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**Introduction**

Our 2013 Asia Pacific Antitrust & Competition Law Guidebook brings together a summary of commentary on competition laws from 13 Asia Pacific jurisdictions.

Baker & McKenzie is very pleased to publish its 2013 edition of this guidebook. A number of Asian economies have recently embraced competition laws, thus joining the more mature competition law jurisdictions in the region such as Japan and Australia. Local and global businesses have been quite keen to follow these developments and learn about the new regulations. We hope this guidebook can assist with this.

Over the past year we have seen the beginnings of enforcement of new competition laws in Hong Kong and Malaysia, evolution of the new merger clearance regime in Indonesia and important changes to the laws in several other countries, including in mature competition law jurisdictions such as Australia and Japan. All of these developments are covered in this guidebook.

Baker & McKenzie’s Global Antitrust and Competition Law Group is very focused on the Asia Pacific region. We continue to give our clients access to the expertise of our long-established and leading practices in North America, Europe and Latin America and bring to our work in Asia a fluent global approach. Our Asia Pacific-based competition lawyers are genuine local experts and have played a significant role in the development of the laws in their home jurisdictions as leading lawyers, advisors to governments and regulators and active participants in the law reform process. They can also tap into decades of experience from the vast network of Baker & McKenzie’s competition law experts spread throughout our more than 70 offices globally.

We are thankful to our many contributing Baker & McKenzie authors and particularly grateful to the input from our contributing correspondent firms. We would also like to acknowledge the efforts of our content editors, Georgina Foster and Irena Apostopoulos.

Whilst we have done our very best to ensure currency and accuracy as at the date of publication, laws and regulations can often change at short notice. Of course any of our contacts, whose details are found in the guidebook, would be happy to assist with any particular inquiries.

We hope you find this guidebook helpful.

*Andre Gan*
Chair, Asia Pacific Antitrust & Competition Group
Baker & McKenzie
# Overview of Competition Laws in the Asia Pacific, 2013

<table>
<thead>
<tr>
<th>Country</th>
<th>Regulatory authority</th>
<th>Key regulation</th>
<th>Merger control</th>
<th>Prohibition on abuse</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Australian Competition &amp; Consumer Commission</td>
<td><em>Competition and Consumer Act 2010</em></td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>China</td>
<td>Anti-Monopoly Enforcement Agency (an umbrella term for three separate agencies dealing with different aspects of the law)</td>
<td><em>Anti-Monopoly Law of the People's Republic of China</em></td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>Competition Commission (appointed April 2013) and Competition Tribunal (to be established); Office of the Telecommunications Authority Broadcasting Authority</td>
<td><em>Competition Ordinance</em> (full implementation expected summer 2014); <em>Telecommunications Ordinance and Broadcasting Ordinance for sector-specific rules</em></td>
<td>No (except communications)</td>
<td>Yes (not yet in force outside communications)</td>
</tr>
<tr>
<td>India</td>
<td>Competition Commission of India</td>
<td><em>Competition Act 2002</em></td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Indonesia</td>
<td>Commission for Supervision of Business Competition</td>
<td>Law No. 5 of 1999 on the <em>Prohibition of Monopolistic Practices and Unfair Competition</em></td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Japan</td>
<td>Fair Trade Commission</td>
<td><em>Antimonopoly and Fair Trade Maintenance Act 1947</em></td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Malaysia</td>
<td>Competition Commission</td>
<td><em>Competition Act 2010</em>. Other relevant provisions contained in <em>Communications and Multimedia Act 1998; Contracts Act 1950; Franchise Act 1998</em></td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Commerce Commission</td>
<td><em>Commerce Act 1986</em></td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Philippines</td>
<td>Office for Competition has certain investigative and enforcement powers</td>
<td>No general competition law. Relevant provisions in: <em>Revised Penal Code; Civil Code; Downstream Oil Deregulation Act 1998; Constitution of the Republic of the Philippines</em></td>
<td>Yes</td>
<td>No (except in respect of oil industry)</td>
</tr>
<tr>
<td>Singapore</td>
<td>The Competition Commission</td>
<td><em>Competition Act 1994; industry codes</em></td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Taiwan</td>
<td>Fair Trade Commission</td>
<td><em>Fair Trade Law 2002</em></td>
<td>Yes</td>
<td>Yes (limited to monopolistic enterprises)</td>
</tr>
<tr>
<td>Thailand</td>
<td>Trade Competition Commission</td>
<td><em>Trade Competition Act B.E. 2542 (1999)</em></td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Vietnam</td>
<td>Competition Authority and Competition Council</td>
<td><em>Competition Law 2004</em></td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Price fixing</td>
<td>Market sharing or other cartel conduct</td>
<td>Anti-competitive arrangements</td>
<td>Vertical restraints (exclusivity/tying)</td>
<td>Resale price maintenance</td>
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<td>Yes (not yet in force outside communications)</td>
<td>Yes (not yet in force outside communications)</td>
<td>Yes (not yet in force outside communications)</td>
<td>Yes (not yet in force outside communications)</td>
<td>To be considered in Competition Commission guidelines</td>
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<td>Yes</td>
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<td>Yes</td>
<td>Yes</td>
<td>No (unless amounts to abuse of dominant position)</td>
<td>No</td>
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<tr>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No (except in respect of non-compete covenant stipulated by dominant player)</td>
<td>No</td>
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<tr>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No (except where parties enjoy market dominance or monopoly)</td>
<td>No</td>
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</table>
Australia
Australia

Both the Federal and the State and Territory governments have enacted legislation for the purpose of prohibiting anti-competitive conduct and to protect consumers from unfair commercial practices in their dealings with business.

Overview of competition laws

The main statute dealing with competition laws in Australia is the Federal Competition and Consumer Act 2010 (Competition and Consumer Act). Part IV of the Competition and Consumer Act is aimed at preserving and promoting competition in the marketplace by prohibiting or regulating anti-competitive agreements and conduct.

Part IV of the Competition and Consumer Act consists of three divisions:

(a) Division 1, which contains criminal and civil prohibitions on cartel conduct;

(b) Division 1A, which contains prohibitions against anti-competitive price signalling and other information disclosures in certain prescribed markets; and

(c) Division 2, which contains prohibitions against a range of anti-competitive conduct, including misuse of market power, resale price maintenance, exclusive dealing, and anti-competitive mergers and acquisitions.

Enforcement and administration

The Competition and Consumer Act is administered and enforced by the Australian Competition and Consumer Commission (ACCC). The ACCC has extensive powers to investigate anti-competitive conduct, including powers to require persons to furnish information, produce documents and attend for examination. The ACCC also has the power to obtain search warrants. In addition to its investigation and enforcement role, the ACCC has responsibilities in relation to merger clearances and the granting of authorisations and notifications, which provide an exemption from certain prohibitions.

In February 2013, the ACCC issued its new Compliance and Enforcement Policy. Under the policy, the ACCC’s key enforcement tools include: educational campaigns; voluntary industry self-regulation codes and initiatives; administrative resolutions where possible; infringement notices; section 87B court enforceable undertakings; working with other agencies; and legal proceedings where appropriate.

If the ACCC believes there has been a contravention of Part IV of the Competition and Consumer Act, it can bring proceedings in the Federal Court of Australia seeking penalties and other remedies against the primary contravener and other persons involved in the contravention.

Cartel conduct

In July 2009, cartel conduct was criminalised in Australia. There are now parallel criminal and civil offences for making or giving effect to a contract, arrangement or understanding that contains a “cartel provision.” A “cartel provision” is a provision of a contract, arrangement or understanding between competitors that has:

(a) the purpose or effect, or likely effect, of fixing, controlling or maintaining prices;

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1 The Trade Practices Act 1974 (Cth) was renamed the Competition and Consumer Act 2010 (Cth) with effect from 1 January 2011.
(b) the purpose of restricting outputs in the production or supply chain;
(c) the purpose of allocating customers, suppliers or territories; and/or
(d) the purpose of rigging bids or tenders.

There are defences to the prohibitions on cartel provisions, including a defence for joint ventures.

The maximum penalties for a criminal offence, for individuals, are imprisonment for a term of 10 years and/or a fine of 2,000 penalty units (AUD340,000).

Civil proceedings for penalties, as well as private proceedings for damages and other remedies, can also be brought against persons who contravene the cartel offences. The maximum penalty for a civil offence for individuals is AUD500,000.

The maximum penalty for a corporation for each criminal cartel offence or civil contravention (whichever applies), is the greater of AUD10 million or three times the value of the benefit gained from the anti-competitive conduct (or, if that cannot be determined, 10% of the corporate group’s annual turnover in Australia in the preceding 12 months). Other penalties include injunctions and orders disqualifying a person from managing corporations and community service orders.

Prosecution of criminal offences will be undertaken by the Commonwealth Director of Public Prosecutions (CDPP). The CDPP is required to prove the charge beyond reasonable doubt. A Memorandum of Understanding between the ACCC and the CDPP details the roles and responsibilities of each agency in relation to the investigation and prosecution of cartel offences.

**Price signalling**

The Competition and Consumer Act includes two core provisions regarding the anti-competitive disclosure of pricing and other information:

(a) a per se prohibition against the private disclosure of pricing information between competitors which are not made in the ordinary course of business; and
(b) a prohibition against the disclosure of pricing or other information if the disclosure is made for the purpose of substantially lessening competition.

These prohibitions apply only to those classes of goods or services prescribed by regulation. As at April 2013, the prohibitions only apply to the banking sector.

**Exclusionary provisions**

Exclusionary provisions (or “collective boycotts”) are contracts, arrangements or understandings between competitors which have the purpose of preventing, restricting or limiting the supply of goods or services to a particular person or group, or have the purpose of preventing, restricting or limiting the acquisition of goods or services from a particular person or group. It is sufficient that at least two of the parties to the arrangement are competitive with each other in relation to the goods or services the subject of the restriction. Further, it is not necessary that the party who has dealings with the target of the boycott be one of the competitors. Exclusionary provisions are prohibited outright by the Competition and Consumer Act, regardless of their impact on competition.

There are defences to the prohibition on exclusionary provisions for joint ventures.
Resale price maintenance

Suppliers of goods or services in Australia are prohibited from specifying a minimum resale price, and may not withhold supply on the basis that the reseller has refused to comply with a specified minimum resale price.

Resale price maintenance is per se unlawful. It is, however, permissible for a supplier to specify a maximum price for resale, so long as this does not amount to a de facto actual price at which the reseller must sell. It is also permissible for a supplier to issue a recommended resale price provided that the price is a recommendation only and there is no obligation to comply.

Misuse of market power

The Competition and Consumer Act prohibits corporations with “a substantial degree of power in a market” from “taking advantage” of that power in that or any other market for the purpose of eliminating or damaging a competitor, preventing market entry, or deterring or preventing a person from engaging in competitive conduct in that or any other market (prohibited purpose).

There is no specified market share threshold that establishes market power. The courts have defined market power as the ability to act free from the constraints of competition, in particular, in relation to price. However, when determining whether a corporation has a substantial degree of market power, a court shall have regard to the extent to which an entity is constrained by the conduct of:

(a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.

A court may also have regard to the body corporate’s power in the market, resulting from:

(a) any contract, arrangement or understanding or proposed contract, arrangement or understanding, that the body corporate or bodies corporate has, or may have, with another party or other parties; or

(b) any covenants, or proposed covenants, that the body corporate or bodies corporate is or are, or would be, bound by or entitled to the benefit of.

The Competition and Consumer Act contains a non-exhaustive list of factors that a court may consider in determining whether a corporation has taken advantage of its market power.

Establishing a prohibited purpose is a fundamental element of determining whether or not a corporation has misused its market power. The prohibited purpose need not be the only motivating purpose to constitute a breach. It is sufficient if it is a substantial or operative purpose behind the conduct, despite the existence of other valid and lawful purposes or reasons. In the absence of subjective evidence, the courts may infer the corporation’s purpose from its conduct and from the surrounding circumstances.

Predatory pricing

In addition to the general misuse of market power prohibition, there is also a specific prohibition on predatory pricing by corporations with a substantial share of a market. Under this prohibition, a corporation that has a “substantial share of a market” must not supply, or offer to supply, goods or services for a “sustained period” at a price that is “less than the relevant cost” of supplying the goods or services for the purpose of:
(a) eliminating or substantially damaging a competitor in a market;
(b) preventing the entry of a person into a market; or
(c) deterring or preventing a person from engaging in competitive conduct in a market.

The predatory pricing prohibition does not require evidence of intended recoupment of losses for a contravention to be established. A corporation may contravene the prohibition even if it cannot, and may not ever be able to recoup losses incurred in supplying the goods or services.

Anti-competitive arrangements

The Competition and Consumer Act prohibits a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition in a market. The expression “arrangement or understanding” is interpreted broadly by the courts. There is no requirement that an arrangement be in writing or enforceable at law. All that is required is a “meeting of minds” between the parties.

Third line forcing

Third line forcing is one of a number of “exclusive dealing” prohibitions in the Competition and Consumer Act. It is the only type of exclusive dealing which is a per se breach of the Act. Third line forcing occurs when a corporation supplies goods or services, or offers a discount, rebate or credit on goods or services, on condition that the purchaser acquires other goods or services directly or indirectly from a third party. An exemption from the prohibition applies if the conduct involves related companies. It is possible to obtain statutory immunity for third line forcing conduct by notifying the ACCC of the conduct. The ACCC will allow the notification to stand so long as the public benefits of the conduct outweigh any anti-competitive detriments.

Exclusive dealing (other than third line forcing)

Exclusive dealing occurs where a supplier agrees to supply goods or services, or supply goods or services to a reseller at a particular price or with a discount, credit or rebate, on condition that it accepts some restriction on its ability to deal with those goods or services or on its freedom to supply or acquire goods or services from third parties. Exclusive dealing also occurs where a corporation acquires goods or services on the condition that the supplier accepts some restriction on who it supplies. Examples of exclusive dealing include:

(a) a restriction on the reseller acquiring competing products;
(b) a restriction on the reseller supplying the goods or services to particular customers or in particular places; and
(c) a restriction on the supplier selling to other resellers.

Refusal to supply or acquire on the grounds that the other party has not agreed to accept such conditions also constitutes exclusive dealing.

Exclusive dealing (other than third line forcing) is prohibited only if it has the purpose or likely effect of substantially lessening competition in a relevant market.

Secondary boycotts

The Competition and Consumer Act prohibits two persons, acting in concert, from hindering or preventing a third person trading with a fourth person, where the purpose or likely effect of the conduct is to cause a substantial lessening of competition in any market in which the fourth person is
involved. Trade unions engaging in boycotts are specifically addressed in Part IV of the *Competition and Consumer Act*.

**Mergers and acquisitions**

The Competition and Consumer Act prohibits the acquisition of shares or assets if that acquisition would have the effect or likely effect, of substantially lessening competition in any market for goods or services in Australia. There are no compulsory financial or market share notification thresholds under the Competition and Consumer Act. Notification is a voluntary process at the parties’ discretion. However, the ACCC’s Merger Guidelines 2008 indicate that the ACCC will want to examine a merger where both of the following apply:

(a) the products of the merger parties are either substitutes or complements; and

(b) the merged firm will have a post-merger market share of greater than 20% in the relevant market/s.

The market share level of 20% is referred to as the ACCC’s “notification threshold.” If an acquisition does not reach this threshold, the ACCC is generally unlikely to make further enquiries.

The Merger Guidelines 2008 also state that the ACCC will generally be less likely to identify competition concerns in situations where the “Herfindahl-Hirschman Index” (\(HRH\)), a measure of market concentration, is less than 2000. The HHI is calculated by adding the sum of the squares of the post-merger market shares of each competitor in the market.

There are three types of voluntary notification to the ACCC: informal clearance, formal clearance and authorisation.

**Informal clearance**

Informal merger clearance is by far the most common option and is encouraged by the ACCC. The ACCC’s Merger Review Process Guideline provides guidance on ACCC processes for informal merger reviews. They are supplementary to the Merger Guidelines 2008 which deal with the analytical framework.

**Formal clearance**

The formal merger clearance process introduced in 2007 has not yet been applied. As at May 2013, merger parties have elected to proceed by way of an informal clearance. The ACCC’s Formal Merger Review Process Guidelines outline the process for applications for formal merger clearance. It provides that the ACCC must determine an application for formal clearance within 40 business days of receiving a valid application. This review period may be extended, either by agreement by a specified period, or unilaterally by the ACCC by a further 20 days in certain circumstances. If the ACCC refuses clearance, an applicant can apply to the Australian Competition Tribunal (Tribunal) for a review of this decision.

**Authorisation**

Under the Competition and Consumer Act the Tribunal has power to authorise an anti-competitive merger where it is satisfied that the merger would result in such a countervailing benefit to the public that it should be allowed to take place. The authorisation process is time consuming and public and is not commonly used in practice. It only tends to be used where there are competition concerns with a proposed merger.

There are no penalties for failing to notify a transaction to the ACCC, since notification is voluntary. However, if a transaction is found to be in breach of the Competition and Consumer Act, financial
The ACCC can also apply to the court for injunctions to prevent anti-competitive mergers taking place and for divestiture orders if an anti-competitive merger has proceeded. Private parties cannot obtain injunctions to prevent an anti-competitive merger from taking place but can seek damages and other remedies for any loss or damage sustained as a result of the merger, as well as divestiture orders.

The Competition and Consumer Act also prohibits certain acquisitions occurring outside Australia which have anti-competitive effects within the country.

Exceptions

The Competition and Consumer Act provides a number of exceptions to certain (but not all) prohibitions in Part IV of the Competition and Consumer Act on cartel and other anti-competitive conduct. These include the following:

(a) a contract of employment insofar as the contract relates to the remuneration, conditions of employment, hours of work or working conditions of employees;

(b) restraint of trade clauses for employees or independent contractors;

(c) a provision in a contract for the sale of a business or shares that is solely for the protection of the purchaser in respect of the goodwill of the business; and

(d) certain aspects of intellectual property licences.

Authorisations and notifications

In certain cases, a corporation may apply to the ACCC for an authorisation in relation to proposed conduct which would otherwise breach Part IV of the Competition and Consumer Act. The ACCC may grant authorisation and thereby immunity for the conduct where the benefit to the public of the conduct outweighs the anti-competitive detriment.

In addition, immunity may be obtained through an ACCC notification process for exclusive dealing conduct, as well as certain forms of collective bargaining conduct.

Penalties and liabilities

The Competition and Consumer Act is administered and enforced by the ACCC, although compliance with most sections can also be enforced by private action. The ACCC has become increasingly vigilant (and successful) in enforcing compliance with the Competition and Consumer Act. Serious cartel conduct will be referred by the ACCC to the CDPP for criminal prosecution.

For a corporation, a breach of the civil prohibitions in Part IV of the Competition and Consumer Act (other than in relation to the prohibition on secondary boycotts) may lead to the following penalties per breach: up to AUD10 million per breach, or three times the value of the benefit received from the anti-competitive conduct or, if the value of the benefit cannot be determined, 10% of annual group turnover in Australia. In the case of secondary boycotts, the maximum penalty is AUD750,000.

For an individual, the criminal penalties for criminal cartel offences are imprisonment for a term of up to 10 years and/or a fine of up to 2,000 penalty units (AUD340,000). The penalty for a civil offence is up to AUD500,000 per breach.

A corporation (including its related bodies corporate) is prohibited from indemnifying its directors, officers or employees against any liability to pay a pecuniary penalty and for any legal costs incurred in defending or resisting proceedings in which the individual is found liable to pay a pecuniary penalty.
The ACCC can also seek a range of other remedial orders, including injunctions, declarations, compensatory orders and orders disqualifying a person who has contravened or has been involved in a contravention of Part IV of the Competition and Consumer Act from managing corporations.

Private actions (including class actions) may be brought against corporations and individuals who have contravened Part IV of the Competition and Consumer Act seeking damages, other compensation, injunctions and other remedial orders.

**Immunity Policy**

The ACCC has an Immunity Policy for Cartel Conduct ([Immunity Policy](#)) under which immunity from ACCC prosecution is available to the first member of a cartel to apply for it, provided that at the time of application, the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings. Immunity is also subject to compliance with certain other conditions, including that the applicant is not the ringleader and that they provide full and ongoing cooperation to the ACCC.

For criminal contraventions, the Prosecution Policy of the Commonwealth includes a specific section covering immunity for cartel conduct. This is in essentially the same terms as the ACCC’s Immunity Policy.

The ACCC is responsible for granting immunity from civil enforcement proceedings and the CDPP for granting immunity from criminal proceedings (although the ACCC recommends to the CDPP whether immunity should be granted). As a matter of practice, applicants will need to apply for both civil and criminal leniency at the same time.

The ACCC also has a Cooperation Policy for Enforcement Matters ([Cooperation Policy](#)) which sets out the ACCC’s position in relation to immunity and leniency applications resulting from cooperation in ACCC enforcement matters. The Cooperation Policy applies to all anti-competitive conduct in contravention of the Competition and Consumer Act.

The ACCC’s Immunity Policy and Cooperation Policy do not provide any protection against private actions.

**Extraterritorial application**

The provisions of Part IV of the Competition and Consumer Act apply to conduct engaged in outside Australia by a company incorporated or “carrying on business” in Australia, or by an Australian entity or person ordinarily resident within Australia. If the anti-competitive conduct involves exclusive dealing or resale price maintenance, a less strict territorial nexus applies: those prohibitions apply to any person outside Australia provided that the person supplies the goods or services to persons within Australia.
China
People’s Republic of China

The Anti-Monopoly Law of the People’s Republic of China (Anti-Monopoly Law) was adopted by the Standing Committee of the National People’s Congress (NPC) on 30 August 2007 and came into effect on 1 August 2008. It applies throughout the PRC with the exception of the two Special Administrative Regions of Hong Kong and Macau.

Overview of competition laws

The Anti-Monopoly Law is China’s first comprehensive competition law and codifies the existing body of competition-related laws and regulations. The Anti-Monopoly Law prohibits monopolistic conduct, which can be divided into the following broad headings:

(a) Anti-competitive agreements between undertakings;
(b) Abuse of a dominant position; and
(c) Mergers that may have the effect of eliminating and restricting competition.

