



C L I F F O R D
C H A N C E

A guide to antitrust and
competition law in Asia Pacific



Introduction

Introduction

Antitrust and competition law has never impacted business as much as it does today – and getting it wrong has increasingly severe repercussions for individuals and for a company's strategy, reputation and growth opportunities.

The rapid expansion and diversity of antitrust and competition legislation has created a complex operating environment for international business in recent years. Asia Pacific exemplifies this trend. Mainland China is now established as a key merger control regime, along with the EU and the US, and is beginning to extend its antitrust enforcement activities. Additional regimes are imminent, such as in Hong Kong, which recently enacted a general antitrust and competition law (although not yet in force), and the ten member states of the Association of South East Asian Nations (ASEAN), which have each agreed to implement national antitrust and competition laws by 2015.

In a transactional context, this growth in antitrust regimes means a well-executed merger control strategy can be the difference between success or failure for a company's transforming transaction. At an enforcement level, incorrect handling of antitrust and competition investigations may severely impact a company's legal position, reputation and financial performance, as the incidence of criminalisation, high penalties and cross-border cooperation in antitrust enforcement rises.

Over the last few decades, Clifford Chance has accumulated significant antitrust expertise and technical knowledge across the Asia-Pacific region, assisting companies on some of the most complex multi-jurisdictional transactions as well as advising on high-profile cases brought against domestic and international businesses.

This guide contains insights into 12 Asia-Pacific jurisdictions, including Australia, Mainland China, Hong Kong, India, Japan and Singapore, reflecting the experience and reach of the firm's regional network; a depth of expertise that empowers our clients and assists them in risk and compliance strategies in this increasingly complex global regulatory environment.

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This guide does not purport to be comprehensive or constitute legal advice. The information and the laws referred to are correct as of January 2014 but may change quickly. If you would like any advice or further information on any of the matters referred to in this guide, please contact Clifford Chance.

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Growing antitrust and competition activity across the Asia Pacific region



Mainland China

Mainland China has cemented its position as a key merger control regime and is now extending its other antitrust enforcement activities. Mainland China's merger regime is now undisputedly one of the "big three" approval locations, along with the EU and the US, although concerns persist over timing and predictability. 2013 saw antitrust enforcement significantly increase, with the country's fining record for anticompetitive conduct, including cartels and vertical agreements, being broken three times that year alone.

Hong Kong

Hong Kong's competition policy is currently restricted to the telecoms and broadcasting sectors, although a new cross-sector competition law is expected to come into force by early 2015. Given that the new law does not contain a merger control regime, it is expected that there will be a heavy focus on enforcement actions (which must be taken through litigation in the High Court) and follow-on litigation.

India

India's merger control regime came into force in June 2011. Filings are mandatory and suspensory, and the thresholds are complex. Only two cases have been subject to remedies (the rest have been cleared unconditionally), and fines have already been imposed for late notifications. India's competition enforcement agency is also increasingly active in enforcement matters.

Thailand

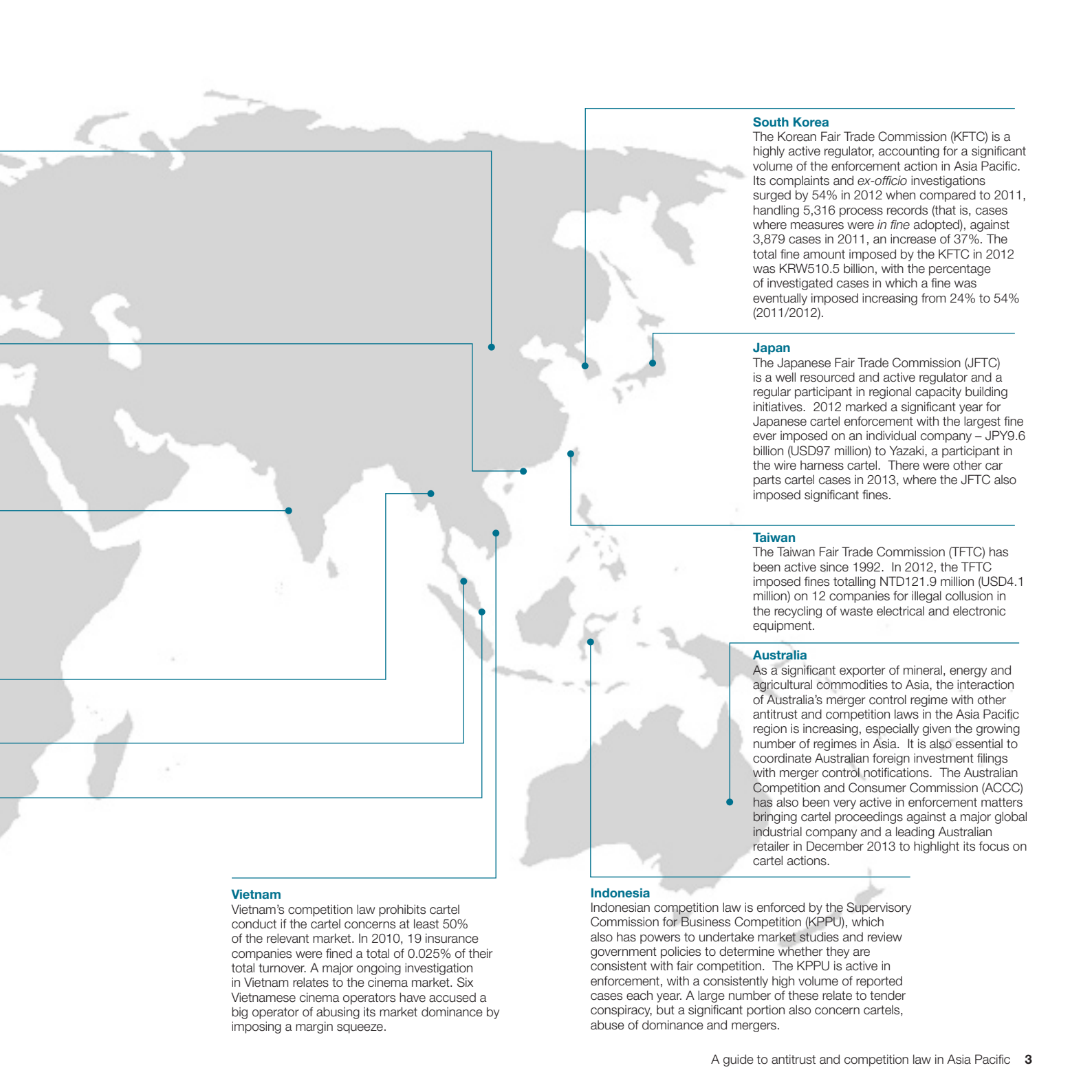
The Thai Competition Act (TCA) came into force in April 1999. The main agency to enforce the TCA is the Trade Competition Commission (TCC), chaired by the Minister of Commerce. The TCC has issued guidelines concerning cartels, abuse of a dominant position, and anti-monopoly or a reduction of competition although there are very few reported cases. No detailed regulations for merger control have yet been issued.

Malaysia

The Malaysia Competition Commission (MyCC) has received 40 complaints since its inception in January 2012. As of September 2013, MyCC was working on 26 ongoing cases, while another 14 had been dismissed. MyCC recently imposed a proposed fine of around USD6 million on Malaysia Airlines and AirAsia for entering into an agreement for market allocation.

Singapore

Singapore has a well-respected competition authority in the Competition Commission of Singapore (CCS) that is astutely tackling competition issues in Singapore. Recent activity includes sanctioning two ferry operators for exchanging and providing sensitive and confidential information, including the prices of tickets sold to travel agencies, marking the first (and to date only) infringement decision by the CCS for anticompetitive exchange of information.



South Korea

The Korean Fair Trade Commission (KFTC) is a highly active regulator, accounting for a significant volume of the enforcement action in Asia Pacific. Its complaints and *ex-officio* investigations surged by 54% in 2012 when compared to 2011, handling 5,316 process records (that is, cases where measures were *in fine* adopted), against 3,879 cases in 2011, an increase of 37%. The total fine amount imposed by the KFTC in 2012 was KRW510.5 billion, with the percentage of investigated cases in which a fine was eventually imposed increasing from 24% to 54% (2011/2012).

Japan

The Japanese Fair Trade Commission (JFTC) is a well resourced and active regulator and a regular participant in regional capacity building initiatives. 2012 marked a significant year for Japanese cartel enforcement with the largest fine ever imposed on an individual company – JPY9.6 billion (USD97 million) to Yazaki, a participant in the wire harness cartel. There were other car parts cartel cases in 2013, where the JFTC also imposed significant fines.

Taiwan

The Taiwan Fair Trade Commission (TFTC) has been active since 1992. In 2012, the TFTC imposed fines totalling NTD121.9 million (USD4.1 million) on 12 companies for illegal collusion in the recycling of waste electrical and electronic equipment.

Australia

As a significant exporter of mineral, energy and agricultural commodities to Asia, the interaction of Australia's merger control regime with other antitrust and competition laws in the Asia Pacific region is increasing, especially given the growing number of regimes in Asia. It is also essential to coordinate Australian foreign investment filings with merger control notifications. The Australian Competition and Consumer Commission (ACCC) has also been very active in enforcement matters bringing cartel proceedings against a major global industrial company and a leading Australian retailer in December 2013 to highlight its focus on cartel actions.

Vietnam

Vietnam's competition law prohibits cartel conduct if the cartel concerns at least 50% of the relevant market. In 2010, 19 insurance companies were fined a total of 0.025% of their total turnover. A major ongoing investigation in Vietnam relates to the cinema market. Six Vietnamese cinema operators have accused a big operator of abusing its market dominance by imposing a margin squeeze.

Indonesia

Indonesian competition law is enforced by the Supervisory Commission for Business Competition (KPPU), which also has powers to undertake market studies and review government policies to determine whether they are consistent with fair competition. The KPPU is active in enforcement, with a consistently high volume of reported cases each year. A large number of these relate to tender conspiracy, but a significant portion also concern cartels, abuse of dominance and mergers.

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Comparison table

Jurisdiction	Australia	China (Mainland)	Hong Kong	India	Indonesia
Regulator	The Australian Competition and Consumer Commission (ACCC).	Anti-Monopoly Commission (AMC). National Development and Reform Commission (NDRC). State Administration for Industry and Commerce (SAIC). Ministry of Commerce (MOFCOM).	Competition Commission. Communication Authority (Telecommunications and broadcasting sectors).	Competition Commission of India.	The Supervisory Commission for Business Competition (Komisi Pengawas Persaingan Usaha (KPPU)).
Key legislation	<i>The Competition and Consumer Act 2010</i> (Cth).	<i>The Anti-Monopoly Law.</i>	<i>The Competition Ordinance</i> (Cap. 619).	<i>The Competition Act, 2002.</i>	<i>Law No. 5 of 1999 Regarding Prohibition of Monopolistic Practices and Unfair Business Competition</i> (Law No. 5/1999).
Is there a prohibition against anticompetitive agreements?	Yes.	Yes.	Yes, but not yet in force.	Yes.	Yes.
Is there a prohibition against unilateral conduct?	Yes.	Yes.	Yes, but not yet in force.	Yes.	Yes.
Are there civil/criminal sanctions for cartels?	Yes, both.	Yes for civil sanctions. No for criminal sanctions.	When in force: Yes for civil sanctions. No for criminal sanctions.	Yes for civil sanctions. No for criminal sanctions.	Yes.
Is there a leniency programme?	Yes.	Yes.	Yes, there will be, when in force.	Yes.	No.
Are there stand-alone or follow-on private rights of action?	Yes.	Yes.	Follow-on, but not yet in force.	Yes.	Yes – although this is via quasi-judicial procedures by the KPPU. The decisions of the KPPU are subject to appeal at the District Court and the Supreme Court.
Is there a merger control regime and is it voluntary or suspensory?	Yes, voluntary and not suspensory unless you file a formal merger clearance notification or application for authorisation.	Yes, mandatory, provided threshold in turnover is met.	Yes, but currently merger control only applies to telecommunications-carrier related mergers.	Yes, mandatory and suspensory.	Mandatory post-merger notification regime for qualifying transactions.

	Japan	Malaysia	Singapore	South Korea	Taiwan	Thailand	Vietnam
	Japan Fair Trade Commission (JFTC).	Malaysian Competition Commission (MyCC).	Competition Commission of Singapore (CCS).	Korea Fair Trade Commission (KFTC).	Taiwan Fair Trade Commission (TFTC).	Thai Trade Competition Commission (TCC).	Vietnam Competition Administration Department (VCAD).
	<i>The Law relating to Prohibition of Private Monopolisation and Maintenance of Fair Trade.</i>	<i>Competition Act 2010.</i>	<i>The Competition Act 2004.</i>	<i>The Monopoly Regulation and Fair Trade Act and its enforcement decree.</i>	<i>Taiwan Fair Trade Act.</i>	<i>The Trade Competition Act of 1999 (TCA).</i>	Law on Competition dated 3 December 2004.
	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.
	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.
	Yes. both.	Yes. both.	Yes for civil sanctions. No for criminal sanctions.	Yes, both administrative and criminal sanctions.	Yes, both.	Yes, both.	Yes, for civil and administrative sanctions. No for criminal sanctions.
	Yes.	Yes.	Yes.	Yes.	Yes.	No.	No.
	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.
	Yes, mandatory filing and suspensory waiting period.	No.	Yes, voluntary and non-suspensory.	Yes, suspensory with respect to the mandatory pre-merger filing.	Yes, mandatory and suspensory.	Yes, mandatory if thresholds exceeded but not yet in operation.	Yes, mandatory provided threshold in market share is met.



AUSTRALIA

Key points

Key agencies and institutions	<p>Australian Competition and Consumer Commission (ACCC) (which has primary responsibility for Australia's competition, fair trading and consumer protection laws)</p> <p>National Competition Council (NCC) (whose main function is to recommend on the regulation of third party access to services provided by monopoly infrastructure)</p> <p>Australian Competition Tribunal (Tribunal) (which hears applications for review of determinations of the ACCC granting or revoking authorisations and granting or refusing formal clearance applications for mergers)</p> <p>Commonwealth Director of Public Prosecutions (CDPP)</p> <p>State and Territory economic regulators (eg IPART in New South Wales, ESC in Victoria, QCA in Queensland, ECCSA in South Australia and the ERA in Western Australia)</p> <p>State and Territory consumer protection agencies have joint responsibilities with the ACCC for enforcement of the Australian Consumer Law (ACL).</p>
Key legislation	<p>The <i>Competition and Consumer Act 2010</i> (Cth) (CCA) including Schedule 2 (Australian Consumer Law)</p>
Key prohibitions	<p>Anticompetitive mergers and acquisitions</p> <p>Anticompetitive contracts, arrangements or understandings</p> <p>Cartels</p> <p>Boycotts and other exclusionary practices</p> <p>Prohibited forms of exclusive dealing</p> <p>Resale price maintenance</p> <p>Misuse of market power (monopolisation)</p>
Key exemptions/defences	<ul style="list-style-type: none">■ authorisation or clearance granted by the ACCC or the Tribunal■ joint ventures in certain circumstances■ civil or criminal immunity■ exceptions permitted under Commonwealth, State and Territory Acts pursuant to section 51(1) of the CCA

Leniency programme

In relation to cartel conduct, the ACCC's immunity policy applies to applications for immunity from civil action initiated by the ACCC. The ACCC does not have power to grant immunity for criminal conduct, and in such cases discretion lies with the CDPP. Immunity on a civil or criminal basis may be granted as either a complete or partial immunity from action.

Under the ACCC's current immunity policy, in order to be eligible for immunity, an individual or corporation must satisfy a number of conditions, including that the individual or corporation:

- was a party to a cartel
- admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the CCA
- is the first person to apply for immunity in respect of the cartel
- has not coerced others to participate in the cartel and was not the clear leader in the cartel
- has either ceased involvement in the cartel or indicates to the ACCC that involvement will cease in the cartel
- undertakes to provide full disclosure and cooperation to the ACCC.

The ACCC's immunity policy as at end December 2013 is under review.

Irrespective of whether a person or corporation is eligible for immunity, they may still receive credit for cooperation under the ACCC's cooperation policy. In civil matters, in recognition of cooperation, the ACCC may:

- permit complete or partial immunity from ACCC action;
- make submissions to the court for a reduction in penalty; and/or
- agree to an administrative settlement instead of litigation.

Remedies and sanctions

Civil remedies for contraventions of the CCA include:

- pecuniary penalties
- injunctions to restrain conduct or transactions
- divestiture (in relation to mergers)
- damages
- non-punitive orders such as a community service order, probation order, order requiring the person to disclose specified information or requiring the person to publish, at their expense, an advertisement in a manner specified
- punitive orders such as an adverse publicity order
- order disqualifying a person from managing a corporation
- costs orders.

In Australia, there is also the possibility of class actions.

Individual liability for cartel conduct includes ten years' imprisonment and/or an AUD220,000 fine.

Corporate liability for cartel conduct includes a fine of not more than the greatest of the following:

- AUD10 million;
- three times the value of the benefit obtained from the prohibited conduct; or
- where the gain cannot be estimated, 10% of annual turnover in a 12-month period when the offence occurred.

Is there a merger control regime and is the regime suspensive or voluntary?

Australia does not have a mandatory pre-merger notification requirement in relation to its merger test. The merger test prohibits direct or indirect acquisitions of shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia. The ACCC has issued guidance in the Merger Guidelines 2008 (analytical guidelines) strongly recommending that certain mergers be voluntarily notified to the ACCC. For example where:

- the products of merger parties are substitutes or complements;
- the merged firm will have a market share greater than 20%;
- the merger raises competition issues; or
- the ACCC has indicated that notification of transactions by a particular firm or industry would be advisable.

The majority of mergers and acquisitions in Australia that are notified to the ACCC are part of an informal clearance regime where the ACCC provides effectively a no action letter (informal clearance). Informal clearances do not require suspension of the merger. In 2013 the ACCC issued revised Merger Guidelines for the informal clearance process. Merger parties seeking a formal clearance or an authorisation must provide an undertaking not to proceed while the merger is being reviewed.

What types of anticompetitive conduct are prohibited?

Some categories of conduct that could potentially give rise to competition law issues under the CCA include:

Anticompetitive agreements

- fixing, controlling or maintaining the prices of goods and services or bid rigging (**price fixing**) or other cartel behaviour between parties who are in competition with each other, which will be caught by the cartel provisions or the prohibition on anticompetitive arrangements. Price-fixing may also encompass frequent exchanges of information on future pricing intentions or other forms of facilitating practices (although it is as yet not fully determined by the Courts whether this always requires a "meeting of the minds" of relevant parties);
- other forms of cartel behaviour include agreements or arrangements or understandings (**output restrictions**) between competitors in relation to capacity or allocating sales territories, customers or markets (**market sharing**);
- **price signalling** and certain types of information disclosure – which currently only applies by way of regulation to certain types of financial institutions in relation to the taking of deposits and making of loans;
- where suppliers restrict customers from acquiring goods or services from a competitor, or when customers impose similar restrictions on suppliers and such conduct has the purpose or effect of substantially lessening competition (**exclusive dealing**). Bundling and third line forcing also come under the exclusive dealing prohibitions;
- when a supplier specifies and enforces a minimum price at which goods or services may be resold, the **resale price maintenance** prohibition will apply;

- arrangements between competitors that restrict supply to particular persons, which may amount to a **primary boycott**; or
- acting together to prevent a third person from supplying goods to another person, which could amount to a **secondary boycott**.

Misuse/abuse of market power

- where a business with a substantial degree of power in a market takes advantage of this power for the purpose of eliminating or substantially damaging a competitor or to prevent a business from entering into a market. This is a **misuse of market power** where the relevant party has a substantial share of the market or substantial market power; or
- **predatory pricing**, which involves the supply of goods or services at below cost for a sustained period, could also be a misuse of market power when the relevant party has a substantial share of the market or substantial market power.

Anticompetitive mergers and acquisitions

- direct or indirect acquisitions of shares or assets that substantially lessen competition, whether the acquisition is within or outside Australia (see **mergers and acquisitions** below).

Many of the prohibitions in the CCA are based on whether the conduct, agreements, arrangements or understandings have the purpose, effect or likely effect, of substantially lessening competition in a market. The substance and not the form of arrangements will be considered and will often be determinative as to whether there is a contravention of the legislation.

All anticompetitive conduct is prohibited unless an authorisation is granted.

In relation to financial services, in the case of authorised deposit-taking institutions (ADIs), particular competition laws apply to "price signalling".

What types of defences/exemptions are available?

A range of formal and informal defences and exemptions may also be available, depending on the anticompetitive conduct alleged. For example, the existence of a good business reason may prevent sales below cost level being considered by the Courts as predatory pricing. Certain business structures may, depending on the circumstances, provide the basis of a defence. For example, certain types of conduct that may otherwise be viewed as cartel conduct between competitors that is contained in a proper joint venture contract for the purposes of supply of a joint venture, are exempt from breach, as are boycott provisions for joint ventures.

In Australia, resale price maintenance – a supplier setting a minimum retail price when goods are sold to distributors or retailers for sale to customers – is a *per se* contravention of the CCA. However, genuine recommended prices are not prohibited, neither is setting a recommended maximum price.

It is possible to make an application to the ACCC for authorisation of conduct that would otherwise be anticompetitive if the public benefits outweigh the detriment. Authorisation is granted for a limited time period and can be granted subject to conditions. However, authorisation cannot operate retrospectively. The parties cannot undertake the conduct that is the subject of the authorisation until it is granted, or an "interim authorisation" is granted by the ACCC.

Formal or informal clearance can also be obtained from the ACCC for mergers and acquisitions, and from the Tribunal for authorisations. If formal merger clearance or merger authorisation is sought, the applicant is required to give a court-enforceable undertaking not to complete the proposed acquisition while it is being considered by the ACCC or Tribunal respectively.

