Cartel Regulation in Asia and the EU

An overview of current practices and challenges

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Overview of cartel regulation in Singapore

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 January 2015, the Competition Commission of Singapore (“CCS”) has issued nine infringement decisions under Section 34 of the Competition Act and has publicly stated that it had received over 24 leniency applications. 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 January 2015 |
|-----------------------------------------------|-----------------------------------|-----------------------------|---------------------------------|---------------------------------|
| Number of cartel infringement decisions       | Number of cartel infringement decisions pursuant to leniency applications | Sets of fines issued         | Number of active leniency application cases¹ | Number of appeals made to the Competition Appeal Board (“CAB”) in relation to cartel infringement decisions |
| 9, out of which 2 involve international cartels | 3                                | 89                          | 9                               | 11, made in relation to 4 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”,¹ i.e. insofar as their cartel conduct affects or restricts competition in Singapore. In a recent interview, the CCS Chief Executive Toh Han Li, in an interview with Global Competition Review published on 9 February 2015.

¹ As disclosed by the CCS Chief Executive Toh Han Li, in an interview with Global Competition Review published on 9 February 2015.

² CCS Chief Executive Toh Han Li, in the Singapore chapter of Global Competition Review’s Asia-Pacific Antitrust Review 2014.
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”.

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”.

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:

2.3.1 “hard-core” cartel conduct, namely:

(a) price-fixing;
(b) bid-rigging;
(c) market-sharing; and
(d) 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

2.3.2 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:

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1 As disclosed by the CCS Chief Executive Toh Han Li, in an interview with Global Competition Review published on 9 February 2015.
2 CCS Chief Executive Toh Han Li, in the Singapore chapter of Global Competition Review’s Asia-Pacific Antitrust Review 2014.
(a) fixing trading conditions;
(b) joint purchasing or selling;
(c) sharing information;
(d) exchanging price information;
(e) exchanging non-price information;
(f) restricting advertising; and
(g) 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.

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:

3.4.1 sharing information to coordinate dawn raids for evidence preservation; and

3.4.2 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 recently stated that “the growing number of cross-border competition cases highlights the importance of cooperation among competition agencies and this is one aspect [the CCS] hopes to work on moving forward”.

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 section 6 below), and/or the CCS’ own-initiative market-surveillance.

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

4.2.1 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;

4.2.2 Section 64: the power to enter premises without a warrant; and

4.2.3 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.

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5 CCS Chief Executive Toh Han Li, in the Singapore chapter of Global Competition Review’s Asia-Pacific Antitrust Review 2015.
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 form 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, 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:

4.9.1 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;

4.9.2 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

6 In addition to the circumstance described in paragraph 4.8 above, CCS Investigating Officers can also conduct a Section 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.
4.9.3 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:

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

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

4.10.3 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 January 2015, 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.

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<tr>
<th>Dawn raids in CCS’ cartel infringement decisions: 1 January 2006 to 31 January 2015</th>
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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:

4.16.1 obstructing, by refusing to give access to, assaulting, hindering or delaying, any agent of the CCS;

4.16.2 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;

4.16.3 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

4.16.4 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:

4.17.1 use force against any person during a Dawn Raid;

4.17.2 examine and/or copy documents which are not relevant to the purpose of the Dawn Raid; and/or

4.17.3 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:

4.18.1 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

4.18.2 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:

4.19.1 between a professional legal adviser and his client; or

4.19.2 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").

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:

5.6.1 **intention:** the CCS may find an infringement to have been committed intentionally if:

i. the agreement has as its object the restriction of competition;

ii. 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

iii. 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

5.6.2 **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.

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7 Under Section 69(4) of the Competition Act.
5.8 The financial penalty will be calculated taking into consideration:

5.8.1 the seriousness of the infringement;

5.8.2 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”);

5.8.3 the duration of the infringement;

5.8.4 other relevant factors, e.g. deterrent value; and

5.8.5 any further aggravating or mitigating factors.

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:

5.9.1 the seriousness of infringement;\(^8\) and

5.9.2 the Relevant Turnover.

\[
\text{Relevant Turnover} \times \frac{\text{Multiplier for seriousness of infringement}}{\text{(applied as a percentage of the Relevant Turnover)}} = \text{Base amount}
\]

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.

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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. CCS550/003/09 – 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.

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\(^8\) See paragraph 2.1 of the CCS Guidelines on the Appropriate Amount of Penalty

\(^9\) 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.
5.11 **Step 2 – Duration of infringement**: The CCS will next consider adjusting the base amount to account for the duration of the infringement.

\[
\text{Base amount} \times \text{Duration multiplier (e.g. multiplier of 2, for a two-year infringement)} = \text{Penalty adjusted for duration}
\]

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 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. ¹⁰ 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.**”

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**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.

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¹⁰ 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.”
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.

![Multiplification diagram]

\[
\text{Penalty adjusted for duration} \times \text{Multiplier for aggravating or mitigating factors (applied as a percentage increase or decrease)} = \text{Penalty adjusted for aggravating and mitigating factors}
\]

### 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

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.
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 seeking 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.

* Before deductions (if any) by the CAB.
5.21 As of January 2015, the CAB has received 11 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:

5.21.1 that an alternative definition of the market, and consequently a different relevant turnover, should be used for the purposes of calculating the financial penalty;

5.21.2 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

5.21.3 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. As of January 2015, the CCS has received over 24 leniency applications. Three of the nine cartel infringement decisions issued by the CCS as of January 2015 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,11 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:

6.4.1 provides the CCS with all the information, documents and evidence available to it regarding the cartel activity;

6.4.2 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;

11 By the exercise of the CCS’ formal investigative powers under Sections 63 to 65 of the Competition Act (please see section 4 above).
6.4.3 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);

6.4.4 must not have been the one to initiate the cartel; and

6.4.5 must not have taken any steps to coerce another undertaking to take part in the cartel activity.

6.5 If an undertaking does not qualify for total immunity because the CCS has already commenced an investigation,¹² it may still stand to benefit from a reduction in the financial penalty of up to 100 per cent. if:

6.5.1 the undertaking is still the first-to-the-door in providing the CCS with evidence of the cartel activity,

6.5.2 this information is provided before the CCS has sufficient information to issue a proposed infringement decision; and

6.5.3 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:

6.6.1 the stage at which the undertaking comes forward;

6.6.2 the evidence already in the CCS' possession; and

6.6.3 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.

¹² Ibid.
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.

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:

6.16.1 the evidence provided by the undertaking relates to a completely separate cartel activity; and

6.16.2 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:

6.19.1 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

6.19.2 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:

6.23.1 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;

6.23.2 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

6.23.3 **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 under paragraph 6.23.2 above) 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 under paragraph 6.23.2 above, 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.
India: Shardul Amarchand Mangaldas
Overview of cartel regulation in India

1. INTRODUCTION
1.1 Competition law in India is governed by the provisions of the Competition Act, 2002 ("Competition Act") and the rules and regulations made thereunder. 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. Under the Competition Act, 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.

1.2 The Competition Act prohibits anti-competitive practices, which cause or are likely to cause an appreciable adverse effect on competition ("AAEC") in India. It primarily seeks to regulate: (i) anti-competitive agreements (Section 3); (ii) abuse of dominance (Section 4); and (iii) acquisitions, mergers and amalgamations (Sections 5 and 6).

1.3 Since the coming into force of the enforcement provisions of the Competition Act in May 2009, the CCI has investigated a number of industries for alleged cartelization and have also imposed significant financial penalties for such violations. Further, on appeal, the COMPAT has largely upheld the decisions of the CCI, however reducing the fines payable by the companies found guilty of infringement. A graph showing the number of CCI and COMPAT decisions since 2011 may be found at Appendix 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 causes or is likely to cause an AAEC in India.

2.2 The term ‘agreement’\(^1\) is 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 M/o Commerce, Govt. of India v. M/s Puja Enterprises & Ors.\(^2\) (Rubber Sole Manufacturers Case), the CCI observed that the definition of an ‘agreement’ under the Competition Act is inclusive and not exhaustive, thereby indicating that the definition covers tacit understandings where parties act ‘on the basis of a nod or a wink’.

Horizontal Agreements (Section 3(3) of the Competition Act)
2.3 Section 3(3) of the Competition Act deals with ‘horizontal agreements’ or agreements among enterprises or persons, including cartels, engaged in identical or similar trade of goods or provision of services, which:

(a) directly or indirectly determine purchase or sale prices;

(b) limit or control production, supply, markets, technical development, investment or the provision of services;

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\(^1\) Section 2(h) of the Competition Act

\(^2\) Ref. Case No. 01/2012
(c) 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 any other similar way; or

(d) directly or indirectly result in bid rigging or collusive bidding.

2.4 A cartel\textsuperscript{3} has been defined 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. Cartel activity is regarded as a particularly serious type of breach of the Competition Act, and breach can result in penalties for the companies involved of up to three times of their profit or 10\% of their turnover for each year of the continuance of the agreement, whichever is the higher.

2.5 Agreements covered by Section 3(3) of the Competition Act are \textbf{presumed} to cause an AAEC. This presumption is, however, rebuttable and the burden of proof lies on the parties to the agreement to prove that the agreement in question does not or is not likely to cause an AAEC.

2.6 For the purposes of Section 3(3) of the Competition Act, it is not necessary for the CCI to delineate a relevant market.\textsuperscript{4} It is sufficient that the elements in Section 3(3) of the Competition Act (as detailed below) are present and once these elements have been established, the presumption regarding AAEC is triggered and the onus shifts on the defending party to rebut such presumption.

\textbf{Standard of Proof}

2.7 There has been significant discussion as to the requisite standard of proof in relation to cartel offences or other violations of the Competition Act. The question that the CCI has consistently been faced with is whether the standard is that of “preponderance of probabilities” or “beyond reasonable doubt” given that violation of the provisions of the Competition Act could lead to severe financial penalties.

2.8 Whilst horizontal agreements are presumed to cause an AAEC, there is no presumption as to the existence of an agreement. In \textit{Neeraj Malhotra v. Deustche Post Bank Home Finance Ltd. & Ors.},\textsuperscript{5} the CCI had held that precise and coherent proof should be produced by the party or the authority alleging the infringement and the existence of any ‘agreement’ cannot be conjectured or even circumstantially adduced. In a subsequent decision, \textit{Re: Aluminium Phosphide Tablets Manufacturers} (\textit{Aluminium Phosphide Case}),\textsuperscript{6} it was held by the CCI that the standard of proof to establish the existence of an agreement under the Competition Act is ‘preponderance of probability’ and not ‘beyond reasonable doubt’. In \textit{Builder’s Association of India v. Cement Manufacturers’ Association} (\textit{Cement Cartel Case}), the CCI clarified that evidence of an agreement need not

\textsuperscript{3} Section 2(c) of the Competition Act.

\textsuperscript{4} Builder’s Association of India v. Cement Manufacturers’ Association, Case No. 29/2010

\textsuperscript{5} Case No. 5/2009

\textsuperscript{6} Suo Moto Case No. 2/2011

\textsuperscript{7} Case No. 29/2010
be direct, and in the absence of direct evidence, it may rely on circumstantial evidence. Similarly, in All India Tyre Dealers’ Federation v. Tyre Manufacturers\(^8\) (Tyres Case), the CCI observed that circumstantial evidence is of no less value than direct evidence if an agreement can be proven from it unequivocally. It was held that an agreement can be inferred from either the conduct or intention of the parties and evidence of communication between competitors was an important clue for establishing any contravention.

2.9 More recently, in the absence of “smoking gun” evidence, significant reliance has been placed on establishing the existence of an agreement on the basis of circumstantial evidence. In a series of bid-rigging cases, most recently the Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab vs M/s Stone India Limited & Ors. (Feed Valves case), the CCI held that “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”.

2.10 In a recent decision involving Indian Foundation of Transport Research and Training v. Shri Bal Malkait Singh and Others, the CCI dismissed the AIMTC’s arguments that there was a lack of substantial and concrete evidence to prove a meeting of minds between AIMTC and its members in the absence of any resolutions, statements or written circulars by AIMTC officials. Given that “evidence in respect of anti-competitive agreements will normally be only fragmentary and sparse, and as such it is often necessary to reconstitute certain details by deduction”, the CCI considered past violations by the association under the Monopolies and Restrictive Trade Practices Act, 1969, signals coming from the highest officials of the association, and records related to interviews given by various officials of the association which were followed by price rises, as credible evidence of the existence of a price-fixing agreement in contravention of Section 3(3)(a) of the Competition Act.

2.11 The reasoning adopted by the CCI has been affirmed by the COMPAT in several decisions. In Travel Agents Association of India v. Lufthansa German Airlines and Ors.\(^9\) (Travel Agents Case), the COMPAT held that the decisions of the airline companies to reduce the commission to be paid to the travel agents taken on different dates is not indicative of an agreement between the firms but constituted their independent decisions. In Gulf Oil Corporation Limited and Ors. v. CCI and Ors.\(^10\) (Explosives Case), the COMPAT, while inferring an agreement between the explosive suppliers, gave due importance to the conduct of the explosives manufacturers in writing similar/identical letters repeatedly although there was no evidence of a formal meeting or communication between them. The COMPAT also deduced the common intention of the parties from their collective interest in boycotting the electronic reverse auction for the supply of explosives to Coal India Limited.

2.12 In the LPG Cylinder Manufacturers Appeal, the COMPAT held that the test of a “strong probability” would suffice, but that its application would differ from case to case, with particularly serious events requiring more convincing proof.