In addition to the Anti-Monopoly Law itself, implementing rules and guidelines assist in the application and interpretation of the Anti-Monopoly Law (see below). Lastly, existing legislation such as the Anti-Unfair Competition Law, Price Law, Bidding Law, Contract Law and Foreign Trade Law remain in force.

Merger control

Several regulations and guidelines have been governing the jurisdictional and procedural aspects of the merger notification and review process, in particular:

(a) State Council Regulations on the Notification Thresholds of Concentrations (effective from 3 August 2008);
(b) Measures for Computation of Turnover for Notification of Concentrations by Business Operators in the Financial Sector (effective from 15 August 2009);
(c) Measures on the Review of Concentrations of Business Operators (effective from 1 January 2010);
(d) Measures on the Notification of Concentrations of Business Operators;
(e) Measures on the Divestiture of Assets or Businesses in Order to Implement Concentrations of Business Operators (effective from 5 July 2010), with a new draft subject to public consultation as at May 2013;
(f) Interim Measures on the Assessment of the Effect of the Concentration of Business Operators on Competition (effective from 5 September 2011); and
(g) Interim Measures for Investigation and Handling of Concentrations between Undertakings Not Notified in Accordance with the Law (effective from 1 February 2012).
Antitrust enforcement

In regard to antitrust enforcement competition, agencies have adopted the following regulations and guidelines to date:

(a) National Development and Reform Commission (NDRC) Rules on Anti-Price Monopoly Conduct;
(b) NDRC Procedural Rules on Anti-Price Monopoly Agreements;
(c) State Administration of Industry and Commerce (SAIC) Rules on Abuse of Dominance;
(d) SAIC Rules on Monopoly Agreements;
(e) SAIC Anti-competitive Abuse of Administrative Power;
(f) SAIC Procedural Rules for Investigating and Handling Cases Relating to Monopoly Agreement and Abuse of Dominance Cases; and
(g) SAIC Procedural Rules for Investigation and Handling of Administrative Monopolies.

Enforcement and administration

Under the Anti-Monopoly Law, the State Council established two regulatory bodies to regulate monopolistic activity: (i) the Anti-Monopoly Committee (AMC), which is responsible for developing competition legislation and policy, publishing guidelines, and coordinating the administrative enforcement work and (ii) the Anti-Monopoly Enforcement Agency (AEA), which is responsible for enforcing the Anti-Monopoly Law. The enforcement powers of the AEA are divided between three agencies namely:

(a) the NDRC - responsible for price-related offences;
(b) the SAIC - responsible for enforcing monopoly agreements, abuses of dominant market position and abuses of administrative powers to eliminate and restrict competition (other than price-related offences); and
(c) the Ministry of Commerce (MOFCOM) - responsible for merger control.

Other than merger control, administrative enforcement is conducted by the NDRC and SAIC both at national and provincial level, depending on the matter. The NDRC has indicated it will adopt a more decentralized approach towards investigations and enforcement of the Anti-Monopoly Law.

The SAIC and NDRC have delegated their enforcement powers to local departments and to date most enforcement activity has been at a local level. For example, provincial level authorities have taken action against price fixing and collective boycott activity in relation to a variety of staple products and services, such as rice noodles and garlic. Such cases are often prosecuted under pre Anti-Monopoly Law regulations and decisions may not even be reported. There are indications that this trend is now changing. For example, in February 2013, fines were imposed on two liquor manufacturers for resale price maintenance under the Anti-Monopoly Law.²

² The Sichuan Provincial Development and Reform Commission (PDRC) imposed a fine of RMB202 million on Wuliangye for imposing minimum resale prices on national liquor distributors. Since 2009 Wuliangye entered into more than 3,200 agreements with independent distributors. Punitive measures, such as reducing or ceasing supply and confiscating deposits or marketing funds, were imposed on those distributors who failed to adhere to minimum resale prices. Guizhou PDRC also imposed a fine of RMB247 million on MaoTai for imposing minimum resale prices on distributors and punishing those who deviated from this price.
Under the Anti-Monopoly Law, individuals and companies are entitled to bring private actions against undertakings that have engaged in monopolistic conduct. Each major court has an existing intellectual property division which has been tasked with hearing Anti-Monopoly Law claims. Several lawsuits have been filed to date, mostly pertaining to allegations of abuse of a dominant market position. To date the courts have required a high standard of proof and have rejected many cases due to lack of evidence, usually for failing to demonstrate that the defendants are in a dominant position.

In May 2012, the PRC Supreme People’s Court published its Rules on Certain Issues relating to Application of Laws for Hearing Civil Disputes Caused by Monopolistic Conducts (SPC Rules). The SPC Rules reduce the burden of proof for a plaintiff to establish dominance. They also create a presumption of dominance for state-owned companies and public utilities. Expert testimonies and evidence are now accepted by courts as evidence. The SPC Rules allow a company or individual to bring a private action directly to the court without first obtaining a government determination on the monopolistic conduct.

In relation to merger control, over 382 filings were made between August 2008 and December 2011, for both China-related deals, as well as global and regional foreign-to-foreign transactions. To date, one deal (Coca-Cola’s proposed acquisition of Chinese juice maker, HuiYuan) has been prohibited and conditional approval was granted in 16 other transactions. Remedies have included, for example, divestments of production capacity (Mitsubishi Rayon-Lucite, Pfizer-Wyeth, Penelope-Savio, Glencore-Xstrata); re-branding (Panasonic-Sanyo); discontinuing an existing brand (Novartis-Alcon); terminating an exclusive distribution agreement (Novartis-Alcon); non-discrimination in supply (General Motors-Delphi, Uralkali-Silvinit, GE China-Shenhua, Henkel-Tiande Chemical); crown jewel remedy (Mitsubishi Rayon-Lucite) and undertakings affecting further acquisition or plant expansion (Anheuser Busch-Inbev, Mitsubishi Rayon-Lucite); maintaining current business practices (Google-Motorola); and ensuring the independence of the target business (Seagate-Samsung, WD-HGST).

**Anti-competitive (monopoly) agreements**

The Anti-Monopoly Law prohibits “monopoly agreements,” These are defined as agreements, decisions or other concerted practices between business operators that have the purpose or effect of eliminating or restricting competition.

Monopoly agreements are divided into two categories: horizontal monopoly agreements and vertical monopoly agreements.

The following monopoly agreements are presumed to be illegal:

(a) agreements to fix or change the price of goods;
(b) agreements to restrict the quantity of goods produced or sold;
(c) agreements to divide a sales market or a raw materials procurement market;
(d) agreements to restrict the purchase of new technology or new equipment, or to restrict the development of new technology or new products;
(e) concerted refusals to deal; and
(f) resale price maintenance.

This list is non-exhaustive and may be added to by the AEA at any time.
The prohibitions on horizontal and vertical monopoly agreements do not apply to agreements entered into by business operators to safeguard legitimate interests in foreign trade and foreign economic cooperation. Other exceptions to the prohibitions may be specified by law or by the State Council.

In addition, an exemption from the prohibition on agreements is available if undertakings can show that:

(a) the agreements will not substantially restrict competition in the relevant market;
(b) consumers will receive a fair share of the resulting benefits; and
(c) the agreement had a qualifying purpose, such as technological advancement and/or product development, improvement in product quality, increases in efficiency and reduction in costs.

Under the Anti-Monopoly Law, these exceptions apply to all monopoly agreements and so, strictly speaking, there is no per se prohibition of monopoly agreements. The parties must rely on self-assessment as there is no mechanism under the Anti-Monopoly Law to apply for an exemption.

**Permitted monopolies**

The Anti-Monopoly Law expressly permits two categories of monopolistic industries:

(a) State-owned industries relevant to the national economy and national security, such as telecommunications and power; and
(b) State-owned industries which are granted exclusivity under current laws, including petroleum and tobacco.

The Anti-Monopoly Law exempts these industries from the scope of its application and expressly endorses those industries, stating that the State “shall protect the lawful business operations conducted by the business operators in those industries.” However, it notes business operators in those industries “shall not harm the consumer interests by taking advantage of their controlling or exclusive dealing position.” The Anti-Monopoly Law is silent on whether the conduct of business operators in these industries should be monitored.

Recently the NDRC investigated alleged price discrimination and abuse of dominance by China Telecom and China Unicom in the broadband access and inter-network settlement sector. This is the first antitrust investigation involving large state-owned companies and indicates that the NDRC may be willing to actively prosecute monopolistic conduct by major state-owned entities. China Telecom and China Unicom have applied for a suspension of the investigation on the condition that they would lower Internet access prices and improve connection speeds. NDRC’s decision is still pending.

**Abuse of dominant market position**

The Anti-Monopoly Law defines a dominant market position as the ability of one or several business operators to control the price, volume or other trading terms in the relevant market or to otherwise affect conditions of a transaction so as to hinder or influence the ability of other business operators to enter into the market.

The dominance assessment is based on a number of factors including the relevant undertaking’s market shares, the ability of the undertaking to control the sale or input market, the financial and technical resources of the undertaking, competitiveness of the relevant market, the extent to which other undertakings rely on the relevant undertaking and barriers to market entry.
Dominant market position is presumed where a undertaking’s market share is 10% or greater and:

(a) The undertaking’s market share exceeds 50%;
(b) The combined market share of the undertaking and one other undertaking exceeds 66.6%; and
(c) The combined market share of the undertaking and two other undertakings exceeds 75%.

Thus, two or more undertakings may be found to hold a joint dominant market position even if there is no coordination of their conduct. Presumptions of dominance can be rebutted by evidence to the contrary.

A dominant market position is not of itself unlawful; only the abuse of such a dominant market position is unlawful. The Anti-Monopoly Law prohibits the following types of conduct as an abuse of dominant market position:

(a) selling goods at prices that are unfairly high or purchasing goods at prices that are unfairly low;
(b) without a legitimate reason, selling goods at below cost price;
(c) without a legitimate reason, refusing to deal with a business operator;
(d) without a legitimate reason, restricting a trading partner by requiring it to deal only with the dominant operator(s) or with other designated operators;
(e) without a legitimate reason, tying goods or attaching other unreasonable conditions to a transaction; and
(f) without a legitimate reason, treating equivalent trading partners in a discriminatory manner with respect to sale price or other trading conditions.

This is a non-exhaustive list and the AEA may add to it.

**Merger control**

Under the Anti-Monopoly Law, notification is mandatory in respect of “concentrations,” such as the following:

(a) a merger between business operators;
(b) a business operator’s acquisition, by way of equity or asset acquisition, of control over another business operator; or
(c) a business operator’s acquisition, by way of contract or other means, of control over, or the ability to exert a decisive influence on, another business operator.

Although the Anti-Monopoly Law itself does not expressly refer to joint ventures, the notes to the merger filing form published in 2012 suggest that joint ventures should be notified. The recent conditional approvals to the GE China-Shenhua joint venture and Henkel (HK)-Tiande Chemical joint venture confirmed that MOFCOM considers joint ventures to be notifiable concentrations.

The Anti-Monopoly Law does not distinguish between foreign and domestic transactions. Foreign-to-foreign transactions are therefore subject to notification if there is a “concentration” and the thresholds are met, as long as there is a potential effect on competition in China. Merger filings are reviewed by the MOFCOM Anti-Monopoly Bureau. Where the relevant merger filing thresholds are met, the Anti-
Monopoly Law expressly prohibits the consummation of a concentration prior to merger control clearance being obtained, and provides for penalties for non-compliance, including the ability for MOFCOM to reverse a transaction or have it declared void.

Notification is required in either of these:

(a) **first threshold**

(i) the combined worldwide turnover in the most recent completed accounting year of all parties to the transaction exceeds RMB10 billion (approximately USD1.6 billion); and

(ii) each of at least two of the parties to the transaction had turnover in the PRC in the most recent completed accounting year exceeding RMB400 million (approximately USD64.5 million); or

(b) **second threshold**

(i) the combined turnover in the PRC in the most recent completed accounting year of all parties to the transaction exceeds RMB2 billion (approximately USD322 million); and

(ii) each of at least two parties to the transaction had turnover in the PRC in the most recent completed accounting year exceeding RMB400 million (approximately USD64.5 million).

For financial institutions (which include banking, securities, futures, fund management and insurance companies), the thresholds are higher (ten times the thresholds set out for non-financial institutions). Also, special rules govern what items are to be included when calculating the turnover of financial institutions. For example, the turnover for insurance companies includes insurance premiums but not investment gains, unlike the treatment for banks.

In addition, MOFCOM’s Anti-Monopoly Bureau has the discretion to investigate a merger not exceeding the turnover thresholds, if it considers that a concentration has or may have an effect of restricting or eliminating competition, as demonstrated by supporting facts and evidence obtained in accordance with prescribed procedures. To date no statutory procedures have been issued. There is at least one instance (BHP Billiton’s bid for Potash Corporation) where a filing has effectively been invited by MOFCOM due to the existence of this provision. Such intervention is most likely to follow a complaint from a competitor, government department or industry body.

The merger review process in China has typically taken a significantly longer period compared to other jurisdictions. This is due to various factors, including MOFCOM’s structural understaffing; several requests by MOFCOM for information and documents from the notifying parties; and the implementation of multiple third-party consultations involving industry associations, Chinese government authorities, competitors, customers and suppliers. In addition, the period preceding MOFCOM’s official acceptance of the notification is increasingly long (~8 to 10 weeks). With increased further investigations (90-day Phase II and 60-day Phase III), MOFCOM has issued guidance to govern how remedies should be negotiated, and the types of structural (including divestment of assets or business) and/or behavioural undertakings (including granting access to facilities, licensing critical intellectual property and terminating exclusive agreements) that can be considered to resolve competition concerns.

There is also a separate system for national security review. MOFCOM has issued Guidelines for Implementation of Relevant Issues Regarding National Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors. The guidelines describe the process of the
national security review and other relevant issues, such as documents to be submitted and how review decisions are made.

Concentrations involving related parties are exempted from the notification requirement where

(a) one of the participating business operators holds more than 50% of the voting shares in or assets of each of the other business operators; or

(b) more than 50% of the voting shares in or assets of each of the participating business operators is owned by the same non-participating business operator.

**Penalties under the Anti-Monopoly Law**

The following penalties are available under the Anti-Monopoly Law:

(a) for concluding and implementing monopoly agreements, or abuses of dominant position, fines of up to 10% of the total turnover in the preceding year;

(b) confiscation of illegal income;

(c) fines of up to RMB500,000 for violations of merger-control provisions; and

(d) the invalidation of agreements concluded in violation of the law, and cease-and-desist orders in respect of abuses of dominant position.

The Anti-Monopoly Law also allows private actions to be brought by parties who have suffered loss as a result of the contravention.

There are no criminal penalties for monopolistic conduct under the Anti-Monopoly Law.

**Extraterritorial application**

The Anti-Monopoly Law aims to safeguard China against anti-competitive activity. As such, it applies to conduct both within China, and conduct outside China which has the effect of eliminating or restricting competition in the Chinese market.

**Reform**

Further implementing regulations, guidelines and measures are under consideration by the Chinese legislative bodies and enforcement agencies. Amongst other topics these may provide additional guidance on fast-track review for merger-control notifications, remedies, treatment of intellectual property abuses and how the Anti-Monopoly Law will interface with intellectual property law (in particular, refusal to licence), and vertical restraints affecting the supply chain such as exclusivity arrangements and geographic territorial allocations.
Hong Kong
Hong Kong

After over a decade of public debate, the Legislative Council of the Hong Kong Special Administrative Region finally adopted the Hong Kong Competition Ordinance (the **Competition Ordinance**) on 14 June 2012. For the first time, Hong Kong has a cross-sector competition law regime.

**Telecoms and broadcasting**

Prior to the Competition Ordinance, telecommunications and broadcasting were the only industries in Hong Kong subject to competition law. Separate competition law regimes for these sectors will remain, though amendments to the Broadcasting Ordinance and Telecommunications Ordinance will ensure consistency with the Competition Ordinance.

The Office for the Telecommunications Authority (**OFTA**), the Broadcasting Authority (**BA**) and the Competition Commission (**Commission**) will be empowered to enforce competition law, with the bodies signing a Memorandum of Understanding clarifying the responsibilities of each authority. This will likely give complainants a choice of authority to approach.

**Overview of the Competition Ordinance**

The Competition Ordinance will be implemented in phases. The institutional provisions — firstly, establishment of the Commission and issuing related guidelines, and secondly, implementing the Competition Ordinance’s adjudicative forces — took effect on 18 January 2013, and will come into force on 1 August 2013 respectively. It is anticipated that the substantive provisions will be implemented before summer 2014.

The Hong Kong government on 26 April 2013 announced the appointment of the chair and 13 other members of the Competition Commission. Three are lawyers, four are academics (one in law, three in economics), eight have business experience, and nine serve on various public or government bodies.

Broadly the Competition Ordinance is based on the European Union (**EU**) competition model. It includes far-reaching investigative powers, the ability to impose potentially high fines, a leniency regime and a mechanism for allowing victims of anti-competitive conduct to bring actions for compensation. The main features of the Competition Ordinance are as follows:

(a) a prohibition on restrictive agreements and concerted practices (First Conduct Rule);

(b) a prohibition on the abuse of a substantial degree of market power (Second Conduct Rule);

(c) a prohibition on anti-competitive mergers in the telecommunications sector;

(d) a judicial enforcement model, where sanctions can only be imposed by a Competition Tribunal;

(e) provisions for extra-territoriality;

(f) limited exemptions for small- and medium-sized enterprises; and

(g) no criminal offences (except incidental, like obstruction).
Enforcement and administration

The Competition Ordinance has a two-tier enforcement model, with two new bodies being set up: (i) a Commission and (ii) a Competition Tribunal (Tribunal).

The Commission will investigate and enforce competition law in Hong Kong. The Commission will consist of at least five members appointed by the Chief Executive, and drawn from legal, economics and business industries.

A key Commission role, especially at first, will be promoting competition law awareness and issuing guidance for businesses and consumers. The Competition Ordinance requires the Commission to issue guidelines covering many aspects of substance and procedure, and to consult on these. The guidelines will cover the legality of many important commercial restrictions, and prove vital for companies who will be expected to self-assess their compliance with the law in most cases.

The Commission is empowered to investigate suspected infringements of the Conduct Rules, both on its own initiative and in response to complaints. The Commission will have wide powers to obtain relevant documents and information in the course of an investigation, including the power to enter and search premises and seize documents.

Once evidence of an infringement is uncovered, the Commission has no power to decide on the penalty to impose. Instead, the Commission must present its case and apply to the Tribunal for a penalty to be imposed. It is the Tribunal which will then decide whether or not the Conduct Rules have been breached and, if so, on the appropriate penalty.

Alternatively, if the Commission identifies a possible infringement, companies can offer a voluntary commitment to take action to address the Commission’s concern at any time during an investigation.

Lastly, the Commission can issue an Infringement Notice after it has conducted its investigation instead of bringing proceedings before the Tribunal, setting out the alleged offence and the Commission’s case. Parties subject to an Infringement Notice can decide whether to accept the Infringement Notice and enter into a binding commitment (that potentially admits liability) and agree to amend the conduct in question. Alternatively they can refuse to accept the Infringement Notice, and allow the case to proceed to the Tribunal. The Infringement Notice procedure will be used in respect of hardcore infringements in breach of the First and Second Conduct Rule. Non-hardcore infringements will be subjected to a “warning notice” instead.

The Tribunal possesses the status and procedures equivalent to those of the Court of First Instance (CFI), and will be staffed by judges of CFI rank. The Tribunal is empowered to do the following:

(a) impose more severe penalties than those available to the Commission directly;
(b) hear private actions for damages;
(c) hear appeals of Commission exemption, exclusion and enforcement decisions;
(d) adopt a wide range of interim orders, pending a final decision of the Commission or Tribunal, such as preventing the implementation of an agreement that is suspected of infringing a Conduct Rule.

Any decision by the Tribunal can be appealed and brought before the Court of Appeal. In addition, those parties who have suffered loss can bring private actions against the relevant companies.
Conduct rules

The Competition Ordinance consists of two main prohibitions covering:

(a) anti-competitive agreements; and
(b) abuse of a substantial degree of market power.

These prohibitions apply to “undertakings,” defined as any legal entity or natural person engaged in an economic activity. The Competition Ordinance also applies to associations of undertakings. All industry sectors are covered unless expressly excluded (see Exemptions and exclusions).

First Conduct Rule

The First Conduct Rule prohibits any agreement, concerted practice or decision where the object or effect is to prevent, restrict or distort competition in Hong Kong. In particular, this applies to agreements, concerted practices or decisions that

(a) directly or indirectly fix prices or any other trading conditions;
(b) limit or control production, markets, technical development or investment; or
(c) share markets or sources of supply.

Agreements can be made exempt from the First Conduct Rule by the Commission on an individual basis or via a “block exemption” (see Exclusions and exemptions).

The government has indicated that “hardcore” and “non-hardcore” infringements will be subject to two different enforcement methods.

(a) “Hardcore” infringements cover the most serious anti-competitive conduct, namely price fixing, market allocation and output control for goods and services, and bid rigging. These will always be considered as imposing adverse effects on competition in Hong Kong and hence will be subject to all the enforcement options provided in the Ordinance.

(b) For “non-hardcore” infringements, the Commission will first issue a “warning notice,” requiring the relevant undertaking to cease the infringement within a specified period. Prosecution before the Tribunal will only take place if the concerned undertaking refuses or fails to cease the infringement within the given time frame.

The First Conduct Rule still contains areas of uncertainty, in particular with respect to:

(a) the policy on resale price maintenance; and
(b) whether a substantiality test will be imposed to qualify an infringement.

The guidelines are expected to address those questions.

Second Conduct Rule

The Second Conduct Rule prohibits the abuse of a substantial degree of market power in conduct where the object or effect is to prevent, restrict or distort competition in Hong Kong. The Competition Ordinance expressly refers to two examples of “abuse,” namely:

(a) behaviour to exclude competitors (such as predatory pricing, refusal to supply or tying/bundling of products); and
(b) behaviour that harms consumers (such as limiting production, markets or technical development).

It remains to be seen how far other types of “abuse” found in other jurisdictions, such as excessively high pricing, are applied in Hong Kong.

