; and the contents, intentions, characteristics and transaction structure of the products or services subject to such acts and the contents and level of effect on the Korean market owing to such acts should be comprehensively considered in order to decide whether the KFTC has extra-territorial jurisdiction on such agreement; however, (ii) if the Korean market makes up a portion of the subject of the agreement, such agreement shall be deemed to affect the Korean market unless there is a special circumstance to the contrary (Supreme Court Case No. 2012*Du*5466 rendered on 16 May 2014). The Supreme Court then held that the KFTC has the extra-territorial jurisdiction on the agreement with respect to routes into Korea because the Korean market was included in such agreement based on the details of relevant transaction structure and practices. The Supreme Court has yet to address more detailed standards for 'direct, substantial and reasonably foreseeable effect' on the Korean market.

4. Penalties

4.1 If the KFTC concludes that a company has or is engaged in Unfair Collaborative Acts in violation of Article 19 of the MRFTL, the KFTC will issue a corrective order instructing the offending parties to cease the prohibited activity as well as order the offending parties to publish a public announcement concerning the violation of the MRFTL. The KFTC will designate the number of daily newspapers in which the announcement must be carried and the size of the announcement, and will usually dictate the contents of the announcement. In addition, the KFTC will impose a monetary fine pursuant to the Enforcement Decree of FTL (the "**Enforcement Decree**") and its accompanying Regulation on Determination of Administrative Surcharges (the "**KFTC Surcharge Regulation**") using the following formula, with certain adjustments noted below.



4.2 The Enforcement Decree was amended, effective 1 April 2005, to increase the Percentage Multiplier from 5% to 10%. Thus, the Percentage Multiplier may be up to 5% if the cartel activity began prior to 1 April 2005. The Percentage Multiplier may be as high as up to 10% if the cartel activity began after 1 April 2005. With respect to cartel activities which began prior to 1 April 2005 but continued beyond 1 April 2005, the maximum Percentage Multiplier of 10% will be applied if the activity continued until or after 4 November 2007. If the activity was discontinued prior to 4 November 2007, it is limited to 5%. This rule assumes that the KFTC would treat the alleged cartel activities which began prior to 1 April 2005 and ended prior to or after 4 November 2007 as one cartel. On the other hand, if the KFTC treats

the alleged cartel conducted in each year as separate cartels, some years would be subject to 5% and some to 10%, but because of the 5-year statute of limitations, some years would not be punishable.

4.3 In calculating surcharge amounts, the KFTC will first determine a "basic surcharge" amount by applying a specific rate within the above ceiling percentage to reflect the gravity of the violation. This basic surcharge percentage will be further adjusted based on various aggravating factors (e.g., not ceasing or correcting the violation despite knowledge of illegality, taking retaliatory measures against other parties, hindering the KFTC's investigation, or direct involvement of a senior officer) as well as mitigating factors (e.g., active cooperation, voluntary correction). Finally, this adjusted amount may be reduced up to 50% if it is determined by the KFTC that the amount is excessive in light of factors applicable to the relevant market or industry structure and other objective circumstances that the KFTC may consider.

4.4 In addition to the monetary fine, the KFTC may file a complaint with the prosecutor's office for indictment under the MRFTL. Criminal proceedings can be commenced only if the KFTC files such a complaint. However, other agencies such as The Board of Audit and Inspection may require the KFTC to file such complaint. In the case of conviction, the offender (and its employees, in case of a corporate defendant) may be subject to a fine of up to 200 million Won or up to 3 years of imprisonment. As for the criminal sanctions, it used to be the KFTC's practice that only in the most severe and blatant cases of violation of the MRFTL or where the offending party continues to engage in the illegal activities despite the cease and desist order would criminal sanctions be imposed. The recent trend of the KFTC's use of criminal sanctions, however, seems to be on the rise, as the Prosecutors' Office is making efforts to strengthen its criminal enforcement of the MRFTL (the Prosecutors' Office has authority to request the KFTC to refer the matter to them for prosecution). Recently, on 13 September 2015 the Prosecutor's Office announced that it indicted (without detention) a Japanese bearing manufacturer and its Korean subsidiary for fixing the prices of bearings supplied to Korean customers. This is the first time in which a foreign company was indicted in Korea for engaging in an international cartel. In the past, the KFTC had generally imposed administrative fines on both the Korean and foreign companies engaging in an international cartel and stopped short of referring the foreign companies for criminal prosecution.

5. Leniency program

5.1 In 1997 the KFTC adopted a formal leniency program to incentivize voluntary disclosure of cartel violations and to encourage full cooperation with the KFTC during its investigation. Since the introduction of the leniency program, there has been a steady increase in the number of leniency applicants over the years, with a jump in leniency applicants starting in 2005 after the KFTC revised its leniency program that year by minimizing the discretion given to the KFTC in determining the level of benefits granted to the leniency applicant, hence giving greater predictability in benefits received to applicants.

5.2 Article 22-2 of the MRFTL and Article 35 of the Enforcement Decree form the statutory foundation for the leniency program and the "Notification on Corrective Orders Regarding Voluntary Reporters of Improper Concerted Acts and the Leniency Program" issued by the KFTC provides the specific procedural rules and standards applicable to the leniency program.

5.3 Under the KFTC's leniency program, an applicant may qualify for either a full or a partial exemption from sanctions if it satisfies certain conditions. Under Article 35(1)(i) of the Enforcement Decree, an applicant who is "first in" to report illegal cartel activities to the KFTC prior to commencement of investigation will receive full leniency from all applicable sanctions. If the first applicant makes the submission after the commencement of investigation, such applicant will still receive full

exemption from the applicable monetary fines, but the KFTC may choose to offer either a full or a partial exemption from other, non-monetary sanctions. In either case, the applicant must satisfy the following four conditions:

- the applicant must exclusively provide information which was necessary to evidence the improper concerted act;
- the report must have been made at a time when the KFTC had either no information regarding the improper concerted acts or the KFTC was not able to obtain sufficient evidence necessary to prove the improper concerted acts;
- all cooperation, including provision of all facts relevant to the improper concerted acts, must have continuously been provided until the completion of the KFTC's investigation; and
- the applicant must have ceased all activities which could be deemed improper concerted acts under the MRFTL.

5.4 Even if an applicant is not qualified as the first reporter, the Enforcement Decree provides that the applicant can still qualify for partial leniency by offering voluntary cooperation.[6] Under Article 35(1)(iii) of the Enforcement Decree, a "second reporter", who: (i) has reported to the KFTC prior to commencement of investigation; or (ii) has cooperated with the KFTC after the commencement of investigation, can qualify for a 50% reduction in monetary fines and a partial exemption from the corrective orders if such person fulfills items (i), (iii) and (iv) of the conditions applicable to the first reporter as set forth above. Third and any subsequent applicants do not qualify for leniency treatment under the MRFTL. However, the KFTC has the discretion to reduce the monetary fine of such "cooperating party" by up to 30% depending on the level and value of cooperation offered by such cooperating party.

5.5 The leniency program in Korea follows the EU's approach in allowing leniency treatment even to parties who may be deemed "ringleaders" of improper concerted acts as long as they satisfy the relevant statutory conditions. However, under Article 35(1)(v) of the Enforcement Decree, an applicant who has gone further to coerce other cooperating parties into participating in the cartel or not stopping the illegal activities in question after the commencement of the investigation will be disqualified from receiving leniency.

5.6 A leniency application may be filed in two forms: (i) a formal application which includes all relevant evidences; or (ii) a short form, summary application. While the KFTC does not have a "marker" system, the summary application can be filed based only on the identity of persons involved and a summary of the conduct in question. Hence, it can serve as an expeditious way to promptly file for leniency once basic information regarding the cartel is confirmed by the applicant. Following the submission of a summary application, the party has an initial period of 15 days to supplement its filing with additional facts and evidence. This 15 day period may be extended by up to an additional 60 days by the KFTC at its discretion.

5.7 One of the key questions that come up in the context of a leniency application is whether others, such as private litigants in Korea or elsewhere or other competition authorities may have access to the materials submitted by the leniency applicant to the KFTC. Under Article 22-2(2) of the MRFTL and Article 35(2) of the Enforcement Decree, the KFTC and its officials have the obligation to not disclose the identity or the information reported by an applicant, except: (i) with the prior consent from the applicant, or (ii) when necessary to initiate or carry out lawsuits related to the case.

[6] A second reporter will not be eligible for leniency if: (i) the cartel involves only two participants; or (ii) when there are more than two participants in the cartel but the second leniency application is filed more than 2 years after the date of the first leniency application.

5.8 There is no convention under the civil procedure of Korea regarding discovery orders as there is in certain other jurisdictions such as the US. However, if a respondent company files an appeal to the KFTC's decision to the High Court, the respondent company may file a motion for documentary evidence and the court at its discretion may issue a document production order to the KFTC which it is obligated to comply with absent a justifiable reason. Given the confidentiality requirements imposed on the KFTC pertaining to information provided to the KFTC by leniency applicants, the KFTC will be reluctant to disclose documents provided by leniency applicants. Nonetheless, it is possible that the KFTC may be required to release some documents. This may be the case for a subsequent private enforcement claim based on the KFTC's decision where if the plaintiff requests for the delivery of documents surrendered to the KFTC as part of a leniency program, the KFTC may be required to cooperate with the request pursuant to the Civil Procedure Act.

5.9 Under the 2012 amendment to the Enforcement Decree to the MRFTL, repeat cartel offenders are restricted from receiving benefits under the KFTC's leniency program. Also, the KFTC has revised its notification regarding the leniency program to set out grounds for the KFTC's cancelation of a leniency applicant's status, such as failure to provide full cooperation, submission of falsified document, continuing participation in the relevant cartel and the coercion of other members to participate in the cartel.

5.10 On 15 April 2016 the KFTC announced that it has further revised its notification regarding the leniency program. Three major aspects of the amended leniency regime are: (i) an express requirement for the officers or employees of the leniency applicant to attend the KFTC hearing; (ii) non-disclosure obligation on leniency applicants to refrain from disclosing the fact that they applied for leniency and their cartel activities to a third party; and (iii) changes to the leniency application form, which now includes a new section for confirming whether the leniency applicant filed for leniency in other jurisdictions and a list of specific obligations imposed on the leniency applicant after the application is filed with the KFTC.

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Overview of cartel regulation in the EU

Slaughter and May, the EU

1. Introduction

1.1 Anti-cartel enforcement has evolved substantially in Europe over recent decades. After a period of low levels of enforcement during the 1960s and 1970s, the European Commission began to impose heavier fines in the 1980s in a number of landmark cases. Since the late 1990s, the Commission has repeatedly reaffirmed its commitment to detecting and punishing "hard-core" cartels, increasing the number and intensity of its investigations and imposing record fines. It has been increasingly active in the area of international cartels, cooperating with the competition authorities in the US and elsewhere. The national competition authorities ("**NCAs**") in the European Union have likewise placed increased emphasis on investigating and pursuing cartels.[1] Some statistics illustrating trends in the enforcement of the EU cartel rules are provided at Annex 1.

2. Anti-cartel legislation and enforcement

Article 101 and national competition laws

2.1 Within the EU, both national and EU competition laws apply to cartels. As far as EU competition law is concerned, the relevant provision is Article 101 of the Treaty on the Functioning of the European Union (TFEU).

2.2 Any secret agreement or understanding between competitors that seeks to fix prices, limit output, share markets, customers or sources of supply (or involves other cartel behaviour such as bid-rigging) will almost inevitably be regarded as an agreement restricting competition. These types of restrictions are generally viewed as "hard-core" infringements of the competition rules, presumed to have negative market effects. Arrangements involving "hard-core" price-fixing or market sharing will attract intense regulatory scrutiny if they come to the attention of the competition authorities.

2.3 Article 101 can apply to agreements between undertakings located outside the EU if they could have effects on competition within the EU. According to the "effects doctrine", the application of competition rules on cartels is justified under public international law whenever it is foreseeable that the relevant anti-competitive agreement or conduct would have an immediate and appreciable effect in the EU. The European Courts have recognised that it is not necessary that companies implicated in the alleged cartel activity be based inside the EU; nor is it necessary for the restrictive agreement to be entered into inside the EU or the alleged acts to be committed or business conducted within the EU.

[1] The current 28 EU Member States are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom. By virtue of the 1992 EEA Agreement, the EU competition rules also extend to three other countries: Iceland, Liechtenstein and Norway (sometimes referred to as the EFTA contracting states). Together, the EU Member States and the EFTA contracting states make up the EEA.