\(^8\) RTPE No. 20 of 2008
\(^9\) Appeal No. 25 of 2011,
\(^10\) Appeal Nos. 82 – 90 of 2012.
Efficiency Enhancing Joint Venture Exception

2.13 The proviso to Section 3(3) of the Competition Act lays down an exception to the presumption raised in relation to certain horizontal agreements listed in Section 3(3) of the Competition Act. According to the proviso, 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". Accordingly, a joint venture agreement is not presumed to be anti-competitive, if it can be shown that such agreement increases efficiencies in production, supply, distribution, storage, acquisition, or control of goods/provision of services. These efficiencies need not necessarily have to be efficiencies, gains or benefits achieved by the parties to the contract but the reference is more likely to efficiencies in the market for the particular goods or services that the joint venture will produce or provide. The burden of proving such efficiencies or competition benefits would be on the joint venture partners. This provision is yet to be tested by the CCI and currently, there is no guidance on the standard of evidence required to qualify as an efficiency enhancing joint venture under this exception.

3. EXCEPTIONS TO SECTION 3

3.1 Section 3(5) of the Competition Act permits parties to impose reasonable conditions for the protection of rights conferred upon them by intellectual property laws. However, this right is not an absolute right as has been held by the CCI in FICCI – Multiplex Association of India v. United Producers/ Distributors Forum,11 (Multiplex Case) where the CCI held "the extent of (the) non-obstante clause in Section 3(5) of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigours of competition law only to protect his rights from infringement". Accordingly, by implication, unreasonable conditions that attach to an intellectual property right will attract Section 3 of the Competition Act. In other words, licensing agreements with onerous obligations on the counter party in relation to the prices, quantities, quality or varieties of goods or services will fall within the contours of competition law.

3.2 Any anti-competitive agreement entered into exclusively in relation to exports is also excluded from the Competition Act. However, this provision is presently untested.

4. HORIZONTAL AGREEMENTS UNDER THE COMPETITION ACT – CCI'S DECISIONAL PRACTICE

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

4.1 Section 3(3)(a) of the Competition Act prohibits horizontal agreements which directly or indirectly determine purchase or sale price.

4.2 In a case which was transferred from the former MRTP Commission, In Re: Glass Manufacturers of India,12 (Glass Manufacturers Case), the CCI examined an alleged cartel among Indian float glass manufacturers and observed that this was a case of price parallelism. However, the CCI held that the mere instance of price parallelism cannot be said to be evidence of the existence of a cartel. To determine the existence of a cartel, price

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11 Case No. 1/2009
12 Case No. 161/2008
parallelism must be supported by evidence of an agreement or collusion or action in concert. The CCI did not find a violation of the Competition Act in this case.

4.3 In the Cement Cartel Case, price parallelism supported by factors such as limiting and controlling supply by underutilising capacity, maintaining similar parallel behaviour in production and dispatch of cement, along with the exchange of information on prices, production and dispatch, at regular association meetings, high profit margins and price leadership though advanced media reporting of price increases, led to the CCI’s conclusion that the cement companies operated as a cartel. The CCI also observed that there need not be complete parallelism for the entire duration of the alleged anti-competitive conduct in order for a case under Section 3(3)(b) of the Competition Act to be made out. Specifically, if there are certain durations of coordinated conduct, evidenced through identical price, dispatch or production patterns, a case for an infringement of Section 3(3) of the Competition Act can be made out. The CCI imposed a penalty of approximately INR 6,200 Crores (approximately USD 1 billion), collectively on 11 cement manufacturers. The Cement Cartel Case has been challenged by the cement companies before the COMPAT and it is expected that the COMPAT will deliver its judgment by end of this year.

4.4 In the Soda Ash Case, while the CCI acknowledged that there are market characteristics that make the market of soda ash amenable to cartelization, it concluded that there was no violation of Section 3(3)(a) as negotiated contractual transactions between the buyers and soda ash manufacturers was the prevalent mode of transaction and there were differences in the periodicity of the contracts of each buyer with soda ash manufacturers. Also, based on the price data collected by the Director General, the CCI observed that the list prices of different players were not identical and vary within short bands for a given region/State. It was a practice in the industry that the buyers invited quotations from multiple suppliers and thereafter, the negotiation on discounts and supplies took place. The basic rates or list prices of the manufacturers were close to each other, but discount was the main element which varies from manufacturer to manufacturer.

4.5 It is a settled position in most other jurisdictions that mere parallel conduct is not sufficient to impute the liability of cartelization on the enterprises. The CCI has recognized that price parallelism in an industry could be a result of independent decision making of the firms involved because of the common industry issues. The approach of the CCI has been of “price parallelism plus” in which the presence of certain plus factors such as the motivation for firms to collude in order to achieve higher profits, coupled with parallel increase in prices, have been analyzed to conclude that there has been cartel-like behavior. The CCI, in various cases such as the Glass Manufacturers Case and In Re: Domestic Air Lines\textsuperscript{13} (Domestic Airlines Case) has acknowledged that in the absence of sufficient evidence supporting the existence of an agreement in addition to the price parallelism, it cannot be concluded that there is a cartel.

4.6 In Re: Alleged Cartelization by Steel Producers\textsuperscript{14} (Steel Manufacturers Case), on the basis of the evidence available on record, the CCI concluded that like many oligopoly markets, the steel producers recognized their interdependence and simply mimicked their rivals conduct and there was no cogent material on record.

\textsuperscript{13} Reference Case No. 01/2011
\textsuperscript{14} Case No. RTPE 9/2008
to contradict this inference. Accordingly, the CCI has categorically noted that the non-competitive nature of the market, by itself, does not imply an “agreement” and interdependent behavior where price and output decisions are arrived at independently, but take into account rival reactions of enterprises, does not necessarily indicate collusive conduct.

4.7 Further, in the Indian Sugar Mills Association (ISMA) v. Indian Jute Mills Association case, the CCI penalized the Indian Jute Mills Association (“IJMA”) and the Gunny Trade Association (“GTA”) for contravening the provisions of the Competition Act by: (i) price fixing of jute material through the circulation of daily price bulletins between themselves; and (ii) limiting and controlling the supply of jute packaging material. 30 out of 34 members of IJMA were also members of GTA, and the CCI held that the IJMA as an association provided a forum to its members for suggesting changes in the daily price bulletins by the GTA, thereby actively influencing the determination of price and limiting the supply of jute packaging in a concerted manner. The price information exchange between wholesalers and manufacturers of jute was found to be in violation of the Competition Act.

4.8 In M/s Shivam Enterprises vs Kiratpur Sahib Truck Operators Co-operative Transport Society Limited & Ors. case, (Truckers Cartel Case) the CCI examined the cartelization of trucking services and fined the Kiratpur Sahib Truck Operators Co-operative Transport Society Limited and its individual office bearers 10% of the average turnover and 5% of the average incomes respectively for collectively fixing prices for trucking services and limiting the supply of these services by not allowing non-member truckers to operate in the area. Such act of the members of the union was seen to amount to a cartel amongst the individual members of the society who were supposed to operate independently but had instead collectively fixed prices and ensured that no other truckers operated in the area.

Limiting of Production, Supply, Technical Development or Investment (Section 3(3)(b) of the Competition Act)

4.9 Section 3(3)(b) of the Competition Act prohibits a horizontal agreement that limits or controls the production, supply, markets, technical development, investment or provision of goods or services.

4.10 In the last few years, the pharmaceutical sector has been the focus of the CCI’s efforts at eliminating malpractices which have the effect of artificially restricting supplies of drugs into the market. In India, the distribution of pharmaceutical drugs is through chemists and druggists, which are organized in state-wise associations. There have been a number of cases such as Re: Bengal Chemist and Druggist Association and Varca Druggist & Chemist & Ors. v. Chemists and Druggists Association, Goa (CDAG)15 (Varca Druggist Case) etc. involving state druggist and chemist associations who had acted collectively and imposed unreasonable conditions on their members and pharmaceutical companies for the sale of drugs through medical stores. These conditions included: (i) requirements to obtain no-objection certificates from the association in order to operate; (ii) pressurizing pharmaceutical companies into not supplying to the stockists who had not obtained no-objection certificates; (iii) fixing trade margins at different levels of drug sale; (iv) issuing instructions restricting discounts on retail or wholesale sale of drugs; (v) calling on members to boycott enterprises for not following instructions of associations; and (vi) requiring payment of product information service

15 Case No. MRTP C-127/2009/DGIR4/28. This was a case under the MRTP Act and was transferred to the CCI after the MRTP Act was repealed
charges by pharmaceutical companies for the release of new drugs. The CCI has looked at such restrictions in significant detail and has held such activities to be in violation of Section 3(3)(a) and 3(3)(b) of the Competition Act as they affect the distribution and supply of pharmaceutical products, and restrain free trade and commercial freedom, thereby causing harm to the consumer. Given the number of similar cases, the CCI has issued a general public notice in relation to their anti-competitive activities, inviting people to report any continued malpractices.

4.11 In the context of several film association cases where a trade association is an unavoidable trading partner, and such trade association prohibits its members from dealing with persons other than its own members, the CCI has found such restriction to be in contravention of Section 3(3)(b). In the CCI’s view, given that such restrictions effectively apply on an industry-wide basis, reducing production in the market would be to the detriment of the purchasers of the product.

4.12 Collective bargaining by trade associations which has the effect of coercing counterparties has also been held to be a violation of the Competition Act. In the case of M/s Cinemax India Limited (now known as M/s PVR Ltd.) v. M/s Film Distributors Association, Kerala (FDA K), the CCI penalised FDA K for exploiting its collective bargaining position to coerce film exhibitors to enter into very onerous revenue sharing arrangements, which had the effect of controlling the provision of services in the market of distribution and exhibition of films.

4.13 Similarly, other restrictive conditions that such an association may impose on its members may be impermissible, notwithstanding that membership is voluntary; such as in Sunshine Pictures v. Central Circuit Cine Association, Indore, where requirements imposed by an association of film producers and distributors that all members should register before exhibiting films, or exhibit films of a particular language, were held to be anti-competitive. The COMPAT while upholding the CCI order in the Motion Pictures Association, Delhi v. Reliance Big Entertainment Pvt. Ltd. (Motion Pictures Case) held that the commonality of rules such as prohibition from dealing with non-members, power of boycott and inflicting punishment, compulsory registration of films with the respective association, etc. to be in violation of Section 3(3)(b).

Sharing of Markets amongst competitors (Section 3(3)(c) of the Competition Act)

4.14 Section 3(3)(c) of the Competition Act prohibits horizontal agreements whereby competitors share the market or sources of production or provision of services by way of allocation of the geographical area of market, or type of goods or services, or number of customers in the market.

4.15 The COMPAT, while dealing with the Motion Pictures Case concerning the film distribution business in India, upheld the CCI’s findings that the film distributors were guilty of anti-competitive practices such as compelling membership and registration of movies, prohibiting members from dealing with non-members, imposing long hold back periods to delay exploitation of DTH, satellite and video rights and discriminating against non-regional films. The COMPAT found that the trade associations of the film distributors controlled the business of distribution and exhibition of films in their respective territories, and held that the rules of the

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17 Appeal Nos.69, 70, 71, 73, 96, 97, 102, 78, 66, 67 of 2012.
associations regarding the distribution rights were in contravention of Section 3(3)(b) of the Competition Act as they limited the supply and distribution of movies in India.

Bid Rigging or Collusive Bidding (Section 3(3)(d) of the Competition Act)

4.16 Section 3(3)(d) 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.

4.17 In the Aluminium Phosphide Case, the CCI found that three firms which had been quoting and negotiating rates identically in response to tenders by the Food Corporation of India over a period of 7 years, in spite of having different cost structures & locations and as corroborated by a common visitor book entry by all bidding firms on the date of tender, as being in breach of Section 3(3)(d) of the Competition Act.

4.18 In the LPG Cylinder Manufacturers Case, the CCI found 48 cylinder makers guilty of manipulating the bids and quoting identical rates in groups, through common agents and collusive action while bidding for tenders floated by the Indian Oil Corporation. The decision has been reaffirmed by the COMPAT.

4.19 In the Explosives Case, the CCI found that the firms had contravened Section 3(3)(d) of the Competition Act when they collectively decided to boycott an auction. Some parties had also sent identical letters of objection to the terms of the bid, which the CCI considered to be evidence of a 'meeting of minds' between the parties. The COMPAT upheld the finding of the CCI regarding the violation of Section 3(3)(d) and held that the collective boycott of the electronic reverse auction by the explosive manufacturers amounted to "adversely affecting or manipulating the bidding process"; however, the quantum of penalty was reduced in appeal.

Public Procurement and Bid Rigging

4.20 The public sector in India has long been affected by vices such as collusive bidding or bid rigging. Many of the CCI decisions on bid rigging, such as the LPG Case, Aluminium Phosphide Case and the Explosives Case,18 involved public procurement tenders in which the CCI imposed heavy penalties on the infringing parties. Bid rotation and courtesy bidding are violations of the Competition Act which involve concerted action between the parties to distort competition in procurement. The approach of the CCI and the COMPAT so far has been strict in coming down against bid rigging especially in case of public procurement, which is clear from the imposition of heavy penalties in the Explosives Case and the LPG Case.

4.21 In the Explosives Case, based on the evidence, the CCI observed that the motivation for collusion could be ascertained from the interest of the explosives manufacturers in keeping the smaller and new players out of the market and retaining their control in the supply of explosives to CIL.