Unusually by international standards, though consistent with the position in Mainland China, the Commission has the power to exempt abuses of market power from the Second Conduct Rule, and undertakings can apply for such an exemption (see Exclusions and exemptions).

**Exclusions and exemptions**

**Statutory bodies**

The Competition Ordinance does not apply to statutory bodies, except those specified in a separate list that will be adopted by the Chief Executive in Council. Statutory bodies are persons, incorporated or unincorporated, established under an ordinance, or constituted or appointed by an ordinance, but do not include companies, trustees, societies, cooperatives and trade unions. So far, the government has reviewed 581 statutory bodies and has recommended that six statutory bodies will be subject to the Competition Ordinance, namely: the Federation of Hong Kong Industries, Federation of Hong Kong Industries General Committee, Helena May, Kadoorie Farm and Botanic Garden Corporation, Matilda and War Memorial Hospital, and Ocean Park Corporation.

The Competition Ordinance includes a mechanism through which the Chief Executive may revoke the general exclusion for a particular statutory body and/or specific activities they undertake. This will only take place where the body in question competes with other undertakings in an area not directly linked to the provision of public services, is damaging economic efficiency, and there is no public policy reason to maintain the exclusion.

**Other exclusions**

The Ordinance also contains the following:

(a) An exclusion from the First Conduct Rule for agreements enhancing overall economic efficiency, either by improving production or distribution, or by promoting technical or economic progress, provided that these agreements do not impose unnecessary restrictions and do not eliminate competition in respect of a substantial part of the market in question;

(b) An exclusion from the First Conduct Rule for agreements that are made for the purpose of complying with Hong Kong or Mainland Chinese legal requirements; and

(c) An exclusion from the First and Second Conduct Rules for undertakings entrusted with the operation of services of a general economic interest, or where the prohibition would obstruct it from carrying out its assigned tasks.

**De minimis regime for SMEs**

Schedule 1 provides a de minimis framework, excluding from the First Conduct Rule all agreements between business operators with a combined annual turnover not exceeding HKD200 million in the preceding financial year. This exclusion will not apply to agreements involving “hardcore” infringements. Undertakings with an annual turnover of less than HKD40 million will be excluded from the Second Conduct Rule.
Exemptions

The Commission may also grant (i) block exemptions for categories of agreement that enhance overall economic efficiency, and (ii) specific exemptions if there are exceptional and compelling public policy grounds to do so, or in order to avoid conflict with international obligations. Exemptions are limited in duration and scope.

Restrictive agreements or practices that breach the First or Second Conduct Rule but also improve production or distribution, or promote technical or economic progress, will be permitted provided certain conditions are met. Concerned undertakings have the option of a self-assessment or requesting a decision from the Commission. The Commission will not be obliged to offer formal guidance unless the application raises novel or otherwise unclear issues. The Competition Ordinance also permits the Commission to charge a fee for such applications.

Merger control

The Competition ordinance does not include any general merger-control provisions (except for the merger-control rules which already apply to the telecommunications industry). The Competition Ordinance clarifies that even minority acquisitions and indirect or overseas transactions involving telecom licencees fall within the scope of the Hong Kong regime. Both OFTA and the Commission will be empowered to review or challenge telecom mergers. Under Schedule 1, merger activities are specifically excluded from the application of the First Conduct Rule and the Second Conduct Rule.

Penalties and liabilities

Infringement of the First or Second Conduct Rule is a civil offence potentially resulting in severe penalties. The Commission may impose financial penalties of up to HKD10 million and invite undertakings to sign binding legal commitments and admissions of liability. The Tribunal may impose fines on companies of up to 10% of turnover obtained in Hong Kong for each financial year in which the infringement occurred, up to a maximum of three years. Lastly, the Commission may recover its investigation and legal costs.

Other penalties include director disqualification, unwinding of the transaction, a declaration that the relevant agreement is void, damages for loss suffered as a result of the infringement and paying back the profit gained as a result of the infringement.

The Ordinance creates a number of criminal offences relating to misleading and obstructing investigations, as well as violating the terms of commitments. These offences carry substantial fines, as well as imprisonment for a period of up to two years.

The limitation period for the imposition of any of the above penalties is five years from the day on which the infringement ceased or the Commission became aware of the infringement, whichever is later (i.e., the Commission must complete any investigation within five years).

The Competition Ordinance also includes a leniency regime. The Commission can reduce or waive pecuniary penalties for companies who come forward with information regarding illegal activity, or assist the Commission in their investigation. While the full details have been left to the Commission to determine, we understand that 100% immunity from fines and other penalties (but not from private actions) will be available. The Commission has the power to revoke leniency agreements where the applicant has not cooperated fully or has given false or misleading information.

Third parties which have suffered loss can bring private action against the relevant companies. Only follow-on damages actions are permitted (i.e., based on an infringement decision from the Tribunal).
Extraterritorial application

Both Conduct Rules expressly apply to agreements and conduct that have the object or effect to prevent, restrict or distort competition in Hong Kong, even if the undertakings are located outside Hong Kong, and the agreements or conduct take place in whole or in part outside Hong Kong.
India

For 40 years, India had its own version of competition law, which was enacted through a legislation called the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). This legislation, based on principles of a “command and control” economy, was designed to put in place a regulatory regime in a country which did not allow concentration of economic power in a few hands because it was prejudicial to public interest, and therefore prohibited any monopolistic and restrictive trade practices. Post-economic liberalisation in 1991, it became imperative to put in place a competition law regime that was more responsive to the economic realities of the nation and consistent with international practices.

Consequently, in 2002, the Indian Parliament approved a comprehensive competition legislation — the Competition Act, 2002 (Competition Act) — to regulate business practices in India so as to prevent practices having an appreciable adverse effect on competition (AAEC) in India. The Competition Act primarily seeks to regulate three types of practices: (i) anti-competitive agreements, (ii) abuse of a dominant position and (iii) combinations (i.e., mergers, acquisitions and amalgamations).

The Competition Act, which was amended by the Competition (Amendment) Act, 2007 later, came into force on 2009 May 20, when the Government of India notified the provisions related to “anti-competitive agreements” and “abuse of dominant position” of the Competition Act. It took three more years for the merger-control provisions of the Competition Act to be brought into force on 2011 June 1.

Enforcement and administration of the Competition Act

The Competition Act has also created a new enforcement authority — the Competition Commission of India (the CCI) — which is solely responsible for its enforcement and administration. The CCI comprises of a Chairperson and not less than two and not more than six other members to be appointed by the Government of India. The CCI presently comprises of seven members, including the Chairman, Ashok Chawla.

The CCI may initiate an inquiry in relation to an “anti-competitive agreement” or “abuse of dominant position” either on its own, on the basis of information or knowledge in its possession or on receipt of information or on the receipt of a reference from the government or a statutory authority. Any person, consumer or their associations can file a complaint/information relating to anti-competitive agreements and abuse of dominant position. With respect to combinations, the CCI may initiate an enquiry either on its own or on the basis of the notification by the firms proposing to enter into the combination.

The CCI is entrusted with extensive powers of investigation with respect to anti-competitive practices, which include powers to summon and enforce the attendance of any person, examine them on oath, receive evidence on affidavit and other similar provisions. While carrying out its functions, the CCI is assisted by the Director General (DG) and other officers and staff of the CCI. If the CCI is of the opinion that there is a prima facie case, it shall direct the DG to investigate the matter and report its findings. The CCI may rely upon the recommendations made by the DG in its report and after giving the concerned parties a due opportunity to be heard, pass such orders as it may deem fit, including an order to “cease and desist” and impose penalties.

Under the Competition Act, there is a provision for appeal to the Competition Appellate Tribunal (COMPAT) against the decision of the CCI. A further appeal from the decision of the COMPAT may lie before the Supreme Court of India.
Scheme of the Competition Act

The Competition 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 have or are likely to have an AAEC in India. This is a significant development in the new competition law regime since the erstwhile MRTP Commission did not have extra-territorial jurisdiction.

Anti-competitive Agreements

The Competition Act seeks to regulate two kinds of agreements: (a) anti-competitive agreements between/amongst competitors (horizontal agreements) and (b) anti-competitive agreements between enterprises or persons at different stages or levels of the production chain (vertical agreements).

Under the Competition Act, horizontal agreements are presumed to cause an AAEC in India. The presumption does not mean that all alleged horizontal agreements are necessarily anti-competitive; it remains open to the parties entering into such an agreement to provide evidence that their agreement does not result in an AAEC and rebut the presumption.

On the other hand, such presumption does not apply to vertical agreements. Vertical agreements are usually permitted unless it is established that they cause, or are likely to cause, an AAEC within India. The Competition Act provides an exhaustive list of horizontal agreements which are presumed to cause an AAEC in India, as well as an inclusive list of vertical agreements which may be prohibited depending upon their effect on conditions of competition within India.

Horizontal agreements

The Competition Act sets out a list of horizontal agreements which are presumed to cause an AAEC within India. In other words, once it is established that such an agreement exists and the agreement results in any of the conduct listed below, the CCI may, on the basis of the presumption that they cause an AAEC, seek to prohibit them. These four types of agreements, which are also known as “cartel” arrangements, are set out below:

(a) price-fixing agreements, i.e., agreements between competitors which directly or indirectly have the effect of fixing or determining purchase or sale prices;
(b) agreements between competitors which seek to limit or control production, supply or markets;
(c) 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;
(d) bid-rigging agreements, i.e., agreements between competitors which have the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding.

Notably, the presumption that these types of horizontal agreements cause an AAEC in India does not apply if the agreement is entered into by way of joint ventures, provided that such a joint-venture agreement results in increased efficiency in the process of production, supply, distribution, storage, acquisition or control of goods or provision of services.

If a joint venture between competitors, however, involves the acquisition of assets or shares or voting rights or control of one party to the agreement by another, it may be characterised as a “combination.” In such an event, and on fulfilment of the asset or turnover thresholds prescribed under the Competition Act, the transaction may need to be reported to the CCI for prior approval.
Since its inception in 2009, the CCI has examined allegations of cartelisation in sectors ranging from cement to film distribution and banks to float glass. The CCI has come a long way since its first cartel violation decision, when three associations of film producers got away with nominal fines. However, the CCI has taken a stricter approach in subsequent decisions including the cement cartel case where 11 companies were given a fine of 50% of their profits made during the cartel period. Interestingly, in the last few cartel decisions, there has been an increasing trend within the CCI to scrutinize the role of trade associations in cartel investigations. In fact, the recent orders of the CCI, including the cement cartel case and the LPG manufacturers’ cartel case, well demonstrate that the CCI is unlikely to shy away from holding trade associations liable where such associations have engaged in any conduct, by which directly or indirectly, they have assisted their members to engage in any kind of anti-competitive activity. It may also become important to note that the CCI has started to look into the role of individuals (members of the executive committee of the industry association) in the anti-competitive practice carried out by the association.

**Vertical agreements**

As far as the regulation of vertical agreements is concerned, there is no corresponding presumption of an AAEC under the Competition Act. As such, vertical agreements are subject to a detailed examination (commonly known as the “rule of reason” test) and it is only when an AAEC in India is established that such agreements are sought to be prohibited.

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 Competition Act depending on their actual or likely effect on conditions of competition. While assessing the likely effects of the agreement on the relevant market in India, the CCI may consider all or any of the factors prescribed in Section 19(3) of the Competition Act. These factors include driving existing competitors out of the market and foreclosure of competition by hindering entry into the market.

From a review of the CCI’s decisions on vertical arrangements, it appears that it has clearly established that for an infringement of the provision on anti-competitive vertical agreements under the Competition Act, five essential elements have to be satisfied:

(a) there must exist an agreement amongst enterprises or persons;

(b) the parties to such agreement must be at different stages or levels of the production chain, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services;

(c) the agreeing parties must be in different markets;

(d) the agreement should be of the nature as illustrated in Section 3(4) of the Competition Act; and

(e) the agreement should cause or should be likely to cause AAEC in India.

Most importantly, the CCI has acknowledged that for a vertical restraint to adversely affect the competitive conditions at different levels of a production-supply chain, it is imperative for the parties to the agreement to possess some market power in their respective market spheres.

Interestingly, in these four years, even though the CCI has investigated vertical arrangements such as exclusive distribution and supply agreements, tie-in arrangements and refusal to deal, it has not found a contravention or imposed fines in any of its decisions.
Abuse of dominant position

The Competition Act prohibits an enterprise, which enjoys a “dominant position” in a relevant market, from abusing its position of dominance. Under the Competition Act, “dominant position” is defined as a position of strength, enjoyed by an enterprise, in the relevant market in India which enables it to (a) operate independently of competitive forces prevailing in the relevant market or (b) affect its competitors or consumers or the relevant market in its favour. The Competition Act does not specify any single criterion for determining whether an enterprise or group enjoys a dominant position in a relevant market, instead it provides a list of several factors which may be considered by the CCI when determining such dominance. These factors include market share, size and resources of an enterprise, size and importance of competitors, market structure and size of market and countervailing buying power.

The Competition Act provides an exhaustive list of practices, which, when carried out by a dominant enterprise or group, would constitute an abuse of dominance. Any behaviour by a dominant firm which falls within the scope of such conduct is likely to be prohibited. These include:

(a) imposing unfair or discriminatory conditions on sale or purchase of goods/services including predatory pricing;
(b) 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;
(c) indulging in practice or practices resulting in denial of market access, in any manner;
(d) 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; and
(e) using one’s dominant position in one relevant market to enter into or protect another.

The prohibition on imposing “unfair” or “discriminatory” pricing, however, does not apply to dominant enterprises when such conduct is employed to meet competition. Interestingly, the terms “unfair” or “discriminatory” have not been defined under the Competition Act.

The CCI has so far issued decisions in abuse of dominance cases pertaining to sectors such as the stock exchange, real estate, specialty glass, sports regulation, etc. One of the interesting trends in the CCI’s enforcement pertains to the determination of the “relevant market” in investigations into potential abuse of dominance. So far, the CCI seems inclined to define the relevant market in the narrowest possible way. For instance, in the DLF Decision, when assessing alleged abuse by DLF (a real estate company), the CCI adopted a fairly narrow definition of the relevant market. The primary question was whether “high-end” residential apartments in a small geographical region (Gurgaon) would constitute a relevant market. In its analysis, the CCI distinguished between the markets for high-end and low-end apartments and found that these form two separate product markets, as consumer preferences for each were different.

The language used in Section 4 (1) of the Competition Act seems to suggest that abuse of a dominant position is subject to a per se prohibition. In other words, the CCI is not required to carry out a market effect analysis for abuse of dominance cases. Nevertheless, from a review of the decisions of the CCI, it appears that the CCI is inclined to analyze market effects as well while dealing with abuse of dominance cases.
Regulation of combinations

From 1 June 2011, all high-value combinations (i.e., acquisitions, mergers and amalgamations) require prior notification to and approval from the CCI. The provisions pertaining to the Indian merger control regime are contained in sections 5 and 6 of the Competition Act and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 as amended up to 4 April 2013 (Combination Regulations) issued under the Competition Act.

Filing thresholds:

A merger filing with the CCI must be made if any one of the asset/turnover thresholds set out below is satisfied, unless the de minimis test described below is met.

Post-the combination, the group to which the target will belong will have:

(a) assets in India of more than INR60 billion; or
(b) turnover in India of more than INR180 billion; or
(c) worldwide assets of more than USD3 billion, including at least INR7.5 billion in India; or
(d) worldwide turnover of more than USD9 billion, including at least INR22.5 billion in India.

The parties to the transaction (i.e., the buyer and the target) have:

(a) assets in India of more than INR15 billion; or
(b) turnover in India of more than INR45 billion; or
(c) worldwide assets of more than USD750 million, including at least INR7.5 billion in India; or
(d) worldwide turnover of more than USD2.25 billion, including at least INR22.5 billion in India.

De minimis test:

No filing is required if

(a) the target has assets in India of INR2.5 billion or less; OR
(b) the target has turnover in India of INR7.5 billion or less.

Further, the pre-notification is required to be made within 30 days of the approval of the transaction by the board of directors (in the case of mergers or amalgamations) or within 30 days of the execution of an agreement or any other document conveying the decision or intention to acquire (in the case of an acquisition). It becomes important to note that a failure to notify a combination does not mean that the CCI cannot investigate such combinations. The Competition Act empowers the CCI to investigate such combinations up to one year from the date on which the combination takes effect.

The responsibility for making the notification to the CCI varies depending upon the nature of transaction. While in the case of an acquisition, it is the sole responsibility of the acquirer, in the case of mergers and amalgamations, it is the joint responsibility of all the parties.

Notification to the CCI may be made either in Form I or Form II, as specified in the Combination Regulations. Form I is a short form of notification and Form II is the longer form, which requires extensive details and documents relating to the parties, the transaction and the affected markets to be provided (much more than what appears to be required in other jurisdictions across the world).
notice to the CCI is ordinarily to be filed in Form I while a Form II is “preferred” in instances when (a) it is a horizontal combination and the parties to the combination have a combined market share of 15% or more and (b) if it is a vertical combination and the parties to the combination have a combined or individual market share of 25% or more in the relevant market. Further, the CCI has the power to ask for additional information or to ask parties to file the notice in Form II even after the parties have notified a transaction in Form I. Form I filings are to be made with a fee of INR1 million and Form II filings are to be made with a fee of INR4 million.

The Competition Act, however, exempts share subscription or financing facility or any acquisitions made pursuant to a loan agreement or an investment agreement by banks, public financial institutions, venture capital funds and foreign institutional investors, from the requirement of prior notification and approval. Such transactions only require notification to the CCI in Form III within seven days of completion of the transaction.

Exemptions from notification:

Schedule I of the Combination Regulations treats certain categories of transactions as being ordinarily not likely to cause an appreciable adverse effect on competition, and hence provides that a pre-notification need not normally be filed for such transactions. These include:

(a) 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 shareholders’ agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired;

(b) 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;

(c) 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 cases where the transaction results in transfer from joint control to sole control;

(d) 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 the 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;

(e) Amended or renewed tender offer, where a notice has been filed with the Commission prior to such amendment or renewal;

(f) An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business;

(g) 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 stock broker 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; and

A combination taking place entirely outside India with insignificant local nexus and effect on markets in India.

**Merger review:**

The Competition Act prohibits a person or an enterprise from entering into combinations which cause or are likely to cause an AAEC within the relevant market in India. In other words, an “effects test” envisaged under the Competition Act will be applied by the CCI to determine whether a proposed combination is likely to cause an AAEC in India. This effects test essentially involves an economic assessment to determine the possible pro- and anti-competitive effects of the combination. While assessing the likely economic effects, the CCI is required to examine several factors prescribed under the Competition Act, including the extent of barriers to entry, countervailing buying power, level of combination in the market, and the extent of effective competition likely to sustain in the market.

Based on such assessment, the CCI may finally pass three types of orders: (a) approve the combination; (b) disapprove the combination; and (c) approve the combination subject to modifications.

The CCI is required to form a prima facie opinion within 30 days of the notification as to whether a proposed transaction will cause an AAEC. If the CCI is of the opinion that the notified transaction is not likely to cause an AAEC in India, it will prima facie approve the proposed transaction so notified to it and publish its decision on its website.

On the other hand, if the CCI finds that a proposed transaction may give rise to an AAEC and merits further investigation, then the time limit for the CCI’s final determination is extended to the maximum of 210 days from filing of the notification under the Competition Act. Notably, however, the CCI may, during the merger review process, if necessary, require the parties to the combination to file additional information. The time taken by the parties to the combination in furnishing additional information shall be excluded from the 30-day period to form a prima-facie opinion and 210-day period to pass the final decision on the proposed combination. Further, while the Combination Regulations provide that the CCI shall endeavor to make its final determination within 180 days from the date of filing the notification, this target is not binding on the CCI. In the event that the CCI fails to pass a merger-clearance decision within 210 days (excluding the stoppage time), the combination will be deemed to be approved.

The merger-control regime in India has now been in place for almost two years. The CCI has looked into more than 100 combinations in sectors, including automobiles, pharmaceuticals, steel, insurance, media and real estate. To date, the CCI has cleared all notified combinations unconditionally, with the exception of two cases where commitments were accepted in relation to non-compete clauses, both in the pharmaceutical sector. So far, the CCI has amply demonstrated its ability and willingness to clear
most of the merger applications well within the specified time limit. In fact, the CCI has even cleared the two detailed Form II notifications that it has received within the 30-day time period.

The CCI has also established a number of key principles since its introduction, which will shape the competition law regime in India. For example, through its decisions, the CCI has clearly set out what constitutes “control” under the Competition Act. Unfortunately, there are still a number of ambiguities in the language used in the provisions of the Competition Act and Combination Regulations which are yet to be clarified by the CCI. An instance of such an ambiguity is the language used in Schedule I, paragraph (10) of the Combination Regulations which exempts combinations taking place entirely outside India, with insignificant nexus and effects on markets in India. If notifying parties already meet the turnover/asset thresholds prescribed under the Competition Act, it is unclear as to what additional factors will be considered by the CCI in determining the “local nexus” of a transaction.

**Consequences for contravention of the Competition Act**

The Competition Act — unlike its predecessor, the MRTP Act — prescribes heavy penalties for the violation of its provisions. In the case of anti-competitive agreements and abuse of dominance, 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 also require parties to an anti-competitive 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 anti-competitive. In the case of abuse of dominance, the CCI has the power to order the division of the dominant enterprise.

During the last few years, the CCI has sent out a strong message to the industry that it will not hesitate to use its considerable fining powers available under the Competition Act, if the gravity and the nature of infringement so demands. In quite a few cases, the CCI has imposed penalties up to the highest permissible level of 10% of the average annual turnover of the past three years, including a cartel case involving seven regional film bodies. As indicated earlier, in another cartel case involving 11 cement companies, the CCI fined companies 50% of the profit made during the cartel period.

One issue that, however, remains unclear is how the CCI is likely to determine the quantum of fine that may be imposed on parties for contravening the provisions of the Competition Act. While most jurisdictions across the world, such as the European Union, consider the degree of involvement of a party, as well as the mitigating factors at the time of determining the quantum of fine, the CCI has been silent in its orders till date. However, news reports have indicated that the CCI may soon come out with regulations/guidelines on the method of quantifying fines in light of the gravity of the infringement.

