

Cartel Regulation

Contributing editor
A Neil Campbell



2016

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Cartel Regulation 2016

Contributing editor
A Neil Campbell
McMillan LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2015
No photocopying without a CLA licence.
First published 2001
Sixteenth edition
ISSN 1473-3420

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of November 2015, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Editor's Foreword	7	India	103
A Neil Campbell McMillan LLP		Suchitra Chitale C&C Partners (Chitale & Chitale)	
Global Overview	8	Indonesia	108
Peter K Huston, Ken Daly and Lei Li Sidley Austin LLP		HMBC Rikrik Rizkiyana, Albert Boy Situmorang and Anastasia P R Daniyati Assegaf Hamzah & Partners	
Australia	11	Israel	114
Michael Corrigan and Ian Reynolds Clayton Utz		Eytan Epstein, Tamar Dolev-Green and Eti Portook Epstein, Knoller, Chomsky, Osnat, Gilat, Tenenboim & Co Law Offices	
Austria	19	Italy	122
Astrid Ablasser-Neuherber and Florian Neumayr bvp Hügel Rechtsanwälte		Rino Caiazzo and Francesca Costantini Caiazzo Donnini Pappalardo & Associati	
Brazil	25	Japan	130
Mauro Grinberg, Leonor Cordovil and Ricardo Motta Grinberg e Cordovil Advogados		Eriko Watanabe Nagashima Ohno & Tsunematsu	
Canada	31	Korea	136
A Neil Campbell, Casey W Halladay and Guy Pinsonnault McMillan LLP		Hoil Yoon, Sinsung (Sean) Yun and Kenneth T Kim Yoon & Yang LLC	
China	40	Lithuania	144
Susan Ning and Hazel Yin King & Wood Mallesons		Giedrius Kolesnikovas and Michail Parchimovic Motieka & Audzevičius	
Cyprus	48	Macedonia	152
Pantelis Christofides L Papaphilippou & Co LLC Advocates & Legal Consultants		Tatjana Popovski Buloski and Metodija Velkov Polenak Law Firm	
Ecuador	54	Malaysia	159
Daniel Robalino-Orellana, Alberto Brown and José Urizar Ferrere Abogados		Sharon Tan Suyin Zaid Ibrahim & Co	
European Union	59	Malta	166
Anna Lyle-Smythe and Murray Reeve Slaughter and May Hans-Jörg Niemeyer and Hannah Ehlers Hengeler Mueller		Mark Refalo Refalo & Zammit Pace Advocates	
Finland	69	Mexico	171
Mikael Wahlbeck, Antti Järvinen and Katja Jaakkola Hannes Snellman Attorneys Ltd		Rafael Valdés-Abascal and José Ángel Santiago-Ábreo Valdes Abascal Abogados SC	
France	75	Netherlands	177
Pauline de Lanza and Juliette Hochart Latournerie Wolfrom Avocats		Jolling K de Pree and Stefan Molin De Brauw Blackstone Westbroek NV	
Germany	83	Nigeria	185
Thorsten Mäger and Alf-Henrik Bischke Hengeler Mueller		Babatunde Irukera and Ikem Isiekwena SimmonsCooper Partners	
Hong Kong	90	Norway	190
Natalie Yeung Slaughter and May		Thomas Sando and Aksel Joachim Hageler Advokatfirmaet Steenstrup Stordrange DA	
Hungary	95	Portugal	196
Levente Szabó KLART Szabó Legal		Mário Marques Mendes and Alexandra Dias Henriques Gómez-Acebo & Pombo	

Singapore	205	Turkey	240
Lim Chong Kin and Scott Clements Drew & Napier LLC		Gönenç Gürkaynak and K Korhan Yıldırım ELIG, Attorneys-at-Law	
Spain	212	Ukraine	248
Juan Jiménez-Laiglesia, Alfonso Ois, Jorge Masía, Joaquin Hervada and Rafael Maldonado DLA Piper Spain		Timur Bondaryev and Natalia Ivanytska Arzinger	
Sweden	219	United Kingdom	253
Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg Mannheimer Swartling		Lisa Wright and Vassilena Karadakova Slaughter and May	
Switzerland	227	United States	265
Marcel Meinhardt, Benoît Merkt and Astrid Waser Lenz & Staehelin		Martin M Toto White & Case LLP	
Taiwan	234	Quick Reference Tables	275
Mark Ohlson, Anthony Lo and Fran Wang Yangming Partners			