4.22 The MDD Case related to the rigging of bids in tender invited by a PSU dealing in Government hospital supplies. There was a trend of bid rotation among the parties in their supplies to various Government hospital supplies tenders. The COMPAT based its finding of collusion on the common typographical errors in the bid documents of the three parties and upheld the CCI order. However, while deciding the issue of quantum of

18 Coal India Limited v. Gulf Oil Corporation Limited & Ors., Case No. 6/2011
penalty, the COMPAT observed that the nascency of the competition jurisdiction is an important factor for consideration while imposing penalties in cartel cases.

4.23 In the *Rubber Sole Manufacturers Case*, the CCI found rubber sole suppliers guilty of cartel activity by holding that they had indulged in bid rigging, limitation of supplies, market sharing and fixing of prices in tenders. The CCI proceeded to impose a penalty of 5% of the last three years' average turnover of the suppliers. Similarly, in *Re: Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Indian railways, Patiala, Punjab*,19 in relation to the procurement of feed valves to be used in diesel locomotives, the CCI held that the act of quoting identical prices not only adversely affected the tender process but also showed that the tender process was manipulated and the CCI refused to grant any form of leniency for being the first offender.

**Information Exchange**

4.24 Information exchange allows for agreement between competitors to be reached if the information discloses market strategies or works as a recommendation of a particular future market conduct. Of greater concern is that exchange of information, especially private, disaggregated and sensitive information shared on a regular basis, increases market transparency and reduces strategic uncertainty about competitors' actions. As such, information exchange may be used to monitor adherence to an agreed price or volume. This monitoring could lead to swift and more effective punishment of deviants. Cases of concerted practice or tacit collusion are particularly difficult to prove. Often however, some form of facilitating practice such as information exchange accompanies such conduct.

4.25 In the *Cement Cartel Cases*, the CCI noted that the cement manufacturers' trade association i.e., Cement Manufacturers' Association ("CMA") was collecting, inter alia, detailed retail and wholesale prices of cement from 34 centers across India on a weekly basis. For this purpose, the CMA had appointed representatives from cement manufacturers in various cities/regions to collect, collate and communicate the data back to CMA either by phone or over email. In addition to the above, the CCI also observed that while the CMA was collecting factory wise company level data for each of the cement manufacturers in relation to cost, capacity, production, dispatches, exports etc. for provision to the Government of India, it was also sharing this detailed information about each of the cement manufacturers with all its member cement manufacturers at regular intervals. Further, such detailed information was only available to the members of the CMA and was not available in the public domain and the consumers could not have access to such detailed information.

4.26 In light of the above observations, in relation to,

i. collection and sharing of price information, the CCI found that, given that the cement manufacturers were collecting each others' prices both on the retail and wholesale levels either over the telephone or through emails on a regular and repeated basis, the cement manufacturers had an opportunity to fix prices for the future and such sharing of information easily facilitated coordination among them.

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19 *Suo Moto Case No. 03/2012*
ii. sharing of production and capacity data, the CCI held that the collection and dissemination of information production and capacities facilitated interactions among the cement manufacturers for determination and fixation of production of cement.

iii. collection and dissemination of commercially sensitive information, the CCI found that CMA was providing a platform for the cement manufacturers to engage in anti-competitive conduct.

Activities of Trade Associations

4.27 The Indian industry is replete with trade associations. The CCI has closely scrutinized the activities of trade associations, viewing them as a forum for cooperation between competing members. The CCI has dealt with a number of cases involving allegations of anti-competitive agreements through trade associations. When trade associations boycott the supply of goods or services to their buyers, it is likely to amount to a contravention if all or most of the competitors in the market are members of the trade association. It recognizes that trade associations have an important and legitimate role to play in areas such as standard-setting and addressing common concerns with government and environmental protection. It has stated that trade associations can be legitimate fora for promoting standards, innovation and competition.

4.28 However, trade associations can also become a facilitator for cartel behavior and their members will be in breach of Section 3 of the Competition Act where they engineer price fixing, limit supplies, refuse to supply goods, allocate customers, encourage rigging of bids, facilitate the exchange of confidential information between competitors or engage in exclusionary behaviour such as collective boycotts. Accordingly, the CCI is fully alive to two broad concerns relating to the activities of trade associations – first, a trade association may assume a central role in facilitating collusion between its members and second, the association members may use the association as an opportunity to enter into anti-competitive agreements.

4.29 In addition, the rules and regulations governing the operation of a trade association may, by themselves be adjudged as anti-competitive by the CCI. In fact, as evidence of anti-competitive agreements, the CCI has relied on guidelines, circulars and rules of the trade associations. For example, in Santuka Associates Pvt. Ltd. v. All India Organization of Chemists and Druggists and Ors. (AIOCD Case)\(^9\), the CCI imposed a penalty of 10% of the average receipts for the last three years on AIOCD, consisting of various State chemists and druggists associations, for indulging in practices such as: (i) requiring the production of a no-objection certificate from AIOCD affiliated state level trade associations as a pre-condition for appointment as a new stockist, (ii) obligation to obtain an approval after payment of necessary fees from AIOCD affiliated state level trade associations prior to launching any new product, (iii) fixing industry wide minimum trade margins to be earned by any wholesaler or retailer from the sale of the pharmaceutical product, and (iv) collective boycott to coerce the pharmaceutical companies to agree to their demands. The CCI reached similar conclusions in the Varca Druggists Case and Bengal Druggists Case, as the Chemists and Druggists Association ("CDAG"), through its restrictive guidelines, was able to limit supply of the drugs and the number of players in the market by requiring a no-objection certificate for the appointment of a person as wholesaler or stockist. Further, wholesalers were only allowed to pass a limited discount to retailers and margins were also fixed by

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\(^{9}\) Case No. 20/2011
the CDAG. The CCI found the CDAG to have violated Section 3 of the Competition Act and directed the CDAG to cease and desist from engaging in anti-competitive conduct together with a penalty.

4.30 Trade associations may also often act by means of decisions and recommendations to its members. Where such recommendations and/or decisions result in uniform conduct in the market by the members of the association, or have an exclusionary effect, they have been held to be in violation of the Competition Act. In *Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Association of India & Ors.* 21, the refusal to deal by way of a boycott call given by trade associations of travel agents against a number of international airlines, and the expulsion of one member who did not heed to the boycott resulting in expulsion of membership, was held as anti-competitive conduct in violation of the Competition Act. Similarly, in *M/s Arora Medical Hall, Ferozepur v. Chemists & Druggists Association, Ferozepur,* 22 the CCI held that the decision to boycott and stop purchasing goods from one member amounted to limiting and controlling supply in the market of drugs and medicines.

4.31 In the *Indian Sugar Mills Association (ISMA) v. Indian Jute Mills Association* case 23 (the IJMA Case) the CCI penalized the Indian Jute Mills Association and the Gunny Trade Association ("GTA") for contravening the provisions of the Competition Act by: (i) price fixing of jute material through the circulation of daily price bulletins between themselves; and (ii) limiting and controlling the supply of jute packaging material. 30 out of 34 members of IJMA were also members of GTA, and the CCI held that the IJMA as an association provided a forum to its members for suggesting changes in the daily price bulletins by the GTA, thereby actively influencing the determination of price and limiting the supply of jute packaging in a concerted manner. The price information exchange between wholesalers and manufacturers of jute was found to be in violation of the Competition Act.

5. INTERNATIONAL COOPERATION

5.1 The CCI has signed Memoranda of Understanding ("MOU") with the Federal Antimonopoly Service of Russia, the U.S. Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") and Australian Competition and Consumer Commission, Commissioner of Competition, Competition Bureau Canada and the European Commission’s DG Competition to enhance cooperation between the authorities. The CCI is also in the process of signing similar MOUs with other key jurisdictions. In November 2013, the CCI entered into the Delhi Accord with the BRICS (Brazil, Russia, India, China and South Africa) competition agencies. It is a member of the International Competition Network and participates regularly in its meetings and conferences.

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

21 Case No. 3/2009
22 Case No. 60/2012
23 Case No. 38 of 2011, 31 October 2014.
5.3 In the current scenario of intense globalization and companies having a presence across multiple jurisdictions, it is particularly important for all group companies to be compliant with local competition laws as cartels can be discovered and caught in any jurisdiction.

6. INVESTIGATION

6.1 As a general matter, an investigation into alleged anti-competitive conduct can be initiated by the CCI either on its own motion (suo moto) or on the basis of information or a reference from the government. In addition to these, cartel investigations can also be initiated pursuant to a leniency application. There is also an increasing trend where the CCI is receiving references from the government or State authorities alleging anti-competitive activities. These references have largely been in relation to the public procurement process i.e., bid rigging matters.

6.2 Once the CCI, on the basis of the evidence available before it, forms a prima facie view that a violation of the provisions 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 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 certain 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. The interaction between the DG and the party is generally through requests for collecting information and oral testimony. In addition to the informant and the enterprise accused of contravening of the Competition Act, such information requests are also sent to competitors, customers or consumers, and suppliers by the DG.

6.3 Even though the DG is vested with powers to conduct dawn raids, it has sparingly used these powers on account of procedural hurdles such as the requirement to obtain a warrant from the Chief Metropolitan Magistrate, New Delhi prior to conducting search and seizure. This is discussed below.

7. DAWN RAID POWERS

7.1 The CCI has the power to use “dawn raids” or unannounced search and seizure to investigate allegations of a cartel. Dawn raids are considered to be an effective tool in investigating cartels by more mature competition authorities. Such power can be incredibly intrusive and parties being raided have an obligation to cooperate with the CCI during the search. Section 41 of Competition Act empowers the DG to conduct investigations when directed by the Commission. During the course of investigation, the DG is vested with the powers of the Civil Court in cases of issuing summons, receiving evidence, requisitioning public records etc. The power of the DG with respect to search and seizure is analogous to that of an inspector under Section 220 of Companies Act 2013. The DG may invoke the power of search and seizure with the approval of the Magistrate. However, search and seizure can only be undertaken when he has reasonable grounds to believe that the books and papers which are useful for evidentiary purposes may be destroyed.

7.2 The dawn raid powers of the CCI have been used sparingly. However, recently, in a pending abuse of dominance investigation against JC Bamford Excavators ("JCB") and JCB India, the DG conducted its first
dawn raid. In the course of its investigation, the DG raided JCB’s premises. The raid was conducted in multiple offices of JCB simultaneously. However, in October 2014, the Delhi High Court stayed further proceedings by the CCI into the matter, including a direction to the DG to file a personal affidavit indicating the material available and the reasons that prompted the dawn raid, since the matter was pending in the High Court of Delhi between the parties. The final decision of the High Court of Delhi will set the stage for future dawn raids in India.

7.3 Further, given the existing MOUs with the international agencies, there is a possibility that in the event that a need is felt, the CCI may approach other authorities for cooperation in relation to dawn raids and investigation.

7.4 Proposed amendments to the Competition Act (as stipulated in the Competition Amendment Bill, 2012) are expected to strengthen the CCI’s powers to conduct dawn raids. The proposed amendments are expected to empower the Chairperson of the CCI to unilaterally authorise unannounced searches of the premises of persons or enterprises under investigation for violations of the Competition Act. Search and seizure provisions under the Code of Criminal Procedure are also expected to be made applicable to such searches. However, in February 2014, the Standing Committee on Finance, while considering the Competition Amendment Bill, rejected the proposal to introduce such an amendment as it was found that the existing provisions had sufficient checks and balances.

8. PENALTIES

8.1 Under the Competition Act,\textsuperscript{24} if an agreement is found to be in contravention of Section 3 of the Competition Act, the CCI has the power to, \textit{inter alia}:

(a) pass cease and desist orders;

(b) impose a penalty not exceeding 10% of the average turnover for the last three financial years on each enterprise that is a party to an anti-competitive agreement. In case of cartels, the penalty is higher and can be up to three times of the profit or 10% of the turnover of each participating enterprise for each year of continuance of such agreement, whichever is higher; and

(c) modify any offending agreement.

8.2 Contravention of the CCI’s orders can invite further penalties and the CCI can even file a criminal complaint against such contravention which, in turn, could lead to the imposition of additional fines or even imprisonment of up to three years.\textsuperscript{25}

\textsuperscript{24} Section 27 of the Competition Act

\textsuperscript{25} Section 42(3) of the Competition Act
8.3 Further, where a company has contravened the Competition Act with the connivance or consent of any director, manager or secretary or any other officer of the company who was responsible and in charge of the conduct of business of the company, such persons shall be deemed to be guilty and punished accordingly.26

8.4 The CCI has not framed any guidelines or given any guidance, in any cases decided so far, on calculating penalties. However, the CCI has not been hesitant to impose significant monetary penalties for violations of the provisions of Section 3 of the Competition Act. In Varca Druggist Case the CCI imposed the maximum penalty of 10% of the annual turnover of the parties for a contravention of Section 3. In other cases, including the Explosives Case and in the Aluminium Phosphide Case, the penalty imposed varied between 3% and 9%. In the Cement Cartel Case the CCI imposed a penalty of 0.5 times the profit of the companies for the two years of the existence of the cartel. The penalty imposed on the cement manufacturers and the Cement Manufacturers’ Association was approximately USD 1174.2 million, the highest penalty imposed in any case by the CCI so far.