With regard to combinations, if the CCI is of the opinion that the combination will cause or is likely to cause an AAEC within India, the CCI 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 Commission can result in a fine of up to 1% of the total turnover or the assets of the enterprises involved, whichever is higher. During the last year, the CCI has used such powers in two instances, including a penalty of INR100,00,000 for a delayed filing in a transaction involving Titan International and Titan Europe.

Further, non-compliance with orders passed by the CCI or directions of the DG may also attract a penalty of INR100,000 for each day of non-compliance, subject to a maximum of INR10 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. The CCI had for the first time imposed a fine of INR10 million on Kingfisher
Airlines Limited (Kingfisher) for not furnishing information it sought during the ongoing investigation into Kingfisher’s proposed strategic agreement with Jet Airways. Though the fine was later reduced to INR7.25 million, this particular CCI order sent out a strong message to the industry that the CCI may use its power to impose fines for non-compliance with CCI/DG’s direction.

**Leniency under the Competition Act**

The Competition Act has certain leniency provisions, including those aimed at encouraging the flow of “insider information” regarding cartels. The CCI has the power to impose lower penalties if a cartel participant has made a disclosure which is full, true and vital to expose the cartel. To this end, and in addition to the lesser penalty provision in the Competition Act, the CCI has notified and put into effect the Competition Commission of India (Lesser Penalty) Regulation (Lesser Penalty Regulations) with effect from 13 August 2009. The objective of the Lesser Penalty Regulations is to encourage a cartel member to help the CCI detect and investigate cartels, which usually is a challenge on account of the secrecy under which the cartels operate.

The Lesser Penalty Regulations follows a “first come, first served approach.” The first member to approach the Commission who makes a vital disclosure to the CCI on the existence of a cartel may receive a waiver of penalty up to 100%. Members who subsequently contact the CCI are eligible for partial penalty waivers, up to 50% and 30%, respectively, on the condition that they provide additional valuable information which was not known to the CCI earlier. However, such reductions are absolutely discretionary. It is solely up to the CCI to decide whether the information provided by the concerned member was vital or not. The Lesser Penalty Regulations require the CCI to either reduce or waive the monetary penalty only after duly considering (a) the stage at which the applicant has approached the CCI, (b) the evidence already in possession of the CCI, (c) the quality of information provided by the applicant, and (d) the overall facts and circumstances of the case.

**Future developments**

In an attempt to plug in existing lacunas in the Competition Act, last year the Government of India issued a set of draft amendments. Based on the recommendations of the expert committee, the government introduced the Competition Amendment Bill, 2012 (Bill) in the lower house of the Indian Parliament, the Lok Sabha. While these amendments are yet to be notified, once implemented, they are likely to introduce significant changes to competition in India.

Most notably, the Bill seeks to introduce the concept of “joint dominance” under Section 4 of the Competition 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 doesn’t qualify as being dominant on its own. The Bill also provides an enabling provision which will give the government the flexibility to specify sector specific asset/turnover thresholds. This will then determine whether the pre-merger notification requirement is triggered in the relevant sector.

In terms of procedure, one of the most controversial amendments sought to be introduced in the Bill is in relation to the CCI’s power of “search and seizure.” The Bill replaces the existing requirement of the DG to seek prior sanction from the Chief Judicial or Metropolitan Magistrate for conducting a search-or-seizure operation with a requirement to seek prior sanction from the Chairperson of the CCI instead. This will most likely ease the process for conducting “dawn raids” and it is expected this power will be exercised frequently during investigations.

The Bill also seeks to introduce several other small, yet significant, changes to the Competition Act. These include providing an opportunity to parties to be heard before imposing a penalty; reducing the “waiting period” for merger clearance from the existing 210 days to 180 days and clarifying the definition of the term “turnover” to exclude the taxes on the sale of goods or provision of services.
Indonesia
Overview of competition laws

The Anti-Monopoly Law prohibits many kinds of agreements and acts of “business actors.” Business actors are defined as any person or entity which is established in Indonesia or does business in Indonesia.

Some of these acts and agreements are illegal per se, that is, the illegality of the alleged act or agreement depends solely on whether it fits within the definition of the prohibition. Others are qualified prohibitions meaning that the acts or agreements are prohibited only if they may cause monopolistic practices or unfair competition.

Administration and enforcement

The primary enforcement authority is the Business Competition Supervisory Commission (KPPU), an independent body with power to investigate alleged violations and impose administrative sanctions. The Anti-Monopoly Law provides for criminal investigation and prosecution. To date, however, this has not resulted in actual criminal investigation or prosecution. In 2011, KPPU entered into a Memorandum of Understanding with the National Police of the Republic of Indonesia (Police) under which the Police will give assistance during KPPU investigations if required by KPPU.

Prohibited agreements

Oligopoly and oligopsony

The Anti-Monopoly Law prohibits an agreement between business actors to jointly control the following, if it may cause monopolistic practices and/or unfair competition:

(a) the production and/or marketing of a product (oligopoly); or
(b) the purchase of a product (oligopsony).

Unfair pricing practices

The Anti-Monopoly Law prohibits price-fixing agreements between competing business actors and agreements to price discriminate without qualification. Competing business actors are prohibited from agreeing to fix prices below the market prices if the agreement may cause unfair competition. Likewise, minimum resale price maintenance is prohibited if it may cause unfair competition.

Market allocations

Competing business actors are prohibited from agreeing to allocate the market for products if this agreement may cause monopolistic practices and/or unfair competition. This includes vertical and horizontal allocation.

Boycotts

There are two kinds of boycott under the Anti-Monopoly Law, both of which are prohibited without qualification:
(a) an agreement among competing business actors to bar another business actor from doing the same business, within a relevant market; or

(b) an agreement among competing business actors to refuse to sell products of another business actor, which causes this other business actor to suffer a loss.

Combinations

Competing business actors are prohibited from agreeing to establish a cartel to regulate production and/or marketing of products or a trust (i.e., a combination of business actors) if this agreement may cause monopolistic practices and/or unfair competition.

Vertical integrations

Agreements between business actors at different levels of the supply and production chains to integrate vertically is prohibited if it may cause unfair competition and harm society.

Closed agreements

The Anti-Monopoly Law prohibits the exclusive contract terms set out below between a supplier and reseller:

(a) a reseller’s purchase is conditional on the purchase of other products of the supplier;

(b) a discount or price is conditional on the reseller not purchasing competing products; or

(c) a reseller may only resell products to, or is prohibited from reselling to, certain parties or areas.

Strictly speaking, these are per se offences. However, in 2011 KPPU issued a guideline which provides that it will consider possible pro-competitive impacts of the restrictions. This guideline indicates a move towards a rule of reason approach.

Agreements with overseas parties

Any agreement with overseas parties, the terms of which may cause monopolistic practices and/or unfair competition, is prohibited.

Prohibited actions

Monopoly and monopsony

A market share of 50% or more of the production or sale of a product within a relevant market qualifies a business actor as a monopoly. Likewise, control of 50% or more of the purchase of a product within a relevant market qualifies a business actor as a monopsony. A monopoly or monopsony is prohibited if it may cause monopolistic practices or unfair competition.

Restrictive practices

The Anti-Monopoly Law prohibits the restrictive practices set out below if they may cause monopolistic practices or unfair competition:

(a) barring competitors from entering the market;

(b) barring customers from doing business with competitors;

(c) limiting distribution of products;
(d) discriminating against other business actors; or

(c) predatory pricing.

Businesses are prohibited from fixing tenders and obtaining confidential information if these acts may cause unfair competition.

Conspiracy to obstruct the production or distribution of a competitor’s products with the intent of reducing their supply in the relevant market is prohibited without qualification.

**Abuse of dominant position**

“Dominant position” is defined as a situation where a business actor:

(a) no longer has any significant competitors in the relevant market in terms of the market share controlled;

(b) has a higher position than all of its competitors in terms of financial capability, access to supply or sales, and capability to adjust the supply or demand for certain products; or

(c) has 50% or more of the market share.

Two or three business actors are dominant if they have a market share of 75% or more.

As with a monopoly, being dominant in a relevant market is not, in itself, unlawful. Dominant business actors may not, however, do the following:

(a) impose terms of trade with the intention of preventing and/or obstructing consumers from acquiring competitive products;

(b) restrict the market and the development of technology; or

(c) obstruct potential competitors from entering the market.

**Interlocking management**

A person who is serving as a director or a commissioner of a company is prohibited from simultaneously holding the position of director or commissioner in another company, if these companies operate in the same relevant market, have strong links in terms of their field or type of business, or together have the potential to control the market share of certain products, if their interlocking management may cause monopolistic practices and/or unfair competition.

**Mergers and acquisitions**

Under the Anti-Monopoly Law, business actors are prohibited from merging or consolidating business entities or acquiring shares in companies if these actions may cause monopolistic practices and/or unfair competition.

**Notification**

To prevent this kind of activity, the Anti-Monopoly Law requires mergers, acquisitions or consolidations that exceed certain asset or sales value thresholds to be reported to KPPU within 30 days after the date of the combination, merger or takeover.

On 20 July 2010, Government Regulation No. 57 of 2010 on Merger or Consolidation of Business Entities and Acquisition of Shares of Companies which May Cause Monopolistic Practices and Unfair Business Competition (**Merger Regulation**) was issued.
Under the Merger Regulation, transactions meeting the following thresholds must be reported to KPPU within 30 days of the transaction taking effect:

(a) the value of the assets of the combined businesses exceeds IDR2.5 trillion (around USD280 million) or IDR20 trillion for banks (around USD2,247 million); or

(b) the sales turnover of the combined businesses exceeds IDR5 trillion (around USD561 million).

The Merger Regulation also states that in calculating the above thresholds, the assets and sales of affiliates in Indonesia will also be considered.

Failure to notify is subject to a fine of IDR trillion (around USD112,000) for each day of late filing. The maximum fine is IDR25 trillion (around USD2.8 million). This is in addition to penalties for merger, consolidation of business entities or a company’s share acquisition that causes monopolistic practice and/or unfair business competition, which may be invalidated.

Business actors may opt to voluntarily notify KPPU of their proposed transactions before the transactions are closed. Business actors can then know in advance KPPU’s view on the proposed transaction. However, pre-closing notification does not eliminate the mandatory post-closing notification requirement.

Links to a list of merger notifications filed with KPPU and PDF scans of the Indonesian originals of KPPU rulings on such filings are available at www.kppu.go.id.

Merger remedies

In 2012, the new KPPU Merger Guideline introduced a procedure for the acquiring entity to propose remedies within 14 days after KPPU issues its assessment stating that the transaction is substantially lessening competition. According to the New Guideline, the proposed remedies can be in the form of:

(a) Structural remedies, i.e., shares or assets divestiture;

(b) Behavioural remedies relating to intellectual property rights, price or output and eliminating competition barriers (for example, exclusive contracts, consumer switching cost, tie-in or bundling, supply or purchase barriers).

If KPPU accepts the proposed remedies, KPPU will issue an opinion of conditional no allegation of monopolistic practices or unfair competition. If KPPU rejects the proposed remedies, KPPU will issue an opinion of allegation of monopolistic practices or unfair business competition.

Cross-shareholding

The Anti-Monopoly Law prohibits certain share acquisitions. In particular, it provides that a business actor is prohibited from owning or creating a majority shareholding of several companies of the same type which conduct business activities in the same field in the same market if:

(a) one business actor or one group of business actors controls more than 50% of the market share of a certain type of good or service; or

(b) two or three business actors or a group of business actors control(s) more than 75% of the market share of a certain type of good or service.

The term “majority” has been interpreted in one case to include a minority shareholding that caused monopolistic practice or unfair competition. KPPU also asserted that the rule of reason applies to the prohibition against majority cross-shareholdings which are usually regarded as illegal per se in order
to extend this prohibition to cover minority shareholdings. This KPPU assertion has been affirmed by the Supreme Court on appeal.

**Exemptions**

Article 50 of the Anti-Monopoly Law exempts the following actions and agreements from this law’s application:

(a) actions and agreements the purpose of which is to implement current laws and regulations;
(b) agreements related to intellectual property (e.g., the licensing of intellectual property), trade secrets and franchising;
(c) agreements to set technical standards for products, provided these agreements do not restrict or obstruct competition;
(d) agency agreements, provided they do not provide for resale price maintenance;
(e) agreements for research cooperation for the purpose of promoting or improving the standard of living of the general public;
(f) international agreements which have been ratified by Indonesia;
(g) agreements and/or actions for export which do not disturb the domestic market’s needs and/or supplies; and
(h) business operations of cooperatives which are intended to service their members (as opposed to operations which are intended for the general public).

In practice KPPU rarely accepts an Article 50 defence; it typically finds an act or agreement does not fall within the above exemptions.

**Penalties and liabilities**

KPPU is the primary enforcement body of the Anti-Monopoly Law, having wide authority to investigate and try cases (subject to review by the courts).

KPPU is authorised to impose a range of administrative penalties, including:

(a) nullification of all agreements or mergers, consolidations and acquisitions which violate the Anti-Monopoly Law;
(b) orders to business actors to stop all actions which violate the Anti-Monopoly Law;
(c) determination of damages to compensate parties for loss; and
(d) imposition of fines of between IDR1 billion and IDR25 billion.
(e) The courts may impose:
(f) criminal penalties, including fines and imprisonment;
(g) revocation of a business actor’s business licence;
(h) a ban on individuals holding management positions in companies for between two and five years; and
(i) termination of certain activities that cause losses to other parties.

KPPU has rendered decisions in around 200 cases of violations of this law and has examined hundreds of reports of violations received from the public. A complete list of ongoing cases and KPPU decisions (downloadable in their original Indonesian in PDF format) can be accessed at www.kppu.go.id.

**Leniency**

There is no leniency program in Indonesia. KPPU may consider imposing a lesser penalty in appreciation of a good gesture to comply from a party under investigation, on a case-by-case basis.

**Extraterritorial application**

There are two cases where KPPU has asserted jurisdiction over overseas tender participants who otherwise did not have any connection with Indonesia. In the Temasek cross-shareholding case KPPU asserted that it has jurisdiction over foreign parties who directly and indirectly control Indonesian companies but otherwise do not have any connection with Indonesia. This KPPU assertion has been affirmed by the Supreme Court on appeal.
Japan
Japan

The Antimonopoly and Fair Trade Maintenance Act 1947 (Antimonopoly Act) governs antitrust and unfair business practices in Japan. Practices covered by the Antimonopoly Act include exclusive dealing, monopolisation, price discrimination, predatory pricing, cartels, primary boycotts, tying arrangements, resale price maintenance and unwarranted abuse of bargaining position when dealing with another party.

Overview of competition laws

There is no general provision in the Antimonopoly Act which prohibits anti-competitive practices. The Antimonopoly Act is divided into four parts:

(a) The first part deals with unreasonable restraints of trade (cartels);
(b) The second part distinguishes between “private monopolisation” (which result from an intended exclusion or control of competitors);
(c) The third part deals with unfair trade practices; and
(d) The fourth part deals with mergers and acquisitions control.

Administration and enforcement

The Antimonopoly Act is administered by the Fair Trade Commission (Commission), which is an independent administrative commission. The Commission has the power to establish fair competition rules; to designate unfair business practices; to investigate, adjudicate and dispose of a case; and to issue cease-and-desist orders and surcharge payment orders to enterprises that violate the Antimonopoly Act.

Any person (including individuals) may report a violation of the Antimonopoly Act to the Commission and ask for it to take appropriate measures to investigate and make a determination on an alleged violation. After that, the Commission has to initiate a necessary investigation. If the Commission conducts administrative investigation, it must designate an investigator from within.

If the investigator of the Commission determined that an enterprise violates the Antimonopoly Act, the Commission issues cease-and-desist orders and/or surcharge payment orders to the enterprise. The enterprise may request the Commission to conduct a hearing proceeding regarding the said order if the enterprise is dissatisfied with the order. In the hearing proceeding, the hearing examiner who is designated from the staff of the Commission by the Commission decides the validity of the hearing request by the enterprise after hearing both the investigator’s opinion and the enterprise’s opinion. If the enterprise is dissatisfied with the decision, it may file a suit to rescind the said decision with the Tokyo High Court.

Unreasonable restraints on trade (cartels)

The phrase “unreasonable restraint on trade” as used in the Antimonopoly Act refers to situations in which:

*Any enterprise, by contract, agreement or any other concerted action (irrespective of the name) with another enterprise, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby substantially restraining, contrary to the public interest, competition in any particular field of trade.*
An “unreasonable restraint on trade” exists if the following elements can be established:

(a) a contract, agreement or other concerted action between two enterprises to mutually restrict or conduct business activities;

(b) to fix, maintain, or increase prices, or to limit production, technology, products, facilities, customers, suppliers or the like;

(c) substantially restrains competition in any particular field of trade; and

(d) contrary to the public interest.

The Antimonopoly Act regulates not only domestic cartels consisting of domestic Japanese enterprises, but also international cartels involving foreign enterprises.

Based on an analysis of past decisions, the Courts and the Commission will find that prohibited activities constitute a cartel if the participating enterprises have an aggregate market share of 50% or more.

The Courts’ treatment of price-fixing cartels comes close to applying the principle of per se illegality. An agreement between competitors that does not affect the prices of products is, however, not per se illegal, and whether or not such agreement is in fact considered to substantially restrain fair competition in the market and amount to an illegal cartel will depend on market conditions.

**Private monopolisation**

The Antimonopoly Act prohibits such business activity by which any enterprise excludes or controls the business activities of other enterprises, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

Private monopolisation includes two types — “control-type private monopolisation” and “exclusionary-type monopolisation” — and the surcharge rate is different between these two types as mentioned below. The “control” means that an enterprise restrains other enterprises’ decision making on their business activities and thereby bends them to its will. The “exclusionary” refers to conduct that would cause difficulty for other enterprises to continue their business activities or for new market entrants to commence their business activities.

With regard to “exclusionary-type monopolisation,” in order to clarify its interpretation, the Commission has issued Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act on 28 October 2009.

**Unfair trade practices**

The Antimonopoly Act and the Fair Trade Commission Public Notice titled “Designation of Unfair Trade Practices” stipulate certain types of unfair trade practices. The main unfair trade practices are as follows:

**Price discrimination**

It is unlawful to supply or receive commodities or services at prices which unreasonably discriminate on the basis of region or customer. Predatory pricing (i.e., continually supplying commodities under cost, thereby distorting competition) is unlawful if done without justifiable cause.
Boycotts
Competitors must not, without justifiable cause, refuse to deal with, or decide jointly to limit dealings with, a specified party. In addition, competitors must not, without justifiable cause, force other parties not to deal with, or to limit their dealings with, a specified party.

Unjust low price sales
It is unlawful to unjustly supply goods or services for a low consideration, thereby tending to cause difficulties to the business activities of other enterprises. There is no problem in providing goods at a low price that has been achieved through an enterprise’s efficient operations, but if an enterprise tries to acquire customers by offering a low price that totally disregards profitability, it may be unlawful. With regard to unjust low price sales, the Commission has issued Guidelines Concerning Unjust Low Price Sales under the Antimonopoly Act on 18 December 2009.

Resale price maintenance
It is unlawful, without justifiable cause, to require wholesalers or retailers to maintain wholesale or resale prices at a specified level.

Tying arrangements
It is unlawful to impose unfairly on a third party a condition that, in order to purchase certain commodities, it must also purchase other designated commodities (referred to as “full-line forcing” in other jurisdictions).

Exclusive dealing
This is regulated under the unfair business practices provisions of the Antimonopoly Act. It is, for example, prohibited to deal with a party on condition that the party does not conduct business with a competitor, thus reducing the business opportunities for the competitor.

Trading on restrictive terms
The Fair Trade Commission Public Notice titled “Designation of Unfair Trade Practices” stipulates the provision that an enterprise shall not trade with another party on conditions which unjustly restrict any trade between the said party and its other transacting party or other business activities of the said party. This provision is the general clause which covers unjustifiable restriction against counterparty other than the resale price maintenance and the exclusive dealing above. The criteria for legality of typical restrictions against counterparty, such as restriction on distributors’ handling of competing products, restrictions on distributors’ sales territory, restrictions on distributors’ customers, restrictions on retailers’ sales methods, and the like, is explained in the Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act issued on 11 July 1991.

Interference with competitor’s transactions
It is unlawful to unjustly interfere with a transaction between another enterprise who is in a domestic competitive relationship with oneself or with the corporation of which one is a stockholder or an officer, and its transacting party, by preventing the effecting of a contract, or by inducing the breach of a contract, or by any other means whatsoever.

Abuse of superior bargaining position
Under the situation where if one party (Party A) makes a request that is substantially disadvantageous for the other party (Party B), Party B would be unable to avoid accepting such a request on the grounds that Party B has difficulty in continuing the transaction with Party A and thereby Party B’s business management would be substantially impeded. It is unlawful for Party A to conduct certain
designated acts of imposing disadvantageous conditions on Party B in the transaction by using such situation.

In order to clarify the interpretation by the Commission, the Commission has issued Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act on 30 November 2010.

**Mergers and acquisitions**

The Antimonopoly Act prohibits mergers and acquisitions if they would result in a substantial restraint of competition in any particular field of trade. The Commission may review a merger and acquisition and prevent the merger from proceeding if it will result in a substantial restraint of competition. If the transaction has already taken place, the Commission also has the power to order the parties to take a range of remedial steps, including divestiture or transfer of a business, in order to restore competition.

In order to clarify how the potential effect of a merger on competition is reviewed and evaluated, the Commission has issued Guidelines to Application of the Anti-Monopoly Act Concerning Review of Business Combination (Guidelines). The Guidelines declares that the Commission will use the Herfindahl-Hirschman Index (HHI) as a safe harbour. Specifically, the Guidelines state that the scrutiny of a business combination will not be required in the following cases:

(a) The HHI, after the transaction, is 1,500 or less.

(b) The HHI, after the transaction, is over 1,500 but does not exceed 2,500, and the HHI increases by 250 or less as a result of the transaction.