What are the substantive laws on cartels in the jurisdiction?

The CCA deals with the following categories of cartel provisions in contracts, arrangements or understandings between competitors:

- those with the purpose or likely effect of fixing the price or discount on goods or services;
- those with the purpose of restricting output (eg capacity), allocating customers, suppliers or territories, or bid rigging.

It is often said that a legitimate commercial purpose is a defence. However, it is more strictly correct to say that it is a contravention if the relevant conduct is for a prohibited purpose. Further proof of actual effect on competition is not required where a prohibited purpose is proven.

For there to be criminal liability for cartel conduct, a person must have known they were entering into a cartel. While a broad range of conduct falls within the cartel provisions, there are a number of defences and exclusions. Recommended prices or recommended discounts are not cartels. Collectively acquiring goods or services or joint price advertising is also permissible in certain circumstances. There is a limited exemption from the cartel provisions available for joint venture arrangements where the arrangements are referred to in writing and are for the purposes of the joint venture.

What are the criminal and civil sanctions?

Breaches of the CCA can attract civil or criminal sanctions.

Civil remedies include:

- pecuniary penalties (section 76)
- damages (section 82)
- injunctions (section 80)
- divestiture (in relation to mergers) (section 81)
- non-punitive orders (eg community service) (section 86C)
- punitive orders – adverse publicity orders (section 86D)
- disqualification from directorship (section 86E)
- other orders (section 87)

Individual liability for cartel conduct includes ten years' imprisonment and/or a AUD220,000 fine.

Corporate liability for cartel conduct includes a fine of not more than the greatest of the following:

- AUD10 million;
- three times the value of the benefit obtained from the prohibited conduct; or
- where the gain cannot be estimated, 10% of annual turnover in a 12-month period during which the offence occurred.

In addition to those directly involved in a contravention, any other person who aids, abets, counsels or procures a contravention can also be subject to sanctions. It does not matter if the person was not aware that they were breaching the CCA, so long as there was intentional participation in the relevant conduct.

What are the regulator's investigatory powers?

The CCA confers extremely wide powers on the ACCC to gather evidential material to assist in regulatory investigations.

The ACCC may commence investigations:

- on its own initiative;
- upon receipt of complaints; or
- on referral from the Government.

During investigations, the ACCC has the power to require information to be provided compulsorily in writing or documents to be produced within a specified time, or to require a person to give oral evidence to the ACCC by issuing notices to do so under section 155 of the CCA. The only exemption from compliance is on the grounds of legal professional privilege. It is not possible to decline to respond on the basis of self-incrimination, although the CCA expressly provides that any incriminating information provided by an individual is not admissible as evidence against that individual in criminal proceedings.

The ACCC may also apply for search warrants in order to conduct so called "dawn raids". Searches under warrant are typically conducted where there is a risk of evidence destruction or as part of a co-ordinated process with other competition agencies such as the United States Department of Justice and the European Commission.

In a criminal investigation, the ACCC also has the power to seek telephone interception and surveillance device warrants in conjunction with the Australian Federal Police to investigate cartel offences.

In relation to regulatory matters such as applications for authorisation or exclusive dealing notifications, the ACCC has the power to make reasonable and appropriate inquiries. In relation to exclusive dealing notifications, the ACCC has the power to issue notices pursuant to Section 155 of the CCA.

The ACCC has the power to investigate and make inquiries in relation to mergers on its own initiative, if there are complaints in relation to a merger or if a party brings a merger to the ACCC for review.

There are serious consequences and several criminal offences under the CCA. Any person who refuses or fails to provide information, destroys or falsifies documents, gives false or misleading information, or otherwise impedes the ACCC in its investigations, faces the payment of fines and/or criminal sanctions, including imprisonment.

Does the law allow follow-on or stand-alone rights of action?

A person who has suffered loss or damage as a consequence of a contravention of the CCA can bring an action for compensation or other remedial orders, and the ACCC can also take representative action on behalf of such persons.

Any person can also apply for an injunction from the Federal Court of Australia in relation to conduct that constitutes or would constitute a contravention of Part IV of the CCA (other than section 50 and section 50A relating to mergers and acquisitions where the ACCC is the only applicant) or that constitutes an attempt to contravene such provisions or aids, abets, counsels or procures a person to contravene such provisions. There is also the possibility of class actions for contraventions.

Are there industry-specific regimes?

Intellectual property licences and assignments in certain circumstances are exempt from most competition provisions (other than the misuse of market power and resale price maintenance provisions). The CCA also includes a comprehensive regime for overseas cargo shipping services. Some competition provisions do not apply to arrangements relating solely to the export of goods or services.

The CCA is a law of general application. However, in addition to the CCA, the Australian Energy Regulator (AER) is responsible for regulation of the electricity and gas networks pursuant to the National Electricity Law and the National Gas Law. Special provisions under the CCA also apply to telecommunications services, which are also subject to a separate *Telecommunications Act 2010* (Cth). Breaches of industry codes or regimes can also be investigated and prosecuted by the ACCC.

To deal with access rights to certain types of infrastructure, the CCA also provides a procedure for the Commonwealth, States and Territories to declare essential services of national significance – for example, major airports and railways. If the infrastructure is declared, and the parties are unable to agree on access arrangements to the declared facility, the ACCC can arbitrate and establish terms and prices for access under Part IIIA of the CCA.

What are the enforcement trends?

The ACCC released its Compliance and Enforcement Policy in February 2013 and it continues to refine the Policy as time progresses. The ACCC has indicated that it is currently prioritising its work on:

- competition and consumer issues in highly concentrated sectors, in particular in the supermarket and fuel sectors;
- online competition and consumer issues, including conduct which may impede emerging competition between online traders or limit the ability of small businesses to compete effectively online;
- credence claims (for example "organic"), which have the potential to have a significant impact on consumers, and therefore the competitive process, if those claims are inaccurate and disadvantage a competitor; and
- misleading carbon pricing representations.

The ACCC has been very active in consumer protection and market conduct cases over the last two years, particularly with respect to cartel behaviour and price fixing. There have been a number of high-profile prosecutions against airlines for fixing fuel surcharges and freight charges between Australia and the rest of the world, with 12 airlines prosecuted so far, paying a total of AUD98.6 million in penalties, with three more cases still to be determined. These penalties are among the highest penalties ever awarded in an ACCC investigation for one matter and are likely to foreshadow greater enforcement activity in this area of the law. The ACCC commenced proceedings against Unilever, Colgate Palmolive and PZ Cussons over alleged cartel activity in the detergent sector in late 2013. The ACCC has also commenced proceedings against Japanese ball bearing manufacturer NSK over cartel activity in proceedings similar to those taken by Japan's Fair Trade Commission against NSK for price fixing on bearings.

As penalties are aimed at deterrence, substantial penalties will likely be sought where there has been a complaint of serious misconduct. The ACCC generally will not refer minor cartel

conduct for criminal prosecution but will concentrate on cartels that can cause large-scale serious economic harm.

As with many other countries with concentrated industries, the ACCC is focusing on misuse of market power and associated behavioural matters such as unconscionable conduct between large and small corporations as well as merger control to address structural issues.

In industries that are not trade exposed through imports, mergers resulting in further consolidation have increasingly come under ACCC scrutiny. The ACCC has an undertakings unit dedicated to negotiating, monitoring and enforcing undertakings, and is also increasingly turning to internal company documents and papers to assess mergers.

In 2013, the new Coalition Government announced that it would conduct a "root and branch" review of the CCA. This review is likely to occur in the course of 2014.

Merger control filing requirements

The merger control test

The CCA prohibits direct or indirect acquisitions of shares or assets, if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia (unless the acquisition is authorised).

To determine whether a transaction is likely to lessen competition in a market substantially, the ACCC compares the likely competitive environment post-acquisition if the transaction proceeds (the "with" position) to the likely competitive

environment if the transaction does not proceed (the “without” or “counterfactual” position).

In assessing whether an acquisition would have the effect, or be likely to have the effect of substantially lessening competition in a market, the ACCC has regard to, in particular, the non-exhaustive list of factors set out in section 50(3) of the CCA, namely the:

- actual and potential level of import competition in the market;
- height of barriers to entry to the market;
- level of concentration in the market;
- degree of countervailing power in the market;
- likelihood that the acquisition would result in the acquirer being able significantly and sustainably increase prices or profit margins;
- extent to which substitutes are available in the market or are likely to be available in the market;
- dynamic characteristics of the market, including growth, innovation and product differentiation;
- likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
- nature and extent of vertical integration in the market.

The merger control processes

Unlike most other jurisdictions, there are no mandatory pre-merger notification requirements in Australia for antitrust merger control. However, as a practical matter, most significant mergers or mergers that involve a request to obtain foreign investment approval from the Australian Foreign Investment Review Board (FIRB) (which includes consideration of the impact on competition in Australia) involve the merger parties (generally the purchaser) seeking the views of the ACCC in order to provide commercial and regulatory certainty.

There are three alternative processes to having a proposed transaction cleared or authorised:

- informal clearance – mergers granted informal clearance by the ACCC are not immune from liability to third parties under the CCA, as the informal clearance is essentially a “no action” letter from the ACCC and is not binding on third parties. However, as a practical matter, as the ACCC is the only party able to obtain an injunction to restrain a merger proceeding, this is the most commonly used process and most commercial parties consider it provides sufficient commercial certainty;
- formal clearance – if formal clearance is granted by the ACCC, the parties are immune from liability and have legal protection from court action by any other party; or
- authorisation – in the event that a merger or anticompetitive agreement is likely to reduce competition in an Australian market, such behaviour may still be in the public interest. The Tribunal may authorise the merger if the public benefits outweigh any detriments associated with the lessening of competition. If authorised by the Tribunal, the parties are immune from liability.

The informal merger review process is flexible in terms of time frames, confidentiality and information requirements, and there is no obligation to suspend the merger pending clearance. As noted above, if the parties make a self-assessment that the proposed merger may risk constituting an anticompetitive merger, it is usual for the proposed merger and related transactions to be implemented only once clearance has been obtained. Since the informal review process does not produce a ‘formal’ decision from the ACCC, there is no direct statutory avenue available to appeal such a decision. The parties can advise the ACCC that they intend to proceed and take a risk that the ACCC may seek an injunction to restrain the transaction from proceeding.

If a formal merger clearance is sought, the applicant is required to give a court-enforceable undertaking suspending the behaviour while it is being considered. Since the formal clearance process was introduced in January 2007 there have been no applications for formal clearance – partly because of the inflexibility of the process and the extensive nature of the material that needs to be submitted by the merger parties. In this situation, an informal clearance is still generally viewed as the more commercially timely and attractive process. A decision by the ACCC to prevent a merger or a clearance subject to conditions can be appealed to the Tribunal within 14 days of such a decision. There is no time limit within which an appeal must be determined. On appeal, the ACCC's decision can be affirmed, varied or set aside.

The new process of authorisation for mergers was introduced in 2007, and where authorisation is sought the applicant is also required to give a court-enforceable undertaking suspending the transaction from completing while it is being considered. Murray Goulburn announced in November 2013 that it would seek to take its merger proposal for Warrnambool Cheese and Butter to the Tribunal. This application was the first example of a merger being taken directly to the Tribunal, by-passing the informal merger clearance process of the ACCC. There is no statutory right of merit review for refusal to authorise a merger; however, since the Tribunal is exercising administrative power, the usual avenues of judicial review may be available. Mergers taken to the Tribunal have historically been few because of the difficulty of demonstrating public benefits, such as increased exports (as is the case in Murray Goulburn), exceed the detriments in the lessening of competition associated with the merger.

Decisions of the ACCC and the Tribunal may be appealed to the Federal Court of Australia, but only on questions of law, not the merit of the original decision.

There have been some limited examples of the ACCC seeking injunctions to prevent a proposed transaction from proceeding. However, it does occur and the threshold for the ACCC to obtain an injunction is generally viewed as relatively low in order to protect the public interest. Accordingly, most merger parties in contested matters before the Court will agree as a practical matter to have the acquisition restrained in return for an expedited hearing of the matter. In addition to injunctions and penalties, divestiture orders can also be made for acquisitions that have proceeded and have the prohibited effect on competition. In December 1996, the ACCC obtained penalties and costs orders totalling AUD5 million against Pioneer International in the *Q Block Case* for a breach of section 50 of the CCA.

Separately and in addition to competition issues, if the merging parties involve a foreign person, an approval from the FIRB may need to be sought, depending on the nature and value of the transaction and the percentage shareholding by the foreign person.

Further, it should be noted that if parties decide not to seek the ACCC's clearance voluntarily, the ACCC may become aware of the proposed merger through other means, such as media reports, from competitors or through referral from other government bodies. For example, if the parties seek approval from FIRB, it is likely that FIRB will refer the proposed transaction to the ACCC to ensure that there are no competition issues, before FIRB will grant its approval.



MAINLAND CHINA

Key points

Key agencies and institutions	<p>Anti-Monopoly Commission (AMC, responsible for developing competition policy, conducting market investigations, publishing guidelines and co-ordinating the enforcement authorities)</p> <p>National Development and Reform Commission (NDRC, responsible for the enforcement of price-related anticompetitive conduct)</p> <p>State Administration for Industry and Commerce (SAIC, responsible for the enforcement of non-price-related anticompetitive conducts)</p> <p>Ministry of Commerce (MOFCOM, responsible for merger control)</p> <p>NDRC, SAIC and MOFCOM are collectively known as the “Anti-monopoly Enforcement Authorities” (AMEA)</p>
Key legislation	<p>The <i>Anti-monopoly Law</i> (AML)</p>
Key prohibitions	<p>Anticompetitive agreements</p> <p>Abuse of dominance</p> <p>Anticompetitive mergers and acquisitions</p>
Key exemptions/defences	<ul style="list-style-type: none">■ improving technologies or developing new products■ upgrading product quality, reducing cost, improving efficiency, implementing product standardisation or work specialisation■ improving operational efficiency for small and medium-sized enterprises■ protecting public interest■ mitigating severe reductions of sales or excessive production caused by economic recession■ protecting international trade and foreign economic cooperation*■ other circumstances as prescribed by law or the State Council*. <p>Except for exemptions marked with asterisks, the law does not provide for automatic exemptions; undertakings are required to prove that the agreement concluded would not substantially restrict competition in the relevant market and that the agreement would enable consumers to share the benefits arising from such an agreement.</p>

<p>Leniency programme</p>	<p>For undertakings that have entered into or implemented anticompetitive monopoly agreements in violation of the law, NDRC or SAIC may exercise its discretion to reduce the penalties imposed or grant exemption from penalties for voluntary submission of relevant information and important evidence to NDRC or SAIC.</p>
<p>Remedies and sanctions</p>	<p>Civil remedies for contravention of the AML include:</p> <ul style="list-style-type: none"> ■ pecuniary penalties ■ orders to cease illegal act ■ confiscation of illegal income ■ revocation of registration of trade association (in relation to trade associations) ■ measures to restore the original status prior to concentration (in relation to mergers). <p>The thresholds for pecuniary penalties are:</p> <ul style="list-style-type: none"> ■ where the undertaking has entered into and implemented a monopoly agreement, a fine between 1% to 10% of the sales amount of the undertaking in the preceding year may be imposed ■ where the undertaking has concluded but not implemented a monopoly agreement, a maximum fine of RMB500,000 may be imposed on the undertaking ■ for abuse of dominant position, a fine of between 1% to 10% of the sales amount of the undertaking in the preceding year may be imposed ■ for anticompetitive concentrations, a maximum fine of RMB500,000 may be imposed on the undertaking.

Is there a merger control regime and is the regime suspensive or voluntary?

Notification of mergers and acquisitions to MOFCOM is mandatory if the concentration of undertakings meets these minimum thresholds:

- total worldwide turnover of all undertakings to the concentration in the preceding financial year equivalent to or exceeds RMB10 billion; and the turnover within Mainland China of at least two of the undertakings is equivalent to or exceeds RMB400 million in the preceding financial year; or
- total turnover in Mainland China of all undertakings to the concentration is equivalent to or exceeds RMB2 billion in the preceding financial year, and the turnover within Mainland China of each of at least two of the undertakings is equivalent to or exceeds RMB400 million in the preceding financial year.

No concentration shall be implemented prior to the notification being made and approved by the relevant authorities.

What types of anticompetitive conduct are prohibited?

In general, three principal categories of anticompetitive conduct are prohibited:

- anticompetitive agreements
- abuse of dominance
- anticompetitive mergers and acquisitions.

Such types of conduct are deemed to raise competition law issues if they have, or are likely to have, the effect of eliminating or restricting competition and harm consumers' benefits:

Examples of anticompetitive agreements:

- price fixing between parties who are in competition with each other
- vertical agreements made with suppliers or retailers to fix the resale price or to restrict the minimum resale price
- agreements/arrangements between competitors to restrict the production volume or sales volume of goods
- agreements/arrangements between competitors to divide the sales or raw material market
- agreements to restrict the purchase or development of new technology and products
- agreements/arrangements between competitors or with third parties to boycott transactions to other parties.

Examples of abuse of dominance – when undertaken with dominant market position:

- sale of products at unfairly high or low prices
- sale of products below the cost without valid justification
- refusal to conduct business with a trading partner without valid justification

- coercion of a trading partner to deal exclusively with it or a designated undertaking
- imposition of unreasonable trading conditions without valid justification
- implementation of discriminatory pricing or treatments to trading partners.

Anticompetitive mergers and acquisitions

In general, mergers with, and acquisitions of control in, another entity that do not trigger the notification thresholds do not need to be notified to MOFCOM. However, the AML provides that for mergers and acquisitions that do not meet the notification threshold but have or may have the effect of eliminating or restricting competition as proven by facts or evidence collected in compliance with other relevant procedures, MOFCOM will have the right to conduct the necessary investigations.

What types of defences/exemptions are available?

Agreements concluded and/or implemented by the undertakings on grounds of justifiable business reasons such as:

- improving technologies or developing new products
 - upgrading product quality, reducing cost, improving efficiency, implementing product standardisation or work specialisation
 - improving operational efficiency for small and medium-sized enterprises
 - protecting public interest
 - mitigating severe reductions of sales or excessive production caused by economic recession,
- will be exempted if the undertaking can prove that such agreements would not substantially restrict competition in the relevant market, and that the agreements would enable consumers to share the benefits arising from these agreements.

Agreements concluded and/or implemented by the undertakings that have the object or effect of protection of international trade and foreign economic cooperation will be exempted.

What are the substantive laws on cartels in the jurisdiction?

The AML prohibits agreements on price fixing, restricting production and sales output, and upstream and downstream allocation of markets. Sanctions for violations of the AML include fines of between 1% and 10% of the sales of the infringer's total turnover in the preceding year.

The AML does not explicitly state whether penalties will be calculated on worldwide or Mainland China turnover, but neither the AML nor the implementing rules contain language limiting penalty calculations to Mainland China-wide turnover.

The maximum fine that can be imposed on an infringer for anticompetitive agreements that have not been implemented is RMB500,000. In addition, the agencies may order an infringer to cease the illegal act and may confiscate the illegal income.

What are the criminal and civil sanctions?

Civil sanctions

The AML provides that where an infringer implements a monopolistic conduct and causes loss to others, the infringer will be subject to civil liabilities.

Criminal sanctions (not on anticompetitive conduct, but on illegal activities during the investigation of government authorities) (including anti-monopoly enforcement authorities)

If individuals or organisations refuse to provide relevant material or information, or provide false material or information, or conceal, destroy or remove evidence, or act in such a way to refuse or hinder an investigation, the authority may impose a maximum fine of RMB20,000 on an individual and RMB200,000 on an organisation. In serious cases, the Anti-Monopoly Enforcement Authority may impose a higher fine of between RMB20,000 and RMB100,000 on an individual or a fine of between RMB200,000 and RMB1,000,000 on an organisation. For serious offences that constitute a crime, the AML provides that criminal liabilities shall be pursued in accordance with law.

What are the regulator's investigatory powers?

The Anti-Monopoly Commission under the State Council is responsible for developing competition policy, conducting market investigations, publishing guidelines and coordinating enforcement.

The Anti-Monopoly Enforcement Authorities designated by the State Council (AMEA) are responsible for the enforcement of the AML, including:

- conducting on-the-spot inspections at the undertaking's business site or other relevant sites
- compelling the undertakings under investigation, interested parties or other relevant entities or individuals to provide relevant information
- inspecting, reviewing and duplicating relevant bills and vouchers, agreements, accounting books, business correspondences, electronic data and other documents and information from the undertaking concerned, the interested parties or other relevant entities or individuals
- impounding or seizing relevant evidence
- inspecting the bank accounts of the undertakings concerned.

Does the law allow follow-on or stand-alone rights of action?

The AML confirms the existence of both follow-on and stand-alone rights of action; any person or entity may commence a private action, regardless of whether an infringement has already been established in a decision of an administrative agency.

Any harmed party may file claim. There does not appear to be any limitation on indirect purchasers bringing action, as long as they can establish that they suffered harm.

Are there industry-specific regimes?

The AML does not apply to the joint or concerted acts implemented by agricultural producers and rural economic organisations in their business operations, including production, processing, marketing, transportation and the warehousing of agricultural products.

What are the enforcement trends?

2013 saw Mainland Chinese antitrust enforcement expand, with a number of high-profile investigations brought against domestic and international businesses:

- In January 2013, NDRC reported that it had investigated a total of 49 price-related cases since the enactment of the AML. The investigations covered a broad range of industries, including pharmaceuticals, paper-making, LCD panels, cement, insurance and shipping.
- In December 2012, SAIC reported that it commenced investigations in at least 17 cases. The investigations covered

a similar broad range of industries, including construction, gas, tourism, electronics and used cars.

- Recent press reports suggest that investigations are likely in the IT and retail banking sectors.
- More procedural guidance on antitrust enforcement is expected. Chinese antitrust investigations typically take only a few months (two months in the *Chinese liquor case* - an investigation by NDRC of Moutai and Wuliangye, two well-known liquor manufacturers in China, for resale price maintenance) compared to years in Europe. This can place companies under severe pressure.