8.5 In light of the COMPAT’s 2013 decision in the MDD Medical case27, the CCI has started to specify the aggravating and mitigating circumstances which are to be taken into account in determining the level of penalty. In the LPG Cylinder Manufacturers case28, the CCI maintained its strict approach to cases of bid rigging in public procurement, stating that the costs of bid-rigging on the exchequer and on end-consumers was a compelling factor for imposing a penalty and for viewing breaches seriously. However, it found as mitigating factors the nascent state of competition jurisdiction and the size of the enterprises. In this as in most of the other recent cases, the CCI has tended to impose penalties at the higher end of the 10% average turnover spectrum. On appeal, even though the COMPAT confirmed the findings of the CCI, the matter was remanded to the CCI, giving the parties the opportunity to plead on reduction in penalty before the CCI. The CCI gave due consideration to factors such as: (i) nascent stage of competition jurisdiction, as Section 3 of the Competition Act came into force only a few months prior to March 2010 when the offence of cartelization was alleged to have taken place, (ii) first time contravention by the enterprise and no evidence of past violations, and (iii) the national importance of the subject matter of the rigged bid. However in cases of public procurement and bid rigging such as this one, the CCI was not inclined to reduce the amount of penalty as any collusion in rigging tenders in public procurement costs the exchequer, resulting in higher costs to the consumers.

8.6 In the Aluminium Phosphide Case, although the COMPAT upheld the allegations of bid rigging, it applied the 9% penalty only on the ‘relevant turnover’ (turnover generated by aluminium phosphate tablets) rather than the turnover of the entire company, reducing the penalty from INR 317 crores to INR 10 crores. The COMPAT ruled that when deciding penalty for multi-product companies the CCI should only consider ‘relevant turnover’, that is, turnover only connected to the business in violation. In addition, CCI should also look at aspects such as the financial health of the company, the necessity of the product, the likelihood of the company being shut down due to harsh penalty and the general reputation of the company. The CCI has

26 Section 48 of the Competition Act
28 Case No. 3 of 2011, 6 August 2014.
however not followed the guidance laid down by the COMPAT in the *Excel Crop case*\(^{29}\) on “relevant turnover” in relation to multi-product firms. In the *Feed Valves decision*, it imposed penalties on the basis of the overall average turnover of the offending enterprise and not on its relevant turnover. The COMPAT decision is under appeal to the Supreme Court.

8.7 The CCI is increasingly penalizing responsible individuals and office bearers under Section 48 of the Competition Act for their involvement in breaches by their companies/associations. There have been a number of cases in the last year where the CCI has imposed penalties on office bearers who were responsible for running the affairs of the association and actively participated in giving effect to the anti-competitive decision or practice. In the recent decision of *M/s Swastik Stevedores Private Limited v. M/s Dumper Owners’ Association & Ors*\(^{30}\), the Dumper Owners’ Association was fined 8% of its average turnover for the last 3 years for price fixing and controlling the supply of dumpers. The CCI also imposed a penalty on five office bearers of the Association at the rate of 5% of their average income for the past three years, relying upon minutes of meetings to determine their involvement in the anti-competitive practices. In *M/s Arora Medical Hall Ferozepur v. Chemist and Druggist Association, Ferozepur (CDAF)*, the CCI penalized the office bearers of CDAF to deter any other association/office-bearers from engaging in such type of actions in the future and imposed a penalty of 10% of their average income.

8.8 Similarly, in the *IJMA Case*, where the CCI penalized the IJMA and the GTA for price fixing and limiting the supply of jute material, it also penalized the persons in charge of IJMA and GTA as vicariously liable for issuing circulars and involved in the decision making of their respective associations. The CCI imposed a penalty at the rate of 5% of the average income of the last three financial years of the members of the Executive Committee of IJMA and GTA.

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*”), prescribe when, and the manner and degree to which, the CCI can reduce the penalties for members of a cartel that make vital disclosure to the CCI.

9.2 An important factor to consider is the inherent risks in filing a lesser penalty application. The primary risks that may arise are: (i) no guarantee of a reduction (the leniency regime in India 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) the position on whether the lesser penalty benefit will extend to individuals employed by a leniency applicant is not clear, and (iii) confidentiality concerns.

9.3 The law on leniency is not yet developed in India and there are no 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.

\(^{29}\) Appeals Nos. 80 and 81 of 2012, 29 October 2013

\(^{30}\) Case no. 42 of 2012, 21 January 2015
Assessment and Extent of Reductions

9.4 Any reduction in the monetary penalty is a matter of discretion of the CCI and will be based, after giving due consideration to the: (i) stage at which the applicant comes forward with its disclosure; (ii) evidence already in possession of the CCI; and (iii) quality of the information relied upon by the applicant for such disclosure, and (iv) facts and circumstances of the case.

(a) **First Applicant**: The first party to make a vital disclosure to the CCI could benefit from a reduction in penalty of up to 100%, in the event the disclosure enables the CCI to either: (i) 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) establish the contravention of the Competition Act by providing evidence which the DG or the CCI did not have in its possession in a matter under investigation.

(b) **Second Applicant**: Reduction up to or equal to 50%, upon making a disclosure of evidence that provides *significant added value*\(^{31}\) to the evidence already in possession of the CCI or the DG.

(c) **Third Applicant(s)**: Applicant(s) marked as third in the priority status 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 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:

(a) cease from further participation in the cartel, unless otherwise directed by the CCI;

(b) provide vital evidence to the CCI;

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

(d) must not conceal, destroy, manipulate or remove any relevant documents which may establish the existence of a cartel.

9.7 Where the 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.

\(^{31}\) Means the extent to which the evidence provided enhances the ability of the CCI or the DG to establish existence of a cartel
Procedure on making an Application

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

(a) contact the designated authority32 at the CCI orally, by email or by fax; or

(b) make an application in the format set out in a schedule to the Lesser Penalty Regulations.

9.9 In the event a party communicates information orally or via email/fax, it will be required to submit a written application, within a maximum timeframe of 15 days. Where there has been a failure to submit an application within the 15 day timeframe or such extended time period as the CCI grants, the party may have to forfeit its claim for priority status and consequently for 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 either by phone, email or fax. The CCI will also provide a written acknowledgment on receipt of the application, informing the party of the priority status.

9.11 In the event 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; provided, however, that before rejecting the application for lesser penalty, the CCI is required to provide the party with an opportunity of hearing.

9.12 Further, if an applicant has been granted immunity under the leniency provisions, such immunity will not extend to any compensation claims by third parties, i.e., such an applicant can still be made a party to a compensation claim before the COMPAT.

Confidentiality of Lesser Penalty Applications

9.13 In order to secure a reduction in the fines under the leniency regime, party(ies) to a cartel are required to make full, true and vital disclosure and also must continue to co-operate with the CCI throughout the period of investigation and until the completion of the proceedings before the CCI.

9.14 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.

9.15 As mentioned above, the CCI has the power to enter into memoranda or arrangements with foreign authorities to share information in relation to, inter alia, cooperation on investigation of international cartels.33 Section 18 read with Section 57 of the Competition Act provides that the CCI can share information,
which may include leniency applications, with other authorities, with the previous 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 for a part penalty to be deposited in an interest bearing account until the final disposal of the appeals.

10.2 For example, in the Explosives Case, the explosives manufacturers were directed to furnish a deposit of 5% of the penalty imposed by the CCI while in the Cement Cartel Case, the COMPAT ordered a deposit of 10% of the penalty imposed by the CCI. In certain abuse of dominance cases, for example, in Schott Glass India Pvt. Ltd v. CCI and Ors. and Board of Control for Cricket In India v. CCI and Ors., the COMPAT has even ordered deposits up to 25% of the penalty imposed by the CCI.

10.3 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.

34 Appeal No. 91 of 2012.
35 Appeal No. 17 of 2013.
APPENDIX 1
Number of CCI and COMPAT decisions by year (since 2011)

Statistic of CCI and COMPAT decisions

No. of Cases

<table>
<thead>
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Japan: Anderson Mori & Tomotsune
Overview of cartel regulation in 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 2013 fiscal year (which ended on 31 March 2014), the JFTC dealt with 50 leniency applications, meaning that a total of 775 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 17 cartel cases during the 2013 fiscal year (8 related to cartels and 9 related to bid rigging cases). The surcharges imposed for violations of the AMA (mainly cartels) totalled approximately JPY30 billion (about USD250 million) (the 2010 fiscal year saw the highest surcharges to date being imposed by the JFTC at JPY72 billion (approximately USD600 million)). The 2013 fiscal year record also includes a cartel case in relation to international ocean shipping services for automobiles, which marks the second highest record for surcharges in the JFTC’s history (approximately JPY22.7 billion which amounts to approximately USD189 million).

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 21 criminal accusations so far.

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

2. ANTI-CARTEL LEGISLATION AND ENFORCEMENT
Cartel regulations
2.1 The substantive provisions of the cartel prohibition are contained in 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

– 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 corporation**

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.

**(a) 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. 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.

**(b) 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, in 2014, the Japanese government established a study group to consider further amendments to the AMA. In particular, the right for outside counsel to be present during JFTC investigations, and the concept of attorney/client privilege, are being considered so as to enhance due process. However, the majority of the study group has so far indicated that the introduction of attorney/client privilege would be premature under the current system.

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.

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 Appendix 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 procedure 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 JPY500 million (approximately USD4.2 million). For individuals, the maximum prison term is five years and the maximum fine is JPY5 million (approximately USD42,000). 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 Nagoya subway bid rigging 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 JPY3 million (approximately USD25,000) 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 indicted 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
in an 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 The JFTC only discloses the identity of successful leniency applicants at the time of the issuance of orders and only if the applicants agree to such publication. In addition, the JFTC does not disclose leniency application forms to other defendants or interested parties. Therefore, applicants are generally able to keep their leniency applications confidential if desired.

6. ADMINISTRATIVE SETTLEMENT OF CASES

6.1 In Japan, there is 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, as previously mentioned, the Japanese government has established a study group to consider further amendments to the AMA. Among other issues, the group is considering whether Japan should introduce: (i) a discretionary surcharge imposition system to enhance the JFTC’s investigative capabilities and an EU style “settlement” system to be potentially used in relation to cartels; and (ii) an EU style “commitment” system to be potentially used in relation to abuse of dominance cases and mergers.

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 (JPY520 million which is approximately USD4.3 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.
APPENDIX 1: STATISTICS ON JFTC CARTEL ENFORCEMENT

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

<table>
<thead>
<tr>
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<tr>
<td>Amount (JPY Billion)</td>
<td>1115</td>
<td>18.87</td>
<td>9.26</td>
<td>11.29</td>
<td>27.03</td>
<td>36.07</td>
<td>72.08</td>
<td>44.25</td>
<td>25.07</td>
<td>30.24</td>
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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

<table>
<thead>
<tr>
<th>Fiscal year</th>
<th>Number of cases of bid rigging and price cartels, etc., for which legislative action was taken</th>
<th>Number of cases in which the application of the leniency system was publicly disclosed</th>
<th>Number of companies for which the application of the leniency system was publicly disclosed</th>
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<tbody>
<tr>
<td>1 April 2005 – 31 March 2006</td>
<td>17</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1 April 2006 – 31 March 2007</td>
<td>9</td>
<td>6</td>
<td>16</td>
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<td>37</td>
</tr>
<tr>
<td>1 April 2008 – 31 March 2009</td>
<td>11</td>
<td>8</td>
<td>21</td>
</tr>
<tr>
<td>1 April 2009 – 31 March 2010</td>
<td>22</td>
<td>21</td>
<td>50</td>
</tr>
<tr>
<td>1 April 2010 – 31 March 2011</td>
<td>10</td>
<td>7</td>
<td>10</td>
</tr>
<tr>
<td>1 April 2011 – 31 March 2012</td>
<td>17</td>
<td>9</td>
<td>27</td>
</tr>
<tr>
<td>1 April 2012 – 31 March 2013</td>
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<td>19</td>
<td>41</td>
</tr>
<tr>
<td>1 April 2013 – 31 March 2014</td>
<td>17</td>
<td>12</td>
<td>33</td>
</tr>
<tr>
<td>Total</td>
<td>153</td>
<td>98</td>
<td>235</td>
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</table>

Number of applications for leniency for each fiscal year

<table>
<thead>
<tr>
<th>Fiscal year</th>
<th>Number of leniency applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 January 2006 – 31 March 2006</td>
<td>26</td>
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<tr>
<td>1 April 2006 – 31 March 2007</td>
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<td>1 April 2013 – 31 March 2014</td>
<td>50</td>
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<tr>
<td>Total</td>
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</table>
APPENDIX 2: COMMISSION’S METHOD OF SETTING FINES  
Calculation rate for surcharge

<table>
<thead>
<tr>
<th></th>
<th>General base rate (medium and small-sized companies)</th>
<th>Mitigated rate</th>
<th>Aggravated rate</th>
<th>Rate where several aggravating requirements are satisfied</th>
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</thead>
<tbody>
<tr>
<td>General</td>
<td>10% (4%)</td>
<td>8%</td>
<td>15%</td>
<td>20%</td>
</tr>
<tr>
<td>Retailers</td>
<td>3% (1.2%)</td>
<td>2.4%</td>
<td>4.5%</td>
<td>6%</td>
</tr>
<tr>
<td>Wholesalers</td>
<td>2% (1%)</td>
<td>1.6%</td>
<td>3%</td>
<td>4%</td>
</tr>
</tbody>
</table>
China: Jun He Law Offices
Overview of cartel regulation in China

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 see Appendix 1: Recent enforcement in cartel cases.