The European Competition Network

2.4 The implementing rules are contained in Regulation 1/2003.[2] The principal enforcement agency in the EU is the European Commission, in particular its Competition Directorate General (**"DG Competition"**).[3]

2.5 In accordance with Regulation 1/2003, the NCAs throughout the EU are also fully competent to enforce Articles 101 and 102 (as well as their domestic competition rules) to cartels at the EU level. In this regard, if an NCA within the EU uses domestic competition law to investigate a cartel that may affect trade between Member States, it must (in accordance with Article 3 of Regulation 1/2003) also apply Article 101. Generally, national competition rules should not be used to prohibit agreements that are compatible with the EU competition rules nor to authorise agreements that are prohibited under the EU competition rules.

2.6 There is close cooperation between the European Commission and the NCAs, which have established a European Competition Network (**"ECN"**). The various authorities exchange information and cooperate through the ECN structures to ensure the efficient allocation of cases.[4]

International cooperation

2.7 The EU has bilateral cooperation agreements with certain non-EU countries, notably the US, Canada, Japan, South Korea and Switzerland. These agreements can help the Commission to obtain information and evidence located outside the EU. The EU has also agreed other forms of cooperation with a number of other competition regulators, including with the other OECD member countries and China.

2.8 These international cooperation agreements do not generally allow the Commission to disclose confidential information received from companies in the course of its investigations (in contrast to the extensive cooperation and disclosure that is possible between the NCAs within the ECN following the implementation of Regulation 1/2003). Because of this restriction on the supply of confidential information, deliberations are not possible on the substance of the evidence gathered unless the investigated parties grant "waivers". That said, there are currently proposals for moving forward with so-called "second generation" cooperation agreements to enable the exchange of company confidential information. The EU has signed such a "second generation" agreement with Switzerland.

2.9 Competition authorities also cooperate in the context of various international organisations and networks which have facilitated discussions on practical problems and the exchange of experiences in the handling of competition issues, including international cartels. For example, more than 100 competition agencies currently participate in the International Competition Network (ICN). Similarly, many agencies contribute to the work of the OECD Competition Committee, which issues recommendations and reports regarding enforcement action against hard-core cartels.

[2] Council Reg. (EC) 1/2003 (OJ 2003 L1/1, 4.1.2003) on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty.

[3] For cases affecting trade between non-EU countries that are covered by the EEA Agreement, an agency known as the EFTA Surveillance Authority (ESA) enforces competition law. Where trade between the EU and one or more EFTA countries is affected, allocation of cases between the Commission and the ESA depends on the relative importance of the activities concerned in the affected EFTA and EU territories.

[4] In principle, the Commission (and not the NCAs) is generally seen as the best placed authority to deal with a suspected cartel (or other infringement of the EU competition rules) if:

- the relevant market covers more than three Member States;
- issues raised by the case are closely linked to other EU rules that may be exclusively or more effectively applied by the Commission;
- a Commission decision is needed to develop EU competition policy; or
- it is appropriate for the Commission to act to ensure effective enforcement of the antitrust rules.

3. Investigations

3.1 The Commission and NCAs have wide powers of investigation under Regulation 1/2003. Investigations may be triggered as a result of:

- one or more of the parties to a cartel or anti-competitive agreement approaching the Commission (and/or the NCAs), e.g. as a "whistleblower" under applicable leniency programmes;
- a third party making a complaint, e.g. customers, competitors, consumers or any other party with information;
- the Commission or an NCA launching an inquiry of its own initiative; or
- an NCA referring a case with a cross-border element to the Commission (or vice versa) through the structures of the ECN.

3.2 Once a case comes to the Commission's attention, it will collect further information, either informally or using its formal powers of investigation laid down in Regulation 1/2003 (e.g. Article 18 requests for information and "dawn raids", as considered below). Information may also be offered by third parties or by the cartel participants themselves under the Commission's leniency programme. If the Commission considers that there is evidence of an infringement of Article 101 that should be pursued, it may decide to open formal proceedings itself or it may refer the case to one or more of the NCAs through the structures of the ECN.

3.3 Where the proceedings are brought at the Commission level, this may lead to the Commission formally addressing a written "statement of objections" (or "**SO**") to the parties setting out the Commission's case. The parties are then allowed to examine the documents on the Commission's file ("access to the file") and to respond to the SO (in a written "reply" and at an "oral hearing"). The Commission's final decision is then taken by the full College of Commissioners and is notified to the undertakings concerned. A different procedure is adopted where the parties elect to pursue settlement with the Commission – see Part 6 below.

3.4 It is difficult to generalise about the timing of cartel cases, but from initial investigation to final disposition they usually take several years.

Dawn raids

3.5 Under Article 20 of Regulation 1/2003, an important way for the Commission to gather information – particularly early on in a cartel investigation – is for it to conduct unannounced on-site inspection visits (commonly known as "dawn raids"). Most of the NCAs have broadly similar powers to conduct inspection visits, as do many competition authorities outside Europe. In the case of international cartels, authorities increasingly coordinate their dawn raids to maintain the element of surprise. Where appropriate these inspection powers can also be used with warning (for example, where the Commission has already gathered some information from suspected key participants in a cartel but subsequently seeks additional information either from the same companies or from third parties).

3.6 Commission officials can conduct dawn raids anywhere in the EU.[5] They can enter the premises, land and means of transport of a company, examine its books and other business records (including computer records), take copies from books and records and ask for oral explanations on the spot. Regulation 1/2003 also provides for the power to seal premises and records; the breaking of a seal is considered a violation of the obligation to cooperate and can lead to significant fines. The Commission can also inspect any other premises (including the homes of directors and employees), subject to obtaining a court warrant, if there is reasonable suspicion that books and other records related to the business and to the subject matter of the inspection are kept at the premises.

3.7 The Commission has no power to require individuals to make statements or provide evidence under oath. Under Regulation 1/2003 (Article 19) the Commission only has the power to take statements from any natural or legal person on a voluntary basis (i.e. such persons cannot be summoned to testify). Commission investigations therefore tend to focus heavily on documentary evidence.

3.8 The Commission can, however, require on-the-spot oral explanations of documents/information that it finds in the course of a dawn raid; the precise scope of this power is not clearly defined. The European Courts have confirmed that Commission officials are only empowered to require explanations in respect of specific issues arising out of the books and business records they examine; this should not be treated as a power to ask general questions of a type that would require more consideration and that might be used to gather new information from the company being investigated. Consistent with the Courts' interpretation, Regulation 1/2003 grants the Commission the power to interrogate a company's representatives and staff for explanations only on facts or documents relating to the subject matter and purpose of the inspection.

3.9 The Commission team conducting a dawn raid typically consists of between five and 10 officials, of whom at least one is likely to be a technical expert who will aim to concentrate on electronically stored information. The Commission officials are normally accompanied by two or three officials from the relevant NCA assisting the Commission in its investigation. The officials will be acting pursuant to either a formal decision or an authorisation; in either case, the document must specify the subject matter and purpose of the investigation and the penalties for non-compliance or incomplete information. The company is only required to cooperate if the Commission has taken a formal decision (which it will generally have done in the context of unannounced on-site inspection visits).

3.10 Commission officials have no power to force entry; however, where an investigation is obstructed, the NCA officials assisting the Commission in its investigation may use force to gain entry, provided they have obtained the necessary warrant (under national procedures). In practice, as a precaution, the NCA officials generally have such a warrant. National courts called upon to issue a warrant in support of a Commission investigation cannot second-guess the need for the investigation and are only required to assess whether national procedural safeguards are satisfied with respect to that investigation.[6]

[5] The Commission can also request that the EFTA Surveillance Authority (responsible for enforcement of the EEA competition rules in the EFTA contracting States) conduct a dawn raid in respect of undertakings located in Iceland, Liechtenstein or Norway, in cases also investigated by the Commission under Arts. 53 and/or 54 of the EEA agreement. Information so obtained is transmitted to the Commission (which usually also takes part in such raids).

[6] According to the Court of Justice in Case C-94/00 *Roquette Frères v Commission*, judgment of 22 October 2002, to allow such assessment the Commission is only required to provide national courts with detailed explanations demonstrating that it is in possession of solid information and evidence, but not to present the information and evidence as such.

Information requests

3.11 Under Article 18 of Regulation 1/2003, the Commission also has extensive powers to request information from companies. These requests for information ("**RFIs**") are addressed in writing to the companies subject to the investigation or to third parties (such as competitors and customers). They must set out the legal basis and the purpose of the request, as well as the penalties for supplying incorrect information. RFIs are widely used by the Commission as a means of obtaining information, both as part of the initial fact-gathering and subsequently in the course of investigations. Particularly at the initial fact-finding stage they tend to be framed very broadly and impose tight deadlines, so are very burdensome for their addressees. There is, however, some possibility for negotiating reasonable limitations in their scope and/or extensions of the time deadline. Generally, it is advisable for companies to respond to RFIs as fully and as accurately as possible.

3.12 Regulation 1/2003 permits the Commission to impose fines up to 1% of total annual turnover for providing incorrect or misleading information, or failing to supply information, in response to an RFI.

3.13 With respect to non-EU companies, the Commission is often able to exercise its enforcement jurisdiction by sending the RFI within the EU to a subsidiary company of the non-EU parent firm or group. However, where a firm has no physical presence in the EU, this will not be possible. In the latter case, the Commission usually sends out informal RFIs (without reference to its fining powers under Regulation 1/2003); it would be normal for addressees to cooperate in the provision of information in response to such requests.

Rights of defence

3.14 During the Commission's investigations, a company has certain fundamental rights of defence, including the right not to be subject to an unauthorised investigation, the right to legal advice, the right not to be required to produce legally privileged documents (limited to correspondence with EEA-qualified external counsel) and the right not to be required to incriminate itself.

Legal professional privilege

3.15 The Commission is not entitled to require disclosure of written exchanges between a company and its EEA-qualified external lawyers seeking or giving legal advice where the exchange:

- follows the initiation of proceedings by the Commission and concerns the company's defence; or

- is linked with the subject matter of those proceedings (even if the exchange occurred before the initiation of proceedings).

3.16 The extent of this privilege is therefore limited in scope. In particular, legal professional privilege does not apply to exchanges between a company and its in-house lawyers (unless they are simply reporting the statements of an EEA-qualified external lawyer), or between a company and an external lawyer qualified outside the EEA. Although advice from in-house lawyers or from lawyers qualified outside the EEA may qualify as privileged under national legislation, caution is still required because of the risk that the Commission may investigate.

Privilege against self-incrimination

3.17 The European Courts have also recognised a privilege against self-incrimination, albeit narrow in scope. The precise scope of the privilege is not clearly defined. European Courts have previously refused to acknowledge the existence of an absolute right to silence and have held that companies are obliged to cooperate actively. They have also observed, however, that the Commission must take account of the undertaking's rights of defence. Thus, the Commission may not compel a company to provide answers that might involve an admission of the existence of an infringement that it is incumbent on the Commission to prove. In this context, the European Courts appear to draw a distinction between requests intended to secure purely factual information, on the one hand, and requests relating to the purpose of actions taken by the alleged cartel members, on the other hand. Whereas the former type of questions is generally permitted, the latter infringes the undertaking's rights of defence.

4. Sanctions and sentencing

Fines

4.1 The principal sanction available to the Commission is the imposition of fines. The Commission has no powers to impose criminal sanctions on individuals involved (in contrast to the position at the national level in some countries, including the UK: see paragraph 4.12 *et seq.* below).

4.2 In general, the European Courts have confirmed that the Commission has wide discretion in setting the level of fines on companies, within the limits of Regulation 1/2003.[7] In fixing the amount of the fine, regard must be had to the gravity and the duration of the infringement, as well as to any aggravating or attenuating circumstances. The calculations also take account of the market shares held by each party and their overall size, so as to reflect each company's capacity to harm consumers and to act as a deterrent.

4.3 Fines can in theory be up to 10% of worldwide group turnover in the financial year preceding the decision. The Court of Justice has confirmed that fines may exceed the turnover in the products concerned by the infringement, provided that they stay within the overall 10% ceiling (*Pre-insulated Pipe* Cartel Appeals, 2002).

Guidelines on the method for setting fines

4.4 The Commission has published Guidelines on the method of setting fines (the Fining Guidelines).[8] The flowchart at the end of this Part 4 describes the steps taken by the Commission in setting fines:

- **Value of sales:** The Commission starts by applying a percentage of the undertaking's value of sales in the market affected by the infringement. The percentage applied in each case is based on the gravity of the infringement and, as a general rule, will be set at a level of up to 30% of sales. In determining the proportion of the value of sales, account is taken of the nature of the infringement, its actual effect on the market, and the size of the relevant geographic market;

[7] Under Council Reg. (EEC) 2988/74 (OJ 1974 L319, 29.11.1974), a limitation period may be available to protect a company from fines, provided it has not been involved in the cartel activity for at least five years before the Commission took any steps to investigate the cartel.