Mainland China's merger regime is now one of the three major regimes in terms of merger filings, along with the EU and the US, although concerns persist over timing and predictability:

- Initiatives to shorten MOFCOM's review period are being examined. A simplified procedure with clear and predictable parameters will facilitate review processes. In piloting the new procedure, MOFCOM has suggested around 50% of cases were cleared within 30 days.
- Increasing consolidation globally may lead to more cases giving rise to concerns, including in China. This may lead to increasing levels of intervention in sensitive sectors, and increasing reliance on national economic development as a basis for intervention.
- Increasing sophistication of decision-making is expected. This is likely to lead to reliance on robust economic analyses in notifications.

Merger control filing requirements

Two authorities deal with mergers in Mainland China:

- the Anti-Monopoly Bureau within MOFCOM is responsible for reviewing and clearing merger filings
- the AMC is responsible for formulating and issuing merger guidelines, and is the coordinating government agency between MOFCOM, NDRC and SAIC.

In Mainland China, pre-merger notification is mandatory when the undertakings of the proposed concentration meet certain turnover thresholds:

- a total worldwide turnover of all business operations participating in the concentration exceeding RMB10 billion, and at least two of these business operators each having a turnover of more than RMB400 million within Mainland China; or
- a total turnover within Mainland China of all business operators exceeding RMB2 billion, and at least two of these operators each having a turnover of more than RMB400 million within Mainland China.

Although the AML is the primary antitrust legislation governing merger control, a number of regulations and guidelines on merger notification requirements have come into effect since the AML was enacted in 2008. These regulations and guidelines provide detailed rules in terms of merger filing, merger review, and imposition and supervision of remedies.



HONG KONG

Key points

Key agencies and institutions	Investigative and prosecutorial: Competition Commission Communications Authority (telecoms & broadcasting sector) Adjudicative: Competition Tribunal (a specialist division of the High Court) Court of Appeal, Court of Final Appeal
Key legislation	<i>Competition Ordinance</i> (prohibitions not yet in force: see important notes below)
Key prohibitions	Anticompetitive agreements Abuse of market power
Key exemptions/exclusions/defences	<ul style="list-style-type: none">■ efficiency – agreements must:<ul style="list-style-type: none">- contribute to:<ul style="list-style-type: none">- improving production or distribution or- promoting technical or economic progress- while allowing consumers a fair share of the resulting benefit- not impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives- not affording the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.■ block exemptions (not available in relation to abuse of market power)■ compliance with legal requirements■ services of general economic interest■ agreements or conduct that results in, or if carried out would result in, a merger■ agreements of lesser significance ie where the agreement is between undertakings with a combined annual turnover in the relevant year not exceeding HKD200 million (only available in relation to anticompetitive agreements).

	<ul style="list-style-type: none"> ■ conduct of lesser significance ie conduct engaged in by an undertaking the turnover of which does not exceed HKD40 million for the relevant year (only available in relation to abuse of market power) ■ on public policy grounds ■ on grounds of compliance with international obligations ■ specified persons/activities. <p>Numerous statutory bodies are also expected to be exempted under a broad exclusion to be granted by the Chief Executive in Council of the Hong Kong Government.</p>
Leniency programme	<p>The competition authorities may enter into leniency agreements with individuals and corporations, agreeing not to pursue proceedings for a pecuniary penalty against them, in exchange for their cooperation in an investigation or proceedings.</p>
Remedies and sanctions	<p>Pecuniary penalties not exceeding 10% of the turnover of the undertaking “obtained in Hong Kong” for each year of infringement, up to a maximum of three years. If the infringement period exceeds three years, the penalty may be based on the three years of infringement with the highest turnover.</p> <p>Other orders include injunctions, damages, disqualification of directors for up to five years, disgorgement orders, and a wide range of other orders as specified in Schedule 3 of the Competition Ordinance.</p>
Is there a merger control regime and is the regime suspensive or voluntary?	<p>There is no general merger control regime in Hong Kong. However, change in control of telecommunications carrier licensees is presently regulated under section 7P of the Telecommunications Ordinance, which is a voluntary notification regime.</p> <p>The Merger Rule in the Competition Ordinance, when it comes into force, will only apply to mergers which concern one or more parties that own or control, either directly or indirectly, a carrier licensee, replacing the current regulation under section 7P of the Telecommunications Ordinance. It will also be a voluntary notification regime.</p>

Hong Kong has traditionally pursued a light-handed competition policy consistent with its once laissez-faire economic policy. This consisted of:

- sectoral competition laws in telecommunications and broadcasting
- regulation of utilities and transport through flexible consensual regulatory mechanisms (such as the contractual electricity schemes of control)
- the Competition Policy Advisory Group (COMPAG), established to review private and public conduct and to make recommendations to the Hong Kong Government where it is considered competition issues have been identified that require a policy response.

This light-handed competition policy was driven by Hong Kong's historically strong faith in the ability of markets to self-correct and a recognition of the risks of regulatory error where intervention is considered as a means of addressing perceived market failures.

Hong Kong has now enacted a general competition law, the Competition Ordinance. The law was gazetted on 22 June 2012, but the prohibitions are not yet in force. The law is to be implemented in phases. The provisions in the law allowing for the establishment of the Competition Commission (the body responsible for investigating and prosecuting under the new law) came into force on 18 January 2013. The provisions allowing for the establishment of the Competition Tribunal (a specialist division within Hong Kong's High Court set up to hear competition law cases) came into force on 1 August 2013.

The Competition Ordinance will repeal the existing sectoral competition laws that exist under the Telecommunications

Ordinance and the Broadcasting Ordinance. From that point, those sectors will be subject to the new law, with the exception of a new prohibition on excessive pricing and unfair terms which is being introduced into the Telecommunications Ordinance to apply to telecommunications licensees.

What types of anticompetitive conduct are prohibited?

Anticompetitive agreements

Under the Competition Ordinance, an undertaking must not make or give effect to an agreement, engage in concerted practice or as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

The prohibition distinguishes between two different categories of agreements:

- "serious anticompetitive conduct" ie price-fixing, market-sharing, output-controls and bid-rigging; and
- "other agreements" ie any agreements not falling in the category above.

A warning notice must be issued before the Competition Commission takes action against non-serious anticompetitive conduct. No warning notice will be issued before action is taken against serious anticompetitive conduct and such conduct is likely to attract the most severe penalties in consequence of breach.

Abuse of market power

Under the Competition Ordinance, an undertaking that has a substantial degree of market power must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. The Competition Ordinance highlights predatory pricing and "limiting production, markets or technical development to the prejudice of consumers" as particular conduct that could comprise a breach. However, it is expected that this prohibition will be applied broadly to the various types of conduct that are, in other mainstream antitrust jurisdictions, considered an abuse of market power.

In the EU and the UK, "unfair pricing" is expressly prohibited, although that prohibition is rarely enforced. It is notable that Hong Kong's market power prohibition does not refer to "excessive" or "unfair" pricing. It would appear that the intention is to follow the approach in jurisdictions such as the United States and New Zealand, where such conduct is not regulated by competition law, the philosophy being that markets with workable competition are, generally, far better regulators of "high" prices than government agencies.

No warning notice will be issued before prosecution under the market power prohibition.

What types of defences/exemptions are available?

The following table indicates, in broad terms, the exemptions and exclusions applicable in relation to the Conduct Rules. Note that these exclusions and exemptions are not available in relation to the Telco Rule, which is administered under the Telecommunications Ordinance.

The exemptions on grounds of public policy and to avoid conflict with international obligations are granted by way of orders of the Chief Executive in Council. The exclusion of statutory bodies and specified persons/activities, similarly, are addressed by regulations promulgated by the Chief Executive in Council. There has been no suggestion as yet as to how the exclusion for specified persons/activities will be applied. It has been proposed that most statutory bodies in Hong Kong will be excluded, despite the fact that a number of them conduct significant activities on the market in competition with private undertakings.

The exemption of categories of agreements by way of block exemption is by way of order made by the Competition Authorities.

Otherwise, undertakings must, as a general rule, self-assess whether their agreements or conduct benefit from an exclusion.

In relation to both self-assessed and non self-assessed exclusions and exemptions, businesses are able to seek clarification through guidance and decisions from the Competition Authorities in certain circumstances.

CO ref.	Exclusion / Exemption grounds	First Conduct Rule	Second Conduct Rule	Self-assessment?
s.4	Exclusion of Specified Persons and Specified Activities	Yes	Yes	No
s.5	Exclusion of Statutory Bodies	Yes	Yes	No
s.15	Categories of agreements subject to Block Exemption	Yes	No	No
s.31	Exemption based on exceptional and compelling reasons of public policy	Yes	Yes	No
s.32	Exemption based on avoidance of conflict with international obligations	Yes	Yes	No
Sched.1, s.1	Exclusion in relation to agreements which enhance economic efficiency	Yes	No	Yes
Sched.1, s.2	Exclusion in relation to agreements or conduct undertaken in order to comply with legal requirements	Yes	Yes	Yes
Sched.1, s.3	Exclusion in relation to agreements or conduct undertaken by undertakings entrusted by the Government with the operation of services of general economic interest	Yes	Yes	Yes
Sched.1, s.4	Agreements and conduct which result in, or if carried out would result in, a merger	Yes, unless telco related	Yes, unless telco related	Yes
Sched.1, s.5	Agreements of lesser significance (the First Conduct Rule <i>de minimis</i> carve out)	Only to non-"serious" anticompetitive conduct	No	Yes
Sched.1, s.6	Conduct of lesser significance (the Second Conduct Rule <i>de minimis</i> carve out)	No	Yes	Yes

Efficiency defence

Undertakings may be able to avail themselves of the efficiency exclusion where agreements are challenged as being anticompetitive. To come within the defence, an agreement must:

- contribute to:
 - improving production or distribution or
 - promoting technical or economic progress
- while allowing consumers a fair share of the resulting benefit
- not impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives

- not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Block exemptions

Where the competition authorities are satisfied that a particular category of agreements are excluded agreements (ie that they fall within the efficiency defence described above), they may issue a block exemption order in respect of that category of agreements.

Block exemptions may be granted on the competition authorities'

own volition or on application by an undertaking. Block exemption orders will be subject to review at a date specified in the order, not more than five years after the date of the order.

What are the substantive laws on cartels in the jurisdiction?

The Competition Ordinance states that the following will be considered "serious" anticompetitive conduct (ie akin to cartel conduct):

- fixing, maintaining, increasing or controlling the price for the supply of goods or services (ie price-fixing)
- allocating sales, territories, customers or markets for the production or supply of goods or services (ie market-sharing)
- fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services (i.e. output restrictions)
- bid-rigging.

As mentioned above, no warning notice will be issued before prosecution for serious anticompetitive conduct and there is also no *de minimis* protection from prosecution ie the exclusion for agreements of lesser significance does not apply to serious anticompetitive conduct.

The Competition Ordinance does not draw any express distinction between horizontal and vertical conduct when defining serious anticompetitive conduct. It remains to be seen how the rule is applied in practice and what the guidelines to be issued before the law comes into force will state in this regard.

What are the criminal and civil sanctions?

Penalties for breach can be up to 10% of the turnover of the undertaking "obtained in Hong Kong" for each year of infringement up to a maximum of three years.

The Competition Tribunal will also have the power to make disgorgement orders, award damages, impose injunctive relief, disqualify directors for up to five years and to make orders for structural relief (eg requiring divestiture of business operations) and a significant array of other remedies as specified in the Third Schedule to the Competition Ordinance.

Hong Kong's law, unlike some other competition laws, will also allow actions to be taken directly against individuals, including staff and directors. Furthermore, it is prohibited to indemnify staff or directors for penalties that they may be ordered to pay in the event of a finding of breach. The penalty for such an indemnity is a fine of up to twice the value of the penalty that had been the subject of the indemnity (in other words, they could end up personally paying treble fines).

Criminal sanctions are imposed for obstructing the Competition Commission in carrying out its functions and in respect of producing or providing false or misleading documents or information and perjury.

What are the regulators' investigatory powers?

Competition Authorities

The Competition Commission is responsible for the investigation, pre-prosecution enforcement and bringing enforcement

proceedings in the Competition Tribunal. The Commission has been established with the following primary functions:

- to investigate suspected breaches
- to take pre-prosecution enforcement actions (eg to issue decisions, take commitments, and issue infringement/warning notices)
- to bring enforcement proceedings in the Competition Tribunal for alleged breaches.

The Competition Commission can also carry out market studies, though it is not clear how extensive this function will be.

The Communications Authority has concurrent jurisdiction over cases under the Competition Rules to the extent that cases involve telecommunications or broadcasting licensees. Together, the Competition Commission and Communications Authority are referred to as the Competition Authorities.

The Competition Authorities may commence investigations:

- on their own initiative
- upon receipt of complaints
- on referral from the Government or a court.

The Competition Authorities must issue guidelines indicating the manner and form in which complaints are to be made and on deciding whether to conduct an investigation and, if so, the procedures they will follow. It is hoped the Competition Authorities will, in the guidelines on whether they will investigate complaints, lay down clear guidelines for their enforcement priorities.

The Competition Authorities are vested with a wide range of investigative powers, including powers to compel the production of documents and information, to require persons to attend an interview and to enter and search premises under a court warrant ("dawn raids").

The Competition Authorities may, instead of bringing a prosecution for serious anticompetitive conduct or abuse of market power, issue an infringement notice against the person(s) it proposes to prosecute, offering not to bring the proceedings if they agree to make a commitment to comply with the infringement notice. The Competition Authorities are not obliged to take this step and could, in an appropriate case, proceed directly to lodging proceedings in the Competition Tribunal. Undertakings need to be aware that they will be exposed to potential follow-on private actions if they admit liability in response to an infringement notice.

Parties may also apply to the Competition Authorities for a "decision" as to whether an agreement or conduct falls within exclusions or exemptions under the Competition Ordinance.

Competition Tribunal

The Competition Tribunal is a specialist division of the High Court of Hong Kong, responsible for hearing and deciding competition cases, and imposing penalties and other relief. The Competition Tribunal also has the power to review actions of the Competition Authorities, such as decisions requested by parties as to whether an agreement or conduct is excluded or falls within an exemption.

Decisions of the Competition Tribunal can go on appeal to the Court of Appeal and the Court of Final Appeal in the same way as other decisions of the High Court.

Does the law allow follow-on or stand-alone rights of action?

Private follow-on actions may be commenced where it is established that there has been a breach. Applicants in follow-on actions may seek orders for damages and the broad range of relief that is set out in Schedule 3 to the Competition Ordinance.

Are there industry specific regimes?

There are presently sector-specific competition rules in the telecommunications and broadcasting sectors.¹ The Competition Ordinance will, when the prohibitions come into force, repeal those competition rules. Telecommunications and broadcasting licensees will, from that point, be subject to the above prohibitions on anticompetitive agreements and abuse of market power in the same way as other undertakings.

However, for reasons that are unclear given the highly competitive state of the telecommunications markets in Hong Kong now, telecommunications licensees are being singled out to be subjected to (in addition to continuing merger control, discussed below) a new rule prohibiting exploitative conduct, the Telco Rule.

The new Telco Rule is being introduced by way of an amendment to the Telecommunications Ordinance: section 7Q. The prohibition will only apply to "dominant" licensees. Under the Telco Rule, a dominant licensee is prohibited from fixing and maintaining prices or charges at an "excessively high level" and setting "unfair trading terms and conditions".

Currently, merger control only applies to telecommunications carrier licensees per section 7P of the Telecommunications Ordinance. Section 7P will be repealed and carrier licensee related mergers will be regulated under the Merger Rule in the Competition Ordinance when the Merger Rule comes into force (see further below).

What are the enforcement trends?

There has been active litigation under the existing broadcasting and telecommunications sector competition laws over recent years, including in relation to alleged abuses of dominance and issues arising around changes in the telecommunications regulatory structures.

As the prohibitions in the Competition Ordinance are not yet in force, there are no enforcement trends outside the sectoral regimes.

Merger control filing requirements

Change in control of telecommunications carrier licensees is presently regulated under section 7P of the Telecommunications Ordinance. The Communications Authority may conduct such investigation as considered necessary to determine whether or not the change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market in Hong Kong.

¹ See sections 7K, 7L, 7N and 7P of the Telecommunications Ordinance and sections 13 and 14 of the Broadcasting Ordinance.

There is no pre-notification requirement under the Telecommunications Ordinance (although there may be an obligation to inform the Communications Authority under the conditions of a licence). The Communications Authority has two weeks from when it knew, or ought to have known, of the merger to challenge it.

The parties to a proposed merger may approach the Communications Authority to discuss the implications of the transaction and obtain informal advice on the transaction (which would not be binding), on a confidential basis if necessary, or may submit a formal request *ex ante* for consent to the proposed change.

The Merger Rule in the Competition Ordinance, when it comes into force, will apply to mergers which concern one or more parties that own or control, either directly or indirectly, a carrier licensee, replacing the current regulation under section 7P of the Telecommunications Ordinance. The Merger Rule will prohibit any such merger that has or is likely to have the effect of substantially lessening competition in Hong Kong.

There is no pre-notification requirement. The Competition Authorities will have 30 days from when they knew, or ought to have known, of the merger to challenge it.

Undertakings wanting advance comfort will also be able to apply to the Competition Authorities under the Competition Ordinance for a decision.



Key points

Key agencies and institutions	<p>Competition Commission of India (CCI) Office of the Director General (DG Office) Competition Appellate Tribunal (COMPAT)</p>
Key legislation	<p>The <i>Competition Act, 2002</i> (the Act) The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (as amended from time to time) (Combination Regulations) The Competition Commission of India (General) Regulations, 2009 (as amended from time to time) (General Regulations).</p>
Key prohibitions	<p>Horizontal arrangements, including cartels, that:</p> <ul style="list-style-type: none"> ■ fix prices ■ limit or control production, supply, technical development, markets, investment or provision of services ■ share markets, source of production or provision of services ■ result in bid rigging or collusive bidding. <p>Vertical arrangements including tie-ins, exclusive supply and distribution agreements, refusal to deal and resale price maintenance, that result in an appreciable adverse effect on competition (AAEC) in India</p> <p>Abuse of dominant position.</p>
Key exemptions/defences	<ul style="list-style-type: none"> ■ no AAEC in India. ■ arrangement is in the form of an efficiency enhancing joint venture. ■ imposition of reasonable conditions to protect certain intellectual property rights. <p>Agreements that relate exclusively to the production, supply, distribution or control of goods/ services for export.</p>

Leniency programme

The Act and its allied regulations provides that if a cartel member makes a full and true disclosure in respect of the alleged violations and such disclosure is vital, the CCI can reduce the fine applicable to the offending member.

The CCI can grant the first, second and third applicants, reduced penalties of up to 100%, 50% and 30% respectively.

Remedies and sanctions

The Act provides for very strict and stringent action against non-compliance of its provisions.

Anticompetitive agreements and abuse of dominant position:

- fines of up to 10% of the average turnover for the last three preceding financial years
- in case of cartels, the penalty is the higher of the amount equal to three times the total profit made for each year of the continuance of such agreement or 10% of the turnover for each year of the continuance of such agreement
- modification of agreement
- in cases of abuse of dominant position, division of the dominant enterprise.

Combinations:

- failure to notify a combination to the CCI may result in a fine of up to 1% of the total turnover or the assets of the enterprises involved, whichever is higher
- suitable modification to combination to eliminate possible AAEC.

Others:

- failure to comply with orders of the CCI may result in a fine which may extend to INR100,000 for each day during which such non-compliance occurs, subject to a maximum of INR100 million
- failure to pay the fine could result in imprisonment for up to a period of three years, or a fine of up to INR250 million.

Is there a merger control regime and is the regime suspensive or voluntary?

Notification of mergers, acquisitions and amalgamations (combinations) that meet the monetary thresholds set out in the Act is mandatory, unless:

- the assets or turnover of the target enterprise in India is below certain thresholds (*de minimis* exemption)
- the transaction is one listed under Section 6(4) of the Act
- the transaction is eligible for any other exemption from notification as set out in the Act and Combination Regulations.

The regime is suspensory in nature, and a combination cannot come into effect until clearance is received from the CCI or 210 days have passed from the date of notification, whichever is earlier.

What types of anticompetitive conduct are prohibited?

The Act seeks to prevent business practices that may have an AAEC in the relevant market in India. Specifically, the Act seeks to regulate three types of conduct:

- anticompetitive agreements
- abuse of dominant position
- mergers and acquisitions.

Anticompetitive agreements

The Act draws a distinction between anticompetitive agreements between/amongst competitors (horizontal agreements), and anticompetitive agreements between enterprises or persons at different stages or levels of the production chain (vertical agreements).

The Act sets out a list of horizontal agreements that are presumed to cause an AAEC within India. These four types of agreements include:

- price-fixing agreements
- agreements between competitors which seek to limit or control production, supply or markets
- market-sharing agreements between competitors irrespective of the form that they may take – this includes market sharing by way of product allocation, allocation of geographic markets or source of production
- bid-rigging agreements.

As far as the regulation of vertical agreements is concerned, there is no corresponding presumption of an AAEC under the Act.

Vertical agreements such as “tie-in,” “resale price maintenance,” “refusal to deal,” “exclusive supply agreements” and “exclusive distribution agreements” are specifically listed and may be prohibited under the Act depending on their actual or likely effect on conditions of competition.

Abuse of dominant position

The Act contains an exhaustive list of practices, which, when carried out by a dominant enterprise, would constitute an abuse of dominant position. These include:

- imposing unfair or discriminatory conditions on sale or purchase of goods/services including predatory pricing
- limiting or restricting the production of goods or provision of services of a market or the technical or scientific development relating to goods or services to the prejudice of consumers
- indulging in practice or practices resulting in denial of market access, in any manner
- making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature according to commercial usage, have no connection with the subject of such contracts
- using one’s dominant position in one relevant market to enter into or protect another.