(c) The HHI after the transaction is over 2,500, but the HHI does not increase by more than 150 as a result of the transaction.

Although for this substantive analysis, the Commission previously limited geographic market range within Japan, the revised Guidelines have made it clear that the Commission will take into consideration the presence of competing overseas suppliers, which can affect the market within Japan.

**Mergers of companies**

If two companies (including foreign companies) merge and (i) the group of combined companies to which one of the parties to the transaction belongs has sales in Japan of more than JPY20 billion; and (ii) the group of combined companies to which any other party to the transaction belongs has sales in Japan of more than JPY5 billion, details of the proposed merger must be reported to the Commission at least 30 days prior to the proposed merger.

**Stock acquisitions by a company**

In the case of a stock acquisition by a company (including foreign companies), a report on the stock acquisition must be submitted to the Commission at least 30 days prior to the proposed acquisition. A stock acquisition is notifiable where:

(a) the total amount of sales in Japan of the group of combined companies to which the acquirer belongs exceeds JPY20 billion;

(b) the total amount of sales in Japan of the target company and its subsidiary exceeds JPY5 billion; and
(c) as a result of the acquisition, the aggregate percentage shareholding (i.e., voting rights) of the group of combined companies to which the acquirer belongs would move to above 20% or to above 50%, respectively, of the total issued shares (i.e., voting rights) of the target company.

Other acquisitions (business acquisitions)

Details of the proposed acquisition must be filed to the Commission as part of a notification 30 days prior to completion of the acquisition, where the acquirer belonging to the group of combined companies whose total amount of sales in Japan exceeds JPY20 billion acquires any of the following:

(a) The entire business from a company with sales in Japan of more than JPY3 billion;
(b) The substantial part of a business, or entire or substantial part of the fixed assets of the business from a company with sales in Japan of more than JPY3 billion;

Procedures of review of business combination

When a notification is filed with the Commission, the Commission reviews the said business combination to be conducted by the notifying company. As a result of the review, if the Commission ultimately judged that the said business combination is problematic in light of the Antimonopoly Act, a cease-and-desist order is issued by the Commission after the notice prior to the cease-and-desist order (prior notice) given to the notifying company. The concrete procedure of the review is as follows:

(a) After filing a notification, the notifying company is prohibited from implementing the business combination such as merger and stock acquisition until the expiration of the 30-day period from the date of the Commission’s receipt of the said notification. The Commission may shorten the 30-day period if it finds it necessary, when the notifying company requests it.

(b) During the 30-day period (or during a shortened waiting period), the Commission will normally either: (i) judge that the said business combination is not problematic in light of the Antimonopoly Act and give notification to the effect that it will not issue a cease-and-desist order, or (ii) judge that more detailed review is necessary and request for the submission of the necessary reports, information or materials.

(c) In the case of (ii), the period of the review is extended until 120 days after the date of the receipt of notification or 90 days after the date of the receipt of all reports, etc., whichever is late. During the extended period, the Commission will either (a) judge that the business combination in question is not problematic in light of the Antimonopoly Act and give notification to the effect that it will not issue a cease-and-desist order, or (b) provide prior notice. After providing prior notice to the notifying company, the Commission issues a cease-and-desist order. The Commission may decide not to issue a cease-and-desist order after it gave prior notice if the notifying company has, for instance, offered to take remedy.

A notifying company may consult the Commission prior to filing a notification with regard to method to make entries on the notification and to seek the view of the Commission related to the method (e.g., the view of the scope of the market).

Sanctions and consequences of breach

The Antimonopoly Act provides for surcharges, fines and imprisonment. Where a price-fixing cartel or a control-type private monopolization has been formed, the offending parties may be ordered to pay an administrative surcharge computed on the basis of a surcharge rate applied to the total sales related to the cartel or the control-type private monopolization during the period the cartel or the control-type private monopolization was in place (maximum three years). A surcharge rate of the cartel is determined within the range from 1% to 10% depending on the scale and the category of
business or the offending parties. A surcharge rate of a control-type private monopolization is
determined within the range from 2% to 10% depending on the scale of the offending parties. Recent
amendments to the Antimonopoly Act increased the surcharge amount for cartel leaders by 50% and
introduced surcharges for the following acts:

(a) Exclusionary-type private monopolization (surcharge rate: 1% to 6%, depending on the
category of business)

(b) Unjust low price sales if repeated (surcharge rate: 1% to 3%, depending on the category of
business)

(c) Discriminatory pricing if repeated (surcharge rate: 1% to 3%, depending on the category of
business)

(d) Concerted refusal to supply if repeated (surcharge rate: 1% to 3%, depending on the category
of business)

(e) Resale price restriction if repeated (surcharge rate: 1% to 3%, depending on the category of
business)

(f) Abuse of superior bargaining position if continued (surcharge rate: 1%)

With regard to (a) to (f) above, the amount of surcharge is computed on the basis of respective
surcharge rates applied to total sales (in the case of [f], total transaction amount) related to the
violation act during the period the violation act was in place (maximum of three years).

Those who have engaged in unreasonable restraints on trade or private monopolization may be
sentenced to imprisonment terms of up to five years or criminally fined up to JPY5 million (Article 89
of the Antimonopoly Act).

The maximum fine for a company under the Antimonopoly Act is JPY500 million. The
Antimonopoly Act prescribes strict liability for the following conduct:

(a) Unreasonable restraints on trade

(b) Private monopolization

(c) Engagement in particular international agreements or contracts and trade associations
contravening the Antimonopoly Act

In the event of a civil suit under the Antimonopoly Act by a plaintiff for damages suffered as a result
of such conduct, the plaintiff need not prove the facts of, or any negligence in relation to, the conduct
determined to be an unreasonable restraint of trade, private monopolization or unfair trade practice by
the Commission.

In addition to the remedies under the Antimonopoly Act, the victims of anti-competitive conduct can
file a civil damage suit in accordance with the Civil Code of Japan.

Furthermore, any person whose interests are seriously infringed by unfair trade practices is entitled to
file an application for an injunction.

**Leniency program**

A leniency program has been in effect since January 2006. Under the leniency program, there is
immunity from or a reduction in surcharge payments if a violator of the rules of unreasonable
restraints on trade applies for leniency by notifying the Commission of sufficient information
concerning the violation in accordance with the leniency rules. The leniency program is not applicable to fines but the Commission has adopted a policy that it will not indict a first leniency applicant to the Prosecutor’s Office. The rates of leniency are as follows:

(a) The first application before investigation: total immunity from surcharge
(b) The second application before investigation: 50% reduction in surcharge payments
(c) The third application before investigation: 30% reduction in surcharge payments
(d) The fourth and fifth application with new information provided before investigation: 30% reduction in surcharge payments
(e) The application with new information provided within 20 business days after investigation to the extent of the third application after investigation and the fifth application in total including the applications before investigation: 30% reduction in surcharge payments

Extraterritorial application

An agreement made in a foreign country will be subject to Japanese jurisdiction so long as its contents affect the Japanese market. Any activities of a foreign subsidiary within Japan would be directly subject to the Antimonopoly Act in the same manner as a Japanese entity.

The Antimonopoly Act prohibits enterprises from entering into an international agreement or an international contract that pertains to matters constituting unreasonable restraints of trade or unfair trade practices.

Reform

In March 2010, a bill to amend the Antimonopoly Act was submitted to the Japanese Diet (Bill). If passed, the Bill will abolish the hearing proceeding conducted by the Commission, which is the procedure of the administrative complaint review of administrative measures taken by the Commission. If the Antimonopoly Act is amended by the Bill, the enterprise who receives a cease-and-desist order and/or a surcharge payment order from the Commission would be able to file a suit to quash the Commission’s order with the Tokyo District Court instead of requesting a hearing proceeding.
Malaysia
Malaysia

Malaysia has introduced competition legislation of general application which is similar to competition legislation in Singapore and the UK. The Competition Act 2010 (Competition Act) and the Competition Commission Act 2010 (Competition Commission Act) were passed by the Malaysian Parliament in May 2010, and received Royal Assent on 2 June 2010. The Competition Commission Act came into force on 1 January 2011 while the Competition Act came into force on 1 January 2012.

Sector-specific guidelines prohibiting anti-competitive behaviour also exist, notably in the telecommunications, media, energy and franchise sectors. A specific prohibition on restraint of trade is also contained in the Malaysian Contracts Act 1950.

Overview of competition laws

The Competition Act prohibits the following:

(a) agreements which have the object or effect of significantly preventing, restricting or distorting competition in Malaysia; and

(b) conduct which amounts to the abuse of a dominant position in a market in Malaysia.

Enforcement and administration

The Competition Act is enforced by the Malaysian Competition Commission (MyCC), a new government authority formed on 1 April 2011 pursuant to the Competition Commission Act.

The MyCC has a broad range of powers and duties under the Competition Commission Act, which range from the role of advising the Minister or any public or regulatory authority on competition matters, to educating and raising awareness regarding the benefits of competition law among members of the public.

Anti-competitive agreements

The Competition Act prohibits agreements between enterprises that have either the object or effect of significantly preventing, restricting or distorting competition in Malaysia. This is sometimes referred to as the “Chapter One Prohibition,” and covers both agreements between competitors (horizontal agreements) and agreements between enterprises operating at different levels of the supply chain (vertical agreements).

Under the Competition Act, certain horizontal agreements are illegal per se, i.e., they are deemed to have the object of significantly preventing, restricting or distorting competition in the market (without the need to assess if the agreement has an anti-competitive effect on the market). These include horizontal agreements which have the object of:

(a) fixing, directly or indirectly, purchase or sale prices or other trading conditions;

(b) sharing markets or sources of supply;

(c) limiting or controlling: (i) production; (ii) market outlets; (iii) market access; (iv) technical or technological development; or (v) investment; and

(d) bid rigging.
Less serious types of restrictions may either fall outside the Chapter One Prohibition entirely (because they do not significantly impact on competition in Malaysia) or are exempt from the Chapter One Prohibition (discussed in further detail below).

MyCC has indicated in its “Guidelines on Chapter 1 Prohibition” (Chapter One Guidelines) that in general, anti-competitive agreements will not be considered “significant” if:

(a) the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20%; or

(b) the parties to the agreement are not competitors and each of the parties individually have less than 25% share in any relevant market.

On this note, we should highlight that although price fixing in a horizontal agreement is illegal per se, there is no corresponding prohibition for vertical agreements. This means that resale price maintenance (e.g., fixing resale prices or setting a minimum resale price) in a vertical agreement is not illegal per se.

Having said that, certain practices in respect of vertical agreements may still be viewed negatively by the MyCC. In particular, MyCC has indicated that:

(a) it will take a strong stance against minimum resale price maintenance; and

(b) it will deem other forms of resale price maintenance (including maximum pricing or recommended retail pricing) which serve as a focal point for downstream collusion to be anti-competitive.

However if the parties come within the safe harbour set out in the Chapter One Guidelines, then such resale price maintenance will not be considered “significant” and therefore, will not represent a breach of the Competition Act.

In addition, the Competition Act contains a schedule listing a small number of activities that will be excluded entirely from the Chapter One Prohibition, including acts necessary to comply with other laws, and collective bargaining agreements between an employer and their workers.

Exemption from the prohibition on anti-competitive agreements

The Competition Act provides that an enterprise which is a party to an anti-competitive agreement which infringes the Chapter One Prohibition may be exempt if:

(a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;

(b) the 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;

(c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and

(d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods and services.

The Competition Act provides for individual exemptions and block exemptions (where a particular category of agreements is exempted) and permits relevant provisions to be used as a defence (in the event of an investigation or litigation).
While as at May 2013, the MyCC had not yet granted any individual exemptions, it is anticipated that individual exemptions will be granted only for agreements that are particularly novel or carry a high degree of importance to the wider economy. The MyCC, in line with the position taken by other jurisdictions with an individual exemption system (such as the European Union), has stated that individual notification of exemptions will not be accepted for routine cases, in order to preserve resources for agreements and practices of wider significance.

Most companies seeking exemption for their agreements are likely to look to fit within a “block exemption.”

Both an individual and a block exemption may be subject to certain conditions and/or be granted for a limited duration.

**Self-assessment of anti-competitive agreements**

Parties will, in practice, be expected to “self-assess” whether a restriction under an agreement will qualify for an individual exemption, and in the event of an investigation or litigation, will need to be able to demonstrate that the agreement had been assessed and cleared in this way.

While the *Competition Act* sets out the basic criteria for assessing when a restriction may be exempt, the MyCC has not provided more detailed guidance on how it will apply these criteria. The *Competition Act* does empower the MyCC to issue such guidance in due course but pending the issuance of such guidelines by the MyCC, existing guidance issued by jurisdictions such as Singapore and the European Union offer a helpful starting point.

**Abuse of a dominant position**

The *Competition Act* also prohibits enterprises from abusing their “dominant position” in a market. This is referred to as the “Chapter Two Prohibition.”

The term “dominant position” refers to one or more enterprises possessing such significant power in a market that they are able to adjust prices, outputs, or trading terms without effective constraint from competitors or potential competitors.

The MyCC had issued a guideline on the Chapter Two Prohibition, which provides that generally, a market share of above 60% would indicate that an enterprise is dominant. However, market share, on its own, is not conclusive and the MyCC has indicated that it will also take into account other factors to assess whether an enterprise is dominant.

Under the Competition Act, an abuse of a dominant position may include:

(a) directly or indirectly imposing an unfair purchase or selling price or other unfair trading conditions;

(b) limiting or controlling (i) production; (ii) market outlets; (iii) market access; (iv) technical or technological development; or (v) investment, to the detriment of consumers;

(c) refusing to supply to a particular enterprise or group/category of enterprises;

(d) applying different trading conditions to equivalent transactions to an extent that may harm competition;

(e) making the conclusion of a contract subject to acceptance by the other parties of supplementary conditions which, by their nature or according to commercial usage, have no connection with the subject matter of the contract (for example, tying the sale of one product to the sale of another);
(f) any predatory behaviour towards competitors; or

(g) buying up a scarce supply of intermediate goods or resources required by a competitor, where the dominant enterprise does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.

Although this list of conduct is wide and will cover most examples of abuse, it is non-exhaustive.

A significant point to note is that notwithstanding the above list of prohibited conduct, an enterprise in a dominant position is allowed to take steps which have reasonable commercial justification or which represent a reasonable commercial response to the market entry or market conduct of a competitor. This is likely to mean that if an enterprise can justify its conduct on reasonable commercial grounds, then that conduct is unlikely to be considered an abuse of a dominant position. It remains to be seen how strictly this provision will be interpreted.

**Merger control**

The Competition Act does not contain any requirement or option for enterprises to seek advance clearance of a planned merger, acquisition or joint venture.

**Sanctions and consequences of breach**

Where there is an infringement of the Chapter One and/or Chapter Two Prohibition, the Competition Act confers powers on the MyCC to impose a financial penalty of up to 10% of the worldwide turnover of an enterprise over the period during which the infringement occurred. This penalty is likely to be assessed based on the turnover achieved by the entire corporate group concerned.

It is noteworthy that an infringement of the Chapter One Prohibition or Chapter Two Prohibition is currently not a criminal offence. In other words, while anti-competitive activity could lead to the imposition of a financial penalty on the infringer, it would not lead to criminal prosecution of the infringer or its officers.

That said, the Competition Act provides that it will be a criminal offence for individuals or bodies corporate to obstruct MyCC’s investigations, tip off third parties about an imminent investigation or MyCC’s visit, or make threats or reprisals against companies or individuals either making complaints to the MyCC or helping a MyCC’s investigation.

A body corporate which commits an offence under the Competition Act will attract a fine of up to 5 million Malaysian Ringgit (RM), while a second or subsequent offence will result in the imposition of a fine not exceeding RM10 million.

Conversely, first time non-compliance by individuals will result in the imposition of a fine not exceeding RM1 million or imprisonment for a term not exceeding five years or both. A second or subsequent offence will result in the imposition of a fine not exceeding RM2 million or a term of imprisonment not exceeding five years or both.

**Leniency program**

The Competition Act provides for the implementation of a leniency regime. Under the leniency regime, where an enterprise admits its involvement in cartel arrangements, the enterprise may obtain immunity or a reduction of up to 100% of any penalties which would have otherwise been imposed.3

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3 The MyCC has yet to issue any guidelines on the leniency regime. It therefore remains to be seen how the MyCC will apply/implement the regime in practice.
Extraterritorial operation

The Competition Act expressly applies to commercial activity taking place within Malaysia. Activity taking place outside Malaysia is also covered where there is an effect on competition on any market in Malaysia.

Communications and Multimedia Act

The Communications and Multimedia Act 1998 prohibits anti-competitive behaviour in the communication, computing, multimedia and broadcasting industries. Types of anti-competitive conduct which are prohibited include:

(a) conduct which has the purpose of substantially lessening competition in a communications market;
(b) price fixing, market sharing or boycotting of a competitor or supplier; and
(c) tying sales of products or services to the sale of other products or services.

Contracts Act

The Contracts Act 1950 contains a provision which prohibits restraints of trade. Under the Contracts Act, an agreement that restrains a party from exercising a lawful profession, trade or business of any kind, is void (this is subject to three limited exceptions).

Energy Commission Act

The Energy Commission Act 2001 contains provisions which govern competition in the energy sector. It also establishes the Energy Commission (Commission) which has a range of functions, including promoting and safeguarding competition and fair and efficient market conduct. In the absence of a competitive market, it is the Commission’s role to prevent the misuse of monopoly or market power in respect of the generation, production, transmission, distribution or supply of electricity and the supply of gas through pipelines.
New Zealand
New Zealand

The key legislation dealing with restrictive trade practices is the New Zealand Commerce Act 1986 (Commerce Act), particularly Part II.

Overview of competition laws

Certain types of conduct in the Commerce Act are prohibited regardless of their impact upon competition. The kinds of conduct which fall into this category are price fixing, resale price maintenance, and taking advantage of a substantial degree of market power for an unlawful anti-competitive purpose.

Other conduct is prohibited only if it has the purpose, effect, or likely effect of substantially lessening competition in a market. This includes anti-competitive agreements and exclusionary arrangements between competitors.

Enforcement and administration

The Commerce Act is administered and enforced by the Commerce Commission. The Commerce Commission’s activities include investigation and prosecution of anti-competitive conduct. The Commerce Commission has statutory powers to assist in gathering information and evidence in the investigation of anti-competitive conduct, including powers to compel the production of documents and information and to obtain and execute search warrants.

Price fixing

Price fixing is absolutely prohibited under the Commerce Act. Price fixing involves an agreement between people or businesses in competition with each other that has the purpose, effect or likely effect of fixing, controlling or maintaining the price for goods or services (including any discount, allowance, rebate or credit in relation to those goods or services).

The price-fixing prohibition is in the process of being replaced by a prohibition on “cartel provisions,” discussed in more detail below.

Resale price maintenance

Resale price maintenance is absolutely prohibited. The prohibition against resale price maintenance covers a range of different conduct, including persuading or inducing a reseller not to sell goods below a specified price, withholding supply on the basis that a reseller has sold goods below a specified price, and entering into an agreement for the supply of goods where the minimum resale price is specified.

Suppliers are permitted to issue recommended retail prices but must not enforce any minimum price. It is also permissible for a supplier to specify a maximum price for resale, so long as this does not amount to a de facto actual price at which the reseller must sell.

Taking advantage of market power

The Commerce Act prohibits a person with a substantial degree of power in a market from taking advantage of their market power for the purpose of restricting the entry of a person into a market, preventing or deterring a person from engaging in competitive conduct in a market, or eliminating a person from a market.

There is also a specific prohibition on a person taking advantage of market power in trans-Tasman markets.
Predatory pricing

A person with a substantial degree of power in a market may take advantage of their market power if they price below cost in order to restrict the entry of a third party into a market, prevent or deter that party from engaging in competitive conduct in a market, or eliminate that party from a market. In order for this conduct to amount to predatory pricing, the Courts have found that the person with substantial market power must intend to recoup their loss from pricing below cost by raising prices after the third party has been restricted from entering the market.

Anti-competitive agreements

The Commerce Act prohibits a person entering into and giving effect to a contract, arrangement or understanding that contains a provision that has the purpose, effect or likely effect of substantially lessening competition in a market.

The Commerce Act also prohibits agreements between persons in competition with each other that contain “exclusionary provisions.” Exclusionary provisions are provisions that have the purpose of preventing, restricting or limiting the supply or acquisition of goods or services to or from particular persons. It is a defence to the prohibition on exclusionary provisions if the provision does not have the purpose, effect or likely effect of substantially lessening competition in a market. The prohibition on exclusionary provisions is currently in the process of being repealed by the legislation discussed below. Once the prohibition is repealed, such agreements will fall to be assessed under the general prohibition on agreements with the purpose, effect or likely effect of substantially lessening competition in a market.

Authorisation

Companies can apply to the Commission for authorisation of anti-competitive agreements, price fixing, resale price maintenance and exclusive dealing, but not misuse of market power. In order for such an authorisation application to be granted, the Commission must be satisfied that there are sufficient public benefits to outweigh the detrimental effect the practice would have on competition.

Exceptions

There are a number of exceptions to the restrictive trade practices provisions in Part II of the Commerce Act. For instance, these provisions do not apply to a contract, arrangement or understanding containing a provision relating to conditions of employment. Nor do they apply to the entering into a contract for the sale of a business in so far as it contains a provision that is solely for the protection of the purchaser in respect of the goodwill of the business. There is also a specific exception for entering into a contact, arrangement or understanding licensing intellectual property rights, although this exception does not apply to the “misuse of market power” provision.

Mergers and acquisitions

The Commerce Act prohibits a merger only if there is, or is likely to be, a substantial lessening of competition in a market. There are no compulsory financial or market share notification thresholds under the Commerce Act. Notification is a voluntary process at the parties’ discretion. However, guidelines issued by the Commerce Commission indicate that an acquisition may not substantially lessen competition where the following conditions apply:

(a) the top three firms in the relevant market post acquisition have a market share of below 70% and the merged firm will have a share of the relevant market at 40% or less; or

(b) the top three firms in the relevant market post acquisition have a market share above 70% and the merged firm will have a market share of 20% or less.
These market share and concentration levels are referred to as “safe harbours.”