Global Overview

Peter K Huston, Ken Daly and Lei Li

Sidley Austin LLP

Cartel enforcement around the world remained robust in 2015. Authorities racked up impressive fine totals, and in some jurisdictions prison terms, for price fixing and bid rigging in a wide variety of industries from road building to international finance. While many investigations and prosecutions were local or regional in nature, the blockbuster cartel investigations that grabbed the biggest headlines were those that crossed international borders and involved difficult conceptual issues as to how the conduct should be categorised. For example, toward the end of 2014, the UK Financial Conduct Authority announced massive fines against five global banks for manipulating foreign exchange (Forex) rates. The conduct was collusive in nature but the FCA proceeded on a fraud theory. A few months later, the Antitrust and Criminal Divisions of the US Department of Justice (DoJ) jointly announced that some of the same banks had agreed to plead guilty to both fraud and antitrust charges and pay additional massive fines in the US. Because the conduct occurred in the highly regulated financial sector, the banks faced additional investigations from a wide variety of other authorities in the US and around the world, including the Commodity Futures Trading Commission (CFTC), the Federal Reserve, the Comptroller of the Currency, the New York State Department of Financial Services and the Swiss Financial Market Supervisory Authority (FINMA). So far, those agencies, along with civil plaintiffs, have extracted over US\$12 billion in fines, penalties and settlements. There will surely be more shoes to drop. The UK and US have not finished their investigations and the European Commission, Germany, Singapore, Hong Kong, Japan, Australia, Brazil, New Zealand and South Africa are also investigating.

The Forex investigation was preceded by a global investigation into manipulation of the London Interbank Offered Rate (Libor). In Libor, the district court judge presiding over the US civil cases dismissed the antitrust claims (now on appeal to the Second Circuit Court of Appeals). That decision was criticised by the judge presiding over the Forex civil cases who allowed antitrust claims. A more recent investigation into precious metals trading involves some of the same banks and the same difficult legal, factual and logistical issues. The complexity of these investigations cannot be overstated. They involve not only competition and fraud authorities across multiple jurisdictions, but industry regulators and private civil plaintiffs as well. Counsel for the targets of these probes are often pulled in multiple directions as they try to keep penalties to levels that will allow their clients to remain afloat.

While these investigations were some of the most noteworthy, there were many other cartel enforcement highlights around the world.

Europe

European Union

2015 brought many significant changes for cartel enforcement in the European Union and its member states: new faces, new cases and a number of procedural developments.

The European Commission's competition department (DG Comp) witnessed a major shake-up in its leadership. Margrethe Vestager celebrates her first anniversary as Competition Commissioner, having inherited significant competition cases such as *Google* and *Gazprom*, as well as a number of ongoing cartel investigations. Johannes Laitenberger, the German former chief of staff to the Commission's President and member of the legal service, took up his new position as Director General of DG Comp on 1 September 2015. How the two will work together and what changes will come about remains to be seen, but there is no reason to expect a let-up in cartel enforcement activity.

At the end of 2014, a new directive on antitrust damages actions was adopted for implementation in all member states by December 2016. This has been heralded as a major departure for the EU, which to date has seen little private enforcement. The directive seeks to remove a number of obstacles to pursuing compensation that have deterred actions to date, by harmonising rules relating to the proof required, discovery, the defences available, the procedural timetable and other litigation features. The changes are intended to have a significant impact on the overall private enforcement climate, and in particular the number of follow-on damages claims in competition cases. Already it has become highly likely that those found to have participated in cartels will face civil actions in the EU. The courts in England and Wales, the Netherlands and Germany are the most common jurisdictions chosen by civil plaintiffs so far, but other member states are in the process of adjusting and aligning their procedures to facilitate claims.