Merger control

The Act prohibits mergers and acquisitions that cause, or are likely to cause, an AAEC in India.

What types of defences/exemptions are available?

Depending on the type of conduct alleged, there are different defences/exemptions available.

Anticompetitive agreements

In the case of horizontal arrangements, it is presumed that these will have an AAEC in India. This is, however, a rebuttable presumption. The presumption does not apply to any horizontal agreement entered into by way of an efficiency-enhancing joint venture.

A similar presumption does not attach to vertical arrangements unless it is shown that the arrangement causes, or is likely to cause, an AAEC in India.

Finally, the provisions relating to anticompetitive agreements do not restrict:

- a person from imposing "reasonable conditions, as may be necessary for protecting" his intellectual property rights as conferred upon him under certain specific statutes (*Copyright Act, Patents Act, Trade and Merchandise Marks Act, Trade Marks Act, Geographical Indication of Goods (Registration and Protection) Act, Designs Act, and Semi-conductor Integrated Circuits Layout-Design Act*)
- the right of any person to export goods so long as the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Merger control

A combination must be notified prior to completion to the CCI if it meets the monetary thresholds in the Act unless:

- the assets held or turnover generated in India by the target enterprise (including its subsidiaries) is below INR2,500 million or INR7,500 million respectively;
- the transaction is listed in Section 6(4) of the Act (share subscription, financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to a covenant of a loan or investment agreement)*;
- the transaction qualifies for any of the other exemptions listed in the Combination Regulations (please see Annex 1 for a complete list of exemptions).

**The transactions listed in Section 6(4) must instead be notified to the CCI within seven days of the date of the acquisition. This is more to inform the CCI rather than seek consent for the transaction.*

What are the substantive laws on cartels in the jurisdiction?

The CCI refers to cartels in the context of horizontal arrangements between competitors. There are certain arrangements that are presumed to cause an AAEC in India:

- price-fixing agreements
- agreements between competitors which seek to limit or control production, supply or markets
- market-sharing agreements between competitors irrespective

of the form that they may take; this includes market sharing by way of product allocation, allocation of geographic markets or source of production

- bid-rigging agreements.

This is a rebuttable presumption, which does not apply to any horizontal agreement entered into by way of an efficiency enhancing joint venture.

What are the criminal and civil sanctions?

The Act prescribes significant penalties for the violation of its provisions.

Anticompetitive agreements and abuse of dominant position

The CCI may impose fines of up to 10% of the average turnover for the last three preceding financial years upon each of such persons or enterprises which are parties to such agreements or abuse. In the case of cartels, the CCI may impose the higher of the amount equal to three times the total profits for each year of the continuance of such agreement or 10% of turnover for each year of the continuance of the agreement.

The CCI may require parties to an anticompetitive agreement or enterprises abusing their dominant positions to "cease and desist" from continuing with such agreements or practices. The CCI may also sanction modification of agreements which are found to be anticompetitive. In the case of abuse of dominance, the CCI has the power to order the division of the dominant enterprise.

Merger control

If the CCI is of the opinion that the combination will cause or is likely to cause an AAEC within India, it may either pass an order prohibiting the proposed combination or may permit the combination subject to modifications in the scheme of merger, acquisition or amalgamation. Failure to notify a combination to the CCI can result in a fine of up to 1% of the total turnover or the assets of the enterprises involved, whichever is higher.

Others

Non-compliance with the orders passed by the CCI or directions of the DG Office may attract a penalty of INR100,000 for each day of non-compliance subject to a maximum of INR 100 million. Failure to pay the fine could result in imprisonment for up to a period of three years, or a fine of up to INR250 million.

What are the regulator's investigatory powers?

The CCI is entrusted with extensive powers of investigation with respect to anticompetitive practices, which include powers to summon and enforce the attendance of any person, examine him on oath, receive evidence on affidavit and issue commissions for the examination of witnesses and documents. While carrying out its functions, the CCI is assisted by the DG Office and other officers and staff of the CCI. The DG Office serves as the investigative arm of the CCI and carries out investigations when so directed by the CCI.

The decisions of the CCI may be challenged before the three-member COMPAT. A further appeal from the decision of the COMPAT may lie before the Supreme Court of India.

The Act is based on the "effects doctrine" and grants the CCI jurisdiction over any agreement, abuse of a dominant position or combination which takes place outside of India as long as such agreements, conduct or combination cause or are likely to cause an AAEC in India.

Does the law allow follow on or stand alone rights of action?

Under Section 53N of the Act, the COMPAT may pass an order for recovery of compensation from any enterprise for any loss or damage shown to have been suffered as a result of any contravention of the provisions of Chapter II (anticompetitive agreements, abuse of dominant position, and merger control), having been committed by an enterprise. This claim for compensation can be filed by the Central Government, a State Government, local authority, or any enterprise or person.

The claim may arise from the findings of the CCI, order of the COMPAT (in an appeal against the findings of the CCI), under Section 42A (compensation for contravention of orders of the CCI) or Section 53Q(2) (compensation for contravention of orders of the COMPAT).

Are there industry-specific regimes?

In addition to the carve-outs for intellectual property rights and export-oriented agreements set out above, several industries are subject to the jurisdiction of specialist regulators. For instance, the Telecom Regulatory Authority of India is tasked with overseeing the telecommunications sector in India. However, the jurisdiction of the CCI to proceed with an investigation is independent of

other specialist regulatory agencies.

To facilitate dialogue between the CCI and such sectoral regulators, the Act and General Regulations provide for a reference mechanism. In a proceeding before a statutory authority, where an issue is raised upon which the decision may run contrary to the Act, the statutory authority may refer the issue to the CCI.

Conversely, the CCI may also make references to relevant statutory authorities. However, in either case, such references are not mandatory.

Finally, the Central Government has the ability to exempt from the application of the Act, or any provision therein:

- any class of enterprise if the exemption is necessary in the interest of State security or public interest
- any practice or agreement arising out of or in accordance with any obligation under any treaty, agreement or convention with another country(ies)
- any enterprise which performs a sovereign function on behalf of the Central Government or a State Government.

To date, this provision has been used to exempt failing banks (forced bank mergers under Section 45 of the *Banking Regulation Act, 1949*) from the merger control provisions for a limited period of five years. However, the Ministry of Corporate Affairs recently rejected a request by the Reserve Bank of India for a blanket exemption from the Act for forced mergers of distressed banks.

What are the enforcement trends?

Anticompetitive agreements and abuse of dominant position

The CCI has taken its role as antitrust regulator very seriously, and this is evident from the sizeable investigations undertaken and penalties imposed, in the short time since its commencement in May 2009.

For instance, the CCI's investigation into alleged cartelization in the cement industry ended with the imposition of a fine of INR63 billion on 11 cement manufacturers and INR7.3 million on the industry association. The abuse of dominance cases won against real estate developer DLF and the National Stock Exchange resulted in hefty fines of INR6.3 billion and INR555 million respectively. In several cases, penalties have been in the range of 5-10% of the turnover of the errant enterprise.

The CCI is also faced with several "copy-cat" cases, largely spurred by investigations previously conducted or currently pending before regulators in the European Union and the United States of America.

Finally, recent events indicate that the CCI will be taking two areas into greater consideration: firstly, the interplay of intellectual property rights and competition law (particularly in the context of standard essential patents and FRAND commitments); and the issue of individual liability for contraventions by enterprises.

Merger control

The CCI has cleared over 100 combinations in the first two years since the introduction of the merger control regime, and some key trends have emerged.

First, the exemption from notification for offshore transactions should be treated with extreme caution. The CCI's decisional practice shows that so long as the parties meet the monetary thresholds in India (often through the presence of subsidiaries), the transaction should be notified, despite the absence of effect on competition in India.

Second, the CCI has approved three different combinations only after the parties offered binding commitments, showing its willingness to consider binding remedies to clear otherwise troublesome notifications.

Third, the CCI does not seem to recognise the distinction between 'full function' and 'partial function' joint ventures. If the acquisition of shares, voting rights, assets or control in a joint venture, whether green-field or brown-field, meets the asset/turnover thresholds prescribed in the Act and does not qualify for any exemption, it will require notification to the CCI.

Merger control filing requirements

The Act requires that every merger, acquisition or amalgamation that meets certain prescribed asset or turnover thresholds be necessarily notified to the CCI for its approval. Section 5 of the Act and the Combination Regulations together set out a three-step process to determine whether a transaction requires notification.

Step 1: 'Combined entity' threshold

The first step involves an evaluation of whether the combined value of assets or turnover of the acquirer/acquirer group acquiring the shares/control/voting rights/assets and the target enterprise exceed the 'combined entity' thresholds contained in Section 5 of the Act.

Under the Act, different combined entity thresholds are prescribed depending on whether the transaction involves parties that are in India or outside India. The asset and turnover thresholds prescribed under Section 5 of the Act are:

India		
	Assets	Turnover
Either acquirer or target or both have:	INR15,000 million (USD250 million)	or INR45,000 million (USD750 million)
Group to which the target will belong has:	INR60,000 million (USD1,000 million)	or INR180,000 million (USD3,000 million)
Worldwide		
	Assets	Turnover
Either acquirer or target or both have:	USD750 million INCLUDING assets of at least INR7,500 million (USD125 million) in India	or USD2,250 million INCLUDING turnover in India of more than INR22,500 million (USD375 million)
In case of a merger, the enterprise after merger or created as a result of merger		
Group has:	USD3,000 million INCLUDING assets of at least INR7,500 million (USD125 million) in India	or USD9,000 million INCLUDING turnover in India of more than INR22,500 million (USD375 million)

[USD1= INR60]

Step 2: 'De-minimis' threshold

The second step involves an evaluation of whether the *value* of the assets or turnover of the target enterprise meet the '*de-minimis*' thresholds introduced through the notification dated 4 March 2011 and clarified by a subsequent notification dated 27 May 2011.

For a combination to be exempt from pre-merger notification under the '*de-minimis*' test, the target enterprise must EITHER have assets of less than INR2,500 million (approximately USD41 million²) in India, or a turnover of less than INR7,500 million (approximately USD125 million³) in India. It is important to note that the '*de-minimis*' exemption applies to acquisitions only, and the benefit of this exemption is available for a limited period of five years from 4 March 2011.

Step 3: Exemptions from pre-merger filing

If a transaction meets the asset/turnover thresholds mentioned in Steps 1 and 2, then an evaluation as to whether the transaction qualifies for any other exemption has to be made. There are two broad categories of transactions that may be exempt from the prior notification requirement to the CCI:

- the transactions listed in Section 6(4) of the Act
- the transactions identified as ordinarily not likely to cause an AAEC in Schedule I to the Combination Regulations (see Annex 1).

Potential amendments to the Act

In 2012, the Government of India introduced the *Competition Amendment Bill, 2012* (Bill) which, if successfully passed in the coming months, will introduce significant amendments to the Act.

² USD1=INR60

³ Ibid

Most importantly, the Bill seeks to introduce the concept of 'joint dominance' under Section 4 of the Act. With this amendment, the CCI will be able to assess dominance on the basis of the combined ability of two or more enterprises to act independently of the competitive forces in the relevant market, in cases where one enterprise does not qualify as being dominant on its own.

The Bill also contains an enabling provision, which will give the Government the flexibility to specify sector-specific asset/turnover thresholds. These will override the general thresholds currently set out in the Act with respect to those sectors.

In terms of procedure, one of the most controversial amendments in the Bill is that relating to the CCI's power of 'search and seizure'. The Bill replaces the existing requirement for the DG Office to seek prior sanction from the Chief Judicial or Metropolitan Magistrate to conduct a search or seizure operation with a requirement that can rely on prior sanction from the Chairperson of the CCI instead. This will most likely ease the process for conducting 'dawn raids' and we can expect this power to be exercised frequently during investigations.

Finally, the Bill also contains several other small, yet significant, changes to the Act. These include:

- providing an opportunity for parties to be heard before imposing a penalty
- reducing the 'waiting period' for merger clearance from the existing 210 days to 180 days
- clarifying the definition of the term 'turnover' to exclude the taxes on the sale of goods or provision of services.

ANNEX 1 - other exemptions listed in the Combination Regulations

Schedule I to the Combination Regulations identifies certain transactions that are ordinarily not likely to cause an AAEC, and hence need not normally be notified to the CCI. These include:

- Acquisition of shares or voting rights made solely as an investment or in the ordinary course of business, provided that the total shares or voting rights held by the acquirer directly or indirectly, does not entitle the acquirer to hold 25% or more of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a share holders' agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.
- An acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, not resulting in gross acquisition of more than 5% of the shares or voting rights of such enterprise in a financial year, where the acquirer or its group, prior to acquisition, already holds 25% or more shares or voting rights of the enterprise, but does not hold 50% or more of the shares or voting rights of the enterprise, either prior to or after such acquisition – *provided that such acquisition does not result in acquisition of sole or joint control of such enterprise by the acquirer or its group.*
- An acquisition of shares or voting rights, where the acquirer, prior to acquisition, has 50% or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the transaction results in transfer from joint control to sole control.
- Acquisition of assets not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of an enterprise, and not resulting in acquisition of substantial business operations in a particular location or for a particular product or service, irrespective of whether such assets are organised as a separate legal entity.
- An amended or renewed tender offer, where a notice has been filed with the CCI prior to such amendment or renewal.
- An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables, and other similar current assets in the ordinary course of business.
- Acquisition of shares or voting rights pursuant to a bonus issue, stock split, consolidation, buy back or rights issue, not leading to acquisition of control.
- Acquisition of shares or voting rights by a securities underwriter or a stockbroker on behalf of a client in the ordinary course of its business and in the process of underwriting or stock broking.
- Acquisition of control, shares, voting rights or assets by one person or enterprise, of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are not part of the same group.
- A merger or amalgamation of two enterprises where one of the enterprises has more than 50% shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than 50% shares or voting rights in each of such enterprises are held by enterprise(s) within the same group – *provided that the transaction does not result in transfer from joint control to sole control.*
- A combination taking place entirely outside India with insignificant local nexus and effect on markets in India.

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INDONESIA

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Key points

Key agencies and institutions	The Supervisory Commission for Business Competition (Komisi Pengawas Persaingan Usaha (KPPU))
Key legislation	<i>Law No. 5 of 1999 Regarding Prohibition of Monopolistic Practices and Unfair Business Competition</i> (Law No. 5/1999) Indonesian Criminal Code (Articles 382bis) Indonesian Civil Code (Article 1365) Government Regulation No 57/2010 KPPU implementing regulations.
Key prohibitions	Oligopoly agreements Price fixing agreements Price discrimination Predatory pricing Resale price maintenance Market allocation/segmentation Boycotts Forming cartels Forming trusts Forming monopolies, monopsonies and oligopsonies Closed contracts Cross-directorships/commissionerships in the same relevant market or closely related markets Taking unfair advantage of a dominant position Cross shareholding (majority ownership) in the same relevant market Vertical integration Market control Tender conspiracy.

<p>Key exemptions/defences</p>	<ul style="list-style-type: none"> ■ activities and agreements entered into as implementation of prevailing laws and regulations; ■ agreements related to intellectual property rights (eg licences, patents, trademarks, copyright, industrial product design, integrated electronic circuits and trade secrets). This exemption also applies to franchising arrangements; ■ agreements for stipulation of technical standards of goods and or services which do not prohibit or impede competition; ■ agency agreements which do not stipulate the resupply of goods and/or services at a price level lower than the agreed price; ■ cooperation agreements in the field of research for upgrading or improving the living standards of society; ■ international agreements ratified by the Indonesian Government; ■ export agreements and/or actions not disrupting domestic needs and/or supplies; ■ small scale business actors; ■ activities of cooperatives aimed specifically at serving the members of the cooperative.
<p>Leniency programme</p>	<p>There is no recognition of leniency in Law No.5/1999 or any KPPU implementing regulations.</p>
<p>Remedies and sanctions</p>	<p>Sanctions for business actors that have been proven to have violated Law No.5/1999 are stipulated under Article 47 (administrative sanctions) and Articles 48 and 49 (criminal sanctions) of Law No. 5/1999 and include:</p> <ul style="list-style-type: none"> ■ decision to annul anticompetitive agreements; ■ order to discontinue vertical integration; ■ order to discontinue practices proven to be monopolistic and/or unfair business competition or be harmful to society; ■ order to discontinue abuse of a dominant position; ■ decision of annulment of merger, amalgamation or shares acquisition; ■ decision to pay compensation for damages; ■ administrative fines ranging from IDR1 billion to IDR25 billion; ■ criminal fines ranging from IDR1 billion to IDR100 billion; ■ director and commissioner disqualification; ■ revocation of business licence; and ■ imprisonment.
<p>Is there a merger control regime and is the regime suspensive or voluntary?</p>	<p>In accordance with Law No. 5/1999, Government Regulation No 57/2010 requires business actors that conduct mergers, amalgamations or share acquisition transactions that cause their assets' value and/or sales value to exceed a certain threshold to notify such transactions to the KPPU no later than 30 working days after the merger, amalgamation or share acquisition transaction becomes legally effective.</p>

What types of anticompetitive conduct are prohibited?

Categories of conduct that could potentially give rise to competition law issues under Chapter III of Law No. 5/1999 (prohibited contracts) include:

- forming contracts to jointly control production and/or the marketing of goods and services (oligopoly) that can result in monopolistic practices and/or unfair business competition – “jointly controlling production and/or marketing” arises where two or three business actors or groups of business actors jointly own more than 75% of the market share of one certain type of goods or services;
- price-fixing between business actors who are in competition with each other in the same market, except for joint ventures – price-fixing may encompass frequent exchanges of information on future pricing intentions or price signalling;
- price discrimination – causing buyers to pay a different price from that which must be paid by other buyers for the same type of goods/services;
- agreements between business actors who are in competition with each other to fix the price of goods or services below the market price that can result in unfair business competition;
- resale price maintenance that can result in unfair business competition;
- dividing market areas or allocating geographical markets for goods/services that can result in monopolistic practices and/or unfair business competition;
- boycotts – agreeing with other business actors to refuse (on) selling goods or services of another business actor;
- making contracts with other business competitors which could hamper other business actors from engaging in the same type of business, either for domestic or export purposes;
- forming cartels (see below for definition of a cartel);
- forming trusts – combining companies into groups while maintaining the continuation of each of such companies with the intention to control production and/or marketing of goods and services that can result in monopolistic practices and/or unfair business competition;
- oligopsonies – business actors are prohibited from contracting with competitors to jointly control the buying or receiving of supplies in order to control the price of goods and services in the relevant market, that can result in monopolistic practices and/or unfair business competition (“jointly controlling production” arises where two or three business actors or groups of business actors own more than 75% of the market share of one certain type of goods or services);
- vertical integration – business actors are prohibited from making contracts with other business actors with the intention of controlling different levels of the supply chain of certain goods or services, which may potentially result in unfair business competition and/or be harmful to society;
- closed contracts – includes, among others, prohibition for business actors to enter into any contracts that impose terms by which the parties receiving the goods and/or services shall or shall not resupply those goods to certain parties or at certain places; and
- contracting with parties overseas to cause monopolistic practices and/or unfair business competition.

Categories of conduct that could potentially give rise to competition law issues under Chapter IV of Law No. 5/1999 (banned activities) include:

- monopoly and monopsony – Controlling production or controlling supply of goods and/or services in a relevant market that can result in monopolistic practices and/or unfair business competition.

- market control – business actors are prohibited from:
 - barring certain other business actors from entering the market;
 - barring consumers or customers from doing business with competitors;
 - limit the distribution or sales of goods or services in the relevant market;
 - engage in discriminatory practices towards certain business actors;
 - predatory pricing, that can result in monopolistic practices and/or unfair business competition; and
 - engaging in unfair practices in determining production cost and other costs which forms part of the price component of goods or services that can result in unfair business competition.
- conspiracy – business actors are prohibited from conspiring with other parties:
 - to determine the winner of a tender;
 - to obtain information regarding the business activities of their competitors which are classified as company confidential information; and
 - to impede the production or marketing of goods or services of their competitors so that the goods or services offered or supplied in the relevant market are reduced, whether in quantity or quality or not within the required timeline.

Categories of conduct that could potentially give rise to competition law issues under Chapter V of Law No. 5/1999 (dominant position) include:

- cross directorship/commissionership positions – a person who serves as a director or commissioner of a company is prohibited from concurrently being a director or commissioner

- at other enterprises in the same market or a closely related market or if such companies are jointly able to control a certain market of goods or services that can result in monopolistic practices and/or unfair business competition;
- holding majority stakes in enterprises in the same relevant market if this results in one business actor or a group of business actors controls more than 50% of the market share of one type of certain goods or services, or two or three business actors or groups of business actors control more than 75% of the market share of one type of certain goods or services;
- taking unfair advantage of a dominant position – a dominant position arises where one business actor or group of business actors controls 50% or more of the market share of one type of certain goods or service, or two or three business actors or groups of business actors control 75% or more of the market share of one type of certain goods or services; and
- conducting mergers, amalgamations or acquisitions of companies that can result in monopolistic practices and/or unfair business competition.

What types of defences/exemptions are available?

Under Article 50 of Law No. 5/1999, several activities, arrangements or agreements have been exempted from the operation of Law No. 5/1999 as follows:

- activities and agreements entered into as implementation of prevailing laws and regulations;
- agreements related to intellectual property rights (eg licences, patents, trademarks, copyright, industrial product design, integrated electronic circuits and trade secrets); this exemption also applies to franchising arrangements;
- agreements for stipulation of technical standards of goods and

- or services which do not prohibit or impede competition;
- agency agreements that do not stipulate the resupply of goods and/or services at a price level lower than the agreed price;
- cooperation agreements in the field of research for upgrading or improving the living standards of society;
- international agreements ratified by the Indonesian Government;
- export agreements and/or actions not disrupting domestic needs and/or supplies;
- small-scale business actors; and
- activities of cooperatives aimed specifically at serving the members of the cooperative.