There are two types of voluntary notification to the Commission:

(a) an application for a formal clearance where a transaction does not substantially lessen competition; and

(b) an application for formal authorisation where a transaction may substantially lessen competition but there are sufficient public benefits arising from the transaction that it should be permitted.

There are no penalties for failing to notify a transaction to the Commission as notification is voluntary. The risk in not approaching the Commission is that, in addition to the disruption to the transaction if the Commission decides to intervene, there is the possibility of various penalties being imposed for breach of the Commerce Act if the acquisition substantially lessens competition in a market. Under the Commerce Act, the courts can order that penalties of up to NZD5 million be paid by companies or up to NZD500,000 in the case of an individual for an anti-competitive merger. The courts may also impose injunctions, and private actions can be brought by third parties who have been detrimentally affected (see Penalties and liabilities section). In addition, the courts can issue orders for the disposal of the assets or shares.

In November 2008, the Commission published guidelines about the merger clearance process and revised the clearance application form. The guidelines introduced two new elements to the Commission’s review process, namely pre-notification discussions and statements of preliminary issues:

(a) Pre-notification discussions are voluntary and may be held between the Commission and a potential applicant to determine the information and evidence the Commission is likely to require to make its assessment; and

(b) A statement of preliminary issues will be published between 15 and 25 working days after an application is made and will outline the Commission’s initial competition views, allowing interested parties to consider the issues and provide further information to assist the Commission’s assessment.

The Commission’s clearance and authorisation guidelines are currently in the process of review, and new guidelines are likely to come into effect later in 2013.

Penalties and liabilities

The Commerce Act is administered and enforced by the Commission. Failure to comply with the Act can result in serious consequences for both the company and the individuals concerned or involved in the breach.

Under the Commerce Act, the courts can order that civil penalties be paid in respect of any breach of the restrictive trade practices in Part II by companies of up to the greater of NZD10 million, or three times the value of any commercial gain or, if commercial gain is not known, 10% of the company’s turnover (including the turnover of all of its interconnected bodies corporate, if any). Penalties of up to NZD500,000 can be imposed on individuals. Companies cannot indemnify individuals for penalties or legal costs incurred from price fixing.

In addition, private actions can be brought by third parties (e.g., competitors, customers or consumers) which have been detrimentally affected by the anti-competitive conduct seeking damages for the amount of the loss suffered.
The courts may also impose injunctions to restrain anti-competitive conduct and vary or nullify anti-competitive contracts or arrangements.

**Leniency policy**

The Commerce Commission has a Leniency Policy for Cartel Conduct, which was updated in March 2010. Under the Leniency Policy, immunity is available to the first person involved in a cartel who reports the cartel to the Commerce Commission. As a result of the updates to the Leniency Policy, an applicant may still apply for immunity even after the Commerce Commission is aware of a cartel, provided it does not have sufficient evidence to commence court proceedings. The updated Leniency Policy also includes a marker system, enabling an applicant to preserve their place as an immunity applicant for a specified time while they gather the necessary information to support their application.

There are various conditions that apply to the grant of leniency, including that the person seeking leniency has not coerced others to participate and provides full and continuing cooperation to the Commerce Commission.

The Leniency Policy includes provision for cooperation concessions for cartel participants who are not eligible for immunity but wish to cooperate with the Commerce Commission in exchange for a recommended reduction in penalty.

The Commerce Commission also has a Cooperation Policy covering non-cartel matters under which it may agree to take a lower level of enforcement action, or no action at all, against an individual or business in exchange for information and full, continuing and complete cooperation.

**Extraterritorial application**

The Commerce Act also applies to conduct engaged in outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand. The Commerce Act will also apply to persons outside New Zealand, even if they are not resident or do not carry on business in New Zealand themselves, if they are involved in directing agents to carry out conduct in New Zealand.

**Reform**

The Commerce (Cartels and Other Matters) Amendment Bill is currently before Parliament, and was reported back from the Commerce Select Committee on 13 May 2013. The Government has said that the Bill is of “category 3” importance, and will be passed in 2013 if possible. Accordingly, the changes included in the Bill may not come into force until later in 2013, or even in 2014.

The Bill’s current wording makes some significant changes to the Commerce Act including:

(a) introducing a new prohibition (to replace the current price fixing prohibition) on entering into or giving effect to a contract, arrangement or understanding that contains a “cartel provision” — this is defined as price fixing, restricting output or market allocation;

(b) replacing the joint ventures exception to price fixing, with a “collaborative activities” exemption;

(c) allowing for clearances to be sought from the Commission for contracts, arrangements or understandings containing a cartel provision where the parties are involved in a collaborative activity and the cartel provision is reasonably necessary for that collaborative activity; and

(d) introducing a new criminal offence for entering into or giving effect to a contract, arrangement or understanding that contains a cartel provision with the intention of price fixing, restricting output or market allocating. This involves prison sentences up to seven
years for individuals, and penalties of up to NZD10 million for corporates. The civil penalties will also remain in place. These criminal penalties will not come into force until two years after the Bill is passed.
Philippines
The Philippines has general antitrust laws that prohibit unfair competition, and arrangements and combinations aimed to restrain trade or prevent by artificial means free competition in the market. There are also laws that govern specific industries and arrangements, and which prohibit specific acts such as price fixing, tying, information sharing, coordination, abuse of market power, predatory behaviour, and other arrangements. However, the Philippines does not yet have a comprehensive or well-developed body of antitrust law.

**Philippine Constitution**

The role of competition in the private sector is recognized in the Philippine Constitution as a state policy.

Article II, Section 20 maintains that “[t]he State recognizes the indispensable role of the private sector, encourages private enterprise and provides incentives to needed investments.” To encourage private sector enterprise, Article XII, Section 19 provides that “[t]he State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.” The State, therefore, acts as a regulator of competition in the private sector, when the public interest so requires. This provision is a statement of public policy and does not necessarily prohibit monopolies per se. However, the Constitution expressly prohibits unfair competition or combinations in restraint of trade.

**Revised Penal Code**

The Revised Penal Code prohibits monopolies and combinations in restraint of trade. The following acts are prohibited under Article 186 of the Revised Penal Code:

(a) combinations to prevent free competition in the market, by entering into any contract or agreement or taking part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce, to prevent by artificial means free competition in the market;

(b) a monopoly to restrain free competition in the market, by monopolizing any merchandise or object of trade or commerce, or by combining with any other person or persons to monopolize such merchandise or object in order to alter the price thereof by spreading false rumours or making use of any other artifice to restrain free competition in the market; and

(c) the manufacturer, producer, processor or importer of any merchandise or object of commerce combining or agreeing with any person to make transactions prejudicial to lawful commerce or to increase the market price of merchandise or object of commerce manufactured, produced, processed, assembled or imported into the Philippines.

**Civil Code**

Article 28 of the Civil Code of the Philippines provides that “unfair competition in agriculture, commercial or industrial enterprises or in labour through the use of force, intimidation, deceit, machination or any other unjust, oppressive or high-handed method shall give rise to a right of action by the person who thereby suffers damage.”

The Civil Code prohibits unfair competition. To qualify the competition as “unfair,” it must have two characteristics:

(a) it must involve an injury to a competitor or trade rival; and
it must involve acts which are characterized as “contrary to good conscience” or otherwise unlawful.

The public injury or interest factor appears to be a minor aspect. The essence of the matter appears to be a private wrong perpetrated by unconscionable means.

What is commonly known as “cutthroat competition,” for instance, is considered unfair. When a person starts a business that directly competes with another, not for the sake of profit for himself and regardless of loss, but for the sole purpose of driving his competitor out of business so that at a later date he can take advantage of the effects of his malevolent purpose, the person may be guilty of unfair competition.

Unfair competition in this provision follows the extended concept found in American jurisdictions. The term covers cases of discovery of trade secrets of a competitor, bribery of his employees, misrepresentations of all kinds, interference with the fulfilment of a competitor’s contract or any malicious interference with the latter’s business.

Other special laws and regulations

The Philippines also has various industry-specific laws, such as the following, which restrict and prohibit certain arrangements that are considered to be anti-competitive:

(a) Price Act, which governs the sale of basic necessities and prime commodities, and penalizes acts of hoarding, profiteering, and cartels.

(b) Electric Power Industry Reform Act (EPIRA), which regulates competition in the power industry, and prohibits participants in the electricity industry from engaging in any anti-competitive behaviour, including, but not limited to, cross-subsidization, price or market manipulation, and imposes limits on ownership and control by related companies, of installed generating capacity.

(c) Public Telecommunication Policy Act (PTPA), which grants the National Telecommunication Commission (NTC) certain powers to regulate rates or tariffs when ruinous competition results or when a monopoly or a cartel or combination in restraint of free competition exists.

(d) Universally Accessible Cheaper and Quality Medicines Act, which applies to the pharmaceutical industry and prohibits acts of price manipulation such as hoarding, profiteering, or illegal combination or forming cartels by any manufacturer, importer, trader, distributor, wholesaler, retailer, or any person engaged in any method of disposition of drugs and medicines.

(e) Downstream Oil Deregulation Act of 1998 (Oil Deregulation Act), which regulates competition in the oil industry and prohibits, among others, predatory pricing in the context of the sale of oil products.

(f) General Banking Law, which provides for limitations on ownership by related interests or a family group in a domestic bank.

Office for Competition

In June 2011, on the basis of the power of the Secretary of the Department of Justice (DOJ) “to study all laws relating to trusts, monopolies and combinations, to draft such legislation as may be necessary to update or revise existing laws to enable the Government to deal more effectively with monopolistic practices and all forms of trusts and combination in restraint of trade or free competition and/or
tending to bring about non-competitive prices of articles of prime necessity, to investigate all cases involving violations of such laws, and to initiate and take such preventive or remedial measures, including appropriate judicial proceedings to prevent or restrain monopolisation and allied practices or activities of trust, monopolies and combinations,” the President of the Philippines issued Executive Order 45 (EO 45), which designated the DOJ as the Competition Authority and created the Office for Competition (OFC) under the DOJ.

EO 45 vested the OFC with the following broad powers, duties, and responsibilities:

(a) Investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolisation, cartels and combinations in restraint of trade;

(b) Enforce competition policies and laws to protect consumers from abusive, fraudulent, or harmful corrupt business practices;

(c) Supervise competition in markets by ensuring that prohibitions and requirements of competition laws are adhered to, and to this end, call on other government agencies and/or entities for submission of reports and provision for assistance;

(d) Monitor and implement measures to promote transparency and accountability in markets;

(e) Prepare, publish and disseminate studies and reports on competition to inform and guide the industry and consumers; and

(f) Promote international cooperation and strengthen Philippine trade relations with other countries, economies, and institutions in trade agreements.

Pursuant to EO 45, the DOJ issued Department Circular 11, series of 2013, otherwise known as the Implementing Rules and Regulation for the Establishment of the OFC (OFC Rules), which took effect on 1 March 2013.

The OFC Rules apply to all investigations conducted by the OFC on cartelisation, monopolies, and combinations in restraint of trade.

Under the OFC Rules, investigations may be commenced either upon complaint or by the OFC motu proprio. The OFC Rules provide formal requirements but are clear in stating that the OFC may choose to commence an action on the basis of any complaint, regardless of form. A complaint will commence only upon the approval of the OFC Head after determining whether it is sufficient in form and substance. To this end, the OFC is empowered to make use of investigative measures such as “requests for information.” Such measures allow the OFC to procure additional information from the respondent, complainant and other relevant parties for purposes of the initial assessment.

Following the investigation, the OFC must produce an investigation report containing the results of the investigation. The report may recommend the filing of cases with the appropriate bodies or require the complainant to submit additional information for further investigation.

The OFC Rules empower the Secretary of Justice to accept, reject, or modify the recommendations in the investigation report produced by the OFC. Should the Secretary approve a recommendation to file a case, the OFC shall be tasked with preparing and filing the complaints with the appropriate bodies.

The OFC Rules mandate that the OFC must form a mechanism for cooperation with the Department of Trade and Industry (DTI) and freely share information with sector regulators to aid in protecting consumers from abusive, fraudulent, harmful or corrupt business practices.
Merger approval

The Philippines does not have merger control laws that generally require filings or notifications for mergers and acquisitions (M&A) from the perspective of antitrust and competition laws. However, if the merger involves companies registered with the Securities and Exchange Commission (Commission), a filing must be made to the Commission to obtain approval for the merger. Under the Philippine Corporation Code, in cases involving the merger of banks or banking institutions, building and loan associations, trust companies, insurance companies, public utilities, educational institutions or other special corporations governed by special laws, the favourable recommendation/approval of the appropriate government agency must be obtained prior to the Commission approval. Also, certain special laws require prior notice or approval for M&A transactions for specific industries. Currently, these requirements are general in nature and do not focus on the antitrust and competition aspects of the M&A transaction.

Penalties and liabilities

Revised Penal Code

Enforcement of Article 186 of the Revised Penal Code, which prohibits monopolies and combinations in restraint of trade, has been delegated to the DTI.

Compliance with the Revised Penal Code may be enforced by administrative action before the DTI, upon the initiative of a private party or by the DTI.

Administrative Penalties that may be imposed by the DTI include the following:

(a) issuance of a cease-and-desist order;
(b) acceptance of a voluntary assurance of compliance or discontinuance under such terms and conditions as may be imposed;
(c) condemnation or seizure of products which are the subject of the offence;
(d) seizure and forfeiture of the paraphernalia and all properties, real or personal, which have been used in the commission of the offence;
(e) imposition of administrative fines in such amount as deemed reasonable by the Chief Hearing Officer/Adjudication Officer;
(f) cancellation of any permit, licence, authority, or registration which may have been granted by the DTI, or the suspension of the validity thereof for such period of time as the DTI may deem reasonable;
(g) withholding of any permit, licence, authority or registration which is being secured by the violator from the DTI;
(h) assessment of damages;
(i) censure; and
(j) other analogous penalties or sanctions.

The Revised Penal Code may also be enforced through the judicial courts. A determination by a Philippine court of violation of Article 186 of the Revised Penal Code will warrant the imposition of criminal penalties. The penalties imposable for criminal violations of the Revised Penal Code are
prision correccional (or imprisonment from six months and one day to six years) or a fine ranging from PhP200 to PhP6,000, or both.

If the violation affects any food substance, motor fuel or lubricants, or other articles of prime necessity, the penalty imposable shall be increased to prision mayor (or imprisonment of between six years and one day to 12 years). Any property possessed under any contract or by any combination in violation of the Revised Penal Code, being the subject of the said contract, shall be forfeited in favour of the government.

If the violation is committed by a corporation or association, its president and each one of its agents or representatives in the Philippines (if a foreign corporation or association) who knowingly permitted or failed to prevent the commission of such violation will be held liable for the offence.

Civil Code

The Civil Code, which gives a right of action for damages against the offending party, is enforced by private action.

Other special laws and regulations

Any violation of the special antitrust laws or regulations in the Philippines may give rise to the imposition of administrative fines and civil or criminal liabilities on the offending party. For example, under the Price Act, any person who commits any act of illegal price manipulation of any basic necessity or prime commodity shall suffer the penalty of imprisonment for a period of five to 15 years, and shall be imposed a fine of not less than PhP5,000 and not more than PhP2 million. Any person who violates the provisions on automatic price controls and mandated price ceilings of the Price Act shall suffer the penalty of imprisonment for a period of one to 10 years or a fine of not less than PhP5,000 and not more than PhP1 million or both, at the discretion of the court. Under the Oil Deregulation Act, any person found guilty of predatory pricing, including but not limited to the Chief Operating Officer, Chief Executive Officer or Chief Finance Officer of a partnership, corporation or any entity involved, will be punishable with three to seven years imprisonment, and a fine ranging from PhP1 million to PhP2 million.

Extraterritorial application

Philippine laws are generally effective only within the limits of Philippine territory; however, an agreement made in a foreign country will be subject to Philippine antitrust laws if its contents are enforced in the Philippines. Moreover, prohibitive laws such as the foregoing are not rendered ineffective by agreements executed abroad if the acts contemplated affect public order, public policy and good customs.

Reform

There are pending bills before the Philippine Congress that seek to regulate antitrust and monopolistic activities affecting various industries.
Singapore
Singapore

Singapore has introduced a general competition law, largely similar to the UK model, which incorporates minor elements from Irish, Canadian and Indian competition laws. The Competition Act was passed by Parliament on 19 October 2004. Sector-specific guidelines prohibiting anti-competitive behaviour also exist, notably in the telecommunications, media and energy sectors.

Overview of competition laws

The Competition Act prohibits the following three main activities:

(a) agreements which have as their object or effect the prevention, restriction or distortion of competition in Singapore;

(b) conduct which amounts to the abuse of a dominant position in any market in Singapore; and

(c) mergers that have resulted or may be expected to result in a substantial lessening of competition within any market in Singapore for goods and services.

Enforcement and administration

The Competition Commission of Singapore (Commission), which was formally established under the Competition Act, is responsible for the administration of the law. The Commission may recommend block exemption orders to be made by the Minister for Trade and Industry.

The Commission has wide powers to conduct investigations if there are “reasonable grounds” for suspecting an infringement.

Anti-competitive agreements

Section 34 of the Competition Act (which came into force on 1 January 2006 but was subject to a transitional period of six months so that parties could bring their agreements into compliance) stipulates that agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited unless they are exempt or excluded in accordance with the provisions of the Competition Act.

Please note that notwithstanding the above, an agreement will only fall within section 34 if the prevention, restriction or distortion of competition is appreciable.

Agreements, decisions or concerted practices which involve the following will always have an appreciable effect on competition and will therefore be deemed as illegal no matter what the circumstances:

(a) the fixing (whether directly or indirectly) of purchase or selling prices or any other trading conditions;

(b) the limitation on or control of production, markets, technical development or investment;

(c) the sharing of markets or sources of supply; or

(d) bid rigging or collusive tendering.
The following agreements, decisions, or concerted practices may or may not appreciably prevent, restrict or distort competition and must be examined on its facts:

(a) fixing trading conditions;
(b) joint purchasing or selling;
(c) sharing or exchanging price and/or non-price information;
(d) restricting advertising; or
(e) setting technical or design standards.

Any agreement or decision containing provisions that contravene section 34 will be held void. However, the following (listed in the Third Schedule to the Competition Act) are excluded from the restrictions:

(a) undertakings entrusted with operation of services of general economic interest;
(b) agreements made to comply with legal requirements;
(c) agreements which create “exceptional and compelling reasons” why the above prohibitions ought not to apply (including to avoid a conflict between the Competition Act and Singapore’s international obligations);
(d) agreements or conduct which relate to any goods or services where there already exists (or there are plans to put in place) a more appropriate sectoral regulatory framework that balances competition issues with other policy concerns;
(e) agreements or conduct which relate to any “specified activity” (which includes the supply of piped potable water, wastewater management services, cargo terminal operations, scheduled bus services and rail services);
(f) “vertical agreements” (agreements between undertakings operating along different levels of the same value chain, for example, between manufacturer and distributor). The reason for this is that the undertakings have “a mutual interest in ensuring that as many goods and services are sold to consumers as possible” and because such vertical agreements will “have pro-competitive effects that more than outweigh the potential anti-competitive effects”; and
(g) agreements with “net economic benefit” (i.e., agreements which contribute either to improving production or distribution or to promoting technical or economic progress, but which do not impose restrictions which are dispensable to the attainment of those objectives, or afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question).

In July 2006, a block exemption was granted for Liner Shipping Agreements. The Commission is currently conducting a consultation in relation to its proposed recommendations for the block exemption as it is due to expire on 31 December 2010. The proposal in general includes retaining the current features and scope of the exemption (save for some proposed changes to the filing requirements) as well as extending the block exemption for a further five years until 31 December 2015.
Abuse of a dominant position

Section 47 of the Competition Act (which also came into force on 1 January 2006 but was not subject to a transitional period) stipulates that any conduct on the part of one or more undertakings which amounts to the abuse of a “dominant position” in “any” market in Singapore is prohibited. “Dominant position” refers to a dominant position within Singapore or elsewhere. The Competition Act does not deal with the criteria for determining whether an undertaking has a “dominant position.” However, the Commission has issued guidelines that provide indicative thresholds and considerations to take into account in determining dominance.

The Competition Act lists examples of conduct which may constitute an “abuse of a dominant position,” namely:

(a) predatory behaviour towards competitors;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
(d) making the conclusion of contracts subject to acceptance by the other party of supplementary obligations which have no connection with the subject of the contracts.

Exclusions from section 47 are listed in the Third Schedule to the Competition Act and similar to the exclusions in relation to section 34, save that section 47 does not benefit from the vertical agreement and “net economic benefit” exclusions.

Mergers and acquisitions

Section 54 of the Competition Act (which came into force on 1 July 2007) prohibits mergers or anticipated mergers that have resulted, or are expected to result, in a substantial lessening of competition within any market in Singapore for goods and services. Ancillary restrictions which are directly related and necessary to the implementation of those mergers are excluded from section 34 and section 47 of the Competition Act. Certain mergers are excluded from these restrictions (listed in the Fourth Schedule to the Competition Act) and essentially permit mergers that:

(a) are approved by any Ministry or regulatory authority (other than the Commission) pursuant to any requirement for such approval imposed by any written law;
(b) are approved by the Monetary Authority of Singapore;
(c) are under the jurisdiction of any regulatory authority (other than the Commission) under any written law relating to competition, or code of practice relating to competition issued under any written law;
(d) are in relation to the specified activities set out in the Third Schedule; or
(e) result in economic efficiencies arising which outweigh the adverse effects due to the substantial lessening of competition in the relevant market in Singapore.

Other pertinent aspects of the restrictions on mergers and acquisition are as follows.
Voluntary notification of anticipated mergers

A party to an anticipated merger is allowed to notify the Commission of the anticipated merger and apply for the Commission to make a decision as to whether the anticipated merger would breach section 54 of the Act.

Similarly, a party to a completed merger can notify the Commission of the merger and apply for a decision to be made as to whether the merger would breach section 54 of the Act.

There is no mandatory requirement for merger parties to notify their merger to the Commission. Notification is voluntary.