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 “Authorities”). 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 Development and Reform Commissions and Price Bureaus authorised 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 Administration for Industry and Commerce (“AIC”) offices at the provincial level can be authorised 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.
International Cooperation

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

2.6 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.

2.7 We have witnessed an increase in cases as 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(n):

– voluntary disclosure by one or more cartelists by virtue of a leniency policy;

– ex officio action initiated by either of the Authorities;

– complaint of a third party, such as a customer, competitor or anyone aware of the cartel; or

– media report.

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

3.3 Neither the NDRC nor SAIC will announce publicly that they have decided to open a formal proceeding. Instead, 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 its 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 undertaking may apply for a suspension of the investigation and make a commitment to adopt measures to eliminate the influence of the alleged conduct. If the Authorities accept the commitment, they may decide to suspend the investigation and monitor the fulfilment 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 summarise 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 Raids

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 (i) enter and investigate the business location(s) of the undertaking in question and/or other related locations; (ii) interview the investigated undertaking and/or other interested or related entities or individuals and request statements of relevant information; (iii) make copies of files and documents, such as relevant vouchers, agreements, accounting books, business letters, and electronic data; (iv) seize or confiscate related evidence; and (v) 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 Authorities 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 Authorities entered the premises of a related entity to seize necessary documents.  

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

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1 In the investigation against Microsoft, the SAIC entered the premises of Accenture, which maintained Microsoft’s financial data.
the Authorities 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 Authorities.

Information Requests
3.14 The extensive antitrust enforcement powers enjoyed by the Authorities 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 Authorities 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 Authorities 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 3.12 above.

3.16 As to multinational companies, the 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 RFIs, the Authorities may be able to obtain information from their counterparts in other jurisdictions with which they have bilateral cooperative relationships. This data sharing scheme is not only present in cases where fines have been issued in other jurisdictions, but is also increasingly used in ongoing cases. Mutual memorandums of understanding have been concluded among competition authorities globally, including in China.

Right to State Opinions
3.18 The concept of a "right to defence" 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 defence".

Legal Professional Privilege
3.19 There is no corresponding concept of the “legal professional privilege” in China. Therefore, in principle, the Authorities are entitled to obtain written information exchanged between the investigated undertaking and its in-house counsel/external counsel.

Confidentiality
3.20 Under the AML, the Authorities and their officials have the duty to keep confidential any business secrets that they obtain when enforcing the law.
4. SANCTIONS

Administrative Sanctions

4.1 Under the AML, the sanctions that the Authorities may impose on cartelists include: (i) ordering to cease violations; (ii) confiscating illegal gains, and (iii) imposing fines. The Authorities have no right to impose criminal sanctions on the individuals involved.

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 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. Nevertheless, the scope of "turnover", for instance, whether it refers to global turnover or turnover in China, is not expressly defined by the AML and the Authorities have broad discretion on this matter.

4.4 Based on current fines, the NDRC and SAIC appear to use as the basis for calculation the turnover of the cartelist's relevant products in China in the last financial year. However, it should be noted that in the recent Qualcomm case handled by NDRC (which was not a cartels case), the calculation basis was not limited to the turnover generated by the relevant products, but the overall turnover of Qualcomm within China.

4.5 To determine the specific amount of fines, the Authorities may consider factors such as the nature, extent and duration of the violations according to the AML. In practice, the Authorities 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.

4.6 The Authorities 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 organisation facilitates or organises a monopoly agreement among industry members (notably, the members of the trade association), the Authorities may impose a fine of less than RMB 500,000.

Follow-up Private Litigation

4.7 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.

4.8 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 defences invoked. Therefore, the burden of proving the existence of a cartel is on the
plaintiff. 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.

4.9 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. However, 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. Without further statutory clarification, such other ways will be further determined by the court in private litigation cases. No punitive damages, such as treble damages, are assessed in China.

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 Authorities are empowered by the AML to grant immunity or mitigate the penalties imposed on an undertaking engaged in a monopoly agreement where the undertaking voluntarily discloses information about the monopoly agreement and provides critical evidence to the Authorities.

5.3 The procedural regulations issued by the NDRC and SAIC, respectively, provide the general principles for leniency. Generally speaking, in granting leniency, the Authorities usually consider 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.

Leniency Policy of the 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.

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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 Article 19 of Tort Liability Law of the People’s Republic of China (“PRC Tort Liability Law”).

4 This rule is not only applicable to cartels but also applies to vertical monopoly agreements. We have witnessed that in vertical restraints, the Authorities have granted to certain undertakings immunity from fines.
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 the 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 emphasizes its discretion in granting immunity and reduction of fines and clearly provides that the organizer of the cartel does not qualify for leniency.

Procedure for Leniency Applications
5.7 There is currently no formal procedural rule for leniency applications in China. In practice, the undertaking wishing to apply for leniency needs to submit evidence to the Authorities. However, whether the evidence is ultimately crucial for the undertaking to qualify for leniency is not known until the investigation comes to an end. Moreover, there is also no clear scheme to mark or flag the order of applicants.

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 Authorities, the Authorities may decide to suspend the investigation. The decision suspending the investigation will state the concrete measures, or commitments, promised by the investigated undertaking.

6.2 Once the Authorities decide to suspend an investigation, they will supervise the implementation of the commitments made by the investigated undertaking. If the investigated undertaking implements the commitments, the Authorities may decide to terminate the investigation. The Authorities are entitled to resume the investigation where (i) the undertaking fails to implement its promise; (ii) significant changes have taken place in regard to the facts underlying the decision to suspend the investigation; or (iii) the decision to suspend the investigation was made on the basis of incomplete or inaccurate information submitted by the undertaking.

6.3 In practice, both the NDRC and SAIC have applied "suspensions of investigation" in their investigations, not only for local cases, but also for cases involving international companies.

7. JUDICIAL REVIEW
7.1 In China, there is no special rule authorizing the 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 Authorities, it may apply for administrative reconsideration or bring an administrative lawsuit.
## APPENDIX 1: RECENT ENFORCEMENT IN CARTEL CASES IN CHINA

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>Samsung, LG and etc. (三星，LG等)</td>
</tr>
<tr>
<td>2013</td>
<td>Old Phoenix and etc. (老凤祥等)</td>
</tr>
<tr>
<td>2014</td>
<td>Jilin Yatai Cement + 2 other manuf. (吉林亚泰水泥以及其他两家生产商)</td>
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<tr>
<td>2014</td>
<td>PICC (Zhejiang) + 22 other insurers (中国人保（浙江）及22家其他保险公司)</td>
</tr>
<tr>
<td>2014</td>
<td>Hitachi, Denso, Nachi and etc. (日立、电装、不二越等)</td>
</tr>
<tr>
<td>2014</td>
<td>BMW, Audi, Chrysler dealers + potentially others (宝马、奥迪，克莱斯勒经销商及可能的其他品牌经销商)</td>
</tr>
</tbody>
</table>
Korea: Kim & Chang
Overview of cartel regulation in 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, paragraph 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

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).
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 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. 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 MRFT Act, art.19, para. 5.
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. 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,” 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 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 or tripled compared to the previous year: 307.0 billion won (approximately US$ 307 million) in 2007, 110.5 billion won in 2006, 249.3 billion won in 2005, 28.8 billion won in 2004, and 109.8 billion won in 2003. The 2004 figure was exceptionally low.

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 KFTC has often filed such complaints with the National Prosecutor’s Office, and the violators have been indicted.

Particularly, in recent collusive bid-rigging cases, namely nuclear plant cables and the Four Major Rivers Development Project, the courts sentenced the representative directors and responsible directors and officers to prison terms and put them under court custody. In doing so, the court expressed its intent to impose more severe criminal penalties moving forward when it stated that a “heightened level of punishment is necessary given that the practice of penalizing corporate entities and imposing monetary fines on responsible directors and officers has proved to be insufficient to prevent the recurrence of similar violations”.

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.

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5 Id.
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 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.

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 US DOJ 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 investigated and enforced 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 While there is no Supreme Court decision that gives guidance on what constitutes "an effect on the Korean market", the KFTC and Korean appellate courts have addressed this issue in the air cargo cartel case. In 2010, the KFTC investigated various airlines for fixing the fuel surcharges, ultimately sanctioning such airlines for engaging in a price-fixing cartel with respect to routes into and out of Korea. The KFTC determined that it had jurisdiction even 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, EU and Hong Kong), and 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.

3.4 Two of the airlines appealed the KFTC's decision to the appellate court, and the cases were assigned to separate appellate court panels. In one of the appeals, the appellate panel elaborated on the scope of the KFTC’s jurisdiction, outlining three conditions for the extraterritorial application of the MRFTL: (i) the Korean market must make up a portion of the subject of the agreement; (ii) the acts falling under such agreement must directly affect the Korean market; and (iii) such acts must be related to competition within the Korean market. The other reviewing appellate panel held that an effect on the Korean market is sufficient for jurisdiction pursuant to Article 2-2 of the MRFTL, noting that a direct effect on the Korean market is not required. Notably, however, both reviewing appellate court panels accepted the KFTC’s argument that it had jurisdiction over the inbound routes. The appeal is now pending and awaiting decision by the Korean Supreme Court. As the Supreme Court has yet to address this issue, there remains some uncertainty as to how the Supreme Court would come out on this issue.

3.5 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.

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6 Seoul High Court, Case No. 2010Nu45868 rendered on February 2, 2012
7 Seoul High Court, Case No. 2010Nu45950 rendered on May 16, 2012
authorities, such as 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.

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:

\[
\text{Sales Revenue of the Relevant Products during the Violation Period (Contracting Price in case of bid rigging)} \times \text{Percentage Multiplier}
\]

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 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. In
line with this, under the recent amendment to the MRFTL, the Prosecutors’ Office has authority to request
the KFTC to refer the matter to them for prosecution and upon request by the Prosecutors’ Office, the KFTC
must file the complaint with the Prosecutors’ Office. For instance, in Saemanguem case, the Prosecutors’
Office exercised its right to request a complaint and accordingly the KFTC filed a complaint with the
Prosecutors’ Office.

In addition, the statute of limitations provision has been amended. The previous statute of limitations for
MRFTL violations was 5 years from the end date of the violation. The amendment stipulates that if the KFTC
has not commenced an investigation, the statute of limitations would be 7 years from the end date of the
violation whereas if the KFTC has commenced an investigation, the statute of limitations is extended for 5
years beginning with the commencement of the KFTC’s investigation. In essence, the KFTC will now have 5
years to conclude an investigation once an investigation is duly commenced prior to the expiration of the
initial 7 year statute of limitations. In other words, if the KFTC commences an investigation immediately
before the 7 year statute of limitations has run (e.g., during the 7th year), the statute of limitations will run for
an additional 5 years after commencement of the investigation.

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 in 1 April 2005 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:

i. the applicant must exclusively provide information which was necessary to evidence the improper concerted act,

ii. 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,

iii. 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

iv. 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. 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 cartel 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.

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8 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.
5.7 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.

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.
EU: Slaughter and May
Overview of cartel regulation in 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. Some statistics illustrating trends in the enforcement of the EU cartel rules are provided at Appendix 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 which 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.

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

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 3 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.
² For cases affecting trade between non-EU countries which 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.
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 which 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 with a view to ensuring the efficient allocation of cases.³

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 territory. 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 which is possible between the NCAs within the ECN following the implementation of Regulation 1/2003). Due to 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.

³ 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 which 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 in order 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 which 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 of this publication.

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 so as to maintain the surprise element. 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).
Commission officials can conduct dawn raids anywhere in the EU. 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.

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.

The Commission can, however, require on-the-spot oral explanations of documents/information which 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 which would require more careful consideration and which 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.

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).

Commission officials have no power to force entry; however, where an investigation is obstructed, the NCA 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 national officials generally have such a warrant. National courts called upon to issue a warrant in support of a Commission investigation

* 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 Articles 53 and/or 54 of the EEA agreement. Information so obtained is transmitted to the Commission (which usually also takes part in such raids).
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.⁵

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).

⁵ According to the Court of Justice in Roquette Frères (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.
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 which might involve an admission of the existence of an infringement which 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. 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).

Under Regulation 2988/74, a limitation period may be available to protect a company from fines, provided it has not been involved in the cartel activity for a period of at least five years prior to the Commission taking any steps to investigate the cartel.
Guidelines on the method for setting fines

4.4 The Commission has published Guidelines on the method of setting fines (the “Fining Guidelines”). 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 impact on the market, and the size of the relevant geographic market;

- **Duration**: In order 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 real 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 of this publication).

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.

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7 The Fining Guidelines were published on 1 September 2006 and replaced the previous guidelines which dated from 1998.
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. 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 below paras. 4.12 *et seq*). A number of other Member States also provide for some kind of personal exposure for directors. Furthermore, the prospect of extradition resulting in personal fines and imprisonment in jurisdictions outside the EU (e.g. in the US) cannot be disregarded by European executives in international cartel cases.

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 which is intended to harmonise the rules governing actions for damages under national law for competition law infringements (*Damages Directive*). Member States have until 27 December 2016 to implement the directive. It aims to facilitate damages actions through the following key 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 window in which damages claims may be brought;

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* 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.

– 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. Member States were allowed two years from the date of publication of the recommendation within which to implement it and the Commission is due to assess whether any formal legislative measures need to be introduced into this area after July 2015.

4.11 Another important factor to be considered when ascertaining a company’s overall exposure is the fact 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 which 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.