[8] Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Reg. 1/2003 (OJ 2006 C210/2, 1.9.2006).

- **Duration:** To take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales is multiplied by the number of years of participation in the infringement;

- **Entry fee:** In cartel cases (and other hard-core infringements) an additional sum of between 15% and 25% of the infringer's value of sales is included to deter undertakings from participating in cartels even for only a short period;

- **Aggravating/attenuating circumstances and other adjustments:** The sum of the value of sales multiplied by the duration, plus the entry fee, is the "basic amount". The basic amount is adjusted to reflect a variety of possible aggravating or attenuating circumstances. The Fining Guidelines place an emphasis on recidivism as an aggravating factor: the Commission may increase a fine by up to 100% for each similar infringement found by the Commission or an NCA. Additional adjustments are possible for other "objective factors", such as the specific economic context, any economic or financial benefit derived by the offenders, the specific characteristics of the companies in question and their ability to pay in a specific social context; and

- **Leniency Notice:** The final (payable) amount is then calculated following the possible application of the Commission's Leniency Notice (see Part 5).

4.5 Given the substantial discretion the Commission has in setting fines, in practice it can be difficult to assess with any certainty the basic amount or final (payable) amount in cartel cases. This is largely justified on public policy grounds, as increased transparency could prompt companies to engage in off-setting calculations between the likely level of fines and the likely benefit arising from the anti-competitive cartel conduct. Nonetheless, the Commission does generally follow the Fining Guidelines and must exercise its discretion in a coherent and non-discriminatory way.

Parental liability

4.6 Parent companies may face penalties for infringements of their wholly or majority owned subsidiaries where "decisive influence" is established, regardless of whether or not they were aware of the cartel activity.[9] The Court of Justice has confirmed that parent companies may also be liable for penalties imposed in respect of infringements committed by their full function joint ventures, provided the Commission is able to establish that the parents actually exercised "decisive influence" (jointly) over that joint venture company (*DuPont* and *Dow*, 2013).

Ascertaining overall exposure to sanctions

4.7 In addition to the risk of fines at the EU level, a company involved in cartel activity also runs the risk of various penalties under national legislation.

4.8 Some NCAs may take criminal or other enforcement action against individuals, depending on their respective national legislation (see paragraph 4.12 *et seq.* below). A number of other Member States also provide for some kind of personal exposure for directors. Furthermore, in international cartel cases, executives face the real prospect of extradition resulting in personal fines and imprisonment in jurisdictions outside the EU (e.g. in the US).

[9] This can extend, for example, to companies controlled by private equity firms – which can be found jointly and severally liable with the subsidiary company that actually participate in the cartel.

4.9 Third parties who have suffered loss as a result of cartel behaviour in breach of the competition rules can also sue for damages before the national courts. The precise rules of standing, procedure and quantification of damages still vary between different EU Member States. However, in December 2014, a new EU Directive came into force that is intended to harmonise the rules governing actions for damages under national law for competition law infringements (Damages Directive).[10] Member States have until 27 December 2016 to implement the Directive.[11] It aims to facilitate damages actions through the following measures:

- allowing national courts to order the defendant or third parties to disclose relevant evidence, provided that such disclosure is proportionate;
- ensuring that a final decision by an NCA from any Member State may be presented before the national courts of any other Member State as at least prima facie evidence that an infringement of competition law has occurred;
- ensuring the joint and several liability of all undertakings that have infringed competition law (subject to certain exceptions applicable to SMEs);
- introducing limitation periods that allow a reasonable time during which damages claims may be brought;
- ensuring that defendants have the possibility of invoking the passing-on defence;
- encouraging consensual out-of-court settlements; and
- creating a rebuttable presumption that a cartel infringement has caused harm.

4.10 Class action litigation has been slower to develop in the EU compared with the US (where there is the risk of treble damages). However, in July 2013 the Commission released a non-binding recommendation on mechanisms for collective redress and a Communication and accompanying practical guide on quantifying harm in antitrust damages actions.[12] Member States were allowed two years from the date of publication of the recommendation within which to implement it and the Commission will assess whether any formal legislative measures need to be introduced into this area by July 2017.

4.11 Another important factor to be considered when ascertaining a company's overall exposure is that there are no formal rules on avoiding overlapping sanctions in the event of multiple investigations within the EU and other jurisdictions. There are no formal rules requiring the Commission to take account of penalties in other jurisdictions when determining fines, although the European Courts have previously recognised a general principle that any previous punitive decision must be taken into account in determining any sanction that is to be imposed. Still, the Commission appears to take the view that fines imposed or damages in civil actions paid outside the EU (most notably in the US) have no bearing on the fines to be imposed for infringing European competition rules.

[10] Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[11] It is possible to track the progress of each Member State's implementation via the European Commission website at: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

[12] Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ 2013 L201, 26.7.2013); Commission Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (OJ 2013 C167/19, 13.06.2013); Practical guide quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union.

Criminalisation of cartels

4.12 A number of countries provide for criminal sanctions, including fines and imprisonment, for individuals who participate in cartels. For example, in the UK, participation in a cartel is a criminal offence, punishable by jail terms or fines (or both). The first criminal convictions for the UK cartel offence were secured in 2008 (when three businessmen were convicted for participating in a cartel that had been running for nearly four years, and were sentenced to terms of imprisonment from two to three years each).[13]

4.13 A cartel for these UK criminal purposes is an arrangement between at least two persons that, if implemented, would lead to at least two competitors agreeing to fix prices, limit supply or production, share markets or engage in bid-rigging. Vertical agreements are not within the scope of the offence. It is important to note that it is not the participation in an infringement of Article 101 (or the UK Competition Act 1998) that is criminalised; the cartel offence under the Enterprise Act is quite separately defined. Furthermore, it is not necessary to demonstrate an appreciable anti-competitive effect to prove the cartel offence. The issue of whether or not an individual was acting with the company's authority is not relevant to determining whether an offence has been committed. Where the relevant agreement was reached outside the UK, a criminal prosecution can be commenced only if the agreement was also implemented in the UK.

4.14 The Enterprise Act gives the Competition and Markets Authority (CMA) the power to grant leniency to individuals who would otherwise face prosecution, but who inform the CMA of the cartel and fully cooperate with its investigation. In cases where it seems appropriate to grant immunity from prosecution, a "no-action" letter will be issued to the individual giving notice that the individual will not be prosecuted for the cartel offence. The grant of immunity will be made conditional on complete and ongoing cooperation with the CMA and any breach of the conditions may lead to the withdrawal of the no-action letter. The identity of recipients of no-action letters will remain confidential, other than in exceptional circumstances.

[13] The UK cartel offence originally required the individual to have acted dishonestly. From 1 April 2014 the dishonesty element of the offence has been removed and a number of new exclusions and defences have been added.

Commission's method of setting fines

STEP 1: CALCULATION OF BASIC AMOUNT

Value of sales

Commission generally starts its calculation by taking value of undertaking's sales of goods or services to which infringement directly or indirectly relates in relevant geographic area within EEA. If geographic scope of infringement extends beyond EEA (e.g. worldwide cartels), it may instead assess total value of sales of goods or services to which infringement relates in relevant geographic area (wider than EEA), then determine each participant's share of sales of that market, and apply that share to aggregate EEA sales of undertakings concerned. Resulting value of sales will reflect both size of relevant sales within EEA and weight of each undertaking in infringement.

Commission will then determine a proportion of the value of sales (up to 30%) to be used for calculating basic amount of fines. Factors that will be taken into consideration when determining proportion of value of sales include: nature of infringement, combined market share of all undertakings concerned, geographic scope of infringement and whether or not infringement has been implemented.

Duration of infringement

Relevant proportion of value of sales is then multiplied by number of years undertaking participated in infringement. Periods of less than six months are counted as half a year, and periods of more than six months but less than one year as a full year.

Entry fee

An entry fee of 15-25% of undertaking's value of sales is included in cartel cases as a deterrent. Factors taken into consideration when determining level of entry fee are same as those described above in relation to determining relevant proportion of value of sales.

BASIC AMOUNT = (value of sales x duration) + entry fee

STEP 2: ADJUSTMENTS

A. Increased for any aggravating circumstances

- repeated infringement of same type by same undertaking
- refusal to cooperate with or attempts to obstruct Commission
- role of leader or instigator of infringement
- retaliatory measures against other undertakings to enforce practices that constitute an infringement

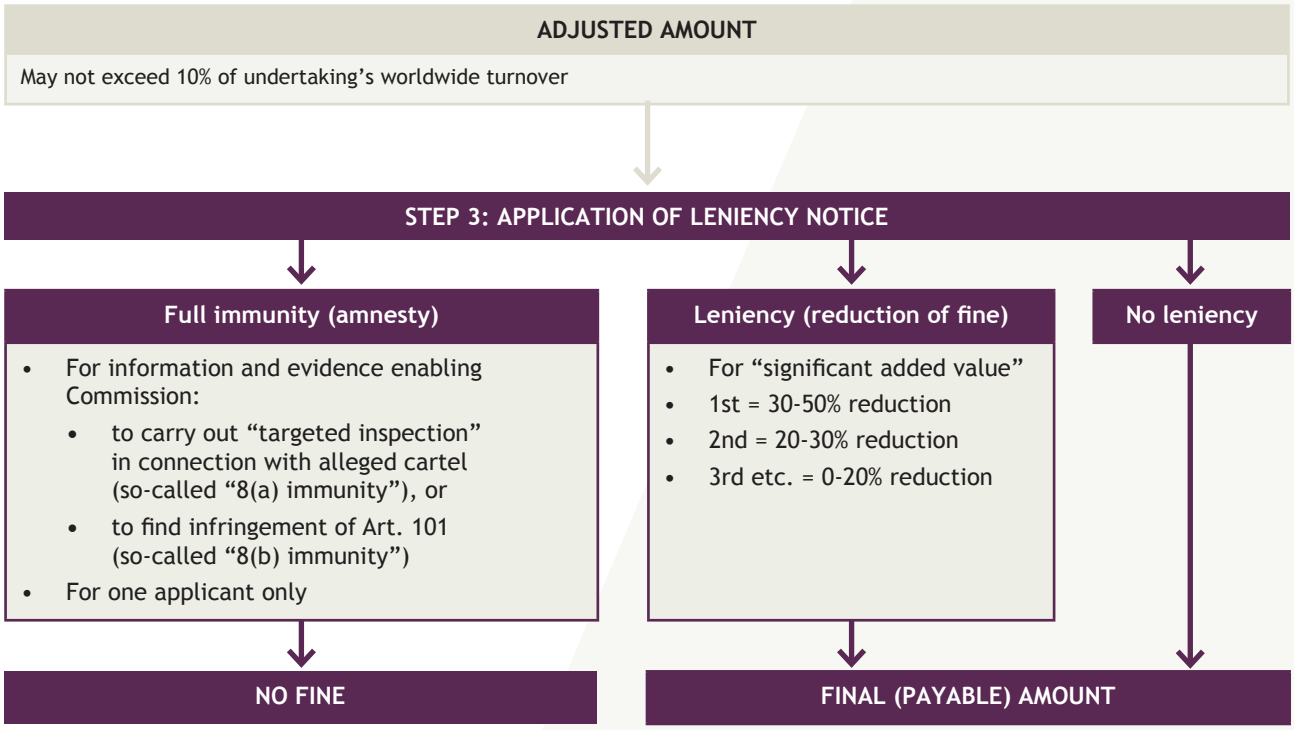
B. Reduced for any attenuating circumstances

- non-implementation in practice of offending agreements or practices
- infringements committed as a result of negligence
- effective cooperation outside scope of Leniency Notice
- anti-competitive conduct has been authorised or encouraged by public authorities

C. Additional adjustments due to "objective" factors

To ensure fine has sufficient deterrent effect, Commission may increase fine if undertaking has a particularly large turnover beyond sales of goods or services to which the infringement relates. Commission will also take account of need to increase fine so that it exceeds the estimated amount of gains improperly made as a result of the infringement.

In exceptional cases, Commission may take into account undertaking's inability to pay in a specific social and economic context. In this event, Commission may reduce fine on the basis of objective evidence showing that fine would irretrievably jeopardise economic viability of undertaking concerned and cause its assets to lose all their value.