Some of the exemptions set out in Article 50 of Law No. 5/1999 are qualified by, and must be read in light of, subsequent KPPU regulations.

What are the substantive laws on cartels in the jurisdiction?

The definition of a “cartel” is found in Article 11 of Law No. 5/1999. A cartel occurs where there is an agreement (in writing or verbally) between a business actor and its competitors, the intent of which is to manipulate price by arranging production and/or marketing of goods and/or services in the same relevant market that can result in monopolistic practices and/or unfair business competition.

In addition to Article 11, KPPU has also issued KPPU Regulation No. 4/2010, which provides a detailed description of cartel practices.

What are the criminal and civil sanctions?

Sanctions for business actors that have been proven to have violated Law No. 5/1999 are stipulated under Article 47 (administrative sanctions) and Articles 48 and 49 (criminal sanctions) of Law No. 5/1999 and can include the following sanctions.

Administrative sanctions

- annulment of anticompetitive agreements
- an order to discontinue vertical integration
- an order to discontinue practices proven to be monopolistic and/or unfair business competition or be harmful to society
- order to discontinue abuse of a dominant position
- annulment of mergers, amalgamations or shares acquisitions
- decision to pay compensation for damages
- administrative fines.

Criminal sanctions

- criminal fines ranging from IDR1 billion to IDR100 billion
- director and commissioner disqualification
- revocation of business licence
- imprisonment.

What are the regulator’s investigatory powers?

To supervise the application of Law No. 5/1999, the KPPU has been granted broad powers of authority to proceed with investigations and adjudicate in competition cases. The KPPU is able to examine agreements, business activities and/or actions performed by business actors. This includes the power

to summon witnesses of fact and expert witnesses, as well as to order disclosure of documents from private and government institutions.

Under the prevailing laws, KPPU's powers of investigation do not extend to conducting raids on the premises of suspected infringers or other relevant persons.

Investigations can be commenced on the initiative of the KPPU, by a member of the public (without a request for compensation), or by an aggrieved party (with a request for compensation).

Does the law allow follow on or stand alone rights of action?

Law No. 5/1999 does not provide a mechanism to bring private actions directly to the Indonesian courts. However, Law No.5/1999 and the Guidelines on Administrative Sanction, do allow injured parties to claim compensation through a quasi-judicial procedure by the KPPU. KPPU decisions are subject to appeal at the District Court and the Supreme Court.

Despite the lack of an express provision for private enforcement of Law No. 5/1999, it may be possible to use other Indonesian legal provisions to obtain recompense for competition law infringements through the courts. Article 1365 of the Indonesian Civil Code provides that any party suffering losses from an unlawful act (tort), can claim damages through the courts.

Are there industry-specific regimes?

Different merger control filing thresholds apply in the case of financial institutions (in respect of the assets limb of the threshold).

What are the enforcement trends?

During the 14 years that competition law has been enforced in Indonesia, around 69% of cases handled by the KPPU related to tender conspiracies, particularly involving Government authorities. The remaining cases are related to other matters, including cartels and abuse of dominant position.

From 2010 to 2013, KPPU examined around 145 notifications of merger and acquisition transactions. Approximately in 84 instances, KPPU indicated that no violation of Law No. 5/1999 was found. In less than ten instances, KPPU found that the transaction notified was not a qualifying transaction under the notification thresholds.

Merger control filing requirements

A mandatory post merger, amalgamation or share acquisition filing is required if the combined assets of the involved parties in Indonesia exceed IDR2.5 trillion, or the combined turnover of the involved parties in Indonesia exceeds IDR5 trillion. In the case of financial institutions, the first (assets) threshold is IDR20 trillion.

The thresholds can be met by one party only. However, for foreign-to-foreign transactions, a filing is only required if both parties have operations, directly or indirectly, in Indonesia (eg through a subsidiary or affiliate in Indonesia), or if at least one party has operations in Indonesia and the other has turnover in Indonesia.

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Key points

Key agencies and institutions	Japan Fair Trade Commission (JFTC)
Key legislation	The <i>Law relating to Prohibition of Private Monopolisation and Maintenance of Fair Trade</i> (Law No. 54 of 14 April 1947, as amended) (Anti-Monopoly Law)
Key prohibitions	<p>Unreasonable restraints of trade, such as cartels and bid-riggings</p> <p>Private monopolisation</p> <p>Unfair trade practices, including:</p> <ul style="list-style-type: none"> - refusal to trade - discriminatory pricing - tying - resale price restriction <p>Exclusive dealing</p> <p>Abuse of dominant bargaining position</p> <p>Anticompetitive acts by trade associations</p> <p>Anticompetitive shareholding</p> <p>Anticompetitive mergers and acquisitions.</p>
Key exemptions/defences	<p>Exemptions</p> <p>The JFTC's guidelines provide some (but not decisive) safe-harbours for certain unfair trade practices as well as mergers and acquisitions.</p> <p>The Anti-Monopoly Law does not apply to acts recognisable as the exercise of rights under the intellectual property law.</p> <p>Price for books, newspapers and music CDs are exempted from the prohibition of the resale price restriction.</p> <p>Cartels to increase the price to reflect the increase of the new consumption tax will be exempted subject to the prior approval by the JFTC.</p> <p>Defences</p> <p>The defences are focused on how insignificant the anticompetitive effects are. Business reasons and public interests may be taken into account by the court and/or the JFTC, however, such defences could be only an element of the examination of the anticompetitive effect and are not determinative.</p>

<p>Leniency programme</p>	<p><i>Reduction of fines</i></p> <p>The first company which reports the cartel to the JFTC will enjoy full immunity, and the administrative fine will be reduced 50% for the second company, and 30% for the third, fourth and fifth companies.</p> <p>Even after a dawn raid by the JFTC, up to three companies that report a cartel can have a 30% reduction in the administrative fine.</p> <p><i>Conditions of availability of the leniency programme</i></p> <p>The applicant must not have committed the relevant violation after the dawn raid (or after the date of the submission of the report if the report is submitted after the dawn raid).</p> <p>The applicant must not have coerced other cartel member(s) to commit the violation or blocked other cartel member(s) from ceasing to commit the violation.</p> <p>The report in the JFTC's form is filed within the deadline.</p> <p>The applicant submits additional reports or materials requested by the JFTC.</p> <p>The report or materials submitted by the applicant do not contain false information.</p> <p>The applicant does not disclose the fact of application to third parties without justifiable reasons.</p> <p>In the case of the fourth and fifth applicants, or any applicant making an application after the dawn raid, their reports and materials include the facts of which the JFTC was aware at the time of the report.</p>
<p>Remedies and sanctions</p>	<ul style="list-style-type: none"> ■ Cease-and-desist orders by the JFTC ■ Administrative fines by the JFTC ■ Civil damage claims and injunctions by the courts ■ Criminal sanctions by the courts following prosecution by the public prosecutors.
<p>Is there a merger control regime and is the regime suspensive or voluntary?</p>	<ul style="list-style-type: none"> ■ Mandatory filing ■ Suspensory waiting period for 30 calendar days (or less, if the JFTC approves) from formal acceptance of complete filing - transactions can be closed when the waiting period expired, but doing so prior to final clearance gives rise to risk exposure ■ No filing deadline ■ No filing fee.

What types of anticompetitive conduct are prohibited?

Unreasonable restraints of trade

Cartels, bid rigging and other cooperative conducts (such as joint R&D, information exchange, joint production, joint sales and joint purchase) that substantially constrain competition are prohibited.

Private monopolisation

There are two types of private monopolisation.

- *Exclusionary private monopolisation*: Companies that, individually or jointly, exclude competitors from the market by, for example, unfair conduct such as unjustly low-price sales, dealing on exclusive terms, tying, refusal to supply, and discriminatory treatment.
- *Private monopolisation by control*: Companies that, individually or jointly, control the business activities of other company(s) by, for example, taking advantage of their dominant bargaining position vis-à-vis such other company(s).

The conduct above is prohibited if such conduct substantially constrains competition. The JFTC's guidelines on exclusionary private monopolisation state that the JFTC will prioritise investigation in cases where a company has a market share of more than about 50% in the market concerned.

Unfair trade practices

Unfair trade practices that potentially restrain fair competition are prohibited. Unfair trade practices are:

- refusal to trade
- discriminatory pricing/treatment
- unjust low price sales
- unjust high price purchasing
- deceptive customer inducement
- customer inducement by unjust benefits
- tying
- trade on exclusive terms or other restrictive terms
- resale price restriction
- abuse of dominant bargaining position
- interference with competitors' transactions
- interference with internal operations of competitors.

Anticompetitive acts by trade associations

Trade associations are also prohibited from constraining companies' business by, for example, limiting the number of companies in a specific market or prescribing prices, production volumes and sales channels to the members of the trade associations.

Companies with excessive market power

No one can establish a company with excessive market power by holding shares in a Japanese company. No company can have excessive market power by acquiring or holding shares in a Japanese company.

Acquisition by banks and insurance companies

Banks and insurance companies cannot acquire voting shares in a Japanese company if it results in that bank or insurance company holding voting shares in excess of 5% (10%, in the case of insurance companies) in the target company.

Mergers and acquisitions

If mergers and acquisitions will substantially restrain competition in any particular market, such mergers and acquisitions will be prohibited.

What types of defences/exemptions are available?

Exemptions

JFTC guidelines – The JFTC's guidelines provide a kind of safe-harbour (but are not definitive) for certain unfair trade practices as well as mergers and acquisitions. For example, refusal to deal by a company does not normally raise a competition issue unless the company has more than 10% share or a top-three position in the market, and mergers and acquisitions do not normally raise a competition issue if the parties' combined market share does not exceed 35% and the Herfindahl-Hirschman Index after the transaction does not exceed 2500.

Intellectual property – The Anti-Monopoly Law does not apply to acts recognisable as the exercise of rights under the intellectual property law. However, this does not mean all the acts related to the intellectual property law should be exempted. For example, if a licensor refuses to license to a licensee because the licensee refuses the licensor's demands on the resale price or other anticompetitive restrictions, such refusal to license will be a breach of the Anti-Monopoly Law.

Permitted resale price maintenance – Prices for books, newspapers and music CDs are exempted from the prohibition of the resale price restriction.

Exemption related to the new consumption tax – Cartels increasing prices to reflect the increase of the new consumption tax (which will increase from 5% to 8% in April 2014) will be exempted, subject to prior approval by the JFTC. This exemption rule is valid until 31 March 2017.

Defences

Overall, the defences available are focused on how insignificant the anticompetitive effects are. Business reasons and public interests may be taken into account by the court and/or the JFTC; however, such defences can only be an element of the examination of the anticompetitive effects and are not determinative.

In merger cases, the failing firm theory can be applied.

In cartel or bid rigging cases, it is practically impossible to argue there are pro-competitive effects. For other cooperative conducts, such as joint R&D, pro-competitive effects can be argued.

What are the substantive laws on cartels in the jurisdiction?

Cartels are prohibited as "unreasonable restraints of trade" under the Anti-Monopoly Law.

There is no distinction between "hard-core cartels" and "non-hard core cartels" in Japan. However, price-fixing, supply restraint cartels, market allocations, bid-riggings and group boycotts are recognised as "vicious cases" by the JFTC. Although these vicious cases are not illegal per se, it is hardly possible to argue that there is no substantial constraint of competition in these vicious cases.

What are the criminal and civil sanctions?

Cease-and-desist order

If the activities of companies or trade associations are found to be in violation of the Anti-Monopoly Law, the JFTC may order the companies or trade associations to cease such activities and take necessary measures.

Administrative fines

Companies or trade associations that commit unreasonable restraints of trade (such as cartels), private monopolisations or abuses of a dominant bargaining position, are subject to administrative fines by the JFTC.

In addition, if a company has received a cease-and-desist order within the last ten years regarding a joint refusal to trade, discriminatory pricing, unjust low price sales or resale price restriction, and commits the same type of conduct, the company will be subject to administrative fines by the JFTC.

The amount of administrative fines is, in principle:

- 10% of the turnover of goods or services associated with the violation gained during the period of the violation for unreasonable restraints of trade and private monopolisations by control
- 6% for exclusionary private monopolisations
- 3% for joint refusal to trade, discriminatory pricing, unjust low price sales and resale price restriction
- the amount of administrative fines for abuse of a dominant bargaining position is, in principle, 1% of the amount of trade

between the company that abuses its dominant bargaining position and the counterparty.

Civil damage claims and injunctions

Normal damage claims under the Civil Code are available. Article 25 of the Anti-Monopoly Law provides that companies or trade associations cannot be exempted from liability of damages caused by unreasonable restraints of trades, private monopolisations and unfair trade practices on the grounds that they did not have any intention or negligence. Article 25 is available only after the cease-and-desist order or the JFTC's decision has become final and binding. Injunctive requests to stop the violation of unfair trade practices may be filed with the court.

Criminal sanctions

In addition to the penalties above, companies may be subject to criminal punishments by a fine of up to JPY500 million where they commit unreasonable restraints of trade or private monopolisations.

Trade associations and members that substantially restrain competition in a market may also be punished by a fine of up to JPY500 million.

The officers and employees of companies and trade associations may be punished personally by fines and/or imprisonment. In addition, breaches of other regulations for trade associations, merger regulations and other procedural rules may be subject to criminal sanctions.

Criminal sanctions for unfair trade practices are triggered only when the company has failed to comply with the JFTC's final and binding cease-and-desist order. Criminal sanctions are subject to an accusation by the JFTC. The JFTC will not file the accusation against the first applicant of the leniency programme, including its officers and employees if they cooperate with the investigation. When a criminal fine is charged, half of its amount is deducted from the administrative fine.

What are the regulator's investigatory powers?

The JFTC may conduct dawn raids, ie entering any companies' place of business (including private locations such as residences of officers or employees if necessary) and inspecting conditions of business operation and properties, accounting books and other documents and order such accounting books and other documents to be submitted. As there is no concept of "client-attorney legal privilege" in Japan, it is impossible to refuse to provide "legally-privileged" documents to the JFTC.

The JFTC may order persons to appear for interrogation, to hear their views or collect reports from them. Also, the JFTC may request experts to give testimony and submit reports.

In criminal cases, the JFTC may request suspects to appear at the JFTC for questioning. The JFTC may also visit, search, or seize with a warrant issued in advance by the courts.

Does the law allow follow on or stand alone rights of action?

A person who has been damaged by a violation of the Anti-Monopoly Law can file a claim with the courts both before or after the JFTC has found the fact of the violation. However, Article 25

of the Anti-Monopoly Law – which affirms the violator's liability without its intention or negligence – cannot be applied before the cease-and-desist order or the JFTC's decision has become final and binding (see above).

Are there industry-specific regimes?

The *Subcontract Act* regulates subcontract transactions to protect subcontractors, and prohibits, for example, late payments, reduced payments and refusal to receive the work from a subcontractor despite the fact that the subcontractor has no fault.

Special rules on unfair trade practices are designated for newspaper, logistics and large-scale retail businesses.

What are the enforcement trends?

The JFTC is actively enforcing the Anti-Monopoly Law, especially in the field of cartels and bid-riggings. The amount of administrative fines imposed by the JFTC has stayed high. In each of the last five years, total administrative fines exceeded JPY25 billion. 2012 marked a significant year for Japanese cartel enforcement, with the largest fine ever imposed on an individual company – JPY9.6 billion on a car parts manufacturer, a participant in a wire harness cartel.

The JFTC has also set up a task force that deals with the cases of abuse of dominant bargaining position. Also, the JFTC is very active on enforcing action on unjustly low prices by powerful retailers that may make it difficult for other competitors to conduct business. In 2012 alone, they issued more than 1,500 informal warnings to retailers on unjustly low prices.

Merger control filing requirements

Pre-merger filing is required if the following thresholds are met.

- An acquisition of shares will require filing if (a) the Japanese turnover of the buyer exceeds JPY20 billion (~EUR195.1 million) *and* (b) the Japanese turnover of the target exceeds JPY5 billion (~EUR48.8 million). Triggering thresholds for notification of share acquisitions are 20% and 50% voting interests.
- A merger will require filing if (a) the Japanese turnover of one party exceeds JPY20 billion (~EUR195.1 million) *and* (b) the Japanese turnover of the other party exceeds JPY5 billion (~EUR48.8million).
- Acquisition of all or an important part of a business or fixed assets will require filing if (a) the Japanese turnover of the buyer exceeds JPY20 billion (~EUR195.1 million) and (b) the Japanese turnover of the business or fixed assets to be transferred exceeds JPY3 billion (~EUR29 million).

In addition, there are thresholds regarding corporate splits (*kaisha bunkatsu*) and special share transfers (*kabushiki iten*) and the foreign law equivalents of those transaction structures.

'Turnover' is defined as including: (i) sales to customers located outside Japan if the seller knows, when executing the sales contract, that the products will be on-sold to Japan or redirected to the buyer's business in Japan, without changing their nature or form; and (ii) sales to customers located in Japan but excluding those which are known to the seller at the time of the contract to be for on-sale outside Japan or redirected to the buyer's business outside Japan, without changing their nature or form. Different

rules apply for the calculation of turnover for banks, insurance companies and dealers of certain financial instruments.



Key points

Key agencies and institutions	Malaysian Competition Commission (MyCC) Competition Appeal Tribunal
Key legislation	The <i>Competition Act</i> 2010 (the Competition Act) The <i>Competition Commission Act</i> 2010.
Key prohibitions	Anticompetitive agreements Abuse of a dominant position.
Key exemptions/defences	<p>It is possible to obtain exemption from the prohibition against anticompetitive agreements where all of the following conditions are met:</p> <ul style="list-style-type: none"> ■ significant identifiable technological, efficiency or social benefits arising from the anticompetitive agreement ■ benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition ■ detrimental effect of the agreement on competition is proportionate to the benefits provided ■ the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

Leniency programme

The Competition Act provides for a leniency regime with a reduction of up to a maximum of 100% of any penalties that would otherwise have been imposed. Leniency may be available to any enterprise which has:

- admitted its involvement in an infringement of any anticompetitive agreement prohibition
- provided information or other form of cooperation to the MyCC which has assisted significantly, or is likely to assist significantly, in the identification or investigation of any finding of an infringement of any prohibition by any other enterprises.

The degree of leniency awarded and the amount of reduction provided depends on:

- whether the enterprise was the first person to bring the suspected infringement to the attention of the MyCC;
- the stage in the investigation at which:
 - an involvement in the infringement was admitted; or
 - any information or other cooperation was provided; or
- any other circumstances which the MyCC considers appropriate.

Remedies and sanctions

Enterprises

The MyCC can impose financial penalties of up to 10% of the infringing enterprise's worldwide turnover for the period of the infringement. The MyCC may also specify steps required to be taken by the infringing enterprise that appear appropriate to the MyCC to end the infringement.

In relation to other offences – for instance, obstruction of the MyCC in its investigations or tipping off – an enterprise on conviction may be fined up to MYR5 million for a first offence and up to MYR10 million for any subsequent offences.

Individuals

Where a body corporate commits an offence, any person who at the time of the commission of the offence was a director, chief executive officer, chief operating officer, manager, secretary or other similar officer of the body corporate, or who was purporting to act in any such capacity, or was in any manner or to any extent responsible for the management of any of the affairs of the body corporate, or was assisting in such management can be charged severally or jointly in the same proceedings and can be deemed to have committed that offence.

Where a person commits other offences – for instance, obstruction of the MyCC in its investigations or tipping off – this person on conviction may be liable to a fine up to MYR1 million or imprisonment for a term not exceeding five years or both, and for a second or subsequent offence, a fine up to MYR2 million or imprisonment for a term not exceeding five years, or both.

Is there a merger control regime and is the regime suspensive or voluntary?

There is no merger control regime. However, mergers and setting up of joint ventures that have an effect on competition in any market may infringe the anticompetitive agreement prohibition.

What types of anticompetitive conduct are prohibited?

There are two types of anticompetitive conduct prohibitions.

The first is the Chapter 1 prohibition of anticompetitive agreement and the second is the Chapter 2 prohibition of an abuse of a dominant position.

The Chapter 1 prohibition applies to both horizontal and vertical agreements. A horizontal agreement is defined as an agreement between enterprises where each operates at the same level in the production or distribution chain, while a vertical agreement is defined as an agreement between enterprises where each of which operates at a different level in the production or distribution chain.

Specific activities that may fall within the Chapter 1 prohibition include horizontal agreements between enterprises that have the object to:

- fix, directly or indirectly, a purchase or selling price or any other trading conditions
- share market or sources of supply
- limit or control production, market outlets or market access, technical or technological development, or investment
- perform an act of bid rigging.

Specific activities that may fall within the Chapter 2 prohibition include:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions on any supplier or customer
- limiting or controlling production, market outlets or market

access, technical or technological development, or investment, to the prejudice of consumers

- refusing to supply to a particular enterprise or group or category of enterprises
- applying different conditions to equivalent transactions with other trading parties to an extent that may:
 - discourage new market entry, expansion or investment by an existing competitor
 - force from the market, or otherwise seriously damage, an existing competitor which is no less efficient than the enterprises in a dominant position
 - harm competition in any market in which the dominant enterprise is participating or in an upstream or downstream market
 - making the conclusion of contract subject to acceptance by other parties of supplementary conditions which, by their nature or according to commercial usage, have no connection with the subject matter of the contract
- any predatory behaviour towards competitors
- buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.

What types of defences/exemptions are available?