The increased likelihood of damages actions caused the Commission to change its own investigative procedures too. In August 2015 the Commission amended its procedures to account for the fact that much of its investigative file will now be available in follow-on civil litigation in national courts. One of the notable changes was designed to reflect that the damages directive protects leniency corporate statements from disclosure in private damages actions, for fear of undermining the EU's valued leniency programme. However, most of the remaining evidence in the Commission's file will now be available (during or immediately after the Commission's investigation, depending on the category) and this is likely to serve as a catalyst for litigation on its own.

Although not required by the damages directive, some member states (notably the UK, but also France, Spain, Italy, Belgium and others) have introduced class-action procedures which will likely further increase the volume of litigation.

In a sign of its desire to keep up with the times, the Commission also updated its explanatory note on what it may seek to capture during inspections or 'dawn raids.' It now explicitly provides that the Commission may search and seize private smart-phones, external hard drives and demand access to files held in cloud-based servers. While the explanatory note is not legally binding, it certainly signifies intent, and it seems likely that the Commission would regard resistance as non-cooperation in an investigation.

In keeping with the EU's goal of 'decentralising' enforcement, the activities of the national authorities in the EU are increasingly noteworthy. This last year has seen new cases or significant developments in national investigations into sectors as diverse as frozen goods (Czech Republic), food retail, commercial steel (Austria), container shipping, metal packaging, agrochemicals, military equipment, mining services, mortar (Germany), vinegar (Netherlands), road haulage, auto dealers, adult diapers (Spain), construction tendering (Slovakia), port services (Portugal), car rental, road freight (Italy), animal feed (Belgium), insulation (France), water storage (UK) and ship waste (Netherlands), to name but a few.

The German authority, the Bundeskartellamt, announced new enforcement records in July 2015, having imposed fines of €1.36 billion in 20 separate cases over the previous two years.

On a national level, the impact of the UK Libor conviction and sentence of 14 years for conspiracy to defraud cannot be overlooked in 2015. The successful conviction will steer future cases against other suspects of rigging both Libor and Forex markets. Eleven others will stand trial and a twelfth suspect is already awaiting sentencing after pleading guilty.

Criminal procedures using competition powers (as opposed to anti-fraud powers) are also under way, and the UK competition authority (CMA) conducted its first successful criminal prosecution since its failed attempt to use those powers against British Airways executives in 2010. An individual was sentenced to six months' imprisonment (suspended) after pleading guilty to participation in a cartel regarding galvanised steel tanks. Two other alleged participants, however, contested the charges and were acquitted.

The Court of Justice of the EU (CJEU) handed down several noteworthy judgments this year. In *Timab*, the General Court had to rule for the first time on a 'hybrid' cartel, in which some parties had agreed to settle and end the case early using accelerated procedures, but another declined to participate in the settlement. The judgment found that the Commission is not bound by the position it took during settlement discussions, even as to the scope of the offences under investigation, and it can impose a fine that is higher than that proposed during settlement negotiations.

2015 also led to some remarkable developments regarding how fines against infringers may be calculated. EU fines take account of the value of sales to which the infringement relates in the European Economic Area (EEA). In *Imolux*, the CJEU confirmed that direct sales of cartelised products to the EEA must be considered, but also found that sales to an infringer's own affiliates outside the EEA which subsequently are incorporated into other products and sold back into the EEA may also be considered. This judgment has the potential to increase the basis of fines considerably.

Russia/Eurasia

On a regulatory front, the international cooperation between competition authorities in Eurasia is among the highlights for 2015. The recently formed Eurasian Economic Union (EEU) strengthens the relationships between Russia, Belarus, Kazakhstan and Armenia. The EEU Treaty, which entered into force on 1 January 2015, incorporates the rules and procedures that were previously established in the Treaty on the Unified Principles and Rules of Competition. The supranational competition authority (the EEU Commission) is expected to deal with extraterritorial antitrust violations within the EEU. The EEU Treaty also sets out a legal framework for the cooperation between the national competition authorities of Russia, Belarus, Kazakhstan and Armenia.