Confidential advice from the Commission

The Guidelines on Merger Procedures were fairly recently revised, with the revised guidelines coming into effect on 1 July 2012. Under the revised merger guidelines, the Commission has provided the possibility of merger parties obtaining confidential advice in respect of whether a merger is likely to raise competition concerns in Singapore. In order to obtain confidential advice from the Commission for a merger, certain conditions must be met:

(a) The merger must not be completed and there must be a good faith intention for the parties to proceed with the transaction;

(b) The merger must not be in the public domain. The Commission may consider giving confidential advice in respect of mergers which are no longer confidential, but the parties are required to justify why they wish to receive confidential advice as opposed to filing a notification;

(c) The merger must raise a genuine issue in relation to the competitive assessment in Singapore (i.e., there must be some doubt as to whether the merger situation raises concerns such that notification is appropriate); and

(d) the requesting party or parties are expected to keep the Commission informed of significant developments in relation to the merger situation in respect of which confidential advice was obtained, for example, completion date or abandonment of the merger.

The information required to be provided to the Commission in order to obtain confidential advice is similar to that as required in the Form M1 (i.e., information similar to that as required for notification applications). Confidential advice is, however, not binding on the Commission, since the Commission retains the right to investigate all merger situations as long as the relevant statutory requirements are met.

Pre-notification discussions

The Commission is prepared to enter pre-notification discussions with a party or parties in respect of the merger or anticipated merger. Such a request for discussion has to be submitted in writing and the Commission will not entertain discussions on speculative or hypothetical transactions. These discussions are not binding on the Commission and are meant to provide an opportunity for the Commission to indicate any potential competition concerns that might arise from the transaction.

Conditional mergers

These are mergers that are allowed to proceed on the basis of binding commitments or specific undertakings, made or given by the merger parties to address any competition concerns identified.
Two-phase merger assessment process

The Commission has adopted a two-phase review process. Phase 1 is expected to be completed within 30 working days and is meant to be a quick review so that merger situations, which clearly do not raise competition concerns, can proceed without undue delay. Phase 2 applies if the Commission is of the view that there are competition concerns, in which case it will carry out a more detailed and extensive examination of the merger situation. Phase 2 is generally expected to be for a period of 120 working days.

Enforcement, penalties and liability

The Commission has wide powers to conduct investigations if there are “reasonable grounds” for suspecting an infringement. Where the Commission decides that the relevant prohibition has been infringed, it has the power to issue directions to the infringer, as it deems appropriate in order to eliminate the infringement and/or to prevent a recurrence of the infringement. Such directions may include that the infringer modify or terminate the agreement or conduct in question, make structural changes to its business or provide a performance bond or guarantee on such terms and conditions as the Commission may determine.

Where the Commission is satisfied that the infringement was committed intentionally or negligently, it may impose a financial penalty of up to 10% of the undertaking’s turnover in Singapore for each year of infringement up to a maximum of three years.

In addition, any person, i.e., any individual, body corporate, an unincorporated body of persons or other entity capable of carrying on commercial or economic activities relating to goods and services, found guilty of an offence under the Competition Act for which no penalty is expressly provided will be liable to a maximum fine of SGD10,000 or to imprisonment for a maximum term of 12 months or both.

Where the offence is committed by a body corporate with the consent of, or attributable to any neglect on the part of, an officer of the body corporate, the officer as well as the body corporate may be held accountable. Where the affairs of the body corporate are managed by its members, such members may also be punished accordingly.

The Competition Appeals Board

A Competition Appeals Board has been established to hear appeals regarding the Commission’s decisions. However, appeals relating to decisions made by the Commission in relation to block exemptions will be heard by the Minister for Trade and Industry, because the power to make block exemption orders rests with the Minister. Only a person who is party to the proceedings in which the Board has made a decision may appeal to the High Court on a point of law arising from the Board’s decision or from any decision made by the Board on the amount of a financial penalty.

Civil liability

Any person who suffers loss or damage as a result of an infringement shall have a right of action for civil relief against the infringing party. Under such an action, the court may grant the plaintiff injunctive or declaratory relief, damages (including exemplary damages) and such other relief as the court thinks fit.

Leniency

The Commission has confirmed that Singapore will, like other competition regimes, operate a program of leniency for parties which provide the Commission with information about cartel activities and cooperate during investigations. The Commission will grant total immunity from fines to any party that can satisfy certain criteria, (including being the first to provide the Commission with
evidence of the cartel activity). Subsequent leniency applicants may be granted a reduction of up to 50% in the amount of the financial penalty which would otherwise have been imposed. A party which initiated a cartel will not be eligible for the full reduction, even if it is the first to blow the whistle.

The leniency programme also comprises the following features:

(a) introduction of a marker system to allow an applicant to keep its place in the queue while it gathers the necessary information; and

(b) a leniency plus system to encourage cartel members who fail to get 100% reduction in financial penalties in respect of one cartel to provide information in relation to a completely separate cartel in order to qualify for a further reduction in financial penalty in the first cartel.

**Extraterritorial application**

The Competition Act applies to a party, agreement, abuse of dominant position or merger if such a party, agreement, abuse of dominant position or merger has infringed any of the prohibitions above and affected a market in Singapore, notwithstanding that:

(a) the agreement has been entered into outside Singapore;

(b) any party to such agreement is outside Singapore;

(c) any undertaking abusing the dominant position is located outside Singapore;

(d) the merger has taken place outside Singapore;

(e) any party to such merger is located outside Singapore; or

(f) any other matter, practice or action arising out of such agreement, dominant position or merger is outside Singapore.

**Sector-specific competition regulations**

Certain industries will continue to be self-regulated. The Ministry of Trade and Industry (MTI) has taken the view that “it would be more appropriate for the relevant sectoral regulators, with their industry knowledge and expertise, to administer their own competition rules.” The MTI also noted that the sectoral exclusions are not intended to be permanent and will be reviewed by the Commission after the Competition Act has been in operation for a period of time.

In the telecommunications sector, for example, the Code of Practice for Competition in the Provision of Telecommunication Services, and in the media sector, the Media Development Authority’s Code of Practice for Market Conduct in the Provision of Mass Media Services, are both examples of subsidiary legislation which are industry-specific and largely prohibit unfair methods of competition, predatory pricing and general misuse of market power.

**Guidelines**

The Commission has issued 13 sets of guidelines intended to provide clarification on how it proposes to apply and interpret the Competition Act. The guidelines cover the prohibitions on sections 34, 47 and 54, market definition, the Commission’s powers of investigation, enforcement, the leniency program, the filing of notifications, transitional arrangements in respect of the section 34 prohibition, the appropriate amount of penalties, the treatment of intellectual property rights, and on competition impact assessment for government agencies. Whilst such guidelines are not binding on the Commission, it has indicated that it will abide by the guidelines as much as possible.
Guideline on the section 34 prohibition (anti-competitive agreements)

This guideline clarifies that an “undertaking” means any person (whether an individual, a body corporate, or an unincorporated body of persons) that is capable of engaging, or is engaged, in commercial or economic activity. Section 34 does not apply to agreements made between entities where one of the entities does not have economic independence and freedom to determine its own behaviour in the market (i.e., the entities are part of a single economic unit). Thus an agreement between parent and subsidiary, or principal and agent, is unlikely to be subject to the section 34 prohibition if such parties comprise a single economic unit. However, this also means that a parent may be liable for its subsidiaries’ infringement of section 34 where they form a single economic unit.

“Agreement” will be defined widely to include written and oral agreements, and legally enforceable and non-enforceable agreements (such as gentleman’s agreements). The prohibition applies equally to concerted practices. These are situations of informal cooperation, such as parallel behaviour on a market, between parties without any formal agreement or decision where the risks of competition have been substituted by such cooperation. In respect of decisions between associations of undertakings, a trade association that is party to an activity that infringes the Competition Act, as well as its members, would be liable for any infringement.

The guideline sets out the “appreciable adverse effect” test, providing that an agreement will only infringe section 34 if it has as its object or effect an appreciable effect on competition in Singapore. If the parties’ aggregate market share does not exceed 20% (where they are competitors), or where each party’s market share does not exceed 25% (where they are not actual or potential competitors), the agreement will generally not have an appreciable adverse effect. In addition agreements between “SMEs” (small and medium enterprises below a specified size) will rarely be capable of having an adverse appreciable effect. Notwithstanding, an agreement involving price fixing, bid rigging, market sharing or output limitations (i.e., “hardcore” restrictions) will always have an appreciable adverse effect on competition even if the market shares of the parties are below the said thresholds.

The guideline also clarifies how the “net economic benefit” exclusion will be applied. The exclusion applies to agreements which contribute to (i) improving production or distribution or (ii) promoting technical or economic progress. The guideline explains that the purpose of these criteria is to define the types of efficiency gain that can be taken into account. The parties’ efficiency claims must be substantiated as follows:

(a) the claimed efficiencies must be objective in nature;
(b) there must be a direct causal link between the agreement and the efficiencies; and
(c) the efficiencies must be of significant value, enough to outweigh any anti-competitive effects.

The greater the increase in market power resulting from the agreement, the more significant the benefits must be. The guideline gives examples of improvements in production or distribution, i.e., lower costs from longer production or delivery runs, or from changes in methods of production and distribution, improvements in product quality or increased product range. Examples of promotion of technical or economic progress include efficiency gains from economies of scale and specialisation in research and development with the prospect of an enhanced flow or speed of innovation.

The “net economic benefit” exclusion also requires that the agreement does not impose restrictions which are dispensable to the attainment of the objective benefits and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods and services in question.

Both the agreement itself and any restrictions must be reasonably necessary to attain the efficiencies. The Commission will also consider whether more efficiencies are produced with the agreement in
place than without, and whether there are less restrictive ways of achieving the efficiencies. A restriction will be viewed as indispensable if its absence would eliminate or significantly reduce the efficiencies that flow from the agreement, or make them much less likely to materialise. Restrictions relating to price fixing, bid rigging, market sharing and output limitation are unlikely to be considered indispensable by the Commission.

When assessing the indispensability of restrictions, the Commission will look at the agreement in context, taking into account the market structure, economic risks facing the parties and the incentives they face.

When assessing whether the agreement affords the parties the possibility of eliminating competition in respect of a substantial part of the goods or services in question, the Commission will look at the degree of competition with and without the agreement. Accordingly, this factor will be of particular importance in a market where competition is already relatively weak.

The Competition Act provides the Minister with the power to grant block exemptions in respect of agreements which, despite having an appreciable adverse effect on competition in Singapore, have a net economic benefit.

Guideline on the section 47 prohibition (abuse of a dominant position)

This guideline looks at how dominance will be assessed and states that although an undertaking’s market share is an important factor in assessing dominance, it will not be decisive. Amongst others, the Commission will look at the relative positions of other undertakings operating on the same market and how market shares have changed over time in that market. The guideline states that in general, dominance may be presumed if an undertaking has a market share in excess of 60% although a market share of less than 60% can be indicative of dominance if strong evidence of dominance is provided by other factors.

The guideline includes a list of examples of the types of conduct that may amount to an abuse of dominance, including predatory pricing, and confirms that the Commission will consider pricing below average variable cost to be predatory in the absence of objective justification. Where an undertaking prices above average variable cost but below average total cost, the Commission will consider other evidence, including whether there is evidence that this strategy was intended to harm competition and the feasibility of recouping the losses sustained.

The Commission may consider if the dominant undertaking is able to objectively justify its conduct. The undertaking will have to show that its conduct was a proportionate response in the circumstances.

Guideline on the substantive assessment of mergers and merger procedures

This guideline provides clarification on the kinds of transactions that are considered mergers under the Competition Act.

Under the Competition Act, a merger occurs when:

(a) two or more undertakings, previously independent of one another, merge;

(b) one or more persons or undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or

(c) an undertaking acquires the assets (or substantial part thereof) of another undertaking so that the first undertaking replaces the second in the latter’s business (or part thereof).

Section 54(3) of the Competition Act states that “control” is acquired if the acquirer is able to exercise decisive influence over the target.
In this respect, the guideline clarifies that “control” can be legal or de facto. Legal control arises where the acquirer has ownership of more than 50% of the voting rights of the undertaking. If the acquirer gains ownership of between 30% and 50% of the voting rights, this would give rise to a rebuttable presumption that there is decisive influence over the company. The Commission will also consider de facto control, which is evaluated on a case-by-case basis. De facto control may arise via financial arrangements, additional agreements and/or rights to veto strategic and commercial decisions by the company.

Joint ventures can also be subject to section 54 of the Competition Act if they are subject to joint control, perform the functions of an autonomous economic entity and do so on a lasting basis. These definitions are further clarified in the guidelines.

The test used in relation to mergers is the substantial lessening of competition test. This test takes into consideration the prospects of competition with and without the merger and is a prospective one, i.e., it attempts to assess future competition. The focus of the analysis is on competition and concerns that do not result from the merger are not taken into consideration for the purpose of section 54.

The Commission will first define the relevant market and then review the changes to the market structure as a result of the merger. Market definition is focused on the areas of overlap in the merger parties’ activities. The Commission will also examine the structure and level of concentration in the relevant market, as well as the merged entity’s market power. The general guideline is that there is no competition issue unless:

(a) the merged entity will have a market share of 40% or more; or

(b) the merged entity will have a market share of 20% to 40% and the combined market share of the three largest firms in the market is 70% or more.

Other relevant factors that are taken into consideration include the immediate competitive effects of the merger (for horizontal mergers), whether the merger will affect the entry into and/or expansion of the market and the possibility of market foreclosure (for non-horizontal mergers).

In the event there is an infringement of section 54, the guidelines provide that the Commission can exercise two broad forms of remedies, structural and behavioural. Structural remedies generally require the sale of one or more of the overlapping businesses that have led to the competition concern, with the buyer being approved by the Commission. A behavioural remedy is generally prescribed where a divestment is impractical or disproportionate to the competition concerns. These are meant to constrain the scope for a merged company to behave competitively.

Guideline on market definition

This guideline sets out the analytical framework used by the Commission to define markets when investigating possible infringements of sections 34 and 47. In this respect, the guideline states that the Commission will use the “hypothetical monopolist test” (also known as the “SSNIP test”) as the conceptual approach to define markets.

The guideline confirms that the Commission, like other competition law authorities, will consider the product market (looking at both demand side and supply side substitutability), the geographic market and the temporal market.

Guideline on powers of investigation

This guideline sets out the powers granted to the Commission under the Competition Act to investigate parties suspected of anti-competitive behaviour. The guideline gives examples of information that may be a source of reasonable grounds for suspicion to justify an investigation by the
Commission, and specifies the documents and information that may be requested by the Commission (plus the procedures applicable to the seizure of documents).

It also sets out the Commission’s power in respect of entering premises (including domestic premises and vehicles), and in respect of obtaining information regarding the undertaking’s suppliers, customers and competitors.

The guideline confirms that communications between a company and both its external legal counsel and its in-house lawyers will be classed as privileged communications and therefore be beyond the reach of the Commission’s power. If the Commission considers it reasonable in the circumstances, it may, subject to such conditions as it considers appropriate, grant a company’s request to wait for legal advisors to arrive at the premises.

Guideline on enforcement

This guideline sets out the extent of the Commission’s powers of enforcement, addressing inter alia the Commission’s ability to direct a party to bring an infringement to an end, and to impose interim measures during an investigation and financial penalties. It also details the process that is open to a party who wishes to appeal against a direction.

Guideline on lenient treatment for undertakings coming forward with information on cartel activity

This guideline sets out the leniency program for parties which provide the Commission with information about cartel activities and cooperate during investigations. The guideline provides that an undertaking may be granted the benefit of total immunity from financial penalties if certain conditions are satisfied. These include being the first to provide the Commission with evidence of the cartel activity before an investigation has commenced, maintaining continuous and complete cooperation throughout the investigation and until the conclusion of any action by the Commission arising as a result of the investigation and that the undertaking must not have been the one to initiate the cartel.

Reduction of financial penalties of up to 100% where the undertaking is the first to come forward but which does so only after an investigation has commenced is also available if the undertaking fulfills certain criteria. Subsequent leniency applicants may also qualify for a reduction of up to 50% in the level of financial penalties if certain criteria are fulfilled.

Under the leniency plus program, cartel members who fail to get a 100% reduction in financial penalties in respect of one cartel may provide information in relation to a completely separate cartel in order to qualify for a further reduction in financial penalty in the first cartel.

Guideline on filing notifications for guidance or decision

Parties may apply to the Commission for guidance or a decision as to whether an agreement or particular conduct is likely to infringe sections 34 or 47, respectively. The guideline states that parties should only notify the Commission if they have serious concerns about their agreements and conduct infringing the Competition Act. A fee will be payable by the party filing the notification. Although the amount is not specified in the guideline, it is listed by the Commission as follows:

<table>
<thead>
<tr>
<th></th>
<th>Initial Fee</th>
<th>Further Fee</th>
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<tbody>
<tr>
<td>Notification for Guidance</td>
<td>SGD3,000</td>
<td>SGD20,000</td>
</tr>
<tr>
<td>Notification for Decision</td>
<td>SGD5,000</td>
<td>SGD40,000</td>
</tr>
</tbody>
</table>
The guideline sets out the process for filing a notification with the Commission and specifies the information that must be provided and the steps that must be taken.

**Guideline on merger procedures**

This guideline sets out the procedure for parties to make an application to the Commission for pre-notification discussions as well as setting out the information gathering powers of the Commission in relation to mergers and its powers of investigation. The guideline was revised in 2012, with the revised guideline taking effect on 1 July 2012.

The main revisions in the revised merger guideline include:

- An indication from the Commission that it is unlikely to investigate a merger situation that only involves small companies, namely where the turnover in Singapore in the financial year preceding the transaction of each of the parties is below SGD5 million and the combined worldwide turnover in the financial year preceding the transaction of all of the parties is below SGD50 million. The turnover in Singapore refers to the turnover booked in Singapore as well as turnover from customers in Singapore; and

- The ability to obtain non-binding confidential advice from the Commission, in order for merger parties to decide whether they wish to notify the Commission of their merger situation (see earlier section on Confidential Advice from the Commission).

**Guideline on the appropriate amount of penalty**

This guideline sets out the factors which the Commission may take into account when determining the appropriate financial penalty for a breach of the Competition Act. The guideline states that the Commission’s policy objective in imposing any financial penalty is to reflect the seriousness of the infringement and to deter undertakings from engaging in anti-competitive practices. The Commission will take into account the seriousness of the infringement, the duration of the infringement, other relevant factors, deterrent value and any further aggravating or mitigating factors. Each of these factors is considered in detail in the guideline.

**Guideline on the treatment of intellectual property rights**

This guideline sets out the factors the Commission will consider when assessing the object or effect of IP licensing restraints. The Commission will look at whether the agreement in question is between competitors or non-competitors. Arrangements between competitors are considered, prima facie, more likely to contain anti-competitive elements. Agreements between non-competitors, where one party has market power, may also impose anti-competitive restraints.

The Commission will also look at whether the licensing restraints restrict actual or potential competition that would have existed in their absence and whether, if the agreement falls within the section 34 prohibition, it has any net economic benefit. The guideline clarifies that vertical agreements are excluded from section 34 provided that the IP provisions are not the primary object of the agreement.

The guideline sets out the indicative thresholds in excess of which a licensing agreement is presumed to have an appreciable adverse effect on competition.

If the parties’ aggregate market share does not exceed 25% (where they are competitors), or where each party’s market share does not exceed 35% (where they are not actual or potential competitors), the agreement will generally not have an appreciable adverse effect.
However, as with the case of other agreements under section 34, a licensing agreement between competitors which involve price fixing, bid rigging and market sharing or output limitations will always have an appreciable adverse effect on competition.

Guideline on competition impact assessment for government agencies

The guideline is meant to assist government agencies in their policy-formulation process. The Commission recognizes that government policies can have a significant impact on competition and the guideline thus helps government agencies to identify and assess the likely competitive impact of their proposed policies.
Taiwan
Taiwan

The Fair Trade Law (amended on 23 November 2011) addresses antitrust issues of monopoly, business combination, cartel, multi-level distribution, other anti-competitive business activities, fines that can be imposed in respect of serious abuses of monopoly power and cartels (up to 10% of total annual sales in the preceding fiscal year) and the leniency policy.

Overview

The Fair Trade Law includes prohibitions regarding the conduct of monopolistic enterprises, cartel activity and unfair competition. It also regulates “business combination,” a term used in the law to include the merging of businesses, acquiring of stock, transfer of business or assets, joint ventures and similar arrangements.

Enforcement and administration

The Fair Trade Commission (Commission) is the primary governmental body responsible for implementing and enforcing the Fair Trade Law and its associated regulations. The main areas of current enforcement focus of the Commission are business combination, cartel, the leniency policy and unfair competition conduct, including false advertisements.

Monopolistic enterprise

The Fair Trade Law provides that a monopolistic enterprise not engage in any of the following acts:

(a) obstructing, directly or indirectly, by unfair method, the participation in competition by another enterprise;
(b) making improper decisions on, or improperly maintaining or making changes in, the prices of goods or compensation for services;
(c) requiring its trading counterpart to give it special benefits without proper or justifiable grounds; or
(d) other acts by abusing its market position.

The term “monopoly” as used in the Fair Trade Law means that in a specific market an enterprise either enjoys a position of no competition or has achieved an overwhelmingly superior status capable of thwarting and keeping out competition.

Cartels

The Fair Trade Law prohibits “cartel” activities. A “cartel” is referred to as “concerted action” in the Fair Trade Law, which is defined as:

[An enterprise which acts in concert with another enterprise or enterprises with which it is in competition, as a result of a contract, agreement or any other form of a meeting of intentions, in deciding on the prices of their goods or service, or in restricting the quantity, technology, products, equipment, trading counterparts, trade areas, etc., of their business, thereby restraining each other’s activity.]

However, a number of situations are exempt where the activity is beneficial to the economy as a whole, as well as to the public interest, and permission has been granted by the Commission.