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).10

4.13 A cartel for these UK criminal purposes is an arrangement between at least two persons which, 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.

10 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.
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 on-going 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.

COMMISSION’S METHOD OF SETTING FINES

**STEP 1: CALCULATION OF BASIC AMOUNT**

<table>
<thead>
<tr>
<th>Value of sales</th>
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</thead>
<tbody>
<tr>
<td>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.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Duration of infringement</th>
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<tbody>
<tr>
<td>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.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Entry fee</th>
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<tbody>
<tr>
<td>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.</td>
</tr>
</tbody>
</table>

**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 with a view to enforcing practices which 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

In order to ensure fines have 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.

ADJUSTED AMOUNT
May not exceed 10% of undertaking’s worldwide turnover

STEP 3: APPLICATION OF LENDENCY NOTICE

Full immunity (amnesty)
- For information and evidence enabling Commission:
  - to carry out “targeted inspection” in connection with alleged cartel (so-called “8(a) immunity”), or
  - to find infringement of Article 101 (so-called “8(b) immunity”)
- For one applicant only

Leniency (reduction of fine)
- For “significant added value”
- 1st = 30-50% reduction
- 2nd = 20-30% reduction
- 3rd etc. = 0-20% reduction

NO FINE

No leniency

FINAL (PAYABLE) AMOUNT

Note: In its 2003 judgment in Desang and Sevon v. Commission (an appeal against the Commission’s decision in Lysine) 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. LENDENCY

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.11 Most key jurisdictions outside the EU likewise operate leniency programmes.12

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11 Currently the only exception is Malta (where a consultation was launched on Draft Leniency Regulations in June 2013).

12 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, South Korea), Oceania (Australia, New Zealand) and South Africa.
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). 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 undertakings contact the Commission, the higher the reward; second, the value of the reward will depend on the usefulness of the materials supplied.

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, a company 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 company 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 which (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 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:

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13 Commission Notice of 8 December 2006 on immunity from fines and reduction of fines in cartel cases (amending the 2002 Notice, which replaced an earlier 1996 Notice on the non-imposition or reduction of fines in cartel cases).
– 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.14

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. 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 file.15 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.

14 For these purposes, DG Competition operates a dedicated and secure fax number: +32-2 299 4585 (and initial contact can also be made through the following dedicated telephone numbers: +32-2 298 4190 or +32-2 298 4191).

15 According to the Commission’s Notice on Access to the File (December 2005), information on the case file which 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.
In addition, the Damages Directive 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 in order 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 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, as in the US, 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

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16 See paragraph 4.9 above.
will be granted to them in writing. If they subsequently comply with their 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 their 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 their 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 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:

- 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 para
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. US 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; or
- 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, with a view to avoiding 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 June 2008 the Commission introduced a new procedure for settling cartel cases, complementing the Leniency Notice and the Fining Guidelines. 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 timeframe 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, prejudice a finding of joint and several liability amongst such undertakings. Following receipt of an expression of interest, the Commission retains its discretion as to 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.

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 which 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 of this publication). Decisions made following the settlement procedure are still subject to judicial review (see Part 7 of this publication).

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 fine 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.
APPENDIX 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)
C. COMMISSION CARTEL DECISIONS BY YEAR (SINCE 2005)

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Competition Commissioner</th>
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<tbody>
<tr>
<td></td>
<td>Industrial Thread (14 September 2005)</td>
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<td></td>
<td>Italian Raw Tobacco (20 October 2005)</td>
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<td></td>
<td>Industrial Bags (30 November 2005)</td>
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<td></td>
<td>Rubber Chemicals (21 December 2005)</td>
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<tr>
<td>2006</td>
<td>Hydrogen Peroxide (3 May 2006)</td>
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<td>Acrylic Glass (31 May 2006)</td>
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<td>Dutch Road Bitumen (13 September 2006)</td>
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<td>Copper Fittings (20 September 2006)</td>
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<td>Steel Beams (Arcelor) (8 November 2006)</td>
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<td>Synthetic Rubber (29 November 2006)</td>
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<td></td>
<td>Alloy Surcharge (Thyssen Krupp) (20 December 2006)</td>
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<td>2007</td>
<td>Gas Insulated Switchgear (24 January 2007)</td>
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<td></td>
<td>Lifts and Escalators (21 February 2007)</td>
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<td>Dutch Brewers (18 April 2007)</td>
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<td>Fasteners and Attaching Machines (19 September 2007)</td>
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<td>Spanish Bitumen (4 October 2007)</td>
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<td>Professional Videotape (20 November 2007)</td>
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<td>Flat Glass (28 November 2007)</td>
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<td>Chloroprene Rubber (5 December 2007)</td>
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<td>Nitrile Butadiene Rubber (23 January 2008)</td>
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<td>International Removals (11 March 2008)</td>
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<td>Sodium Chlorate Paper Bleach (11 June 2008)</td>
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<td>Car Glass (12 November 2008)</td>
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<td>2009</td>
<td>Marine Hose (28 January 2009)</td>
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<td>French and German Gas Markets (8 July 2009)</td>
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<td>Calcium Carbide (22 July 2009)</td>
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<td>Concrete Reinforcing Bars (30 September 2009)</td>
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<td>Heat Stabilisers (11 November 2009)</td>
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<td>DRAM Chips (19 May 2010) *</td>
<td>Joaquin Almunia</td>
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<td>Carbonless Paper (Bolloré re-adoption) (23 June 2010)</td>
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<td>Bathroom Fittings (23 June 2010)</td>
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<td>Prestressing Steel (30 June 2010)</td>
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<td>Animal Feed Phosphates (20 July 2010) **</td>
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<td>Airfreight (9 November 2010)</td>
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<td>LCD Panels (8 December 2010)</td>
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<td>Consumer Detergents (13 May 2011) *</td>
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<td>Exotic Fruit (bananas) 12 October 2011)</td>
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<td>CRT Glass (19 October 2011) *</td>
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<td>Refrigeration Compressors (7 December 2011) *</td>
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<td>Water Management Products (27 June 2012)*</td>
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<td>Gas Insulated Switchgear (re-adoption) (27 June 2012)</td>
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<td>TV and Computer Monitor Tubes (5 December 2012)</td>
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<td>Year</td>
<td>Case</td>
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<td>2013</td>
<td>Automotive Wire Harnesses (10 July 2013)*</td>
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<td>Shrimps (27 November 2013)</td>
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<td>Euro Interest Rate Derivatives (4 December 2013)**</td>
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<td>Yen Interest Rate Derivatives (4 December 2013)**</td>
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<td>2014</td>
<td>Polyurethane Foam (29 January 2014)*</td>
<td>Margrethe Vestager</td>
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<td>Power Exchanges (5 March 2014)*</td>
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<td>Automotive Bearings (19 March 2014)*</td>
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<td>Steel Abrasives (2 April 2014)**</td>
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<td>Canned Mushrooms (25 June 2014)**</td>
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<td>Smart Card Chips (3 September 2014)</td>
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<td>Swiss Franc Interest Rate Derivatives (21 October 2014)</td>
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<td>Paper Envelopes (11 December 2014)*</td>
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<td>2015 (to date)</td>
<td>Yen Interest Rate Derivatives (ICAP) (4 February 2015)**</td>
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* 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)
E. **TOP 20 HIGHEST INDIVIDUAL FINES IN CARTEL CASES**

<table>
<thead>
<tr>
<th>Party</th>
<th>Fine$^{18}$</th>
<th>Case</th>
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<tbody>
<tr>
<td>Saint-Gobain</td>
<td>€715m</td>
<td>Car Glass (2008)</td>
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<tr>
<td>Philips</td>
<td>€705m$^{19}$</td>
<td>TV and Computer Monitor Tubes (2012)</td>
</tr>
<tr>
<td>LG Electronics</td>
<td>€688m$^{20}$</td>
<td>TV and Computer Monitor Tubes (2012)</td>
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<tr>
<td>Deutsche Bank</td>
<td>€466m</td>
<td>Euro Interest Rate Derivatives (2013)</td>
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<td>Hoffman-La Roche</td>
<td>€462m</td>
<td>Vitamins (2001)</td>
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<tr>
<td>Société Générale</td>
<td>€446m</td>
<td>Euro Interest Rate Derivatives (2013)</td>
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<td>Siemens</td>
<td>€397m</td>
<td>Gas Insulated Switchgear (2007)</td>
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<td>Schaeffler</td>
<td>€371m</td>
<td>Automotive Bearings (2014)</td>
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<td>Pilkington</td>
<td>€357m</td>
<td>Car Glass (2008)</td>
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<tr>
<td>E.ON</td>
<td>€320m</td>
<td>French and German Gas Markets (2009)</td>
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<td>GDF Suez</td>
<td>€320m</td>
<td>French and German Gas Markets (2009)</td>
</tr>
<tr>
<td>ThyssenKrupp</td>
<td>€320m</td>
<td>Lifts and Escalators (2007)</td>
</tr>
<tr>
<td>SKF</td>
<td>€315m</td>
<td>Automotive Bearings (2014)</td>
</tr>
<tr>
<td>Air France/KLM</td>
<td>€310m</td>
<td>Airfreight (2010)</td>
</tr>
<tr>
<td>Chimei Innolux Corporation</td>
<td>€288m</td>
<td>LCD Panels (2010)</td>
</tr>
<tr>
<td>Lafarge</td>
<td>€250m</td>
<td>Plasterboard (2002)</td>
</tr>
<tr>
<td>Otis</td>
<td>€225m</td>
<td>Lifts and Escalators (2007)</td>
</tr>
<tr>
<td>Procter &amp; Gamble</td>
<td>€211m</td>
<td>Consumer Detergents (2011)</td>
</tr>
<tr>
<td>LG Display</td>
<td>€210m</td>
<td>LCD Panels (2010)</td>
</tr>
<tr>
<td>NTN</td>
<td>€201m</td>
<td>Automotive Bearings (2014)</td>
</tr>
</tbody>
</table>

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$^{18}$ Amounts adjusted for changes following judgments of the Courts (General Court and Court of Justice of the European Union).

$^{19}$ €392m of this fine was imposed jointly and severally on Philips and LG Electronics (due to their joint venture).

$^{20}$ €392m of this fine was imposed jointly and severally on Philips and LG Electronics (due to their joint venture).
Daren is Head of Competition & Antitrust. He is a competition law specialist, and his practice covers antitrust litigation, international cartels, merger control and sectoral competition regimes.

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.

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

KEY INFORMATION
Admissions
Singapore Bar (1997)
Elsa is Deputy Head of the Firm’s Competition & Antitrust practice, and heads its Competition Economics team.

Elsa is recognised as a leading competition economist in *The International Who’s Who of Competition Lawyers & Economists* since 2010 to-date, and is the only competition economist in Singapore to be cited for 2014 and 2015. She is also recognised in *The Euromoney Guide to the World’s Leading Competition and Antitrust Lawyers and Economists* for 2014. In 2013, Elsa was cited in the 100 most successful women in the field of competition law by *Global Competition Review* (GCR) in their Women in Antitrust 2013 survey, and is the only private practice competition economist in Asia to be featured.

Elsa was involved in the first global cartel and abuse of dominance decisions by the Competition Commission of Singapore (CCS), and the first and only Provisional Infringement Decision by the CCS to be successfully overturned (*Greif/GEP*). She was also involved in securing a clearance for the only completed merger to-date for which divestments and unwinding were considered (*Samwoh/Highway*), and in 2014, the first CCS conditional merger clearance requiring local behavioural and divestiture commitments (*SEEK/JobStreet*). In 2013, Elsa led the team which was conferred the GCR Award 2013: Behavioural Matter of the Year (Asia-Pacific, Middle East and Africa).

Elsa was a pioneer member of the CCS, and was involved in landmark CCS’ decisions, including the CCS Block Exemption Order for Liner Shipping Agreements. Prior to that, she was involved in the drafting of the Competition Act at the Ministry of Trade and Industry of Singapore.

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 an LLM with a specialisation in Competition Law.
Kenneth’s main areas of practice are competition and antitrust, and litigation. He regularly advises clients on complex cartel and monopoly investigations, leniency applications, antitrust litigation, cross-border competition issues, merger control filings, and sector-specific competition regulations. Kenneth has represented clients at all levels of trial and appellate litigation on a wide range of disputes.

Prior to joining Allen & Gledhill, Kenneth served as a Justices’ Law Clerk with the Supreme Court of Singapore, and as a Legal Counsel with the Competition Commission of Singapore.

Kenneth graduated as one of the top law students from the National University of Singapore with an LLB (Hons) degree (First Class), where he was awarded a number of academic prizes and scholarships, and represented NUS at the Philip C. Jessup International Law Moot Court competition. He was awarded the Hauser Global Scholarship to study at the New York University School of Law where he obtained an LLM.

Kenneth was placed on the Supreme Court’s Young Amicus Curiae list in 2010, and has appeared as amicus curiae on novel matters concerning Article 11 constitutional protections, criminal procedure and sentencing under the Moneylenders Act. He is a member of the Ethics Committee and the Insolvency Practice Committee of the Law Society of Singapore.

KEY INFORMATION
Admissions
Singapore Bar (2006)
Ms. Pallavi S. Shroff started her practice as a litigation lawyer with Amarchand & Mangaldas & Suresh A Shroff & Co. in 1981. Her broad and varied representation of public and private corporations and other entities before legal institutions, since then, has earned her national and international acclaim. Today, over 34 years later, she is the lead Litigation Partner at the firm, with extensive knowledge in matters of dispute resolution and arbitration. Ms. Shroff also heads the competition law practice at the Firm.