The Americas

International cooperation was also on display in North America this year. The leaders of Mexico's Federal Economic Competition Commission (COFCE), Canada's Competition Bureau and the two United States antitrust agencies, the Federal Trade Commission and Department of Justice Antitrust Division, met in Mexico City to discuss enforcement and pledge cooperation, including on anti-cartel enforcement. Among these agencies, the US DOJ's Antitrust Division has been the most active anti-cartel enforcer. It has been busy with both local/regional matters and international cartels. On the international front, in addition to the Forex, Libor and precious metals matters mentioned above, the Division investigated cartel activity in the capacitors, resistors, ocean shipping and packaged seafood industries, among others.

For many international cartel matters in the US a key issue is the extraterritorial reach of the Sherman Act. The issue is governed by the Foreign Trade Antitrust Improvements Act (FTAIA). While the FTAIA and the case law surrounding it are notoriously convoluted, in 2015 the US Supreme Court declined the opportunity to provide clarity, denying two petitions for review arising out of the liquid crystal display cartel matters. Absent Supreme Court guidance, the lower courts will continue to struggle with several unsettled FTAIA issues including what counts as 'import commerce,' under what circumstances foreign commerce has a 'direct, substantial, and reasonably foreseeable effect' on domestic US commerce and when that effect 'gives rise to' a claim under the Sherman Act.

Of course, the FTAIA is not of concern for purely domestic matters. The Division continues to devote substantial resources to such cases, most notably to prosecution of bid rigging at real estate foreclosure auctions. The Division's San Francisco office filed charges against numerous individuals in California this year, while the Division's newly established Washington Criminal II section filed cases in Alabama, Georgia and North Carolina.

As in years past, the Antitrust Division has reiterated its view that maximum deterrence is achieved, in both international and domestic cases, by holding culpable individuals accountable. The Division has followed through on this stated policy, charging over 60 individuals in fiscal 2015 (and over 600 individuals since 2004). The Division has also

insisted that in most cases individuals should spend time in prison. The pressure on line prosecutors to look hard at charging individuals in each case increased with the September 2015 issuance of a memorandum from Deputy Attorney General Sally Q Yates laying out the DOJ's more aggressive policy on individual accountability for corporate wrongdoing.

While many individuals charged in the US agree to plead guilty in return for lower sentences, others refuse to plead and are indicted by grand juries. Charged individuals residing outside the US are usually unable to get the charges dismissed in absentia due to the 'fugitive disentitlement doctrine' which was applied in 2015 to a Swiss UBS trader charged in the Forex matter. The doctrine allows courts to avoid reaching the merits of a motion to dismiss for those who do not agree to appear and submit to the court's jurisdiction. When individuals residing outside of the US are indicted and refuse to travel to the US to face the charges they should assume that Interpol will issue a 'red notice' subjecting them to potential arrest when travelling. Increasingly, indicted fugitives also have to worry about potential extradition. Following the Division's first ever extradition of an individual on antitrust charges in 2014, Division officials have emphasised in 2015 that they will continue to pursue extraditions in appropriate cases.

The Antitrust Division's most important enforcement tool remains the corporate leniency programme which incentivises cooperation and destabilises cartels by providing immunity to the first cartel member to come forward, confess and cooperate with the authorities. This year the Division stressed that companies seeking leniency must take their cooperation obligations seriously.

In Brazil, which, like the US punishes hard-core cartels criminally, the Administrative Council for Economic Defense (CADE) has used its leniency programme to propel its increasingly vigorous enforcement regime. Following record fines imposed last year on participants in the cement cartel, this year CADE has focused significant enforcement resources on the sprawling scandal involving Petrobras, the state-run oil company. The scandal involves allegations that a cartel of construction companies conspired over several years to rig the Petrobras bid process, deliberately overcharge the company, and kick back the excess funds to political parties, politicians and Petrobras officials. CADE entered into a leniency agreement with one of Brazil's largest construction companies, Comargo Correa, which has led to revelations about secret bid rigging meetings that executives attended by slipping in through side doors to avoid detection.