Note: In its 2003 judgment in *Daesang and Sewon v Commission*[14] (an appeal against the Commission's decision in *Lysine*)[15] the General Court confirmed that any percentage increases or reductions to reflect aggravating or mitigating circumstances must be applied to the basic amount of the fine, not to the figure resulting from any initial increase or reduction to reflect aggravating or mitigating circumstances.

5. Leniency

5.1 Leniency applications are one of the principal drivers of cartel investigations undertaken by competition enforcement agencies around the world. Virtually all the NCAs within the EU now have leniency programmes of their own in place.[16] Most key jurisdictions outside the EU likewise operate leniency programmes.[17]

Overview of the Commission's leniency programme

5.2 In 2006 the Commission adopted a revised Notice on immunity from fines and reduction of fines in cartel cases (the **"Leniency Notice"**).[18] This replicates in a number of ways the US leniency rules thereby making it easier for companies to make coordinated applications in both the US and Europe (and elsewhere). The Leniency Notice is essentially based on two principles: first, the earlier that undertakings contact the Commission, the higher the reward; second, the value of the reward will depend on the usefulness of the materials supplied.

[14] Case T-230/00 *Daesang and Sewon v Commission*, judgment of 9 July 2003.

[15] Case COMP/36545 PO – *Amino Acids*, Commission Decision of 7 June 2000.

[16] Currently the only exception is Malta (where a public consultation on draft leniency regulations was held in 2013).

[17] These include countries elsewhere in Europe and the Middle East (e.g. Norway, Switzerland, Israel and Turkey), the Americas (e.g. US, Canada and Brazil), Asia (e.g. China, Japan and South Korea), Oceania (e.g. Australia and New Zealand) and South Africa.

[18] Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006, C298/11, 8.12.2006) (amending the 2002 Notice, which replaced an earlier 1996 Notice on the non-imposition or reduction of fines in cartel cases).

Substantive conditions under the Commission's leniency programme

Amnesty – full immunity from fines (Part II, Section A)

5.3 Under the Leniency Notice, full immunity will be granted to either:

- the first undertaking to provide the Commission with information and evidence to enable it to carry out a "targeted inspection" in connection with the alleged cartel (Part II, Section A, 8(a)); or
- the first undertaking to submit information and evidence enabling it to find an infringement of Article 101 (Part II, Section A, 8(b)).

5.4 These options are mutually exclusive so only one undertaking can qualify for full immunity. To obtain full immunity, an undertaking must also:

- not have taken steps to coerce other undertakings to participate in the cartel;
- put an end to its involvement in the illegal activity no later than the time at which it discloses the cartel (except where in the Commission's view it would be reasonably necessary to preserve the integrity of the inspections);
- cooperate fully, on a continued basis and expeditiously with the Commission. The undertaking is expected to provide the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel; and
- not destroy, conceal or falsify any evidence relating to the cartel and not disclose the cartel or the content of its application for immunity, except to other competition authorities.

Leniency – reduction of fines for "significant added value" (Part II, Section B)

5.5 Under the Leniency Notice (Part II, Section B), favourable treatment is also available to undertakings that (while not qualifying for immunity) provide evidence representing "significant added value" to that already in the Commission's possession and terminate immediately their involvement in the cartel activity. Provided these conditions are met, the cooperating undertaking may receive up to a 50% reduction in the level of fine that would have been imposed if it had not cooperated. The envisaged reductions are split into three bands:

- 30-50% for the first undertaking to provide "significant added value";
- 20-30% for the second undertaking to provide "significant added value"; and
- 0-20% for any subsequent undertakings to provide "significant added value".

5.6 The amount received within these bands depends upon the time at which they started to cooperate, the quality of evidence provided and the extent to which it represents added value.

5.7 Although undertakings seeking leniency under Section B are ineligible for total immunity, they may be able to qualify for a form of partial amnesty. If a leniency applicant supplies information previously unknown to the Commission showing that the cartel had lasted longer or was in some way more serious than the Commission had been aware, the Commission will not take account of those elements (regarding duration or gravity) when setting the level of that applicant's fine.

Procedural conditions under the Commission's leniency programme

5.8 If an undertaking wishes to take advantage of the Commission's leniency programme, it must contact DG Competition. Only persons empowered to represent the undertaking for that purpose or intermediaries acting for the undertaking (such as legal advisers) should take such a step.[19]

5.9 The Commission will seek to establish its case on the basis of documentary proof. The undertaking must provide the Commission with a corporate statement and other evidence relating to the alleged cartel, in particular, any evidence contemporaneous to the infringement. Corporate statements may take the form of written documents signed by or on behalf of the undertaking or may be made orally. Given the prospect of written materials needing to be disclosed in court proceedings in the event of damages claims, they are normally made orally. They should include a detailed description of the alleged cartel arrangement; full contact details of the applicant and the other members of the cartel; the names, positions and addresses of all individuals involved in the alleged cartel; and information on which other competition authorities have been (or are intended to be) approached in relation to the alleged cartel.

5.10 Information and documents communicated to the Commission under the Leniency Notice are treated with confidentiality. Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules relating to access to the file.[20] In practice, the Commission does not publicly reveal the identity of a leniency applicant as long as the investigations continue. Eventually, however, details of the cartel investigation and the applicant's involvement may be made publicly available in the final Commission Decision.

5.11 In addition, the Damages Directive[21] sets out a number of safeguards in relation to leniency programmes, including absolute protection from disclosure or use as evidence for leniency corporate statements and settlement submissions, and temporary protection for documents specifically prepared in the context of the public enforcement proceedings by the parties (e.g. replies to authorities' requests for information) or the competition authorities (e.g. a statement of objections).

Application for full immunity

5.12 Following initial contact, the Commission will immediately inform the applicant if full immunity is no longer available for the particular cartel in question (in which case the applicant may still request that its leniency application be considered for a reduction of fines). If immunity is still available, the undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines.

5.13 The Commission may grant a marker protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis to allow for the gathering of the necessary information and evidence. To be eligible to secure a marker, the applicant must provide the Commission with information concerning: its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel, the nature of the alleged cartel conduct, details of any other past or possible future leniency applications to other authorities in relation to the alleged cartel, and its justification for requesting a marker. Where the Commission

[19] For these purposes, DG Competition operates the following dedicated telephone numbers: +32-2 298 4190 or +32-2 298 4191 for initial contacts (and also has a dedicated and secure fax number: +32-2 299 4585).

[20] According to the Commission's Notice on Access to the File (OJ 2005 C325/7, 22.12.2005), information on the case file that involves business secrets, internal Commission and other confidential documents is not to be disclosed, unless it provides evidence proving an alleged infringement or contains information that invalidates or rebuts the Commission's reasoning or tends to exonerate a company suspected of infringing the rules.

[21] See para. 4.9 above.

grants a marker, it will specify the time period in which the applicant must perfect the marker by submitting information and evidence required to meet the relevant threshold for immunity.

5.14 An undertaking making a formal immunity application to the Commission has two ways to comply with the requirements for full immunity. It may choose either:

- to provide the Commission with all the evidence of the infringement available to it; or

- to present this evidence initially in hypothetical terms, in which case the undertaking is further required to list the evidence it proposes to disclose at a later agreed date. This descriptive list should accurately reflect – to the extent feasible – the nature and content of the evidence. The applicant will be required to perfect its application by handing over all relevant evidence immediately after the Commission determines that the substantive criteria for immunity are met.

5.15 In an attempt to increase legal certainty, for full immunity cases the Commission will grant conditional leniency up-front through a formal Commission Decision. It normally takes at least 14 days to issue such a Decision once the evidence has been provided (although in some cases this period may stretch to a number of weeks). Hypothetical applications take longer to process, as they require two Commission Decisions. In the past, the Commission had been unwilling to offer any assurances until the final Decision. In either of the above scenarios, if the immunity applicant meets the substantive criteria, conditional immunity will be granted in writing. If the applicant subsequently complies with its obligation for complete and continuous cooperation, this conditional immunity will be confirmed in the final Decision.

Application for fine reduction

5.16 Applicants wishing to benefit from a reduction in fine should provide the Commission with evidence of the cartel activity at issue. Following the necessary verification process by the Commission, they will be informed whether the evidence submitted at the time of the application has passed the "significant added value" threshold (as well as the specific band within which any reduction will be determined) at the latest on the day of adoption of a Statement of Objections. The specific reduction to be granted will be finalised in the Commission's Decision.

Multi-jurisdictional considerations

5.17 Recent cases have shown that international cartels are highly likely to result in an exposure to prosecution in multiple jurisdictions. If it is decided to apply for leniency, applications to the different regulators should therefore be made as quickly as sensibly possible (and, where appropriate, simultaneously). Given the convergence between the EU and the US leniency rules, it has become easier for companies to apply simultaneously in both the US and Europe (as well as elsewhere).

5.18 In practice, the decision on whether to apply for leniency if a violation is discovered internally requires a careful assessment of the risks, advantages and disadvantages. Factors include:

- the risk of the authorities being on the track already;

- the danger that another participant will get in first. If an undertaking wishes to benefit from full immunity, it needs to tell the Commission as soon as it has gathered evidence of the cartel's existence, sufficient for the purposes of the Leniency Notice. Otherwise, it runs an increased risk that one of the other cartelists may blow the whistle first;

- the jurisdictions in which liability to sanctions may arise;

- the exposure of individuals to criminal prosecution and imprisonment in other jurisdictions if they do not secure amnesty. Although at the European level the Commission cannot impose penalties on individuals, there may be implications for criminal proceedings against individuals under national legislation within or outside the EU;

- the consequences in terms of civil liability, including punitive or treble damages in some jurisdictions (notably in the US); and

- the implications of an approach to the Commission in terms of document disclosure requirements in other jurisdictions.

5.19 Parties to international cartels need to bear in mind that although the Damages Directive provides for leniency submissions to the Commission to be protected under the national laws of Member States (see paragraph 5.11 above), these documents may be subject to civil disclosure (or discovery) rules in litigation proceedings in other jurisdictions, in particular US civil litigation regarding claims for treble damages. Plaintiffs are keen to get hold of documents, statements and confessions provided to the Commission by companies. In an attempt to avoid the undermining of its leniency policy, the Commission has been willing to assist in efforts to protect leniency applications from disclosure in foreign courts in the following ways:

- asserting in the Leniency Notice that any written statement made *vis-à-vis* the Commission in relation to the leniency application forms part of the Commission's file and may not, as such, be disclosed or used for any other purpose than the enforcement of Article 101;

- intervening in pending US civil proceedings by means of *amicus curiae* where disclosure of leniency corporate statements is at stake. The Commission has intervened in this way in a number of cases; and

- accepting oral corporate statements ("paperless submissions").

5.20 In international cartel cases it may be advisable to make a paperless leniency application to the Commission via EU qualified external lawyers benefiting from legal professional privilege. In addition, it may be advisable for companies to restrict their statements and evidence to activities in the EU only, to avoid admission of misconduct with effects in the US or elsewhere outside the EU.

6. Settlement

Overview of the Commission's settlement procedure

6.1 In 2008 the Commission introduced a new procedure for settling cartel cases, complementing the Leniency Notice and the Fining Guidelines.[22] The aim of the procedure is to simplify and speed up the administrative procedure for investigations (and to reduce European Court litigation in cartel cases), thereby freeing up the Commission's resources and enabling it to pursue more cases.

6.2 The procedure is available in cases where the Commission has initiated proceedings with a view to adopting an infringement decision and imposing fines but has not yet issued a formal SO. Pursuant to the settlement procedure, the parties are expected to acknowledge their participation in and liability for the cartel and reach a common understanding with the Commission about the nature and scope of the illegal activity and the appropriate penalty. In return for such cooperation, (a) the parties are rewarded with a 10% reduction in fines (cumulative to any leniency reduction) and (b) any specific increase for deterrence used in their regard will not exceed a multiplication of two.

Procedural conditions under the Commission's settlement procedure

6.3 The Commission has a broad margin of discretion to determine which cases may be suitable for settlement. An undertaking does not have the right to enter into settlement discussions but nor is it under an obligation to do so if invited by the Commission. When the Commission determines the suitability of a case, account is taken of the probability of reaching a common understanding within a reasonable time frame in view of factors such as the number of parties involved, the extent of contested facts and the prospect of achieving procedural efficiencies.