It is possible to obtain exemption from the Chapter 1 prohibition against anticompetitive agreements where all of the following are met:

- significant identifiable technological, efficiency or social benefits arising from the anticompetitive agreement

- benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition
- detrimental effect of the agreement on competition is proportionate to the benefits provided
- the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

Further, the Chapter 1 and Chapter 2 prohibitions do not apply to:

- an agreement or conduct to the extent in which it is engaged in order to comply with a legislative requirement
- collective bargaining activities or collective agreements in respect of employment terms and conditions and which are negotiated or concluded between parties which include both employers and employees or organisations established to represent the interests of employers or employees
- an enterprise entrusted with the operation of services of general economic interest or having the character or a revenue-producing monopoly insofar as the prohibitions under Chapters 1 and 2 of the Competition Act would obstruct the performance, in law or in fact, of the particular tasks assigned to that enterprise.

While the Competition Act applies to any ‘commercial activity’ both within and outside Malaysia, such ‘commercial activity’ does not include:

- any activity, directly or indirectly, in the exercise of governmental authority
- any activity conducted based on the principle of solidarity

- any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.

What are the substantive laws on cartels in the jurisdiction?

The substantive laws on cartels are contained in the Chapter 1 prohibition set out above.

What are the criminal and civil sanctions?

Enterprises

The MyCC can impose financial penalties of up to 10% of the infringing enterprise’s worldwide turnover for the period of the infringement. The MyCC may also specify steps that must be taken by the infringing enterprise, which appear, to the MyCC, to be appropriate to end the infringement.

Criminal sanctions relate to other offences – for instance, the obstruction of the MyCC in its investigations or tipping off. An enterprise, upon conviction, may be fined up to MYR5 million for a first offence and up to MYR10 million for any subsequent offences.

Individuals

Individuals face the possibility of criminal sanctions and where a body corporate commits an offence, any person who at the time of the commission of the offence was a director, chief executive officer, chief operating officer, manager, secretary or other similar officer of the body corporate, or was purporting to act in any such

capacity, or was in any manner or to any extent responsible for the management of any of the affairs of the body corporate, or was assisting in such management, could be charged severally or jointly in the same proceedings and could be deemed to have committed that offence.

Where a person commits other offences – for instance, obstruction of the MyCC in its investigations or tipping off, the person upon conviction may be liable to a fine of up to MYR1 million or imprisonment for a term not exceeding five years or both, and for a second or subsequent offence, a fine of up to MYR2 million or imprisonment for a term not exceeding five years or both.

What are the regulator's investigatory powers?

The MyCC may conduct any investigation it deems expedient if it has reason to suspect that any enterprise has infringed or is infringing any prohibition under the Competition Act, or that any person has committed or is committing any offence under the Competition Act.

The MyCC can, in writing, require any person whom it believes to be acquainted with the facts and circumstances of a case to produce documents or information or to make a statement to the MyCC, providing an explanation of any information or document. However, no person shall be required to produce or disclose any communication protected by legal professional privilege.

A Commission officer may also apply for a warrant authorising search and seizure of any record, book, account, document, computerized data or other thing which contains, or is reasonably suspected to contain, information about any infringement or offence suspected.

Where a Commission officer has reasonable cause to believe that a delay in obtaining a search warrant would adversely affect evidence of an infringement, or that the evidence would likely be tampered with, removed or destroyed, the Commission officer may enter the premises and exercise all the powers as if he were authorised to do so by a warrant.

Does the law allow follow on or stand alone rights of action?

Any person who suffers loss or damage directly as a result of an infringement of the Chapter 1 or Chapter 2 prohibitions has a right of action for relief in civil proceedings in a court against any enterprise which is, or which has at the material time, been a party to such infringement. This action may be brought regardless of whether such person dealt directly or indirectly with the enterprise.

Are there industry specific regimes?

The Competition Act does not apply to any commercial activity regulated under the *Communications and Multimedia Act 1998* (under the purview of the Communications and Multimedia Commission) and the *Energy Commission Act 2001* (under the purview of the Energy Commission).

What are the enforcement trends?

In 2012, the MyCC adopted a softer approach and focused on advocacy and encouraging compliance. However, in line with MyCC's policy to shift to stricter enforcement against cartels, bid rigging and trade associations, 2013 has seen MyCC investigate actively and exercise its powers.

In September 2013, the MyCC issued its proposed decision to fine two airlines MYR10 million each. MyCC held that both airlines had entered into an agreement that had as its object the sharing of markets in the air transport services sector. This case is now pending an oral hearing before the MyCC.

The MyCC also took prompt steps to issue a proposed interim measure in September 2013 to suspend the decision made by an association of lorry owners to raise its members' transportation charges. The association then announced that it would rescind the decision and that its members would make their own independent decision on any changes to their transportation charges.

The MyCC also issued a proposed decision in November 2013 to fine a steel manufacturer MYR4.5 million for abusing its dominant position by charging a price for hot rolled coil products that was disproportionate to the selling price of its cold rolled coil products. MyCC held that this amounted to a margin squeeze that produced anticompetitive effects in the market.

Merger control filing requirements

There is no merger control regime. However, mergers and the establishment of joint ventures that have an effect on competition in any market may infringe the anticompetitive agreement prohibition.

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SINGAPORE

Key points

Key agencies and institutions	Competition Commission of Singapore (CCS) Competition Appeal Board
Key legislation	<i>Competition Act 2004 (CA)</i>
Key prohibitions	Anticompetitive agreements Abuse of dominant position Anticompetitive mergers
Key exemptions/defences	<p>Key exclusions for anticompetitive agreements and abuse of dominant position:</p> <ul style="list-style-type: none">■ exclusion of statutory bodies■ categories of agreements subject to block exemption (with respect to anticompetitive agreements only)■ regulated for competition law purposes by sectoral regulators■ agreements or conduct involving services of general economic interest or revenue-producing monopoly■ activities necessary to comply with legal requirements or to avoid conflict with Singapore's international obligations■ agreements or conduct that relate to any specified activity■ agreements or conduct that relate to clearing houses■ activities arising from exceptional or compelling reasons of public policy■ vertical agreements (with respect to anticompetitive agreements only)■ agreements with net economic benefit (with respect to anticompetitive agreements only)■ agreements or conduct directly related to and necessary for the implementation of a merger or any behaviour that results in a merger. <p>Key exclusions for anticompetitive mergers and acquisitions:</p> <ul style="list-style-type: none">■ exclusion of statutory bodies■ approved by any minister or regulatory authority■ approved by the Monetary Authority of Singapore pursuant to such a requirement by law■ regulated for competition law purposes by sectoral regulators■ involving any undertaking relating to any specified activity■ with net economic efficiencies where the efficiency outweighs any competitive detriment that may arise.

<p>Leniency programme</p>	<p>CCS' Leniency Program is only available to businesses that are part of a cartel agreement or concerted practice or trade associations that participate in or facilitate cartels:</p> <ul style="list-style-type: none"> ■ total (100%) immunity is available to the first undertaking to provide information of an infringement subject to certain conditions being met ■ a reduction in financial penalties of up to 100% is available to the first undertaking to provide information after the CCS has commenced an investigation ■ subsequent leniency applicants may also qualify for a reduction of up to 50% of the financial penalty. <p>A cartel member in one cartel investigation can receive an additional reduction on the financial penalty in the first cartel investigation through the Leniency Plus system if it provides information for a completely separate second cartel.</p>
<p>Remedies and sanctions</p>	<p>The statutory maximum amount of penalty that may be imposed is 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years. It is worth noting that such a penalty can be imposed even when the infringement has ceased.</p>
<p>Is there a merger control regime and is the regime suspensive or voluntary?</p>	<p>Merging entities are not required to notify the CCS of the merger, but should notify the CCS if there are concerns of infringement, assessing whether the concluded or anticipated merger could lead to a substantial lessening of competition, for example, resulting in an increase in prices above the prevailing level, lower quality, and/or less choices of products and services for consumers.</p>

What types of anticompetitive conduct are prohibited?

Anticompetitive agreements

The CA prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that have the object or effect of preventing, restricting or distorting competition in Singapore.

The CCS enforces particularly vigorously against the four so-called “hardcore” anticompetitive agreements made by cartels: price-fixing, bid-rigging, market sharing and output limitations. Bid-rigging occurs where competitors agree on who should win a tender, thereby spurring the party inviting the tender to pay more than it would in a competitive tender.

The CCS is of the view that cartelists have little or no incentive to lower prices or provide better quality goods or services. It is important to note that price-fixing is a broad category ranging from, effectively, fixed list prices to agreements on a certain discount or price range.

Other common areas of anticompetitive agreements include sharing sensitive information, exchanging price information and setting technical or design standards.

Abuse of dominance

The CA prohibits one or more undertakings with a dominant position in any market (whether in Singapore or overseas) from abusing that power. It is important to note that mere dominance is not prohibited, but the abuse of that position is.

The term “market power” is described in guidelines issued by the CCS as “the ability to profitably sustain prices above competitive levels”. An undertaking is dominant if it has the

ability, independently, to increase prices above competitive levels, restrict output, and/or reduce product quality without sufficient competitive constraint.

The guidelines issued by the CCS suggest that a market share of 60% or more is likely to indicate a position of dominance as are factors such as the number and strength of actual and potential competitors and any barriers to market entry. The dominance requirement can be satisfied by collective dominance, such as undertakings aligning their prices, even where this is not done expressly.

The guidelines issued by the CCS cover various categories of conduct that may amount to an abuse of dominance, including predatory behaviour, discount schemes, price discrimination, margin squeezes, vertical restraints, refusals to supply and refusals to allow access to essential facilities. However, abuse of dominance is a difficult concept to define in practice. The line between aggressive (but healthy) competition and abuse is often very fine and difficult, if not sometimes impossible, to assess in advance of a decision.

Mergers and acquisitions

The CA prohibits any merger that substantially lessens competition, whether the acquisition is within or outside Singapore (see mergers and acquisitions below).

What types of defences/exemptions are available?

The CA provides for exclusions in the Third Schedule of the CA from the prohibitions against anticompetitive agreements (contained in section 34 of the CA) and abuse of dominant position (contained in section 47 of the CA). The onus is on the undertaking claiming the benefit of any exclusion to prove that it satisfies the requirements. The table below indicates, in broad terms, the exemptions and exclusions applicable.

Act ref.	Exclusion/Exemption Grounds	Section 34 Prohibition	Section 47 Prohibition
s. 33(4)	Exclusion of Statutory Bodies .	Yes	Yes
s. 36	Categories of agreements subject to Block Exemption .	Yes	No
Third Schedule s. 1	Agreements or conduct involving services of general economic interest or revenue-producing monopoly.	Yes	Yes
Third Schedule s. 2	Agreements or conduct necessary for compliance with legal requirements , that is, requirements imposed by or under any written law.	Yes	Yes
Third Schedule s. 3	Agreements or conduct necessary for the avoidance of conflicts with international obligations .	Yes	Yes
Third Schedule s. 4	Agreements or conduct arising from exceptional or compelling reasons of public policy .	Yes	Yes
Third Schedule s. 5	Agreements or conduct regulated for competition law purposes by Sectoral Regulators .	Yes	Yes
Third Schedule s. 6	Agreements or conduct which relate to any specified activity in the Third Schedule, such as postal services, wastewater management and public transport.	Yes	Yes
Third Schedule s. 7	Agreements or conduct which relate to clearing houses .	Yes	Yes
Third Schedule s. 8	Agreements between parties at different levels of the production or distribution chain relating to conditions for the purchase, sale or resale of goods or service Vertical Agreements .	Yes	No
Third Schedule s.9	Agreements with net economic benefit NEB , that is, where an agreement contributed to improving production/ distribution or promoting technical/economic progress provided it does not restrict the undertakings concerned in a way which is non-essential to that aim and does not generate a scenario where competition could be eliminated.	Yes	No
Third Schedule ss. 10 and 11	Agreements or conduct related to and necessary for the implementation of a merger or to any behavior that results in a merger Ancillary Restrictions . Common examples of Ancillary Restrictions are non-compete clauses, licenses of intellectual property, and purchase and supply agreements.	Yes	Yes

The CA provides for exclusions in the Fourth Schedule of the CA from the prohibition against anticompetitive mergers and acquisitions. The onus is on the undertaking claiming the benefit of any exclusion to prove that it satisfies the requirements. The table below indicates, in broad terms, the exclusions applicable.

Act ref.	Exclusion Grounds
s. 33(4)	Exclusion of Statutory Bodies .
Fourth Schedule s. 1(a)	Approved by any minister or regulatory authority (other than the CCS) pursuant to such a requirement by law.
Fourth Schedule s. 1(b)	Approved by the Monetary Authority of Singapore pursuant to such a requirement by law.
Fourth Schedule s. 1(c)	Regulated for competition law purposes by Sectoral Regulators .
Fourth Schedule s. 2	Involving any undertaking relating to any specified activity in the Third Schedule, such as postal services, wastewater management and public transport.
Fourth Schedule s. 3	With net economic efficiencies where the efficiency outweighs any competitive detriment that may arise. The CCS Guidelines provide illustrations as guidance regarding when economic efficiencies may be established including circumstances where the merger results in greater choice or higher quality.

What are the substantive laws on cartels in the jurisdiction?

The CA prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that have the object or effect of preventing, restricting or distorting competition in Singapore.

Agreements

The CCS takes a very broad view of what constitutes an agreement for the purposes of the CA. The expression captures formal contracts and arrangements, but also extends to what regulators describe as "nod and wink" or "gentlemen's" agreements or arrangements. An agreement can be written or oral, express or implied, and does not need to be in a form that would be legally enforceable. An undertaking may still be party to an agreement where it was not fully committed to the agreement, participated due to pressure, or played a minor role in arranging the agreement.

The CA also applies to concerted practices. A concerted practice may exist where there is informal cooperation, without any formal arrangement or decision. A concerted practice would be found to exist if parties knowingly substituted the risks of competition with cooperation between them. Relevant considerations to determine whether a concerted practice exists may include whether the party knowingly cooperated, if parallel behaviour is witnessed following contact between the undertakings, and whether there is an actual effect on the market.

The guidelines issued by the CCS provide an example of where the market is influenced by direct or indirect contact between competitors. Namely, where the exchange of commercially

sensitive information (for example, on pricing intentions) could be deemed a concerted practice even where there is no actual agreement between the parties on how they will act on the information exchanged.

The CA also prohibits members of associations (including trade associations) from giving effect to decisions of their associations that have the object or effect of preventing, restricting and distorting competition in a market in Singapore.

Decisions of associations can take many forms, including the constitution or rules of an association, association recommendations or resolutions and binding decisions of an association's management or executive committee. A classic issue of concern to competition regulators in this area is recommended price lists published by trade associations with a view to their members following the price recommendations. Trade associations also pose a risk because they often bring together competitors to discuss industry issues. There are numerous issues that legitimately need to be discussed by industry groups. However, there is also a risk of information that should not be given to competitors being disclosed or exchanged, leading to prosecution.

Prevention, restriction or distortion of competition

An agreement will fall within the scope of the CA if it has as its object or effect the *appreciable* prevention, restriction or distortion of competition.

The manner in which these words should be interpreted has been a matter of debate. Any agreement between undertakings

might be said to restrict the freedom of action of the parties. Healthy competitive actions can have an appreciable effect on competition (for example, the introduction of an innovative and highly popular product by one company may well impact competition and/or other companies). That does not, however, necessarily mean that the agreement is prohibited as it may well be pro-competitive, and the CCS will assess an agreement in its economic context.

The guidelines issued by the CCS indicate that an agreement will not have an appreciable adverse effect on competition where the aggregate market share of the parties does not exceed 20% (for agreements between competitors) or 25% (for agreements between non-competitors).

The CCS is also of the view that agreements between small to medium-sized enterprises are rarely capable of appreciable prevention, restriction or distortion of competition. The CCS takes the view that the four so-called "hardcore" anticompetitive agreements – price-fixing, bid-rigging, market sharing and output limitations – will always have an appreciable adverse effect on competition, irrespective of market share.

What are the criminal and civil sanctions?

The CCS has the discretion to impose financial penalties on any undertaking that has intentionally or negligently infringed the CA. The maximum penalty is up to 10% of the infringing undertaking's turnover in Singapore for each year of the infringement up to a maximum of three years.

There is no criminal liability, except to the extent that there are several criminal offences under the CA whereby any person who

refuses to provide information, destroys or falsifies documents, gives false or misleading information, or otherwise impedes the CCS in its investigations faces the payment of fines and/or imprisonment.

What are the regulator's investigatory powers?

The CCS can conduct an investigation where it has reasonable grounds to believe that there is anticompetitive behaviour or that there is likely to be a resultant adverse effect on competition which infringes the CA. In the course of the investigation, the CCS can request that any person produces relevant documents or information. "Document" is a widely-construed term which includes "information recorded in any form".

In the course of its investigation, the CCS can enter any business premises and seize documents. It may also enter domestic premises if there is evidence that the undertaking's affairs are connected with the premises or if documents are kept there. The term "premises" includes a vehicle.

Does the law allow follow-on or stand-alone rights of action?

A right of private action is available to any party who has suffered loss or damage as a result of infringement of the CA. Civil proceedings can be brought against the undertaking once the CCS has determined that there has in fact been an infringement and after the appeal process has been exhausted. A party hoping to bring such a claim needs to be mindful of the two-year limitation period, which runs from the date of the CCS' decision or the determination of an appeal, whichever is later.

Are there industry-specific regimes?

The CA co-exists with the sectoral laws regulated by sectoral regulators in designated sectors. Sectoral regulators include the Infocomm Development Agency, the Media Development Authority, the Energy Market Authority, the Civil Aviation Authority of Singapore, the Casino Regulatory Authority, the Commissioner of Police, and the Monetary Authority of Singapore.

While these bodies may have some regulatory powers, it should be remembered that often their jurisdiction is limited and that the CA may nonetheless apply.

The Minister of Trade and Industry may make regulations for the purpose of coordinating the exercise of powers by the CCS and the sectoral regulators. Such regulations may prescribe the circumstances where the CCS or sectoral regulators should solely exercise their powers and where these powers may be concurrently or conjunctively exercised.

The circumstances in which the latter will occur are limited, as Clause 5 of the Third Schedule of the CA and Clause 1 of the Fourth Schedule of the CA, in short, provide that where a sectoral regulator regulates competition in respect of certain matters, the CCS will not have jurisdiction over that matter.

However, even where a sectoral regulator has sole jurisdiction over a part of an undertaking's activities, this does not mean the CA does not apply at all. For example, where a merger or acquisition requires prior notification or approval from a sectoral regulator, the CCS will not have jurisdiction to administer and enforce the prohibition against mergers and acquisitions. But, where the newly merged entity enters into an anticompetitive

agreement or abuses a dominant position in a market, the anticompetitive agreements and abuse of dominance prohibitions will apply and the CCS will have the power to investigate these activities and enforce the CA.

What are the enforcement trends?

Singapore has a well respected competition authority in the CCS that is astutely tackling competition issues in Singapore. Recent activity includes:

- The 2013 *Motor Vehicle Case*, where the CCS fined 12 undertakings for entering into a bid rigging agreement to refrain from bidding against each other at public motor vehicle auctions held by government agencies. A sole bidder, usually the same company, would bid for the vehicles after which the colluding parties would conduct their own 'private' auctions for the vehicles that were earlier won at the public auctions. The difference in the bid price of the vehicles between the public auctions and the private auctions would be put into a common pool and shared amongst those present at the private auctions.
- The 2012 *Ferry Operators Case*, where the CCS fined two ferry operators for exchanging and providing sensitive and confidential price information on ferry tickets sold to corporate clients and travel agents for routes between Singapore and Batam, Indonesia. Interestingly, this was the first infringement decision by the CCS for anticompetitive exchange of information.
- The 2011 *Modelling Services Case*, where the CCS fined 11 modelling agencies for fixing the rates of modelling services through the Association of Modelling Industry Professionals.

The decision of infringement was upheld on appeal in 2013, but the financial penalties were reduced to reflect the fact that in the modelling industry a large part of the turnover was paid to the models and consequently the agencies received only a small margin.

- The 2010 *SISTIC Case*, where SISTIC was found by the CCS to be abusing its dominant position in the ticket services market by requiring its contractual partners to use SISTIC exclusively, leaving ticket buyers with no option but to buy tickets through SISTIC as well. The financial penalties imposed by the CCS were reduced on Appeal in 2012, with the Board providing clarification of the aggravating factors to be taken into account when calculating financial penalties.
- The 2009 *Express Bus Case*, where the CCS fined 16 express bus operators and the Express Bus Agencies Association for pre-fixing minimum selling prices of coach tickets on journeys from Singapore to Malaysia and Southern Thailand under the auspices of trade association meetings. The financial penalties imposed by the CCS were reduced on Appeal in 2009, in the first decision issued by the Competition Appeal Board.

These recent decisions demonstrate the increasing enforcement of anticompetitive behaviour in Singapore and a shift in the types of behaviour that the CCS will consider caught by the prohibitions contained in the CA.

Merger control filing requirements

The CA prohibits any merger (whether implemented in or outside Singapore) that has or is likely to have the effect of substantially lessening competition in a market in Singapore.

Singapore adopts a voluntary merger system, hence merging entities are not required to notify the CCS of the merger, but should notify the CCS if there are concerns of infringement.

In the event that a merger which may substantially lessen competition comes to the attention of CCS, the CCS has substantial investigative powers that can be exercised if there are reasonable grounds for suspecting that the CA has been infringed. The guidelines issued by the CCS recommend that merger situations should be notified to the CCS if the merger parties believe the merger may result in a substantial lessening of competition within any market in Singapore.

Whether a merger will be considered to lessen competition in Singapore substantially will require complex legal and economic analysis. This will include assessing the relevant competition law markets in which the undertakings operate and the impact the merger is likely to have on the state of competition in those, or other, markets. The relevant test to determine whether this threshold will be met looks to the future implication that the merger may have on competition.

The guidelines issued by the CCS indicate that a merger is unlikely to infringe the CA unless the merged entity has greater than a 40% market share or the merged entity has a market share of between 20% and 40% and the combined post-merger market share of the three largest firms is over 70%.