With regards to Competition Law, Ms. Shroff regularly advises international and national clients on various aspects of the Competition Act 2002. She was a key member of the high-powered SVS Raghavan Committee which contributed to formulating the legal framework for the new Competition law and a draft of the new Competition Act, besides being part of the Standing Committee of Parliament reviewing the Competition Act 2000. She has also represented several companies including Apollo Tyres, Coal India, ACC Limited, Dr. L. H. Hiranandani Hospital to name a few, in competition law cases before the Competition Commission of India and the Competition Appellate Tribunal.

With regards to public policy related work, Ms. Shroff was a member of the committee set up by the Government of India to advise the Government regarding compliance with article 39.3 of the TRIPS, and also played a pivotal role in formulating and drafting of policy documents necessary for the continuing efforts to establish India’s first ‘Zero Piracy Zone’ for the state of Karnataka, and for developing an anti-piracy advocacy programme for the judiciary. Ms. Shroff is
presently a director on the boards of prestigious Indian companies, including Apollo Tyres; Trident Group; GE Capital Services; Maruti Suzuki India Ltd.; and Juniper Hotels Ltd.

Ms. Shroff has also been closely involved with some of the largest and most challenging litigation and arbitration cases in India with regard to energy, infrastructure, natural resources, mergers & acquisitions, legislative and policy related matters. She appears regularly in the Supreme Court and High Courts of India, and in arbitrations, mediations and international legal disputes. Under Ms. Shroff’s lead, the Firm was engaged by FICCI and CII to represent the entire Indian Industry in the Presidential Reference proceedings (Special Reference 1 of 2012) being heard by a five Judge Constitution Bench of the Supreme Court. The Judgment passed by the Constitution Bench is one of the most famous and compelling rulings in India.

For her legal acumen and thought leadership, Ms. Shroff is frequently featured by several international publications. She has been recognized by international publications like the Asia Legal 500 for her “leading practice in dispute resolution and litigation”. The PLC Which Lawyer? commends her as one “experienced in corporate disputes and with solid competition law experience primarily in support of a general corporate and commercial practice.” Ms. Shroff has also been rated by the Who’s Who Legal of Commercial Arbitrators, “as one of three leading practitioners involved with arbitration”. She has been recently selected to feature in the inaugural edition of the Guide to the World’s Leading Women in Business Law – the first-ever guide dedicated to the world’s leading female practitioners, under Commercial Arbitration category. She has been acclaimed in the competition sphere as “a doyenne of Indian competition law” and “a legal luminary with the brilliant acumen necessary to crack the most complex legal cases”.

“Her knowledge in competition law is unparalleled”, describes Chambers & Partners. “Pallavi Shroff heads the firm’s competition group” and is “spectacular”. She specialises in dispute resolution and is noted for her “expert handling” of arbitration and litigation matters, by Who’s Who Legal 100, 2014. Ms. Shroff has been recognized as one of the Most Powerful Women in Indian Business by Business Today. She has been recognized in the C-SUITE WOMEN edition of BUSINESS WORLD titled ‘The Expert Arbitrator’ and as one amongst “The Professionals – High motivation levels, focus on goals and working for the greater good”. She has been awarded as the Best Lawyer in Dispute Resolution in Asia at the Euromoney Legal Media Group’s Asia Women in Business Law Awards. She was also awarded as a Best Woman Lawyer of the Year 2012 at the Legal Era Law Awards 2011-12. Who’s Who Legal speaks about her work: “She has successfully litigated some of the most complex commercial litigations, both nationally and internationally, and handled domestic and international arbitrations. She has represented clients in path-breaking cases in disputes pertaining to infrastructure, shareholders disputes, franchise agreements, banking and finance, telecoms, oil and gas, etc.”

Chambers & Partners 2014 ranks her in Band 1 for dispute resolution & arbitration, cites, “she brings to the table not just legal advice but also commercial acumen,” adding: “Very few people can compare to her in terms of strategy.”
Naval Satarawala Chopra is a Partner in the Firm’s Competition Law Practice, focusing on both contentious and non-contentious competition law matters, particularly in matters relating to abuse of dominance, cartels and merger control. He regularly appears before the Competition Commission of India and the Competition Appellate Tribunal.

Naval is recognised as a leading practitioner of competition law and his clients include both private and government enterprises, including Microsoft, Publicis Group, Facebook, Singapore Airlines, National Stock Exchange, Heinz and VeriFone. Naval recently advised on the India leg of the US$35 billion merger of advertising giants Publicis Groupe S.A. and Omnicom Group Inc.; Berkshire Hathaway and 3G Capital’s US$28 Billion acquisition of H.J. Heinz Company; Microsoft’s US$7.2 Billion acquisition of Nokia’s Devices & Services Business; Bain Capital’s US$1 billion acquisition of Genpact Limited’s shares, and Ingram Micro Inc.’s US$840 Million acquisition of Brightpoint Inc., each of which were unconditionally cleared by the CCI. 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 also represented the National Stock Exchange of India before the Competition Appellate Tribunal in its appeal against the CCI’s finding of abuse of dominance.

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


Naval is the course director for competition law at ILS Law College, Pune. 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 qualified to practice in New York, England & Wales and India. He holds an LL.B. from ILS Law College, Pune and an LL.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.

A detailed experience statement with certain specified/important transaction details can be shared on confidential basis.
Ms. Shweta Shroff Chopra is a Partner in the Firm’s Competition Law Practice, and has over 10 years experience in advising on financing, corporate and competition law matters. Shweta has been practicing competition law since its early days, having been involved in several high profile cases relating to abuse of dominance, cartels and merger control.

Shweta’s clients encompass prominent names of the industry, including HDFC Limited, Apollo Tyres, Coal India Limited, Holcim Group of Companies, Vodafone India Limited, Bharti Airtel, Temasek group, and PVR Cinemas. Shweta has been engaged in leading high profile enforcement cases before the CCI and the Competition Appellate Tribunal (COMPAT) including representing HDFC Limited in the Bank Prepayment Charges case, Jindal Steel & Power Limited against Steel Authority of India Limited, Holcim group companies ACC Limited and Ambuja Cements Limited in the Cement cartel case, Apollo Tyres Limited in the Tyres cartel case, Coal India Limited in abuse of dominance and cartel cases in relation to procurement of explosives, and Vodafone India Limited in an anti-competitive tie-in in a case involving the sale of Apple iPhones.

Shweta was also involved in the seminal CCI v. SAIL case, the first case under the Competition Act to be decided by the Hon’ble Supreme Court of India and is currently representing state-owned oil marketing companies on the important litigation surrounding regulatory overlaps between the CCI and the Petroleum and Natural Gas Regulatory Board. On the merger control front, Shweta has successfully obtained unconditional merger clearances from the CCI for various transactions, including in relation to Huhtamaki Group’s acquisition of Positive Packaging group; Beckman Coulter’s acquisition of Siemens’ Microbiology Technology business, Zuari (Adventz) Group’s open offer for shares of Mangalore Chemicals & Fertilisers Limited, Temasek group’s acquisition of majority shareholding in Olam Industries Limited, Axiall LLC’s joint venture for PVC compounds with
Shweta has been actively involved in driving policy changes in the space of Indian competition law. In particular, she played an instrumental role in the finalization of the Indian merger control regime in April-May 2011, working closely with the Government of India and the CCI in relation to the finalization of the draft Combination Regulations and associated exemption notifications. She has also been part of industry delegations led by CII and FICCI, canvassing the need for changes to the Combination Regulations before the CCI, many of which were reflected in the April 2013 changes to the law.

Shweta has played an instrumental role in implementation of several women specific policies and initiatives at the Firm. On a self designated basis, Shweta led a team of at least seventy lawyers from the firm who put in about forty hours of efforts to come up with an approximately eighty page comprehensive report submitted to a committee constituted under Justice J. S. Verma (retired), Justice Leila Seth (retired) and Mr. Gopal Subramaniam, Sr. Advocate, to recommend changes to the law to prevent and ensure timely and commensurate justice in crimes against women.

According to Chambers and Partners Rankings 2015, Shweta Shroff Chopra is described by market sources as “a very smart lawyer with an in-depth approach, who has worked on big-ticket cases.” She represented Temasek Holdings in its first Indian merger control notification for its proposed SGD6.2 billion acquisition of DBSH. She has most recently acted for Holcim Ltd in its “merger of equals” with Lafarge S. A., which involved negotiating remedies with the CCI. In March 2014, Shweta won the “Young Lawyer of the Year (Female)” Award at the Legal Counsel Congress & Awards 2014 (Mumbai). In January 2014, Shweta has also been 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.

In 2012, Shweta was noted as one of the only “Associates to watch” by Chambers Asia Pacific Legal Guide and then as an “Up and Coming” talent in 2013 and 2014 for her expertise in competition law, wherein she has been “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 2013 and 2014 (by Global Competition Review and Law Business Research Ltd). She was also profiled in the Asialaw Leading Lawyers 2013 and the Euromoney Guide to Leading BRIC Practitioners 2013. Shweta has co-authored leading guides on the law of Dominance and Merger Control in India as part of the Getting the Deal Through series, which are key global reference materials for these areas of law.

Before joining the Firm in 2007, Shweta qualified as a solicitor of England & Wales after completing a training contract with Denton Wilde Sapte, London and did a secondment with Clifford Chance, London. Shweta holds an LL.B. from University of Wales, Cardiff and an LL.M. from the London School of Economics & Political Science. Shweta is qualified to practice in England & Wales and India.
Mr. John Handoll joined Shardul Amarchand Mangaldas in October 2012 and is Senior Advisor – European and Competition Law in the Firm’s Competition Law Practice. Mr. Handoll also serves as an Advisor to the Management Board of Shardul Amarchand Mangaldas & Co.

Mr. Handoll is a specialist competition and regulatory lawyer with some 35 years experience in the area. He has worked in a number of European jurisdictions – notably the UK, Belgium and Ireland – and was, until October 2012, heading the Competition & Regulation practice in William Fry, a major Dublin-based law firm. 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.

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 and clients in a wide spectrum of economic activity. Whilst in Ireland he advised international companies such as RSA (insurance) and Tesco (retail). In India, he has worked with household names such as Vodafone (telecommunications) and Maruti Suzuki (motor vehicles).
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).

John’s contribution to the Indian competition scene has been recognised in Global Competition Review’s Who’s Who Legal of Competition Lawyers and Economists 2012, 2013 and 2014.
Shigeyoshi Ezaki is a partner at Anderson Mori & Tomotsune with a general corporate practice, which includes advising and assisting Japanese and foreign clients with respect to Japanese competition law, trade regulation, intellectual property law and corporate law. He represents many companies involved in cross border mergers and acquisitions as well as joint venture arrangements. He also assists many clients in regulatory investigations with respect to price fixing and similar serious alleged violations before the Japan Fair Trade Commission as well as overseas regulatory authorities such as the US Department of Justice and the European Commission. He also represents many companies in the area of distribution agreements and license agreements.

Publications / Lectures
- “2005 Year In Review,” ABA International Law Section, International Antitrust Committee, Japan Chapter, April 2006 (co-author)
- “2006 Antitrust Year In Review,” ABA International Law Section, International Antitrust Committee, Japan Chapter, April 2007 (co-author)
- “Getting the Deal Through - Private Antitrust Litigation 2009,” Getting the Deal Through, Japan Chapter, October 2008 (co-author)
- “Recent Developments in Merger Review: New Jurisdictions, New Rules, New Challenges” (Speaker) (IBA, April, 2009)
- “2009 Antitrust Year In Review,” ABA International Law Section, International Antitrust Committee, Japan Chapter, April 2010 (co-author)
• “Japan: Merger control” (The Asia Pacific Antitrust Review 2010) (Global Competition Review) (co-author)

• “2010 Antitrust Year In Review,” ABA International Law Section, International Antitrust Committee, Japan Chapter, April 2011 (co-author)

• “2011 Antitrust Year In Review,” ABA International Law Section, International Antitrust Committee, Japan Chapter, May 2012 (co-author)

• “Global Legal Insights - Cartels (1st Edition),” Global Legal Group, Japan Chapter, 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)

• “2012 Antitrust Year In Review,” ABA International Law Section, International Antitrust Committee, Japan Chapter, May 2013 (co-author)


• "Japanese Anti-monopoly Act – Annotated", Koubundou, 2014 (co-author)

Education
Tokyo University (LL.B., 1992)
Columbia University School of Law (LLM., 1998)
Trained at a law firm in the United States

Professional Admissions
Japan (1994)
New York (1999)

Professional and Academic Associations
Dai-ni Tokyo Bar Association
Inter-Pacific Bar Association
Competition Law Forum

Languages
Japanese (first language)
English
Vassili Moussis is an English qualified solicitor. Prior to joining Anderson Mori & Tomotsune in Tokyo, he practiced in London and Brussels for close to 10 years with a particular emphasis on EU competition law. He studied law in Belgium and the UK and holds a Ph.D. on comparative EU and Japanese competition law. Vassili also worked at the European Commission’s Directorate General for Competition for one year as an administrative trainee. At Anderson Mori & Tomotsune his practice focuses on EU law and in particular EU and international antitrust and general competition law with a particular emphasis on merger control and international cartel matters. He is also advising on distribution arrangements, intellectual property issues and other commercial matters, which often include an international element.