6.4 Where the Commission considers a case to be potentially suitable for settlement, it will request that the parties indicate, in writing, their wish to engage in such settlement discussions. The Commission's request will set a time limit of up to two weeks in which the parties must respond. This written indication by the parties does not imply an admission of participation in or liability for the cartel. If two or more parties within the same corporate group indicate their willingness to engage in settlement discussions, they must appoint a joint representative to engage in discussions with the Commission on their behalf. This will not, however, prejudge a finding of joint and several liability among such undertakings. Following receipt of an expression of interest, the Commission retains its discretion whether to proceed with the settlement discussions and to determine the appropriateness and the pace of the discussions. The Commission may decide at any time during the procedure to discontinue settlement discussions altogether.

6.5 The settlement discussions will cover the alleged facts, the gravity and duration of the infringement, the liability of the undertaking and the potential maximum fine. The parties do not have full access to the Commission's file, nor do they have the right to negotiate the existence of the infringement or the appropriate sanction. The Commission will, however, hear the parties' arguments and disclose some (non-confidential) information from its file upon the reasonable request of a party. The content of any settlement discussions with the Commission cannot be disclosed by the parties to the proceedings to any other undertaking or third party unless the Commission has given its prior consent. A breach of such confidentiality may result in the termination of the settlement discussions and, for the purposes of setting a fine, it may be treated as an aggravating circumstance.

[22] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Art. 7 and Art. 23 of Council Reg. (EC) No 1/2003 (OJ 2008 C167/1, 2.7.2008) in cartel cases and Commission Reg. (EC) 622/2008 (OJ 2008 L171/3, 1.7.2008) amending Reg. 773/2004 as regards the conduct of settlement procedures in cartel cases.

6.6 Should the Commission and the parties reach a common understanding as to the scope of the potential objections and the likely fines, the Commission will request a settlement submission from the parties within a set time period of at least 15 working days. The settlement submission is an oral or written statement that must contain the following: a clear, unequivocal acknowledgment of the parties' liability for the infringement; an indication of the maximum amount of fine that the parties would accept; confirmation that the parties have been sufficiently informed of the Commission's objections and have been given sufficient opportunity to be heard; confirmation that the parties do not wish to have an oral hearing; and an agreement to receive the Commission's SO and Decision in an official EU language.

6.7 Once the settlement submission has been received by the Commission, the Commission will issue its SO, which may or may not endorse the view in the settlement submission. If it does, the parties will have at least two weeks to respond to the SO by confirming that it corresponds to the contents of their settlement submission and that the parties remain committed to the settlement procedure. Following this, there will be no formal access to the file or oral hearing, and the Commission can proceed directly to issuing its Decision (following consultation with the Advisory Committee). The Decision will reflect the parties' cooperation, and all parties who participated in the settlement procedure will receive the same reduction of 10% in addition to any reduction they may receive for leniency (see Part 5 above). Decisions made following the settlement procedure are still subject to judicial review (see Part 7 below).

6.8 If, however, the SO does not endorse the view in the settlement submission, the parties' acknowledgments will be deemed to be withdrawn and normal administrative procedures will be followed (e.g. the parties will have full access to the Commission's file and there will be an oral hearing).

6.9 Even if the Commission endorses the view in the settlement submission in its SO, the Commission may nevertheless adopt a Decision that departs from this position. This may be a result of the views put forth by the Advisory Committee and/or the College of Commissioners. In this event, the Commission will issue a new SO and normal administrative procedures will be followed.

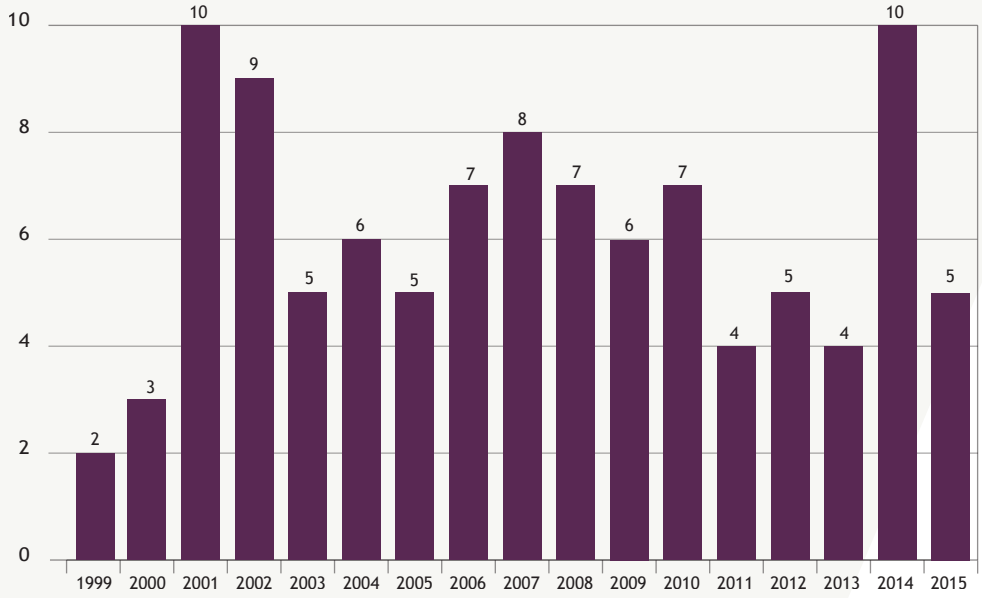
7. Judicial review

7.1 Commission decisions can be appealed to the General Court in Luxembourg. The grounds for appeal are: lack of competence, infringement of an essential procedural requirement, infringement of the TFEU or of any rule relating to its application, or misuse of powers. The General Court has unlimited jurisdiction, as regards matters of fact and law, to review the legality of and reasons for Commission decisions regarding fines and to assess the appropriateness of the amount of the fines imposed. It may cancel, reduce or increase the fines imposed. The burden of proof lies with the Commission to establish the facts and assessments on which its decision was based. General Court judgments may be appealed (on points of law only) to the Court of Justice.

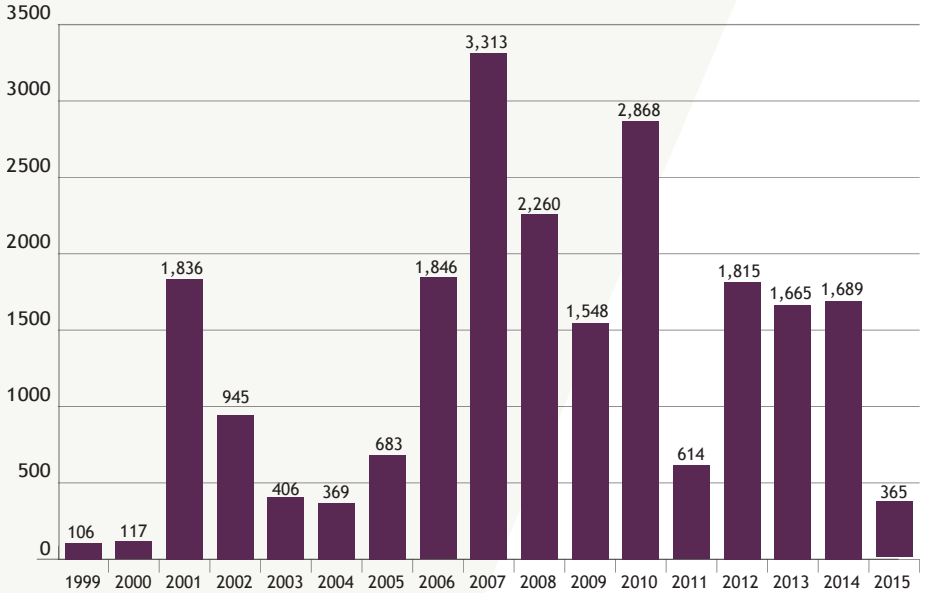
7.2 Companies do not necessarily have to pay their fines immediately, if they lodge an appeal before the General Court. However, in this case, they are required to provide a bank guarantee covering the full amount of the fine plus interest.

Annex 1: Statistics on European Commission cartel enforcement

A. Number of Commission cartel decisions by year



B. Total Commission fines imposed on cartels by year (€ millions)[23]



[23] Amounts adjusted for changes following judgments of the Courts (General Court and Court of Justice of the European Union).

C. Commission cartel decisions by year (since 2005)

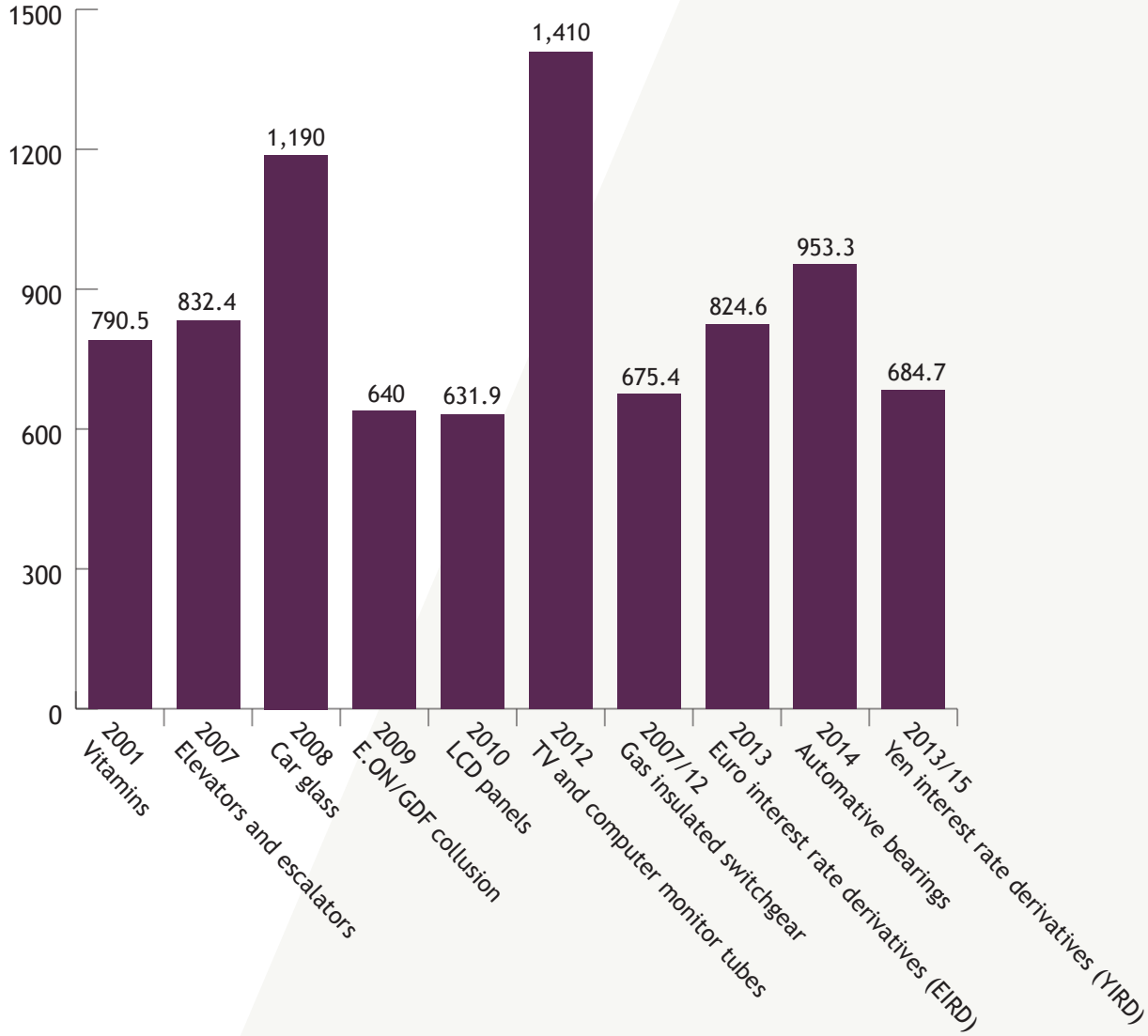
Year	Case	Competition Commissioner
2005	*Monochloroacetic Acid* (19 January 2005) *Industrial Thread* (14 September 2005) *Italian Raw Tobacco* (20 October 2005) *Industrial Bags* (30 November 2005) *Rubber Chemicals* (21 December 2005)	
2006	*Hydrogen Peroxide* (3 May 2006) *Acrylic Glass* (31 May 2006) *Dutch Road Bitumen* (13 September 2006) *Copper Fittings* (20 September 2006) *Steel Beams* (re-adoption of 1994 decision) (8 November 2006) *Synthetic Rubber* (29 November 2006) *Alloy Surcharge* (re-adoption of 1998 decision) (20 December 2006)	
2007	*Gas Insulated Switchgear* (24 January 2007) *Elevators and Escalators* (21 February 2007) *Dutch Brewers* (18 April 2007) *Fasteners and Attaching Machines* (19 September 2007) *Spanish Bitumen* (4 October 2007) *Professional Videotape* (20 November 2007) *Flat Glass* (28 November 2007) *Chloroprene Rubber* (5 December 2007)	
2008	*Nitrile Butadiene Rubber* (23 January 2008) *International Removals* (11 March 2008) *Sodium Chlorate Paper Bleach* (11 June 2008) *Aluminium Fluoride* (25 June 2008) *Paraffin Waxes* (1 October 2008) *Bananas* (15 October 2008) *Car Glass* (12 November 2008)	
2009	*Marine Hose* (28 January 2009) *French and German Gas Markets* (8 July 2009) *Calcium Carbide* (22 July 2009) *Concrete Reinforcing Bars* (re-adoption of 2002 decision) (30 September 2009) *Power Transformers* (7 October 2009) *Heat Stabilisers* (11 November 2009)	
2010	*DRAM Chips* (19 May 2010)* *Carbonless Paper* (re-adoption of 2001 decision) (23 June 2010) *Bathroom Fittings* (23 June 2010) *Prestressing Steel* (30 June 2010) *Animal Feed Phosphates* (20 July 2010)** *Airfreight* (9 November 2010) *LCD Panels* (8 December 2010)	Joaquín Almunia (29 cases)
2011	*Consumer Detergents* (13 May 2011)* *Exotic Fruit* (12 October 2011) *CRT Glass* (19 October 2011)* *Refrigeration Compressors* (7 December 2011)*	