The CCS is unlikely to investigate a merger between small companies (that is, where the annual turnover in Singapore of each party is less than SGD5 million and the combined worldwide turnover of all parties is less than SGD50 million).

The guidelines issued by the CCS specify various questions to be considered when making this assessment, for example:

- **Will the merged entity have the ability to raise prices or reduce output?** In the recent 2013 *Micron/Elpida Notification*, the CCS concluded that in the light of weak market demand and persistent excess supply in the industry of Dynamic Random Access Memory, it was unlikely that the merged entity would have the power to unilaterally increase prices.
- **Are barriers to market entry high?** In the 2012 *Asia Renal/Orthe Notification*, the CCS looked at the ease of establishing dialysis centres in Singapore. Given the low regulatory barriers, the recent increase in number of competitors, and the ease of expanding existing operations, the CCS concluded that barriers to entry were not high.
- **Will the remaining competitors in the market have an increased ability to coordinate their behavior in the market post-merger?** In the 2011 *Greif/GEP Notification*, the CCS found that the imminent expansion of Mauser, a credible competitor in the large steel drum market, was "sufficient in likelihood, scope and time to deter or constrain any attempt by (...) competitors to exploit the reduction in rivalry post-merger".
- **Is the acquired undertaking (or part of it) likely to fail in the near future?** In the 2013 *Micron/Elpida Notification* the CCS analysed the prospects for competition without the merger, taking into account that Elpida would most likely exit the market without financial sponsorship.

Other relevant issues for consideration include the extent of available substitutes (that is, competing products or services) for the products or services offered by the merging undertakings, the degree of countervailing power (that is, the relative strength of

competitors), and the extent of innovation in the market. Where the merger is likely to encourage healthy rivalry or have no impact upon the market, the merger will not be deemed to lessen the competition in the market substantially.

Merger notifications can be made as soon as there is a good faith intention to proceed with the transaction, or as soon as possible after completion.

The CCS may impose a financial penalty if a merger is considered to be anticompetitive, but only if the infringement was committed intentionally or negligently. In practice, if a transaction raises issues, parties are likely to negotiate with the CCS and agree on certain (binding) commitments to remedy any anticompetitive effects prior to receiving a clearance decision.

SOUTH KOREA

Key points

Key agencies and institutions	Korea Fair Trade Commission (KFTC)
Key legislation	The <i>Monopoly Regulation and Fair Trade Act</i> (MRFTA) and its enforcement decree
Key prohibitions	Prohibition of abuses of dominance (Unilateral) unfair trade practices, improper concerted practices and agreements.
Key exemptions/defences	<p>Defences showing that the alleged abusive conduct is “reasonable” may be accepted, eg efficiency gains, consumer welfare, legitimate business justifications, lack of anticompetitive intent or lack of anticompetitive effects.</p> <p>No general exemption exists for unfair trade practices. Specific exemptions may exist depending on the type of vertical restraints, eg a 10% market share safe harbour applies to refusal to deal, discriminatory terms and conditions (except discriminatory prices), exclusive dealings and territory or customer restraints.</p> <p>There are very limited statutory exemptions (eg for SMEs) for improper concerted practices, and there is no available defence for hardcore cartels.</p>
Leniency programme	Yes (but not available to repeat offenders)
Remedies and sanctions	Sanctions imposed for abuses of dominance, unfair trade practices and improper concerted practices may be of an administrative and criminal nature. Both legal persons and individuals may be subject to these sanctions. Behavioural remedies may also be ordered by the KFTC.
Is there a merger control regime and is the regime suspensive or voluntary?	Merger filing in Korea is mandatory. Depending on the type of transaction, it may be either a pre-merger filing with suspensive effect or a post-merger filing.

What types of anticompetitive conduct are prohibited?

There are three main categories of anticompetitive conduct prohibited under South Korean legislation.

Abuses of dominance

These types of conduct are addressed by Chapter 2 of the MRFTA (and Chapter 2 of its enforcement decree). They relate to "unreasonable" conduct adopted by a dominant firm. A company is presumed dominant if its sales turnover or purchase amount in a particular business area is more than KRW4 billion and either its market share is 50% or more, or it is one of the top three or fewer companies with a 75% or more combined market share (with the exception of companies with individual market share of less than 10%).

Abusive conduct encompasses *inter alia*:

- discrimination
- excessive pricing and unfair terms and conditions
- exclusionary rebates
- predatory pricing
- price squeeze
- refusal to deal
- unreasonable exclusivity and non compete provisions
- tying and leveraging
- unreasonable limitation on production, markets or technical progress
- abuse of government process and of IPRs.

Unfair trade practices

These constitute a stand-alone offence under Chapter 5 of the MRFTA (and Chapter 5 of its enforcement decree), and pertain to unilateral unfair trade practices implemented by a company, regardless of its dominance or not. Vertical restrictions are captured by rules on unfair trade practices.

Improper concerted practices

These are dealt with by Chapter 4 of the MRFTA (and Chapter 4 of its enforcement decree), covering *inter alia* price-fixing, bid-rigging, allocation of markets, customers and input.

What types of defences/exemptions are available?

Defences showing that the alleged abusive conduct is "reasonable" may be accepted, eg efficiency gains, consumer welfare, legitimate business justifications, lack of anticompetitive intent or lack of anticompetitive effects.

No general exemption exists for unfair trade practices. Specific exemptions may exist depending on the types of vertical restraints, eg a 10% market share safe harbour applies to refusals to deal, discriminatory terms and conditions (except discriminatory prices), exclusive dealings and territory or customer restraints.

There are very limited statutory exemptions for improper concerted practices, ie agreements that pursue the following objectives:

- industrial rationalisation
- research and technology development
- overcoming economic depression
- industrial restructuring
- rationalisation of transaction terms and conditions
- enhancement of small and medium-sized companies' competitiveness,

may be exempted. However the approach taken to these exemptions is rather stringent. There is no available defence for hardcore cartels.

What are the substantive laws on cartels in the jurisdiction?

Chapter 5 of the MRFTA and Chapter 5 of its enforcement decree deal with improper concerted practices. Guidelines for concerted practices review also provide relevant information for the assessment of improper concerted practices.

What are the criminal and civil sanctions?

In cases of abuse of dominance, the KFTC may impose behavioural remedies as well as a monetary surcharge (administrative sanction), the amount of which may not exceed 3% of the relevant turnover of the infringer. In the absence of a relevant turnover, the maximum amount of the surcharge may not exceed KRW1 billion.

In addition to administrative sanctions, persons found liable for the implementation of an abusive conduct may be subject to criminal sanctions, which may consist of imprisonment of up to three years and a criminal fine of up to KRW200 million.

The KFTC may impose behavioural remedies for unfair trade practices (including vertical restraints). A monetary surcharge (administrative sanction) may be imposed, up to a maximum of 2% of the relevant turnover of the infringer (or a maximum of KRW500 million in the absence of relevant turnover). In addition, criminal sanctions for unfair trade practices are also provided by the MRFTA; imprisonment of up to two years or a criminal fine of up to KRW150 million.

Companies and individuals involved in cartels may be subject to both criminal and administrative sanctions. The maximum amount of an administrative fine is 10% of the sales affected by the unlawful practices. Cease-and-desist measures and other appropriate administrative corrective measures may also be ordered. As for criminal sanctions, the Korean legislation provides for a criminal fine of up to KRW200 million for companies and imprisonment of up to three years and/or a criminal fine of up to KRW200 million for individuals.

What are the regulator's investigatory powers?

Investigation procedures are regulated by Chapter 10 of the MRFTA. The KFTC's powers of investigation encompass the right to:

- summon and hear the companies concerned, interested persons, or witnesses
- designate expert witnesses and request for expert opinions
- impose companies, their officers, or employees to report on the business management conditions, to submit other necessary information or items; to have the custody of submitted information or items
- carry out searches and seizures at a company's or companies' premises, including rights to:

- examine the business management conditions, ledgers, documents, electronic materials, voice-recorded materials, video materials, and other relevant materials
- take statements from the parties concerned, interested persons, and reference witnesses
- order submission of necessary information or items or have the custody of the submitted information or relevant items.

Obstruction of the KFTC's investigation may be sanctioned. An administrative fine of up to KRW200 million may be imposed on a company that has refused, interfered with, or evaded a KFTC investigation. Criminal sanctions against individuals – including imprisonment – are also provided for by Korean legislation.

Does the law allow follow-on or stand-alone rights of action?

Private damage claims for anticompetitive conduct may be brought before the Korean courts. However, class actions or private injunctive relief are not provided for under Korean legislation.

Nonetheless, there is continued debate around the introduction of class actions and private injunctive relief and these may be introduced in the near future.

Are there industry-specific regimes?

In principle, the MRFTA applies across the whole range of industries, but there are some specific pieces of legislation that apply depending on the sector concerned. For instance, the *Telecommunications Business Act* may also apply to dominant companies in the telecommunications sector.

What are the enforcement trends?

There has been a notable intensification of the KFTC's activities and a stronger and stricter public enforcement of competition rules. The main objective underlying current KFTC actions is "economic democratisation".

Although the exact scope and implications of the objective are not clear, it seems that the KFTC is focusing mainly on the regulation of abuses implemented by conglomerates, and the protection of SMEs and consumers.

Industries that have recently been subject to KFTC investigations are distribution in dairy products, alcoholic and non-alcoholic beverages, ramen, ice cream, confectionery, cosmetics, pharmaceuticals, and automobiles. However, the KFTC does not appear to be limiting its actions to particular sectors of activity.

Merger control filing requirements

In addition to the MRFTA and its enforcement decree, South Korea's merger control filing requirements are also subject to the Merger and Acquisition Review Guidelines (M&A Review Guidelines) and Merger and Acquisition Reporting Guidelines (M&A Reporting Guidelines).

Transactions that amount to concentrations within the meaning of Article 12 of the MRFTA are:

- a qualifying acquisition of shares, ie of 20% or more of a non-listed company's (15% or more of a domestic listed company's total outstanding voting shares, or of a subsequent acquisition going from this level to become the largest shareholder, or

a participation in the establishment of a joint venture as the largest shareholder)

- a qualifying acquisition of fixed assets (all or a principal portion of the fixed assets of a business)
- a merger with another company
- an interlocking directorate.

Pre-merger filing of such transactions is required where the following three cumulative criteria are met:

- one party's worldwide turnover or worldwide assets is at least KRW200 billion or KRW2 trillion in the case of an interlocking directorate
- the other party's total worldwide turnover or worldwide assets is at least KRW20 billion
- if the target or all parties are foreign companies (or companies with their principal place of business located outside of South Korea), each relevant foreign company must have a turnover in South Korea of at least KRW20 billion.

Pre-merger filing is also required if any party involved in a business combination is a large-scale company, whose worldwide turnover or assets is KRW2 trillion or more (this does not apply to an interlocking directorate).

If none of these thresholds are met, filing obligation is post-closing only. Post-closing filing has to be done within 30 calendar days after closing. In terms of the duration of pre-merger filing, the waiting periods are as follows: 30 calendar days from the filing date in phase I and up to 90 additional calendar days in phase II.

Fines of up to KRW100 million may be imposed for failure to file or if the transaction is closed before the issuance of the KFTC's

approval. Further, the implementation of an anticompetitive transaction may lead to criminal sanctions of up to three years in prison or a fine of up to KRW200 million.



Key points

Key agencies and institutions	Taiwan Fair Trade Commission (TFTC)
Key legislation	Taiwan Fair Trade Act (TFTA)
Key prohibitions	<p>Abuse of market power (monopoly)</p> <p>Cartel (concerted action)</p> <p>Resale price maintenance (vertical price restriction)</p> <p>Unreasonable restriction on counterparty's activity (non-price vertical restriction).</p>
Key exemptions/defences	<p>Approval for certain types of cartels</p> <p>Clearance for combination (merger)</p> <p>Justification or reasonable grounds for other type of restriction (except resale price maintenance).</p>
Leniency programme	<p>An enterprise violating the cartel prohibitions under the TFTA can be exempted from, or be entitled to, a reduction in fine if it meets one of the following criteria, and the TFTC agrees in advance that the enterprise qualifies for the exemption or reduction:</p> <ul style="list-style-type: none"> ■ before the TFTC becomes aware of unlawful cartel activities or commences its <i>ex officio</i> investigation, the enterprise voluntarily reports the details of its unlawful cartel activities to the TFTC, provides key evidence, and assists with the TFTC's subsequent investigation, or ■ during the TFTC's investigation, the enterprise provides specific evidence that helps to prove unlawful cartel activities and assists with the TFTC's subsequent investigation. <p>Only five enterprises can be eligible for fine exemption/reduction in a single case; that is, the first applicant can be exempted from the fine and fines for the second to the fifth applicant can be reduced by 30% to 50%, 20% to 30%, 10% to 20%, and 10% or less respectively.</p> <p>An enterprise that has ever coerced other enterprises to join or not to exit the subject cartel cannot be eligible for the fine exemption/reduction.</p>

Remedies and sanctions

Administration fine

The TFTA may order any enterprise that violates the TFTA to cease and rectify its conduct within the time prescribed. In addition, it may impose upon the enterprise an administrative fine ranging from NTD50,000 to NTD25 million. If the enterprise fails to comply with the order, the TFTA may successively impose administrative fines ranging from NTD100,000 to NTD50 million until the corrective action is taken.

Where an enterprise *materially* violates the monopoly or cartel regulations, the TFTA may impose an administrative fine of up to 10% of the enterprise's total sales in the previous fiscal year without being subject to the limit of administrative fines above.

Criminal liability

If an enterprise violates the monopoly or cartel regulations and fails to rectify matters after being imposed with administration sanction, or commits a similar violation again, the enterprise shall be punished by imprisonment for not more than three years, in addition to a fine of not more than NTD100 million.

If an enterprise violates the non-price vertical restriction regulations and fails to rectify matters after being imposed with administration sanctions, or commits a similar violation again, the enterprise can be punished by imprisonment for not more than two years in addition to a fine of not more than NTD50 million.

Civil remedy

If an enterprise violates the TFTA and thereby infringes upon the rights and interests of another, the injured party may demand the removal of such an infringement; prevention of any possible infringement may also be claimed.

Any enterprise violating the TFTA and thereby infringing upon the rights and interests of another shall be liable for any damages arising.

In response to the request of the injured party, a court may, taking into consideration of the nature of the infringement, award compensation that exceeds the actual damage, provided that the violation is intentional. No award shall exceed the times the amount of proven damage. However, where the infringing person profits from its act of infringement, the injured party may make a request to assess the damages exclusively based on the monetary gain to the infringing person.

Is there a merger control regime and is the regime suspensive or voluntary?

A transaction that can be defined as a combination under the TFTA will be subject to a mandatory pre-notification obligation if any filing threshold is met. Parties can only proceed with the transaction after receiving clearance from the TFTC.

What types of anticompetitive conduct are prohibited?

The following anticompetitive conducts are prohibited by the TFTA.

Abuse of market power: where a monopolistic enterprise directly or indirectly prevents any other enterprise from competing by unfair means; such as improperly setting, maintaining or changing the price of goods or the remuneration of services; making a trading counterparty provide preferential treatment without justification; or otherwise abuses its market power.

Cartel (concerted action): where horizontal competitors through contracts, agreements or any other form of mutual understanding, jointly determine the price of goods or services, or limit the terms of quantity, technology, products, facilities, trading counterparties, or trading territory with respect to such goods and services, etc, and thereby restrict each other's business activities.

Resale price maintenance: where an enterprise supplies goods to its trading counterparty for resale, and the trading counterparty is not allowed to decide its resale prices freely.

Non-price vertical restriction: where an enterprise unreasonably adopts a boycott to injure a particular party, discriminates against a particular party, or limits its trading counterparties' business activity without justification.

What types of defences/exemptions are available?

The parties may receive approval from the TFTC to proceed with a concerted action if the proposed arrangement (i) meets one of the requirements stipulated in Article 14 of the TFTA⁴ and (ii) is beneficial to the economy as a whole and in the public interest.

Resale price maintenance is illegal *per se* and cannot be justified by any reasonable ground.

Abuse of market power and other types of vertical restriction will be judged by the rule of reason test. That is, there will be no violation of the TFTA if a party can justify its measures on reasonable grounds.

⁴ Article 14 of the TFTA provides the following seven exceptions to a concerted action to be approved by the TFTC:

- a unification: it unifies the specifications or models of goods for the purpose of reducing costs, improving quality, or increasing efficiency;
- b joint research and development: it entails joint research and development for the purpose of upgrading technology, reducing costs, improving quality, or increasing efficiency;
- c specialisation: it develops a separate and specialised area for the purpose of rationalising operations;
- d exportation: it is to enter into agreements concerning solely competition in foreign markets for the purpose of securing or promoting exportation;
- e importation: it is for the importation of foreign goods for the purpose of strengthening trade;
- f economic downturn: it is to limit the quantity of production and sales, equipment, or prices for the purpose of meeting the demand expected during an economic downturn, in which the market price of products is lower than the average production costs so that the enterprises in a particular industry have difficulties in maintaining their business or face overproduction; and
- g small to medium-sized enterprises: it is for the purpose of improving operational efficiency or strengthening the competitiveness of small to medium-sized enterprises.

What are the substantive laws on cartels in the jurisdiction?

Article 7 of the TFTA defines a concerted action as the conduct of any enterprise, by contracts, agreements or any other form of mutual understanding with a competing enterprise, to jointly determine the price of goods or services or to limit the terms on quantity, technology, products, facilities, trading counterparts, or trading territory with respect to such goods and services, thereby restricting each other's business activities.

A cartel prohibited under the TFTA is limited to a concerted action between or among horizontal competitors (ie market players at the same production and/or marketing stage) that may result in an anticompetitive effect (ie interference with the market mechanism for the production or supply and demand of goods).

What are the criminal and civil sanctions?

Criminal liability

If an enterprise violates the monopoly or cartel regulations and fails to rectify matters after being imposed with administration sanction, or commits a similar violation again, it shall be punished by imprisonment for not more than three years, in addition to a fine of not more than NTD100 million.

If an enterprise violates the non-price vertical restriction regulations and fails to rectify matters after being imposed with an administration sanction, or commits similar violation again, it shall be punished by imprisonment for not more than two years, in addition to a fine of not more than NTD50 million.

Civil remedies

If an enterprise violates the TFTA and thereby infringes the rights and interests of another, the injured party may demand the removal of such infringement; prevention of any possible infringement may also be claimed.

Any enterprise violating the TFTA, and thereby infringing upon the rights and interests of another, will be liable for damages arising.

In response to the request of the injured party, a court may, taking into consideration of the nature of the infringement, award compensation that exceeds the actual damage, provided that the violation is intentional. No award shall exceed three times the amount of the proven damages. However, where the infringing person profits from its act of infringement, the injured party may make a request to assess the damages exclusively based on the monetary gain to such an infringing person.

What are the regulator's investigatory powers?

According to the TFTA, the TFTC has three types of investigatory powers:

- to order the parties and any related third parties to appear before the TFTC to make statements
- to order relevant agencies, organisations, enterprises or individuals to submit books and records, documents, and any other necessary materials or exhibits
- to dispatch personnel to conduct any necessary on-site inspection of the offices, places of business, or other locations of the relevant organisation or enterprises.

Under the current legal framework, the TFTC is not entitled to apply for a search warrant from the court as it has not been granted judicial powers. Accordingly, in Taiwan, a dawn raid (ie an unannounced on-site search and seizure) can only be initiated by a prosecutor based on a search warrant; the TFTC alone cannot take such action.

Does the law allow follow on or stand alone rights of action?

A party that incurs or is likely to incur damages due to a violation of the TFTA by an enterprise may demand the removal or prevention of such an infringement. An infringed party may request compensation from the infringing party for damages arising from the violation of the TFTA.

Are there industry-specific regimes?

Generally speaking, the requirements and principles under the TFTA apply to each and every industry, although industries that affect overall economic growth and consumers' daily lives or welfare may be subject to a higher degree of TFTC scrutiny.

The TFTC promulgates industry-specific guidelines governing certain industries' daily operations from time to time. Those industries include telecommunications, banking and finance, real property, oil, and liquefied petroleum gas, among others.

In intellectual property matters, the TFTA does not apply to any proper conduct in connection with the exercise of rights under the *Copyright Act*, *Trademark Act*, or *Patent Act*.

What are the enforcement trends?

In merger control enforcement, the TFTC did not block any combination in 2012. However, combinations in highly-regulated industries, such as telecommunications and the mass media sector, are still subject to a higher degree of scrutiny and are normally cleared with conditions. The TFTC's cartel enforcement has changed considerably following the introduction of the leniency programme into the TFTA. The effectiveness of the leniency programme should be closely watched.

In December 2012, the Executive Yuan approved the drafting of amendments to the TFTA, which may bring the most comprehensive modification to the act since it came into effect in 1992. In particular, amendments may authorize the TFTC to apply for warrants to search and detain through collaboration with judicial personnel, and this will probably lead to more rigorous TFTC investigations. Investigation efforts may also be boosted by an extension to the statute of limitations from three to five years.

As we go to press, the draft amendments to the TFTA are still pending the Legislative Yuan's review and the legislative schedule is not known. However, this potential overhaul of competition law enforcement in Taiwan should be monitored closely.

Merger control filing requirements

According to Article 6 of the TFTA, a "combination" is defined to include:

- a merger
- holding or the acquisition of at least one-third of the voting shares of, or interest in, another enterprise

- a transfer or lease of all or a substantial part of an enterprise's business or assets
- having an arrangement with another enterprise for joint operation on a regular, ongoing basis, or the management of another enterprise's business based on a contract of entrustment
- having direct or indirect control over the operations or personnel of another enterprise.