Recent Publications / Lectures
• 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)

• “Parental liability and joint ventures in the EU: key issues for Japanese companies,” NBL, No.1018 (February 2014) (co-author)

• “Japan passes competition law amendments,” comments on Global Competition Review website (11 December 2013)

• “Comparative EU-US competition law: practical problems that Japanese companies should be aware of when forming JVs and some recommendations,” NBL, No.1010 (October 2013) (co-author)

• “Faster, higher, stronger,” The Lawyer (23 September 2013)

• Interviewed by the Nikkei Business Newspaper in relation to an article on the use of economists at the Japan Fair Trade Commission (14 August 2013)

• Interviewed by the Nikkei Business Newspaper in relation to an article on the Rise of Strict Penalties in International Cartel Enforcement (27 May 2013)

Education
European School, Brussels I (European Baccalaureate (EB), 1989)
Catholic University of Louvain (Licence en Droit, 1994)
University College London (L.L.M., 1995)

College of Law, London (Common Professional Examination, 1997 / Legal Practice Course, 1998)
University College London (Ph.D., 2003)

Professional Admissions
Solicitor, Senior Courts of England and Wales (2000)
Dai-ni Tokyo Bar Association as a Gaikokuho Jimu Bengoshi (foreign registered lawyer) (2010)

Professional and Academic Associations
The Law Society of England and Wales European Lawyers Group
The Belgium-Japan Association and Chamber of Commerce
Dai-ni Tokyo Bar Association

Languages
English (working language)
Greek (first language)
French (first language)
Japanese (fluent)
Spanish (intermediate)
Italian (intermediate)
Ms Hui is an antitrust and M&A lawyer, specialized primarily in antitrust and mergers and acquisitions, and practices in foreign direct investment, overseas listing and general corporate matters. Ms Hui has been the co-head of the M&A practice group and head of antitrust and competition practice group of the firm for many years.

Prior to joining Jun He Law Offices in 2004, Ms Hui acted as senior in-house legal counsel to Wharf T&T Limited, the second-largest telecommunication services company in Hong Kong, for more than 5 years. Ms Hui was in charge of legal and regulatory matters for Wharf T&T Limited, including handling anti-trust and abuse of dominant position matters. Ms Hui also acted as a solicitor in charge of one of the branch office of one of the major law firms in Hong Kong, Johnson Stokes and Master. Other than local experience in Asia, Ms Hui has worked as a solicitor in a law firm in Auckland, New Zealand, for more than 3 years, provided legal services to clients of different nationalities, such as Japanese, Korean, English, USA and Europeans.

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

Professional Qualification/Associations
Member of the Law Society of Hong Kong.
Solicitor and Barrister of New Zealand, 1996.
Solicitor of Hong Kong, 1990.

Language Skills
Fluent in English, Mandarin, Cantonese and Taiwanese dialects

Recent Publications
Co-author of Important Antitrust Civil Litigation Judicial Interpretation Issued, IFLR Magazine, June 2012
Co-author of NDRC’s Strengthening its claws in Year of Dragon 2012, ABA International Antitrust Bulletin, March 2012
Co-author of Getting the Deal Through - Intellectual Property &
Antitrust 2012 - China
Co-author of First Case of Conditional Clearance in Anti-monopoly Review with PE Involved: MOFCOM
Conditionally Cleared Acquisition of Savio Macchine Tessili S.p.A by Penelope S.r.l., 2011-11
Author, Q&A on Articles 13, 14 and 15 of Anti-Monopoly Law of the PRC, China Law and Practice, 2009-9-7
Author, Anti-Monopoly Law – Important Milestone: The First Announced Merger Control Decision, China Law and Practice, 2008-12

Awards & Recognitions
Ms. Hui was recognised as one of the world’s leading competition lawyers in China in the Who's Who Legal: Competition 2014 and 2015 by Global Competition Review (GCR)
Ms. Hui was recognized as one of the "Advisor of the Year" in the WHO'S WHO of Professionals for the 2012-2013
Ms. Hui was recognized as one of the top 75 practitioners in Asia in ALB's Client Choice Hot 75 Survey in 2012
Ms. Hui was recognized as one of the pre-eminent practitioners with expertise in competition and antitrust in China by Expert Guides in 2012
Ms. Hui was recognized as one of the outstanding practitioners in competition and antitrust in China in the Guide to Leading Practitioners 2012
Ms Hui was recognized as one of the world's leading competition lawyers in China in The International Who's Who of Competition Lawyers & Economists 2012
Ms Hui was recognized as a leading lawyer in competition law by PLC Which Lawyer
Ms Hui was listed as one of the leading M&A lawyer in China in 2011 in the Guide to Leading Practitioner: China, published by Euromoney Legal Media Group.
Ms Hui was awarded as the 2011 Asialaw Leading Lawyers in Competition and Antitrust in China.
Ms Hui was awarded as the winner of the ILO Client Choice - M&A China in 2010.

Pro Bono Services
Ms Hui has been leading the pro bono services committees in Jun He to provide pro bono services to different non-profitable organizations in China for more than 5 years. The international and local NGOs served by Jun He Law Offices include but not limited to MSF, WWF, The Nature Conservatory, Thompson Reuters Trust Foundation, Naradu Foundation (南都基金会), Non-profit Partners (NPP/新公益伙伴), One Foundation, Hui Ling Community Services for People with Learning Disabilities (慧灵智障人士社区服务机构), etc. Ms Hui also organized and participated in various charity fund raising activities in China and Hong Kong.

Academic & others
Ms Hui is a part-time lecturer of University of Hong Kong for Chinese Law in PCLL from 2010 to 2015 and Telecommunication Law in LLM in 2003.
Ms Hui is a regular speaker on M&A and Anti-Monopoly Law of the PRC in many international events and seminars, including International Bar Association, American Bar Association, Inter-Pacific Bar Association, Asia Regional Meeting, Asia Multilateral Training Sessions, etc.
Youngjin Jung is a partner at Kim & Chang who primarily practices in the areas of antitrust, international trade and international arbitration. He has extensive experience in the IT, telecoms, semiconductor, aviation and chemical industries.

Dr. Jung was a visiting professor at Duke Law School and an adjunct professor at Georgetown Law School. He was a legal adviser for the Korea-US/Korea-EU Free Trade Agreement (FTA) as a member of the cartel advisory board of the Korea Fair Trade Commission and of the Korea Communication Commission. Previous to this, Dr. Jung was a professorial fellow at the Institute for International Economic Law in Washington, DC. He has participated as a member of the Korean delegation in the OECD competition committee and the WTO Working Party on Interactions between Trade and Competition, and has served as Non-Governmental Advisor (NGA) for the ICN. Before joining Kim & Chang, he was a partner at a major Korean law firm and worked at the Ministry of Foreign Affairs and Trade.

Dr. Jung is a registered arbitrator at the World Bank’s ICSID Arbitration Panel and the Korea Commercial Arbitration Board, and a member of the Korea ICC Arbitration Commission. He is Vice-Chair of the ABA International Antitrust Committee, and an executive member of the IBA Trade and Customs Committee.


He is consistently listed in The International Who’s Who of Competition Lawyers and the International Who’s Who of Business Lawyers and Chambers Asia. He is also consistently listed as a leading lawyer in WTO and International Trade in Chambers Global/ Euromoney/International Who’s Who of Customs and Trade lawyers. He was also noted as a leading expert in Technology, Media and Telecommunication by Euromoney.

Education
Yale Law School (LL.M., 2000; JSD, 2003)
Judicial Research and Training Institute of the Supreme Court of Korea (1993)
College of Law, Seoul National University (LLB, 1991)
Experience
Kim & Chang (2009-Present)
Legal Advisor of Ministry of Public Administration and Security (2008-2010)
Member of Legal Advisors of Korea Communication Commission (2008-2010)
Adjunct Professor at Georgetown law school; Visiting Professor at Duke law school (2008)
Arbitrator of World Bank ICSID Panel (2007-Present)
Member of Public Information Review Board under Office of Prime Minister (2007-2010)
Member of Cartel Advisory Board of Korea Fair Trade Commission (2004-2009)
Partner, Yulchon (2004-2009)
Passed the 30th Higher Civil Service Examination on Foreign Affairs (1996)
Passed the 40th Higher Civil Service Examination on Government Administration (1996)
Judge Advocate (1994-1997)

Admissions
Admitted to bar, Korea, 1993; New York, 2001

Publications
“What to do with the Dilemma facing the State of Necessity Defense under the Investment Treaties and How to Interpret the NPM Clause?”, The Journal of World Investment & Trade Vol.12 No.3 (Co-author, The Journal of World Investment & Trade, 2011)
“The KFTC’s Foray into the Intersection between Competition Law and Intellectual Property Law: A Path Towards Convergence or Divergence?”
Antitrust and Intellectual Property (Competition Law International, 2011)
Anti-Cartel Enforcement Worldwide (Korea Chapter) (Cambridge University Press, 2009)
Competition Laws outside the United States (Korea Chapter) (Co-author, American Bar Association, 2009)
Competition Law and Practice: A Review of Major Jurisdictions (Korea Chapter) (Co-author, Cameron May, 2009)

Languages
Korean and English
Philippe is Head of the Competition Group. 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 petrochemicals joint venture with Solvay
- Bertelsmann in connection with its publishing joint venture with Penguin, cleared at Phase I by the European Commission
- Electrolux on its global litigation strategy for recovery of losses suffered as a result of the upstream compressor cartel
- Global Radio in respect of its acquisition of GMG Radio (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), including the appeal to the Competition Appeal Tribunal
- 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) and its acquisition of Red Bee Media
- esure in relation to the Competition Commission’s investigation into motor insurance
- booking.com on the multijurisdictional investigations into hotel online bookings.

Philippe is listed as a leading individual in the ‘Competition/European Law: Non-contentious’ section of Chambers UK, 2015 (Band 1) and for EU and competition in The Legal 500 UK, 2014. He is also listed for ‘Competition/European Law (Experts Based Abroad)’ in Chambers Global, 2014.

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.
Bertrand studied at the London School of Economics (MSc Economics). He joined Slaughter and May in 1992 and became a partner in 2001. He has worked in both our London and Brussels offices. Bertrand’s practice spans merger control (EU and UK); competition litigation; market inquiries; and competition investigations.

Bertrand has extensive experience of representing clients before the European Commission and the UK Competition and Market Authority.

Current and recent matters include advising:

- an alliance of media organisations in its submissions to the OFT, Ofcom and Government in relation to News Corporation’s proposed acquisition of the remaining 61% of the shares in BskyB

- British Airways in relation to:
  - the European Commission investigation into alleged cartel activity in the provision of air freight (cargo) services and in relation to the OFT’s criminal and civil investigations into alleged cartel activity involving passenger fuel surcharges on long-haul flights
  - private actions relating to the cargo and passenger investigations

- Asda on:
  - the Competition Commission’s market investigation into the supply of groceries in the UK and on the OFT’s investigation into dairy products - including representing Asda before the CAT
  - its acquisition of Netto, the first merger of a mainstream supermarket and a limited assortment discounter

- Prudential on the OFT study of defined contribution workplace pensions

- Japan Tobacco (Gallaher) on an appeal to the CAT and judicial review arising out of the OFT’s investigation into the retail pricing of tobacco products
• Platts in relation to the European Commission’s investigation into the manipulation of the published prices for a number of oil and biofuel products

Bertrand is fluent in French. He is listed as a leading individual for EU and Competition law in *The Legal 500, 2014* and for Competition/European Law: Non-contentious (Band 1) in *Chambers, 2015*. 
Natalie was educated at Cambridge University and is resident in Hong Kong. She joined Slaughter and May in 2005 and became a partner in 2014. She has worked in our London, Hong Kong and Beijing offices.

Natalie’s experience covers a range of competition work involving sectoral regulation, antitrust investigations and merger filings. Her antitrust experience involves a number of high-profile cartel investigations, including advising British Airways in relation to the OFT’s criminal and civil investigations into alleged cartel activity involving passenger fuel surcharges on long-haul flights. She also advised Asda Wal-Mart on the OFT’s investigation into dairy products.

Since moving from our London office to Hong Kong in 2009 to develop the firm’s Asian competition practice, 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:

- Rolls-Royce on its acquisition of the 50% remaining stake in Rolls-Royce Power Systems joint venture from Daimler
- Thermo Fisher Scientific on its proposed takeover of Life Technologies Corporation
- Aegis plc on the recommended cash offer by Dentsu Inc.
- Bertelsmann on its combination with Pearson of their respective trade-book publishing businesses
- INEOS on the creation of a 50/50 oil refining joint venture with PetroChina, the formation of Styrolution with BASF and the proposed joint venture with Solvay in relation to their PVC business
- Prudential plc on its proposed acquisition of AIA Group Limited

In preparation for the Competition Ordinance in Hong Kong, Natalie has been advising MTR Corporation and other listed companies, investment banks and industry associations. She has advised on compliance issues and provided training to senior management and employees.
Natalie speaks Chinese and English and travels regularly between the Hong Kong and Beijing offices. She is qualified in both Hong Kong and England and Wales.

Natalie is recognised as a leading lawyer in *The International Who’s Who of Competition Lawyers & Economists 2015*. She is listed in *Chambers Asia 2015* where she is praised for her “fantastic attention to detail and great organisational skills”, and “her clear, succinct style”. Natalie is the co-author of the Hong Kong chapter of *Getting the Deal Through*’s ‘Cartel Regulation’ publication.