Year	Case	Competition Commissioner
2012	*Freight Forwarding Services* (28 March 2012) *Window Mountings* (28 March 2012) *Water Management Products* (27 June 2012)* *Gas Insulated Switchgear* (re-adoption of 2007 decision) (27 June 2012) *TV and Computer Monitor Tubes* (5 December 2012)	
2013	*Automotive Wire Harnesses* (10 July 2013)* *Shrimps* (27 November 2013) *Euro Interest Rate Derivatives* (4 December 2013)** *Yen Interest Rate Derivatives* (4 December 2013)**	
2014	*Polyurethane Foam* (29 January 2014)* *Power Exchanges* (5 March 2014)* *Automotive Bearings* (19 March 2014)* *Steel Abrasives* (2 April 2014)** *Power Cables* (2 April 2014) *Canned Mushrooms* (25 June 2014)** *Smart Card Chips* (3 September 2014) *Swiss Franc Interest Rate Derivatives (CHF LIBOR and Bid Ask Spread Infringement)* (21 October 2014) *Paper Envelopes* (11 December 2014)*	
2015	*Yen Interest Rate Derivatives (ICAP)* (4 February 2015)** *Parking Heaters* (17 June 2015)* *Retail Food Packaging* (24 June 2015) *Cargo Train Operators* (15 July 2015) *Optical Disk Drives* (21 October 2015)*	Margrethe Vestager (8 cases to date)
2016 (to date)	*Alternators and Starters* (27 January 2016)* *Canned Mushrooms* (6 April 2016)** *Steel Abrasives (Pometon)* (25 May 2016)**	

* Full settlement cases (where all parties settled)

** Hybrid settlement cases (where not all parties agreed to settle)

D. Commission cartel cases with highest overall fines (€ millions)[24]



[24] Amounts adjusted for changes following judgments of the Courts (General Court and Court of Justice of the European Union).

E. Top 20 highest individual fines in cartel cases

Party	Fine[29]	Case
Saint-Gobain	€715m	*Car Glass* (2008)
Philips	€705m[30]	*TV and Computer Monitor Tubes* (2012)
LG Electronics	€688m[31]	*TV and Computer Monitor Tubes* (2012)
Deutsche Bank	€466m	*Euro Interest Rate Derivatives* (2013)
Hoffmann-La Roche	€462m	*Vitamins* (2001)
Siemens	€397m	*Gas Insulated Switchgear* (2007)
Schaeffler	€371m	*Automotive Bearings* (2014)
Pilkington	€357m	*Car Glass* (2008)
E.ON	€320m	*French and German Gas Markets* (2009)
GDF Suez	€320m	*French and German Gas Markets* (2009)
ThyssenKrupp	€320m	*Elevators and Escalators* (2007)
SKF	€315m	*Automotive Bearings* (2014)
Air France/KLM	€310m	*Airfreight* (2010)
Chimei Innolux Corporation	€288m	*LCD Panels* (2010)
RBS	€260m	*Yen Interest Rate Derivatives* (2013)
Deutsche Bank	€260m	*Yen Interest Rate Derivatives* (2013)
Lafarge	€250m	*Plasterboard* (2002)
RP Martin	€247m	*Yen Interest Rate Derivatives* (2013)
BASF	€237m	*Vitamins* (2001)
Société Générale	€228m	*Euro Interest Rate Derivatives* (2013)

[25] Amounts adjusted for changes following judgments of the Courts (General Court and Court of Justice of the European Union).

[26] €392m of this fine was imposed jointly and severally on Philips and LG Electronics (due to their joint venture).

[27] €392m of this fine was imposed jointly and severally on Philips and LG Electronics (due to their joint venture).

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Philippe Chappatte

He is resident in our London office, but also spends a proportion of his time in Brussels. He is responsible for the running and development of the firm's global competition practice, including through our Beijing and Hong Kong offices and 'best friend' firms.

Philippe has extensive experience of both EU and UK competition law with expertise in merger, cartel, behavioural and competition litigation cases in both jurisdictions.

Highlights include advising:

- INEOS in relation to its PVC joint venture with Solvay JV, combining Europe's two largest PVC producers. The European Commission issued a conditional clearance following an in-depth Phase II review
- Ericsson in relation to its acquisition of Red Bee Media, combining two of the leading linear playout service providers in the UK, which was cleared unconditionally by the UK Competition Commission after an in-depth review
- BHP Billiton on its proposed iron ore production joint venture with Rio Tinto (subject to a detailed investigation by the European Commission)
- Bertelsmann in connection with the merger of its recorded music business, BMG, with Sony Music (unconditionally cleared twice after two detailed Phase II investigations by the European Commission) and on its successful appeal to the Court of Justice against the General Court's judgment in the Impala case
- Chi-X Europe on its merger with BATS (cleared unconditionally after a detailed investigation by the UK Competition Commission) and on its representations to the European Commission regarding the proposed Euronext / Deutsche Boerse merger
- Global Radio in the OFT's merger investigation into the GMG Radio deal (only the second case to involve a fast track reference application to the UK Competition Commission and one of the few media cases to involve a Public Interest Intervention notice on media plurality grounds)
- Ericsson on its Article 102 complaint to the European Commission concerning Qualcomm's patent licensing practices, on its acquisition of Nortel's patent portfolio (Rockstar transaction) and of Nortel's multi-service switching business (cleared by the European Commission after concessions)
- Fuji Electric in the GIS and power transformer cartel cases, including on its appeal to the General Court against the European Commission's infringement decision in the GIS case
- Booking.com on the OFT's investigation into hotel online bookings

Philippe is listed as a leading individual in the 'Competition Law' section of Chambers UK, 2016 (Band 1) and for 'EU and competition' and 'Competition litigation' in The Legal 500 UK, 2015. He is also listed for 'Competition Law' and 'Competition/European Law (Foreign Experts) in Chambers Global, 2015.

Philippe is the President of the European Competition Lawyers Forum (which is used as a sounding board on policy and practice-related issues by the European Commission's Competition Directorate General). He is fluent in French and has a reasonable knowledge of German.

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Bertrand studied at the London School of Economics (MSc Economics). He joined Slaughter and May in 1992 and became a partner in 2001. He works in both our London and Brussels offices.

Bertrand's practice spans merger control, competition litigation, market inquiries and competition investigations. He has extensive experience of representing clients before the European Commission and the Competition and Markets Authority (CMA).

Current and recent matters include advising:

- Royal Dutch Shell on its acquisition of BG Group, and on the disposal of its Danish downstream business to SFR
- ITV on its acquisitions of Talpa Media and UTV
- Spirit Pub Company on its acquisition by Greene King
- Regus on its acquisition of Avanta
- British Airways in relation to:
  - cartel investigations by the European Commission and the OFT, respectively, into air freight (cargo) services and passenger fuel surcharges on long-haul flights
  - private actions relating to the cargo and passenger investigations
- A major financial institution on the investigation into trading on the foreign exchange market
- Platts on the European Commission's investigation into the manipulation of published prices for a number of oil and biofuel products
- Japan Tobacco (Gallaher) on litigation arising out of the OFT's investigation into the retail pricing of tobacco products
- Nationwide on the CMA's retail banking investigation

Bertrand is fluent in French. He is listed as a leading individual for EU and Competition Law in The Legal 500, 2015 and for Competition Law in Chambers, 2016.

Experience
Slaughter and May (1992-Present)
Partner since: 2001-Present

Practice Areas
Competition
Competition Litigation
Global Investigations

Overview of cartel regulation in Hong Kong

Slaughter and May, Hong Kong

1. Introduction

1.1 Competition law in Hong Kong is primarily regulated under the provisions of the Competition Ordinance (Cap. 619) (the "**Ordinance**") which came into effect on 14 December 2015. In particular, cartel conduct is expressly prohibited under Section 6 of the Ordinance (the "**First Conduct Rule**"), which relates to anti-competitive agreements, concerted practices and decisions. Prior to the enactment of the Competition Ordinance, competition law in Hong Kong applied only to the telecommunications and broadcasting sectors under the Telecommunications Ordinance (Cap. 106) and the Broadcasting Ordinance (Cap. 562).

1.2 The Competition Commission (the "**Commission**") is an independent statutory body which was established to enforce the provisions of the Ordinance. While the Commission is the principal authority responsible for enforcing the Ordinance, the Communications Authority has concurrent jurisdiction with the Commission in respect of undertakings licensed in the telecommunications and broadcasting sectors. The Commission and Communications Authority have broad powers of investigation and are the only entities which are permitted to initiate legal proceedings seeking a pecuniary penalty for an alleged contravention of the Ordinance's conduct rules.

1.3 While the Commission enforces the conduct rules of the Ordinance, only the Competition Tribunal (the "**Tribunal**") and other courts in Hong Kong have the power to decide if the Ordinance has been contravened. The Tribunal was established under the Ordinance as a superior court of record to adjudicate competition matters arising from the Ordinance. The Competition Tribunal comprises of judges of the Court of First Instance, and is functionally a part of the High Court of Hong Kong.

1.4 In the run up to the Ordinance coming into effect, the Commission published several guidelines and policies on its approach under the Ordinance, including the Guideline on the First Conduct Rule. While there are not yet any published decisions by the Commission or judgments issued by the Tribunal on cartel conduct at this time, the Commission's published guidelines provide valuable guidance on how the Commission intends to interpret and apply the provisions of the Ordinance. In particular, the Commission's Enforcement Policy indicates that the Commission will accord priority to cartel conduct,[1] along with other serious contraventions of competition law.[2]

1.5 Since its inception, the Commission has been involved heavily in public advocacy and direct engagements with members of the Hong Kong business community to ensure that the public is prepared to comply with the Ordinance. The Commission has been particularly engaged with the many trade associations which play a significant role in the Hong Kong economy. The Commission published a brochure entitled 'The Competition Ordinance and Trade Associations' in June 2015 which was sent to over 500 trade associations. It also participated in seminars and events and reviewed the published practices of associations from publicly available information. On 14 March 2016 the Commission published its 'Report on Trade Associations in Hong Kong and the Competition Ordinance', which details the Commission's approach in identifying 20 high risk trade associations and the public responses of at least 12 trade associations to remove existing price restrictions or fee scales.

[1] For the purposes of the Commission's Enforcement Policy, cartel conduct generally covers hardcore restrictions including price-fixing, market sharing, restricting output, and bid-rigging. Such conduct is also considered "serious anti-competitive conduct" under the Ordinance.

[2] The Commission's Enforcement Policy also indicates that the Commission will focus on other types of agreements contravening the First Conduct Rule causing significant harm to competition in Hong Kong, and abuses of substantial market power involving exclusionary behaviour by incumbents.

2. Description of cartel offences

First Conduct Rule

2.1 The First Conduct Rule prohibits undertakings from engaging in the following conduct:

- making or giving effect to an agreement;
- engaging in a concerted practice; or
- as a member of an association of undertakings, making or giving effect to a decision of the association,

if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

2.2 The First Conduct Rule governs any individual or entity which may be involved in anti-competitive conduct. The First Conduct Rule applies to "undertakings" which is defined broadly in the Ordinance to mean "any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity".