According to Article 11 of the TFTA, if any or all of the parties to a combination meet any of the following thresholds, a notification must be filed with the TFTC prior to the closing of the proposed transaction:

- as a result of the combination, enterprises participating in the combination will acquire at least one-third of the market share
- any of the enterprises participating in the combination holds a market share of at least one-quarter before the combination
- the preceding fiscal year's turnover of enterprises participating in the combination exceeded the amount set by the TFTA – for a combination between non-financial enterprises, where one of the enterprises generates annual turnover of at least NTD10 billion, while the other enterprise generates an annual turnover of at least NTD1 billion.

A transaction defined as a combination under the TFTA will be subject to a mandatory pre-notification obligation if any of these filing thresholds is met. Parties can only proceed with the transaction after being granted clearance by the TFTA.

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THAILAND

Key points

Key agencies and institutions	Thai Trade Competition Commission (TCC)
Key legislation	Trade Competition Act of 1999 (TCA)
Key prohibitions	<p>Monopolies and abuse of dominant market position</p> <p>Merger controls</p> <p>Anticompetitive agreement (cartels)</p> <p>Anti-monopoly or a reduction of competition</p> <p>Unfair trade practice.</p>
Key exemptions/defences	Central, provincial, or local government agencies; state-owned enterprises under the law on budgetary procedure; agricultural groups or cooperatives established by law; and other businesses, as prescribed in Ministerial Regulations from time to time.
Leniency programme	There is no leniency programme, but the possibility of introducing such a programme exists.
Remedies and sanctions	<p>The maximum penalties for violating the TCA are imprisonment for up to three years and/or a fine of up to THB6 million. A multiple penalty is imposed for repeat violations.</p> <p>A business operator's violation of an order of the TCC attracts a penalty of imprisonment for up to three years or a fine ranging from THB2 million to THB6 million, plus a daily fine of THB50,000 during the period of the violation.</p>
Is there a merger control regime and is the regime suspensive or voluntary?	Mergers are prohibited when they “may result in a monopoly or unfair competition”. If the merger falls within the merger thresholds, prior approval is required. The relevant regulations are yet to be issued by the TCC. At this stage, the merger control provisions are not in operation.

What types of anticompetitive conduct are prohibited?

The TCA prohibits anticompetitive practices:

- where a business operator has a dominant market position
- where one business operator colludes with another business operator to reduce or restrict competition in the relevant goods or services market
- where any merger may result in a monopoly or unfair competition
- in relation to some other forms of restrictive unfair trade practices.

What types of defences/exemptions are available?

Anticompetitive agreements

Two business operators may obtain permission from the TCC to enter into certain anticompetitive agreements where they can show a business necessity, that it is beneficial for the promotion of the business operation, will not create severe damage to the economy and will not affect significant benefits that consumers would receive as a whole.

In granting permission, the TCC may set a period of time for compliance with any conditions by the business operator.

Anticompetitive mergers

No business operators can merge if the merger results in a monopoly or unfair competition according to the TCC's thresholds, except where permission is obtained from the TCC.

However, the thresholds prescribed by the TCC have not yet been issued, so the merger control provision has never become effective. In principle, merger approval may be obtained where any business operator can show a business necessity, or it is beneficial for the promotion of the business operation, or will not create severe damage to the economy and will not affect significant benefits which consumers would receive as a whole.

What are the substantive laws on cartels in the jurisdiction?

Apart from the TCA, there are no separate laws and regulations on cartels. The TCA prohibits any agreement between business operators that may amount to a monopoly, restrictions or reductions of competition in any goods or services market.

What are the criminal and civil sanctions?

In the event of any violation of anticompetitive conduct prohibited by the TCA, the business operator committing the violation shall be subject to a term of imprisonment up to three years and/or a fine of up to THB6 million (a double penalty will apply in the case of a repeat offence) and a daily fine not exceeding THB50,000 during the period in which the violation is ongoing.

This would extend to the managing directors, managing partner, and any person responsible for the actions of the business operator unless they can prove that they had no knowledge of and did not permit the offence or that they had undertaken reasonable measures to prevent the commission of an offence.

In a case where any person fails to render assistance to the competent officer, fails to comply with a written summons, or obstructs the performance of the competent officials in

conducting their duties, that person shall be subject to a term of imprisonment from one month to one year and/or a fine of between THB2,000 and THB20,000.

In addition to criminal sanctions, the TCC may suspend, stop or require a business to rectify anticompetitive action.

What are the regulator's investigatory powers?

The TCC has numerous powers granted to it under the TCA:

- to require any person to give a statement, facts or written explanations or supply accounts, registrations, documents or any evidence for examination
- in certain circumstances, to enter the business premises or suspected place of business of a business operator to investigate, collect evidence or arrest the offender without a search warrant
- to collect a certain amount of goods as a sample for examination or analysis without having to pay the price of such goods
- to attach documents, books of account, registers or evidence for the purpose of examination and take legal action under the TCA.

Does the law allow follow-on or stand-alone rights of action?

Any person suffering damage as a consequence of a competition law infringement may initiate an action for compensation in the courts.

The Consumer Protection Board (or an association under the laws governing consumer protection) also has the power to file a case claiming for damages on behalf of consumers or members of the association. However, a prosecution for criminal action can only be filed by the TCC. The TCC will examine and investigate the claim before reporting (or not) the case to the public prosecutor to commence criminal proceedings.

Are there industry-specific regimes?

The TCA generally regulates all trade practices of business operators over a broad spectrum of commercial activity including agricultural businesses, manufacturing, commerce, financial services, insurance and other service industries.

It does not make any difference whether the business operator is Thai or foreign because the words "business operator" under the TCA are defined to include any distributor, producer or importer of goods for resale or any purchaser of raw materials for production or further distribution, and any service provider.

The only groups exempt from the TCA are the central, provincial or local government administrations, state enterprises regulated under the law on budgetary procedures, groups of farmers, cooperatives or cooperatives recognised by law whose business objectives are for the benefit of the farming industry and business prescribed by ministerial regulations, which may be fully or partially exempt from the application of the law. No such regulations have been issued so far.

There are other industry-specific regimes including in the energy industry, telecommunications industry and certain guidelines on conduct between retailers, wholesalers, manufacturers and

suppliers issued under the TCA. Industry-specific legislation governs anticompetitive conduct, mergers or monopolies and only applies to the industry that it governs. The TCC and sectoral regulatory authorities may have concurrent and overlapping powers, and it is not always clear as to which authority will be the enforcing authority in the case of an overlap.

At present, the thresholds for prohibited mergers in the TCA have not been established; hence from a practical perspective, there is no merger notification required under the TCA at this time.

What are the enforcement trends?

Since the TCA came into force in 1999, and as at June 2013, 93 claims have been made to the TCC. However, no case has so far reached trial, nor has any criminal prosecution occurred through the TCC.

Merger control filing requirements

The TCA prohibits mergers that would result in monopoly or unfair competition as defined by the TCC. Any business operator who wishes to apply for permission to carry out a merger should submit an application in accordance with the form, rules, procedures and conditions prescribed and published by the TCC in the Government Gazette. The TCA contemplates a 90-day review period with the possibility of a 15-day extension.

The TCC may approve the notified merger if it is convinced that the merger is "reasonably necessary in the business, beneficial to business promotion, has no serious harm to the economy and has no effect on material and due interests of general consumers".

Conditional approvals may be granted by the TCC and it may amend, add to or revoke the conditions based on changes in economic situations, facts or conduct.



Key points

Key agencies and institutions	Vietnam Competition Administration Department (VCAD) (<i>Cục quản lý cạnh tranh</i>); and Vietnam Competition Council (VCC) (<i>Hội đồng cạnh tranh</i>)
Key legislation	<p>Law on Competition of the National Assembly, dated 3 December 2004 (Competition Law)</p> <p>Decree 116 of the Government, dated 15 September 2005, providing the detailed guidelines on certain provisions of the Competition Law (Decree 116) as amended by Decree 119 of the Government, dated 16 December 2011</p> <p>Decree 120 of the Government, dated 30 September 2005, on dealing with breaches in the competition sector (Decree 120).</p>
Key prohibitions	<p>Anticompetitive agreements</p> <p>Abuse of dominant market position and monopoly position</p> <p>Economic concentration (ie merger, consolidation, acquisition of enterprises, and joint ventures between enterprises) with a combined market share of the participating parties in the relevant market of more than 50%</p> <p>Unfair competition practices.</p>
Key exemptions/defences	<p>Some anticompetitive agreements are not prohibited if the combined market share of the participating parties is less than 30% in the relevant market.</p> <p>Exemption from anticompetitive agreements for a definite period is available if they satisfy certain conditions and are designed to reduce prime costs and benefit consumers, upon the authorisation of the Ministry of Industry and Trade (MOIT).</p> <p>Economic concentration results for small or medium-sized enterprises.</p> <p>Exemption from economic concentration upon authorisation by the MOIT if one of the participating parties is at risk of failing or of becoming bankrupt, or upon the authorisation of the Prime Minister if the economic concentration expands exports or contributes to socio-economic development and/or to scientific and technological progress.</p>

<p>Leniency programme</p>	<p>There is no leniency programme in the Competition Law or the accompanying Decrees.</p>
<p>Remedies and sanctions</p>	<p>Penalties are a warning and a fine of up to 10% of the total turnover in the financial year preceding the year in which the prohibited practice took place.</p> <p>Additional penalties, depending on the nature and seriousness of the breach, are:</p> <ul style="list-style-type: none"> ■ withdrawal of business registration certificate; revocation of the right to use a licence or practising certificate; and ■ confiscation of material evidence and facilities used to commit the breach. <p><i>Remedying measures</i></p> <ul style="list-style-type: none"> ■ restructure of an enterprise that abuses its dominant market position ■ division or separation of enterprises that have merged or consolidated, and compulsory re-sale of that part of an enterprise which was acquired; ■ public correction ■ removal of illegal terms and conditions from a contract or business transaction ■ other measures necessary to remedy the effects of the restraint on competition caused by the practice in breach ■ compensation for the loss incurred by other individuals or organisations resulting from the practice in breach.
<p>Is there a merger control regime and is the regime suspensive or voluntary?</p>	<p>Notification of mergers and acquisitions is compulsory for economic concentrations when the combined market share of participating parties in the relevant market ranges from 30% and less than 50%.</p> <p>The notification of mergers and acquisitions is not required for economic concentrations with a combined share in the relevant market of less than 30%, or where after the economic concentration, the enterprise is still regarded as a small or medium-sized enterprise by law.</p>

What types of anticompetitive conduct are prohibited?

Anticompetitive agreements that:

- either directly or indirectly fix the price of goods and services
- share consumer markets or sources of supply of goods and services
- restrain or control the quantity or volume of goods and services produced, purchased or sold
- restrain technical or technological developments or restrain investment
- impose on other enterprises contractual conditions for the purchase and sale of goods and services, or that force other enterprises to accept obligations that are not related in any direct way to the subject matter of the contract
- prevent, impede or do not allow other enterprises to participate in the market or to develop their business
- agreements that exclude other enterprises that are not parties to the agreement from the market
- collusion to allow one or more parties to win a tender for the supply of goods and services.

Abuse of dominant or monopoly market position includes:

- selling goods or providing services below the total prime cost of the goods in order to exclude competitors
- fixing an unreasonable sale or purchase price, or fixing a minimum re-sale price of goods or services, causing loss to customers
- restraining production or distribution of goods or services, limiting the market, or impeding technical or technological development, causing loss to customers;
- applying different commercial conditions to the same

transactions in order to create inequality in competition

- imposing contractual conditions on other enterprises for the purchase and sale of goods and services or forcing other enterprises to agree to obligations that are not related in any direct way to the subject of the contract
- preventing market participation by new competitors
- imposing disadvantageous conditions on customers
- abuse of monopoly position in order to change or cancel unilaterally a signed contract without legitimate reason

The last two prohibited conducts apply to companies with monopoly positions only.

A prohibited economic concentration is a concentration in which participating parties have a combined market share in the relevant market of more than 50%.

Unfair competitive practices include:

- misleading instructions
- infringement of business secrets
- coercion in business
- defamation of another enterprise
- causing disruption to the business activities of another enterprise
- advertisements aimed at unfair competition
- promotion aimed at unfair competition
- discrimination by an association
- illegal multi-level selling of goods
- other unfair competitive practices stipulated by the Government.

What types of defences/exemptions are available?

A range of defences and exemptions is available, depending on the anticompetitive conduct alleged.

Anticompetitive agreements

Anticompetitive agreements are exempt for a certain period if they satisfy one of the following conditions in order to reduce primary costs and benefit consumers:

- rationalising an organisational structure or a business scale or increasing business efficiency
- promoting technical or technological progress or improving the quality of goods and services
- promoting uniform applicability of quality standards and technical norms of product types
- unifying conditions of trading, delivery of goods and payment, but not relating to price or any pricing factors
- increasing the competitiveness of small and medium-sized enterprises
- increasing the competitiveness of Vietnamese enterprises in the international market.

The exemption for anticompetitive agreements should be decided by the MOIT.

Abuse of dominant or monopoly market position

There is no defence/exemption for the abuse of dominant or monopoly position available. In State monopoly sectors and enterprises engaging in production or supply of public utility products or services, the State has the power to:

- decide the sale or purchase price of goods and services in State monopoly sectors
- decide the quantity, volume, and market scope of goods and services in State monopoly sectors
- control public utility producers/suppliers by placing orders, assigning plans or conducting tenders in accordance with prices or fees stipulated by the State.

Prohibited economic concentrations

It is possible to make an application to the VCAD for authorisation of an economic concentration if one of the participating parties is at risk of being dissolved or bankruptcy, or the concentration will have the effect of expanding exports or contributing to socioeconomic development and/or to scientific and technological progress.

The exemption for economic concentration will be decided by the MOIT (in case of one of the participating parties is at risk of being dissolved or bankrupted) or by the Prime Minister (in cases that will expand exports or contribute to socioeconomic development, etc).

Unfair competitive practices

There is no defence/exemption available for unfair competitive practices.

What are the substantive laws on cartels in the jurisdiction?

The Competition Law provides for three levels of control:

- *Prohibition*: any economic concentration in which the

participating parties have a combined market share of more than 50% of the relevant market

- *Notification to VCAD*: any economic concentration in which the participating parties have a combined market share of between 30% and 50% of the relevant market. In this case, the merger can proceed upon confirmation from VCAD that the merger is not prohibited
- *Permission*: permission cases are not subject to prohibition or notification, ie a merger in which the participating parties have a combined market share of less than 30%, or where the enterprise after merger will still be regarded as a small or medium-sized enterprise, or upon authorisation by the MOIT or the Prime Minister.

The Competition Law also applies to "foreign enterprises operating in Vietnam". It is not clear as a matter of law if "foreign enterprises operating in Vietnam" include those companies incorporated outside Vietnam (offshore merger) but have products imported into and sold in Vietnam.

The method of calculating the market share of an enterprise is also vague. Market share for a certain type of goods or service is the percentage of turnover from sales of that enterprise over the total turnover of all enterprises conducting business in that type of goods or services in the relevant market.

It is unclear how total turnover and relevant market are determined; the relevant market is stipulated to consist of the relevant product market and relevant geographical market which are defined as follows:

- the relevant *product market* is defined as a market comprising goods or services that may be substituted for each other in terms of characteristics, use, purpose and price
- the relevant *geographical market* is defined as a specific geographical area in which goods or services may be substituted for each other with similar competitive conditions and which area is significantly different from surrounding areas.

Due to the lack of detailed guidance on the calculation of market share, it is somewhat difficult to calculate market share in order to determine if the merger requires to be notified or is prohibited.

What are the criminal and civil sanctions?

Criminal sanctions

Vietnamese law does not impose criminal sanctions on legal entities, as opposed to individuals. Violations of the Competition Law are not currently subject to criminal sanctions.

Civil sanctions

If a practice in breach of the Competition Law causes loss to the interests of the State or to the lawful rights and interests of other individuals or organisations, compensation must be paid for such a loss in accordance with the Civil Code.

Administrative sanctions

The sanctions for the violation of Competition Law are mainly in the form of warnings, monetary fines, withdrawal of business registration certificates, revocation of the right to use a licence or

practising certificate, the confiscation of material evidence and facilities used to commit the breach, and remedying measures.

The fine for a violation of the Competition Law is up to 10% of the total turnover of the organisation or individual in the financial year preceding the year in which the prohibited practice took place.

In cases of failure to make the required notification of a proposed merger or acquisition, a fine of between 1% and 3% of the total revenue may be imposed.

For a prohibited merger, a fine of 5% of the total revenue of the merging enterprise and the merged enterprise might be imposed. A fine from 5% to 10% of the total revenue of the merging enterprise and the merged enterprise might be imposed if the merged enterprise is coerced directly or indirectly to carry out the merger. In addition to fines, the merging enterprise may be subject to a compulsory de-merger or split into a merged enterprise and a merging enterprise in order to restore their position prior to the merger.

What are the regulator's investigatory powers?

The VCAD has expansive powers of investigation. Investigators of VCAD have the rights, among others, to:

- require organisations and individuals to provide all necessary information and documents relating to the competition case
- require the party under investigation to provide documents and/or explanatory statements relating to the competition case
- take testimony from the claimants, and persons with related rights and obligations if their explanatory statements were not provided or were unclear

- take testimony from the party subject to investigation.

The VCAD also has the right to solicit expertise, apply administrative preventive measures such as:

- personal detention pursuant to administrative procedures
- seizure of material evidence and facilities in breach of the Competition Law
- body searches
- searches of vehicles and other objects
- searches of places used to hide evidence and facilities that are in breach of the Competition Law.

Does the law allow follow on or stand alone rights of action?

A person who has suffered loss or damage as a consequence of a contravention of the Competition Law can bring a civil action to the court for compensation in accordance with the Civil Code and Civil Proceeding Code.

Any organisation or individual that considers that their lawful rights and interests have been infringed as a result of a breach of the Competition Law also has the right to lodge a complaint to VCAD. The time limit for lodging a complaint is two years from the date on which the conduct indicating a breach of the Competition Law occurred. VCAD is then responsible for accepting the complaint file and carrying out the preliminary investigation into the case.

If the preliminary investigation reveals indications of a breach of Competition Law, VCAD will carry out an official investigation and send the report to the VCC.

Upon receipt of the investigation report, VCC will conduct an investigative hearing in accordance with the Competition Law, and issue a decision upon resolution of the competition case, applying administrative sanctions and remedying measures if appropriate.

Are there industry specific regimes?

State sectors

The State controls enterprises operating in State monopoly sectors by the following measures:

- deciding the selling price or purchasing price of goods and services in State monopoly sectors
- deciding the quantity, volume, price and market scope of goods and services in State monopoly sectors.

The State also controls enterprises that produce or supply public utility products or services by placing orders, assigning plans or conducting tenders in accordance with prices or fees stipulated by the State.

Financial services

If an insurance enterprise or a credit institution acquires another enterprise and plans to resell it within a maximum period of one year, such an acquisition shall not be deemed to be an economic concentration if the acquiring enterprise does not exercise the right to control or govern the acquired enterprise, or only exercises such rights in a compulsory context in order to achieve the aim of resale.

The one-year time limit for reselling the acquired enterprise might be extended by the Head of VCAD upon request if the acquiring enterprise proves it was unable to sell the acquired enterprise within the time limit.

What are the enforcement trends?

The VCAD has become more proactive in conducting investigations on anticompetitive restraints in recent years. However, the number of investigations conducted still remains relatively small (ten investigations in 2011 and 12 investigations in 2012).

VCAD investigations are focused more on unfair competitive practices, with 41 investigations conducted during 2012 as opposed to 36 investigations in 2011, resulting in fines imposed by VCAD of VND990 million (approximately USD47,000) in 2012 and VND1,425 million (approximately USD67,850) in 2011.

It appears that VCAD is usually reluctant to block an economic concentration, as to do so would require VCAD to prove that the economic concentrations violate certain provisions of the Competition Law. In practice, VCAD appears not to have sufficient information or resources to do so. Therefore, if the participating parties can present convincing arguments to VCAD, it is more likely to accept such arguments than not. In 2012, VCAD received three notifications of economic concentrations and has approved all three cases. According to the 2012 report on economic concentrations, VCAD has approved all notified economic concentration cases and no prohibited economic concentration cases were identified.

Merger control filing requirements

An economic concentration with a combined market share of participating parties of between 30% and 50% in the relevant market must be notified to VCAD. The participating parties are only allowed to conduct the economic concentration after VCAD issues confirmation that the economic concentration is not prohibited.

The notification of economic concentration to VCAD should include the following documents:

- written notification in prescribed form
- valid copy of business registration certificates of all the participating enterprises
- audited financial statements for the last two consecutive years of all of the participating enterprises
- a list of the subsidiary entities of the participating enterprises
- a list of all the types of goods and services in which the participating enterprises and their subsidiaries are currently conducting business
- a report on market share in the relevant market(s) of the participating enterprises for the previous two years
- a letter of appointment of the representative from all participating enterprises to perform the notification procedure.

Within 45 days of receipt of all required documents, subject to any extension in the event of complicated cases, VCAD shall provide a response in writing. The response shall confirm whether the economic concentration falls within the prohibited category or not. If the merger is prohibited, the reasons for the prohibition must be also specified in the response.

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The world of merger control has changed almost beyond recognition compared to a decade or so ago. Today, transactions are subject not only to a growing number of merger control reviews around the world but also a rising number of foreign investment and national security reviews. This increases the risk of delay to deals and also the possibility of divergent outcomes.

Beyond merger control, antitrust enforcement is on the increase globally. Fining levels are rising and enforcement is becoming ever more global as authorities increasingly cooperate and coordinate with each other and new authorities are established.

Clifford Chance's leading Asia-Pacific antitrust practice combines local market knowledge with top ranked legal skills, and is fully integrated with the firm's leading European and US antitrust practices. We can advise on local, multi-country or global antitrust issues, including merger control, investigations, litigation and international arbitrations, compliance programmes, sector-specific regulation, and regulatory and policy development.

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CLIFFORD CHANCE

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