Price fixing and market sharing are likely to fall into concerted actions and are strictly prohibited.
Resale price maintenance

The Fair Trade Law provides that where an enterprise supplies goods to its trading counterpart for resale to a third party or for such third party to make further resale, the trading counterpart and the third party shall be allowed to decide their resale prices freely; any agreement contrary to this provision shall be void. Therefore, it is unlawful for a supplier to attempt to set a fixed or minimum resale price, or to set a maximum resale price or minimum discount; although, the supplier may suggest a resale price or discount and still allow dealers to decide their resale prices freely.

Anti-competitive arrangements

The Fair Trade Law provides that no enterprise may perform any of the following acts if it is likely to lessen competition or to impede fair competition:

(a) causing another enterprise to discontinue supply, purchase or other business transactions with a particular enterprise for the purpose of injuring such particular enterprise;

(b) giving discriminatory treatment to another enterprise or enterprises without proper or justifiable cause;

(c) causing the trading counterpart(s) of its competitors to do business with it by coercion, inducement with interest, or other improper means;

(d) causing another enterprise to refrain from competing in price, or to take part in a business combination or a concerted action by coercion, inducement with interest, or other improper means;

(e) acquiring the secret of production and sales, information concerning trading counterparts or other technology related secret of any other enterprise by coercion, inducement with interest, or other improper means; or

(f) trading with a trading counterpart, conditional upon the imposition of certain improper restrictions on the business activity of such counterpart.

“Restrictions,” as mentioned in the above paragraph (f), refers to the circumstances under which an enterprise engages in restrictive activity in regards to tie-ins, exclusive dealing, territory, customers, use, or otherwise.

The Fair Trade Law also prohibits an enterprise from doing any of the following acts with respect to the goods or services it supplies, which infringe upon the identification symbol of another enterprise:

(a) using in the same or similar manner, the personal name, business or corporate name, or trademark of another, or container, packaging, or appearance of another’s goods, or any other symbol that represents such person’s goods, commonly known to relevant enterprises or consumers, so as to cause confusion with such person’s goods; or selling, transporting, exporting, or importing goods bearing such representation;

(b) using in the same or similar manner, the personal name, business or corporate name, or service mark of another, or any other symbol that represents such person’s business or service, commonly known to relevant enterprises or consumers, so as to cause confusion with the facilities or activities of the business or service of such person; or

(c) using on the same or similar goods a mark that is identical or similar to a well-known foreign trademark that has not been registered in this country; or selling, transporting, exporting, or importing goods bearing such trademark.
Further, the Fair Trade Law prohibits enterprises from making or using any false or misleading representations or symbols on goods or in advertisements (or to make them publicly known in any other way) in respect of price, quantity, quality, content, method of manufacture, date of manufacture, valid period, method of use, purpose of use, place of origin, manufacturer, place of manufacture, processor, or place of processing. The Fair Trade Law specifically provides that an endorser, i.e., a blogger, should be subject to the law and will be jointly and severally liable with the principal for such false advertisement. The blogger is liable for up to 10 times the value of the remuneration received from the principal if the blogger is not a celebrity, specialist or organisation.

In addition, Article 24 of the Fair Trade Law is a general “catch-all” provision which prohibits any enterprise from engaging in any deceptive or obviously unfair conduct that is able to affect trading order. This Article is frequently applied to various violations of the Fair Trade Law if the Commission is unable to cite any other suitable article.

Abuse of market power by a non-monopolistic enterprise is likely to be regarded a violation of Article 24 of the Fair Trade Law.

Mergers and acquisitions

“Business combination” is defined in the Fair Trade Law to include:

(a) an enterprise merging with another enterprise;
(b) an enterprise holding or acquiring the shares or capital contributions of another enterprise to an extent of one-third or more of the total voting shares or total capital of such an enterprise;
(c) an enterprise accepting the transfer of or leasing from another enterprise the whole or the major part of the business or properties of the enterprise;
(d) an enterprise operating jointly with another enterprise on a regular basis or being entrusted by another enterprise to operate the latter’s business; and
(e) an enterprise directly or indirectly controlling the business operation or the appointment or discharge of personnel of another enterprise.

For each of the above business combination, if any of the following filing thresholds are met, a pre-notification is required to be filed with the Commission reporting the merger or such other activities:

(a) as a result of the business combination, the surviving enterprise will have a Taiwanese market share in excess of one-third; or
(b) prior to the business combination, one of the enterprises participating in the business combination holds 25% of the Taiwanese market share; or
(c) one of the enterprises participating in the business combination has revenue in Taiwan for the preceding fiscal year exceeding NTD 10 billion (currently, USD1 is approximately NTD30.022), and the other enterprise has revenue in Taiwan for the preceding fiscal year exceeding NTD1 billion. Higher thresholds apply for financial institutions.

However, no notification is required in the following circumstances:

(a) one of the enterprises participating in the business combination already holds 50% or more of the total voting shares or total capital contributions of the other enterprise;
(b) a common parent holds 50% or more of the total voting shares or contributes 50% or more of the total capital of the enterprises to the proposed business combination;
(c) the enterprise is transferring the whole or a principal part of its business or properties, or the whole or part of its business capable of independent operation to an enterprise newly established by itself; or

(d) the enterprise is conducting a share buy-back pursuant to the Company Law or the Securities Exchange Law so as to cause the original shareholders to hold one-third or more of the total voting shares or total capital contributions of such enterprise.

Penalties and liabilities

If an enterprise violates any of the above provisions, the Commission can order the enterprise to cease or cure its violation or take other necessary corrective measures within a prescribed period. The Commission may also impose an administrative fine on the enterprise up to NTD25 million. If the enterprise does not follow such an order, it may be additionally fined up to NTD50 million. For certain specific violations, such as concerted action, abuse of market power by a monopolistic enterprise and infringement of identification symbol, the individuals responsible for the violation (such as the Chairman of the Board or the other directors) may also be punished by imprisonment, or detention and/or a criminal penalty.

Pursuant to Paragraph 2, Article 41 of the Fair Trade Law, the Commission may impose an administrative fine of up to 10% of the total sales revenue of the violating enterprise in the previous fiscal year, without being subject to the limit of an administrative fine as set forth above, if the enterprise is deemed by the Commission to be in serious violation of Articles 10 (abuse of monopolistic position) and 14 (cartel conduct).

The Commission has published an Implementing Rules on the Method of Setting Fines for Abusing Monopolistic Positions and Cartel Conduct (Implementing Rules) on 5 April 2012. The Implementing Rules provide that the Commission may treat a company’s act as amounting to a “serious” violation.

First, the Implementing Rules explain that the Commission may treat a company’s act as amounting to a “serious” violation where the following apply:

(a) the company’s sales during the period in which it abused its market power or participated in cartel conduct exceeded NTD100 million (approximately USD3.33 million); or

(b) the company derived a benefit from the infringement which exceeded NTD25 million (approximately USD830,000).

Secondly, the Implementing Rules indicate that the Commission may also treat a company’s conduct as amounting to a serious violation in light of the following key factors:

(a) Scope and degree of harm to competition in the market;

(b) Duration of harm caused to competition in the market;

(c) Market position and market structure;

(d) Total sales income and benefit derived from the violation; and

(e) Type of cartel involved, e.g., horizontal price fixing of goods or services; total industry output; allocation of customers and allocation of territories.

The Implementing Rules follow in the footsteps of the European Commission’s “Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003.” The Commission will first determine a basic amount to be imposed on the enterprise and may later adjust
the basic amount upwards or downwards. The basic amount is set at 30% of the total sales revenue of the products affected by the violation. The Commission may take into account circumstances that result in an increase or decrease of the basic amount. Aggravating factors for increasing the fine include: (1) the role of leader in, or instigator of, the violation; (2) any supervisory or retaliatory measures taken against other enterprises with a view to enforcing the practices constituting the violation; and (3) whether an enterprise continues or repeats the same or a similar violation within a five year period.

Mitigating factors for reducing the fine include: (1) where the enterprise concerned terminated the violation as soon as the Commission conducted its investigation; (2) where the enterprise concerned shows repentance and has effectively cooperated with the Commission in its investigation; (3) where the enterprise concerned has reached an agreement to provide a remedy to the victim; (4) where the violation of the enterprise concerned has been committed as a result of coercion; and (5) where the anti-competitive conduct of the enterprise concerned has been authorised or encouraged by public authorities or by legislation.

The Implementing Rules specify that a 10% cap will apply to the global turnover of an enterprise in the fiscal year preceding the year in which the Commission imposes a fine.

Further, an enterprise that violates any of the provisions of the Fair Trade Law so as to infringe upon the rights and interests of another may be liable for damages arising from the infringement.

**Specific industry sectors**

Certain specific industry sectors are regulated by the Commission’s internal administrative rulings. These include telecommunications, large distributors, financial institutions, textbook publishers, the sale activities of offshore resort memberships, motorcycles, pre-sale buildings, cross -ownership and joint provision of 4C (telecommunication, Cable TV, Computer Network and E-Commerce ), electronic marketplace, cable television, gas and oil, logistics, and real estate brokerage.

**A new leniency regime**

The Fair Trade Law has followed in the footsteps of major antitrust agencies around the world by introducing a leniency regime (which offers immunity or a reduced fine to companies that self-report involvement in a cartel). On 6 January 2012, the Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases took effect, making it clear that the Commission will grant the following:

(a) Full immunity from cartel fines for the first whistle-blower that reports the cartel before the agency is aware of it; and

(b) Reductions in cartel fines for up to four additional leniency applicants coming forward once the agency is aware of the cartel. The first will have its fine reduced by 30% to 50%; the second by 20% to 30%; the third by 10% to 20% and the fourth by up to 10%.

If the above (a) situation is not applicable to any enterprises, the enterprise which is the first to apply the reduction will be granted the full immunity.

In each case, the parties must cooperate with the Commission in order to benefit from immunity/leniency. Companies that initiated a cartel will be ineligible.

**Extraterritorial application**

The Fair Trade Law applies to anti-competitive conduct in Taiwan, and to such conduct outside of Taiwan which has the effect of eliminating or restricting competition in the Taiwanese market.
Thailand
Thailand

The statutory basis of antitrust law in Thailand is the Trade Competition Act B.E. 2542 (1999) (Trade Competition Act) and it is generally applicable to any type of business operation.

Overview of competition laws

The Trade Competition Act provides two types of restrictive trade practices: restrictive trade practices not eligible for permission and restrictive trade practices eligible for permission. Restrictive trade practices that are not eligible for permission include abuse of dominant position, joint price fixing and certain forms of joint conduct by two or more business operators. Restrictive trade practices that are eligible for permission include mergers that may result in a monopoly or unfair competition, as well as certain other restrictive joint practices.

Administration and enforcement

The Trade Competition Commission (Commission) is responsible for the administration and enforcement of the Trade Competition Act.

Restrictive trade practices not eligible for permission

Abuse of dominant position

The Trade Competition Act prohibits business operators from abusing a dominant position. It defines “dominant position” as any one or more business operators enjoying a market share and a sales turnover in excess of those prescribed by the Commission with the Cabinet’s approval. Under the Notification of the Commission on the Criteria for Determining Dominant Position which was announced and came into effect in February 2007, business operators will be considered to hold a dominant position if the business satisfies one of the following characteristics:

(a) individually holding a market share of at least 50% and having a sales volume of at least THB1 billion in the previous year; or

(b) being one of the top three business operators, with a collective market share of at least 75% and a sales volume of at least THB1 billion in the previous year (unless the individual business operator in question had a market share of less than 10% or a sales volume of less than THB1 billion in the previous year).

It is not illegal per se for business operators to hold a dominant position in the market. However, business operators having a dominant position will be prohibited from engaging in the following trade practices:

(a) unfairly fixing or maintaining price levels for the purchase or sale of goods or services;

(b) imposing unfair conditions, directly or indirectly, on its customers (being other business operators) to limit their services, manufacture, purchase or sale of goods; or to limit their opportunities to make choices in purchasing or selling goods or in receiving or providing services or in obtaining credit from other business operators;

(c) ceasing, reducing or limiting services, manufacture, purchases, sales, delivery, or imports into the Kingdom, of goods without reasonable cause, or causing destruction or damage to goods in order to reduce their quantities lower than the market demand; or

(d) interfering with the business operations of others without reasonable cause.
In addition, under the Trade Competition Act, if a business operator with a dominant position has a market share exceeding 75%, the Commission may exercise its powers to order the operator to cease, withhold or change its market share by complying with such criteria, procedures, conditions and time periods as are laid down by the Commission.

**Restrictive trade practices jointly undertaken by two or more business operators**

The Trade Competition Act prohibits any business operator from acting jointly with another business operator to undertake any trade practices that will create a monopoly or that will reduce or limit competition in respect of any goods or services. These include any of the following:

(a) fixing the sales prices of goods or services at the same level, or as agreed between them, or limiting the sales quantity of goods or services;

(b) fixing the purchase prices of goods or services at the same level, or as agreed between them, or limiting the quantity of goods or services to be purchased by them;

(c) concluding a joint agreement to control or manipulate a market; or

(d) attempting to fix an agreement or a condition to enable one party to succeed in a bid or auction of goods or services, or to allow one party not to compete in the bid or auction.

**Restrictive trade practices jointly undertaken with overseas business operators**

The Trade Competition Act prohibits any business operator who has a business relationship with an overseas business operator (whether by way of contract, policy, partnership, shareholding or other comparable relationship) from undertaking any action to cause others wishing to purchase goods or services for their own consumption or limited opportunities in purchasing the goods or services directly from overseas operators.

**Other restrictive practices**

The Trade Competition Act prohibits any business operator from doing anything which is not part of free and fair competition that may result in destruction, damage, hindrance, obstruction, or limitation to the business operations of others, or that may prevent others from engaging in, or that may cause others to cease, their business operations. This provision is very broad and is regarded as a “catch-all” provision under the Trade Competition Act.

**Restrictive trade practices eligible for permission**

**Mergers and acquisitions**

The Trade Competition Act prohibits any business operator from effecting a merger which may result in a monopoly or unfair competition as prescribed by the Commission in the Government Gazette, without pre-merger permission from the Commission. Mergers are defined to include, amongst other things:

(a) a merger between two or more manufacturers, sellers or service providers, causing one business to be terminated or causing the two businesses to be merged into a new business;

(b) an acquisition of the whole or part of another business’ assets in order to control business policy, administration or management; or

(c) an acquisition of the whole or part of another business’ shares in order to control business policy, administration or management.
The merger notification thresholds have not yet been issued. Merger filings are not required until the thresholds have been set.

**Other restrictive trade practices**

Under the Trade Competition Act, the following restrictive trade practices, where deemed commercially necessary, may be undertaken upon obtaining prior permission from the Commission:

(a) allocating a territory in which each business operator may sell or restrict the sale of goods or services or assigning types of customers to whom each business operator may sell goods or services without competition from other business operators;

(b) allocating a territory in which each business operator may purchase or restrict the purchase of goods or services or assigning types of suppliers from whom each business operator may purchase goods or services;

(c) limiting the quantities of goods or services (to be produced, purchased, sold or provided by each business operator) to below-market demand;

(d) reducing the quality of goods or services to below that previously manufactured, sold or provided, at the original or higher price;

(e) appointing any person to be the sole distributor of any goods or services; and

(f) imposing conditions or procedures for the sale or purchase of goods or services in order to cause the same to be performed in the same manner or as agreed upon.

**Penalties and liabilities**

The maximum criminal penalties for a violation of the Trade Competition Act are fines of up to THB6 million and/or imprisonment for up to three years. These penalties can apply to both companies and individuals. Only the Commission can bring criminal legal action against the violators to court. The injured party may only file a criminal complaint with the Commission to investigate and prosecute the criminal case with the courts.

If a business operator illicitly engages in a restrictive trade practice that injures another, the injured party may bring civil legal action to court to seek compensatory damages from the business operator.

**Extraterritorial application**

The Trade Competition Act applies not only to the restrictive trade practices mentioned above, which are wholly or partially committed in Thailand, but also to the commission outside Thailand that has consequences within the country, that is:

(a) the consequence of the commission will occur in Thailand;

(b) the resulting consequence, by the nature of the commission, should occur in Thailand; or

(c) the consequence could be foreseen to occur in Thailand.
Vietnam

The Vietnamese Competition Law (Competition Law) regulates conduct that restricts competition in Vietnam.

Overview of the Competition Law

The Competition Law applies to business organisations, individuals and enterprises producing or supplying products or services in the public interest, enterprises operating in industries and sectors that represent State monopolies and foreign enterprises and trade associations operating in Vietnam.

The Competition Law prevails if there is an inconsistency between its provisions and other laws regarding acts that restrict competition and/or unfair competition. Provisions of international treaties to which Vietnam is a signatory or participant will, however, prevail where such provisions are inconsistent with the provisions of the Competition Law.

Administration and enforcement

The Vietnam Competition Authority (VCA) was established under the Competition Law. It is an organisation under the Ministry of Trade and Industry. With respect to competition matters, the VCA has the duties and powers to investigate anti-competitive behaviours; control mergers, consolidations, acquisitions and joint ventures between enterprises, i.e., the economic concentration process; and handle unfair competition practices, in accordance with the Competition Law. For anti-competitive behaviours such as agreements in restraint of competition or abuse of dominance, after completing the investigations, the VCA will transfer its reports and the case file to the Competition Council for further handling.

The Competition Council consists of 11 to 15 members who are appointed and removed by the Prime Minister. It is an independent agency with the main function of adjudicating anti-competitive behaviours after they have been investigated by the VCA. Specifically, for each competition case referred to it by the VCA, the Competition Council will establish a panel which will review the investigation report and decide whether to conduct a hearing on the case.

Agreements to restrict competition

According to the Competition Law, agreements to restrict competition include agreements:

(a) to set prices directly or indirectly;
(b) to divide markets or sources of supply;
(c) to limit production, purchase or sales volumes;
(d) to restrict technical/technological development and investment;
(e) to impose conditions or unrelated obligations on the signing of contracts;
(f) to prevent or inhibit others from entering the market;
(g) to preclude from the market enterprises that are not parties to the agreement; or
(h) to collude in biddings.

4 The VCA also oversees trade remedies and consumer protection matters in addition to competition matters.
The agreements identified at (f) to (h) above are strictly prohibited regardless of the parties’ market share. The agreements identified at (a) to (e) above are prohibited only if the parties to the agreement have a combined market share of 30% or more. Exemptions may be granted to the agreements identified at (a) to (e) if certain criteria are satisfied, including reduction of costs and other benefits for consumers.

**Market-dominant position and monopoly position**

An enterprise is deemed to have a market-dominant position if it has a market share of 30% or more, or if it is capable of causing a considerable restriction of competition.

Enterprises or a group of enterprises is deemed to have a market-dominant position if it acts together to restrict competition and:

(a) two of them have a combined market share of 50% or more;

(b) three of them have a combined market share of 65% or more; or

(c) four of them have a combined market share of 75% or more.

An enterprise is deemed to hold a monopoly position if it does not have any competitors.

**Abuse of market dominance or a monopoly position**

It is prohibited for enterprises with a dominant or monopoly position in the market to conduct the following acts:

(a) selling goods or services at prices below the total cost price for the purpose of precluding competitors;

(b) imposing unreasonable purchase or sale prices of goods or services, or fixing minimum resale prices, causing damage to customers;

(c) restricting production or distribution, limiting the market, or hindering technical or technological development, causing damage to customers;

(d) applying different commercial terms on identical transactions for the purpose of creating inequality in competition;

(e) imposing conditions or unrelated obligations on the signing of contracts; or

(f) hindering market entrance by new competitors.

In addition to the above, enterprises with a monopoly position are also prohibited from engaging in the following acts:

(a) imposing adverse conditions on consumers; or

(b) taking advantage of the monopolistic position to unilaterally change or cancel an executed contract without legitimate reasons.

**Economic concentration**

The Competition Law includes the concept of “economic concentration.” Economic concentration includes mergers, consolidations, acquisitions and joint ventures. Definitions of mergers, consolidations, acquisitions and joint ventures are provided in the Competition Law.
An economic concentration is prohibited if the combined market share of enterprises participating in it represents more than 50% in the relevant market. Where the enterprises participating in an economic concentration have a combined market share ranging from 30% to 50% in the relevant market, the legal representative of those enterprises must notify the VCA of the proposed economic concentration. The economic concentration procedures at the relevant authorities (e.g., business registration, amendment of business licences, etc.) can only be carried out after those enterprises have obtained the VCA’s confirmation that such economic concentration is not prohibited under the Competition Law. Exemptions may be granted to prohibited economic concentrations if certain criteria are satisfied.

Penalties

The main penalties for a violation of the Competition Law include:

(a) warnings; or

(b) monetary fines of up to 10% of the enterprise’s total annual revenue.

Supplementary penalties for a violation of the Competition Law include:

(a) revocation of business licences, revocation of sub-licences and/or professional practising certificate; and/or

(b) confiscation of materials and facilities used to commit the breach of the Competition Law.

In addition, violators may also be subject to the following remedial measures:

(a) restructure of the enterprise that abuses its dominant position;

(b) division or split of the enterprise that has merged or consolidated, or compulsory sale back of the acquired enterprise;

(c) public retraction;

(d) preclusion of terms in violation of the provisions of the Competition Law from the relevant contract or business transactions; and/or

(e) other necessary measures in order to remedy the anti-competitive effects caused by the violating act.

There is no leniency/immunity regime available under the Competition Law.

The Competition Law includes a number of provisions regarding the functions of the VCA, the Competition Council, investigation and handling procedures of competition cases, competition-related proceedings, and procedures for seeking exemption from the above-mentioned prohibitions.

Extraterritorial application

The Competition Law covers “foreign organisations operating in Vietnam.” However, from both regulatory and practical aspects, it is unclear whether this term includes offshore entities that have no commercial presence in Vietnam.

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5 Under Vietnamese law all communications of a company to a state agency must be signed by the legal representative or an authorised representative who is specifically empowered by the legal representative. Vietnamese law is drafted such that the legal representatives must notify the VCA for economic concentrations.
Online submission of applications

Under a new regulation issued in December 2011, submissions of applications (such as merger filing or applications for exemption) and complaints to the VCA can be made online. Enterprises may choose to submit applications or complaints in person or via the online system. For the purpose of online submissions, true copies (i.e., scanned copies of originals, or electronic files) affixed with the valid electronic signatures of the competent representatives of enterprises are required.
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