Jurisdiction

2.3 The First Conduct Rule applies to all conduct which may have an effect on competition in Hong Kong regardless of whether the conduct took place outside Hong Kong. Section 8 of the Ordinance provides that the First Conduct Rule applies to an agreement, concerted practice or decision that has the object or effect of preventing, restricting or distorting competition in Hong Kong even if:

- the agreement or decision is made or given effect to outside Hong Kong;
- the concerted practice is engaged in outside Hong Kong;
- any party to the agreement or concerted practice is outside Hong Kong; or
- any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.

Agreement, concerted practice and decision

2.4 The Commission considers that the terms "agreement" and "concerted practice" should be interpreted broadly. In particular, an "agreement" for the purposes of the First Conduct Rule is not limited to a legally enforceable contract or an express agreement. The Commission will be satisfied that there is an agreement for the purposes of the First Conduct Rule where there is a "meeting of the minds" between the parties concerned. Even if there is no "meeting of the minds", the Commission will consider that there is a concerted practice where the parties involved knowingly substitute practical cooperation for the risks of competition, e.g. by exchanging competitively sensitive information. Similarly, the non-binding nature of a decision of an association will not in and of itself prevent the Commission from considering the decision to contravene First Conduct Rule.

Object or effect

2.5 Certain conduct will be regarded by the Commission as being anti-competitive by its very nature, and therefore having the object of harming competition. Such conduct includes the conduct identified in the Ordinance as "serious anti-competitive conduct", which includes price fixing, market sharing, restricting output and bid-rigging.[3] Resale price maintenance has also been identified in the Guideline on the First Conduct Rule as potentially having the object of harming competition. If conduct contravenes the First Conduct Rule by having the object of harming competition, it is unnecessary to consider whether the conduct has or is likely to result in anti-competitive effects.

2.6 For conduct which does not have an anti-competitive object, the Commission will consider if there are anti-competitive effects that are likely to flow from the conduct. The Commission will consider that there are likely anti-competitive effects where the conduct is likely to have an adverse impact on one or more of the parameters of competition such as price, output, product quality, product variety or innovation. In assessing the likely effects of the conduct in question, the Commission will consider the market power of the parties involved, the effects on competitors and end-consumers and the likely counterfactual (i.e. what the competitive conditions in the market would be with and without the anti-competitive conduct).

International cooperation

2.7 The Ordinance does not contain express provisions governing cooperation between the Commission and regulatory authorities in other jurisdictions. However, the Commission has been actively communicating with other authorities and participates regularly in the activities of the International Competition Network (ICN). It is therefore very likely that it will be open to international cooperation on cases in the future.

Coordination between Commission and Communications Authority

2.8 Within Hong Kong, Section 160 of the Ordinance provides that where more than one competition authority has jurisdiction to perform functions in relation to a competition matter, if one of the authorities is performing or has performed a function in relation to that matter, the other competition authority must not perform any function in relation to that matter in the absence of an agreement.

2.9 The Commission and the Communications Authority have signed a memorandum of understanding on 14 December 2015 which provides, among other things, that the Communications Authority will ordinarily take the role of the lead authority on matters which fall within the concurrent jurisdiction of both authorities.

[3] Serious anti-competitive conduct will not be able to benefit from the *de minimis* exclusions in para. 5 of Schedule 1 to the Ordinance which excludes from the First Conduct Rule conduct where the combined turnover of the undertakings to the conduct for the previous financial or calendar year does not exceed HKD 200 million.

3. Investigations and dawn raids

Powers of investigation

3.1 The Commission may commence an investigation under the Ordinance where it has reasonable cause to suspect that a contravention of a competition rule under the Ordinance (including cartel conduct under the First Conduct Rule) has taken place, is taking place or is about to take place.

3.2 Once the Commission commences an investigation, the Commission has wide powers of investigation under the Ordinance to:

- require the production of any document or specified information relating to any matter that the Commission reasonably believes to be relevant to the investigation (i.e. information requests);
- require the attendance of a person before the Commission to respond to questions relating to any matter that the Commission reasonably believes to be relevant to the investigation (i.e. interviews); and
- enter and search premises where authorised by warrant (i.e. dawn raids).

Dawn raids

3.3 Where there are reasonable grounds to suspect that documents relevant to the Commission's investigation are located in certain premises, the Commission may, at any stage of the investigation, apply to the Court of First Instance for a warrant to enter and search the premises in question for documents, information or other items relevant to its investigation.

3.4 The Commission's Guideline on Investigations (**"Investigations Guideline"**) states that the Commission expects to seek such a warrant in matters which involve:

- secretive conduct;
- instances where the Commission considers that documents or information relevant to its investigation may be destroyed or interfered with should the Commission seek them through other means; and/or
- circumstances where the Commission has been unsuccessful in obtaining specific or categories of documents or information or suspects non-compliance with an earlier request for such documents and information.

3.5 The Commission is not required to provide prior notice to the occupant of the premises in question or wait for legal advisers to arrive before commencing its searches. However, the Commission will wait a reasonable amount of time for external legal advisers to arrive where requested, unless in-house lawyers are already on the premises. During a dawn raid, the Commission is authorised to, among other things, use reasonable force to gain entry or access evidence on the premises.

3.6 The Investigations Guideline states that the Commission will search, copy and/or confiscate relevant documents and equipment as well as seek explanations from individuals present about any relevant documents. The Commission may retain any items retrieved from the dawn raid for the as long as necessary for the purposes of the Commission's investigation.

3.7 While the Commission primarily focused on 'soft' enforcement methods (such as engagement with trade associations as discussed in paragraph 1.5 above) in the early stages, it has now also utilised its range of investigation powers, including dawn raids. The Commission indicated in a public forum that, as of October 2016, it has conducted about six dawn raids since the Ordinance came into effect. This highlights how important it is for business to have a proper dawn raid response protocol in place and to ensure staff are adequately trained.

Information requests

3.8 In addition to dawn raids, the Commission may also issue written requests to a person for documents and information which the Commission reasonably believes to be relevant to an investigation, and which the Commission has reasonable cause to suspect are in that person's possession or control.

3.9 The documents requested by the Commission may include originals or copies of existing documents and may include information recorded in any form[4] such as electronic data, correspondence and databases.

3.10 Information requests may be issued by the Commission at any stage of the investigation and the Commission is not limited in its ability to issue multiple information requests to the same person.

Interviews

3.11 Where appropriate, the Commission may, by written notice, require a person to attend an interview before the Commission to respond to questions relating to any matter that the Commission reasonably believes to be relevant to an investigation.

3.12 Interviews may be conducted by the Commission at any stage of the investigation and the Commission is not limited in its ability to require the same person to attend multiple interviews. Where a person is required to attend an interview with the Commission, that person may be accompanied by a legal adviser admitted to practice law in Hong Kong.

Legal professional privilege

3.13 The Commission's investigative powers do not affect the rights which may arise from legal professional privilege ("**LPP**") under Hong Kong law.[5]

3.14 Generally, the following categories of information are protected from disclosure:

- communications with a legal adviser for the purpose of preparing legal advice; and
- communications in connection with legal proceedings.

3.15 The protection provided by LPP extends to internal communications within an organisation to the extent that such communications were produced or brought into existence with the dominant purpose that its contents be used to obtain legal advice.[6] Communications between in-house lawyers and other employees within an organisation are also similarly protected by LPP.

[4] The term "document" is defined under the Ordinance to include information recorded in any form.

[5] Legal professional privileged is entrenched under Art. 35 of the Basic Law which provides that Hong Kong residents have the right to confidential legal advice.

[6] *Citic Pacific Ltd v Secretary For Justice and Another* [2015] HKCA 293, para. 63.

3.16 In December 2015 the Commission issued a guidance note on 'Investigation Powers of the Competition Commission and Legal Professional Privilege', stating its policy to ensure disputes over privileged documents are handled as fairly and expeditiously as possible. During a dawn raid, where a dispute arises as to whether LPP attaches to documents or information that the Commission intends to seize or copy, the document will be sealed in a separate opaque bag or container and removed from the premises. The person claiming privilege will then have the opportunity to substantiate its claim of privilege within seven days of the dawn raid, with the potential for any remaining disputes to be resolved by an independent third party by agreement.

Confidentiality and self-incrimination

3.17 Section 45 of the Ordinance provides that a person is not excused from providing information to the Commission on the grounds that doing so would expose the individual to financial penalties sought by the Commission or criminal proceedings.[7] However, the section also provides that no statement made by an individual in giving an explanation about a document or in answering any question is admissible against that individual in financial or pecuniary penalty or certain criminal proceedings (e.g. in relation to perjury) unless, in the proceedings, evidence relating to the statement is adduced, or a question relating to it is asked, by that person or on that person's behalf.

3.18 Section 46 of the Ordinance also provides that a person is not excused from providing any information or document to the Commission on grounds of obligations of confidence owed to any other person. In this regard, Section 46 also provides that a person who provides information or documents to the Commission is not personally liable for such provision under obligations of confidence owed to any other person in respect of such information or documents.

Duration of investigations

3.19 The Commission is not obliged to complete its investigation within a statutory defined timeframe. However, the Commission may not make an application to the Tribunal for sanctions in relation to a contravention of the conduct rules more than five years after the day on which the contravention ceased or the Commission became aware of the contravention, whichever is later. Therefore, Commission's investigations may in practice be limited to a maximum period of five years.

4. Sanctions

4.1 There are several possible outcomes from the Commission's formal investigations into a suspected contravention of the conduct rules ranging from soft enforcement to formal court procedures.

No further action

4.2 The Commission may conclude its investigation by declining to take further action. This may not necessarily indicate that the Commission has determined that the conduct rules have not been contravened and the Commission may re-open the investigation at a later time.

[7] S. 45 of the Ordinance does not apply to an offence under S. 55 or Part V of the Crimes Ordinance (Cap. 200), or an offence of perjury.

Commitments

4.3 The Commission may accept a party's commitment to take, or refrain from taking, any action that the Commission considers appropriate to address its concerns about a possible contravention of the conduct rules. If the Commission accepts a party's commitments, it may agree to:

- not commence and cease all investigations; and
- not commence and cease all proceedings in the Tribunal.

4.4 The commitment process may be initiated by the Commission or the party under investigation at any time. Upon accepting commitments offered by relevant party, the Commission would cease further enforcement action while the party is in compliance with its commitments.

Warning notice

4.5 Where the Commission has reasonable cause to believe that the First Conduct Rule has been contravened and that the suspected contravention does not involve serious anti-competitive conduct,[8] the Commission is obliged under the Ordinance to issue a warning notice to the undertakings involved requiring them to cease the contravening conduct within a specified period. The Commission may commence proceedings before the Tribunal in respect of the alleged contravention if the parties involved continue to engage in or repeat the contravening conduct after the expiry of the specified period for the warning notice. All warning notices will be published on the Commission's website.

Infringement notice

4.6 Where the Commission has reasonable cause to believe that the First Conduct Rule has been contravened and that the suspected contravention involves serious anti-competitive conduct, the Commission is not required to issue a warning notice before bringing proceedings. However, the Commission may elect to issue an infringement notice to the parties involved instead of bringing proceedings at the Tribunal. In issuing the infringement notice, the Commission will offer not to commence legal proceedings in respect of the alleged contravention if the parties involved comply with the commitments set out in the infringement notice.

Proceedings at the Tribunal

4.7 Instead of issuing an infringement notice, the Commission may instead directly commence legal proceedings in the Tribunal in relation to serious anti-competitive conduct. Although the Commission is not obliged to issue a warning notice or infringement notice before bringing proceedings at the Tribunal in the case of serious anti-competitive conduct, the Investigations Guideline states that the Commission will in all cases usually advise the parties involved of its concerns and/or provide the parties with an opportunity to address those concerns before commencing legal proceedings.

[8] The concept of "serious anti-competitive conduct" is defined under the Ordinance to refer to conduct that consists of any of the following or a combination of the following:

i. fixing, maintaining, increasing or controlling the price for the supply of goods or services;

ii. allocating sales, territories, customers or markets for the production or supply of goods or services;

iii. fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services; and

iv. bid-rigging.

4.8 In addition to the contravening parties, the Commission may also pursue legal action against parties who were involved in the contravention which include the following:

- persons who attempt to contravene the relevant conduct rule;
- persons who aid, abet or procure any other person to contravene the relevant conduct rule;
- persons who induce or attempt to induce any other person, whether by threats or promises or otherwise, to contravene the relevant conduct rule;
- persons who are in any way, direct or indirectly, knowingly concerned in or a party to the contravention of the relevant conduct rule; or
- persons who conspire with any other person to contravene the relevant conduct rule.

4.9 The ability of the Commission to commence legal proceedings against "persons being involved" in the contravention indicates that individuals within a contravening undertaking may be held liable for contraventions of the conduct rules, e.g. directors or senior executives of a company.

Pecuniary penalties

4.10 Upon an application by the Commission, the Tribunal may, if satisfied that the conduct rules have been contravened, impose a pecuniary penalty on the contravening party or a party involved in such contravention of up to 10% of the turnover of the relevant undertaking for each year of the contravention, up to a maximum of three years.

4.11 Pursuant to Section 93 of the Ordinance, the Tribunal may have regard to the following matters when determining the appropriate amount of pecuniary penalties imposed:

- the nature and extent of the conduct that constitutes the contravention;
- the loss or damage, if any, caused by the conduct;
- the circumstances in which the conduct took place; and
- whether the relevant party has previously been found by the Tribunal to have contravened this Ordinance.

Other orders

4.12 In addition to pecuniary penalties, where the Tribunal is satisfied that an undertaking has contravened the conduct rules, the Tribunal may impose any of the orders set out in Schedule 3 to the Ordinance which include, among others, the following:

- requiring a person who has contravened the conduct rules or who has been involved in the contravention to do any act or thing, including the taking of steps for the purpose of restoring the parties to any transaction to the position in which they were before the transaction was entered into;
- restraining or prohibiting a person from acquiring, disposing of or otherwise dealing with any property specified in the order;

- requiring a person to dispose of such operations, assets or shares of any undertaking specified in the order, in the manner specified in the order;

- prohibiting a person from making or giving effect to an agreement, or to modify or terminate an agreement; or

- declaration that any agreement be void or voidable to the extent specified in the order.

Follow-on private actions

4.13 The Ordinance does not permit standalone private claims to be brought before the Tribunal for alleged contraventions of the conduct rules. However, where the Tribunal has determined an act to have contravened the conduct rules, or a person has made an admission as to the contravention of a conduct rule, a person who has suffered loss or damage as a result of that contravention may commence a follow-on private action in the Tribunal against the contravening parties and any person who is, or has been, involved in the contravention.

4.14 Follow-on private actions may only be brought after the rights of appeal on a decision finding that an act contravened the conduct rules has been exhausted. Follow-on actions may also not be brought after 3 years have lapsed from the earliest date on which the action could have been commenced under the Ordinance.

Right of appeal

4.15 The Ordinance provides that there is generally a right of appeal to the Court of Appeal against any decision, determination or order of the Tribunal.[9] The Court of Appeal on hearing an appeal may:

- confirm, set aside or vary the decision, determination or order of the Tribunal;

- where the decision, determination or order of the Tribunal is set aside, substitute any other decision, determination or order it considers appropriate; or

- remit the matter in question to the Tribunal for reconsideration in light of the decision of the Court.

4.16 Decisions by the Court of Appeal may potentially be appealed to the Court of Final Appeal, the highest appellate court in Hong Kong, subject to the grant of leave.

[9] S. 154(2) of the Ordinance sets out instances where there is no right of appeal, e.g. orders allowing an extension of time, where the Ordinance specifies that a decision by the Tribunal is final, on costs without leave of the Court of Appeal or Tribunal.

5. Leniency

Eligibility for leniency

5.1 The Ordinance permits the Commission to enter into a leniency agreement with a person. In exchange for that person's cooperation in an investigation or in proceedings under the Ordinance, the Commission will not seek pecuniary penalties in respect of an alleged contravention against the following:

- if the person is a natural person, that person or any employee or agent of that person;
- if the person is a cooperation, that cooperation or any officer, employee or agent of the cooperation;
- if the person is a partner in a partnership, that partnership or any partner in the partnership, or any employee or agent of the partnership; or
- if the person is another undertaking, that undertaking or any officer, employee or agent of the undertaking.

5.2 The Commission published its 'Leniency Policy for Undertakings Engaged in Cartel Conduct' (**"Leniency Policy"**) in November 2015. For the purpose of the Leniency Policy, 'cartel conduct' refers to agreements or concerted practices that seek to do one or any combination of the following activities, which have as their object preventing, restricting or distorting competition in Hong Kong:

- fix prices;
- share markets;
- restrict output; or
- rig bids.

5.3 The Leniency Policy applies only in respect of undertakings engaged in cartel conduct. However, the Leniency Policy states that other contraventions of the First Conduct Rule which are not themselves cartel conduct but are used to give effect to cartel conduct (for example, joint buying or group boycotts) would also ordinarily benefit from the Leniency Policy. The Leniency Policy also does not preclude the ability of the Commission to enter into a leniency agreement with respect to alleged contraventions of the conduct rules which are not covered by the Leniency Policy (i.e. non-cartel conduct).

5.4 Under the Leniency Policy, the Commission will provide leniency only to the first cartel member who applies for leniency. In this regard, the Commission employs a marker system to establish a queue in order of the date and time the Commission was contacted with respect to the conduct for which leniency is sought. As discussed further below, the Leniency Policy states that cartel members which do not qualify for leniency may nonetheless wish to cooperate with the Commission in its investigation, as the Commission may, under its enforcement discretion, potentially consider a lower level of enforcement against such cooperating parties.

Leniency process

5.5 The Leniency Policy sets out the procedural steps involved in an application for leniency.

- **Application for a marker:** At this stage, the applicant makes an application for leniency to the Commission. To obtain a marker in the leniency queue, the applicant must provide sufficient information to identify the conduct for which the leniency is sought including the identity of the undertaking applying for the marker, the information on the nature of the cartel, the main participants in the cartel conduct and contact details.

- **Invitation for leniency:** Where the Commission determines that there is cartel conduct and leniency is available, the Commission will invite the applicant with the highest ranking marker to make an application for leniency. The Commission will require the applicant to enter into a non-disclosure agreement to ensure that its leniency application is kept confidential.

- **Leniency application:** The applicant invited to apply for leniency will be asked by the Commission to provide a detailed description of the cartel, the entities involved, the role of the applicant, a timeline of the conduct and the evidence the leniency applicant can provide in respect of the cartel conduct. The Commission may subsequently request for additional information from the applicant.

- **Offer to enter into leniency agreement:** If the applicant meets the conditions for leniency, the Commission will request the applicant executes a leniency agreement.[10] The leniency agreement will require that the applicant confirms the following which will in practice form part of the conditions for leniency:

  - the applicant has provided and continues to provide full and truthful disclosure to the Commission;

  - the applicant has not coerced other parties to engage in the cartel conduct;

  - the applicant has, absent a consent from the Commission taken prompt and effective action to terminate its involvement in the cartel;

  - the applicant will keep confidential all aspects of the leniency application and the leniency process unless the Commission's prior consent has been given or the disclosure of information is required by law;

  - the applicant will provide continuing cooperation, at its own cost, to the Commission including in proceedings against other undertakings that engaged in the cartel conduct or against other persons involved in the cartel conduct;

  - the applicant will, to the satisfaction of the Commission, agree to and sign a statement of agreed facts admitting to its participation in the cartel on the basis of which the Tribunal may be asked to make an order declaring that the applicant has contravened the First Conduct Rule; and

  - the applicant is prepared to continue with, or adopt and implement, at its own cost, an effective corporate compliance programme to the satisfaction of the Commission.

[10] The form of the Commission's leniency agreement is set out in Annex A to the Leniency Policy.

5.6 **Leniency agreement:** Once the applicant has entered into a leniency agreement with the Commission, it is required to provide the Commission with all non-privileged information and evidence in respect of the cartel conduct without delay.

Non-leniency applicants

5.7 While the Leniency Policy indicates that only the first successful leniency applicant will benefit from an immunity from pecuniary penalties, undertakings who do not qualify for leniency under the Leniency Policy may nonetheless benefit from cooperation with the Commission. The Leniency Policy states that the Commission has enforcement discretion towards undertakings who cooperate with the Commission's investigation.

5.8 By way of example, the Commission may exercise its enforcement discretion by considering a lower level of enforcement action, including by recommending that the Tribunal impose a reduced pecuniary penalty or other appropriate orders. The Leniency Policy also states that the Commission may consider making joint submissions with the cooperating undertaking on the pecuniary penalty or orders that should be imposed.[11] However, the decision on the appropriate pecuniary penalty or orders to be imposed rests with the Tribunal.

5.9 The Commission will have regard to the following factors when considering the extent and value of an undertaking's cooperation:

- whether the undertaking approached the Commission in a timely manner seeking to cooperate;
- whether the undertaking provided significant evidence regarding the cartel conduct;
- whether the undertaking provided full and truthful disclosure, and cooperated fully and expeditiously on a continuing basis throughout the Commission's investigation and any related court proceedings;
- whether the undertaking coerced any other person to participate in the cartel; and
- whether the undertaking acted in good faith in dealings with the Commission.

Multi-jurisdictional cartel investigations

5.10 Where a leniency application involves cartel conduct which is also the subject of separate leniency applications under other competition regimes:

- the applicant is expected to provide the Commission with details of the other jurisdictions where they have sought immunity/leniency and an indication of the on-going status of their application in those jurisdictions; and
- the Commission may require the applicant to authorise the Commission to exchange confidential information with authorities in other jurisdictions.

[11] Rule 39 of the Competition Tribunal Rules (Cap. 619D) provides that if the parties have agreed on the terms of an order to be made by the Tribunal in any proceedings under Part 3 or Part 4, including applications for enforcement under Part 6 of the Ordinance, the agreed terms must be sent to the Tribunal for approval. The Tribunal may then make an order by consent in those proceedings with or without a hearing.

Relevant factors to consider in submitting a leniency application

5.11 While a successful leniency application has the advantage of providing immunity from pecuniary penalties in respect of the relevant contravention, a leniency application should only be made after careful assessment of the relevant pros and cons.

- **Private damages:** The Commission's leniency programme does not preclude the possibility that private claimants may commence a follow-on action in the Tribunal against a leniency applicant for damages. For cross-border cartel conduct, the leniency applicant should also consider if a potential order by the Tribunal that it engaged in cartel conduct (as envisaged under the Leniency Policy as part of the leniency agreement) would expose the applicant to private antitrust claims in jurisdictions outside of Hong Kong. In certain jurisdictions, the potential exposure to damages can be substantive, e.g. the US which has treble damages.

- **Criminal sanctions:** There are no criminal sanctions for contraventions of the conduct rules and a successful leniency application also extends the immunity from pecuniary penalties to officers, employees and agents of the applicant. However, in the case of a cross-border cartel, a potential order by the Tribunal that it engaged in cartel conduct may expose the applicant to potential criminal sanctions in other jurisdictions.

- **Disclosure requirements:** The leniency applicant should also consider whether a leniency application to the Commission may trigger separate disclosure requirements under the laws of other jurisdictions which may also be conducting ongoing investigations into the same conduct.

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Natalie joined the firm in 2005 and moved to our Hong Kong office in 2009. She is an experienced competition and regulatory lawyer who represents clients in relation to cross-border M&A and the new Hong Kong competition legislation.

She has worked on a number of matters involving HK, EU and UK competition law, and her experience covers a range of sectoral regulation, anti-trust and merger control work.

Natalie has been responsible for coordinating the PRC and Asian merger notifications on a number of global transactions.

Her recent advice on cross-border transactions in Asia includes:

- Shell on its £47 billion acquisition of BG Group. The transaction triggered merger control and foreign investment approvals across the world
- Rolls Royce on its acquisition of the 50% remaining stake in Rolls-Royce Power Systems joint venture from Daimler (being the first filing in the PRC under the newly-introduced simplified procedure) and various subsequent transactions
- Thermo Fisher Scientific on its proposed takeover of Life Technologies Corporation
- Bertelsmann on its combination with Pearson of their respective trade-book publishing businesses
- Aegis plc on the recommended cash offer by Dentsu Inc.
- CIMB Group on its acquisition of Asian businesses from RBS
- Prudential plc on its proposed acquisition of AIA Group Limited
- INEOS on the creation of a 50/50 oil refining joint venture with PetroChina and the formation of Styrolution with BASF

Natalie is recognised as a leading lawyer in The International Who's Who of Competition Lawyers & Economists 2015, one of only three lawyers listed for this practice area in Hong Kong. She is listed in Chambers Asia 2016 for Competition/Antitrust (China). She has also been named as the youngest lawyer in Global Competition Review's "40 under 40" in 2015.

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Natalie speaks Chinese and English, and travels regularly between Hong Kong and Beijing offices. She is admitted as a solicitor in England and Wales and Hong Kong.

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Practice Areas
Competition
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