Elsewhere in Latin America, leniency programmes have been adopted in Chile, Columbia, El Salvador, Ecuador, Mexico, Panama and Peru, and the enforcement regimes in those countries continue to grow and mature.

Asia

Cartel enforcement also continues to evolve and mature in Asia. This year the region's most seasoned competition regulator, the Japan Fair Trade Commission (JFTC), decided the extraterritorial reach of the country's competition law. The issue arose in the context of fines imposed on foreign companies for off-shore cartel conduct involving cathode ray tubes which were incorporated into finished products outside of Japan. The fine recipients challenged the JFTC's ability to apply Japan's Antimonopoly Act to them and their overseas conduct. In May of 2015, the JFTC issued a decision reaffirming its authority to investigate and sanction extraterritorial conduct.

In Hong Kong, the Competition Ordinance that was passed back in 2012 is finally set to be fully implemented by the end of 2015. The Competition Ordinance's First Conduct Rule prohibits price fixing, market allocation and bid-rigging cartels, and the Hong Kong Competition Commission (HKCC) has indicated that such conduct will be an enforcement priority. Under the Competition Ordinance the HKCC and the Communications Authority will have broad investigatory powers, including the right to conduct dawn raids.

In Taiwan, the legislature passed extensive amendments to the Fair Trade Act. Among the amendments is a provision allowing the Taiwan Fair Trade Commission to establish a reward fund to strengthen its ability to investigate and punish collusion. The fund will comprise 30 per cent of fines from fair trade violations and will be used to reward the reporting of cartel activities, promote international cooperation, and establish and maintain a database to help strengthen cartel enforcement.

Before China's enacted the Anti-monopoly Law (AML) in 2008, cartels were regulated by other laws, primarily: the Anti-unfair Competition Law for all cartels and bid rigging; the Price Law for price-related cartels; and the Bidding Law for bid rigging. While those laws remain on the books,

government authorities have relied on the AML for cartel enforcement since its passage.

Enforcement authority under the AML is divided. The National Development & Reform Commission (NDRC), with its local offices (Development & Reform Commissions and Price Bureaus), has enforcement authority over price-related cartels, while the State Administration for Industry & Commerce (SAIC), including its local offices (Administrations for Industry & Commerce, AIC), has authority over 'non-price related' cartels.

After an active 2014, anti-cartel enforcement at the NDRC slowed somewhat in 2015. Some suspect that the slow-down was in response to increasing opposition from the international business community and foreign governments to the NDRC's lack of due process and transparent enforcement criteria. However, with NDRC's new Director General of the Bureau of Price Supervision and Anti-monopoly taking office in March 2015, the agency has vowed to resume vigorous enforcement, with a particular focus on several industries where antitrust violations have been 'prevalent,' including automobiles, telecommunications, pharmaceutical products and household electronic appliances. Notably, the NDRC is currently drafting Antitrust Guidelines for Automobiles and has invested significant resources into the effort. It is widely believed that the guidelines will contain comprehensive anti-cartel provisions.

The NDRC's 2014 efforts included an enforcement action in September by the Hubei Provincial Price Bureau which charged FAW-Volkswagen and 10 Audi distributors with vertical and horizontal price fixing of cars, parts and after-sale services. The Bureau imposed a fine of RMB 248,580,000 on FAW-Volkswagen, and a fine of RMB 29,960,000 on eight Audi distributors (two Audi distributors were exempted from fines under leniency programmes).

In August 2014, the NDRC found that eight Japanese automotive system companies, Hitachi, Denso, Aisan, Mitsubishi, Mitsuba, Yazaki, Furukawa Electric, and Sumitomo Electric, engaged in price cartels from for exports to China. The NDRC exempted Hitachi from penalties under its leniency programme, and imposed fines on each of the other seven companies ranging from RMB 29.76 million to RMB 290.4 million.

Also in August 2014, the NDRC found that four Japanese bearing companies, Nachi-Fujikosh, Seiko, JTEKT and NTN, engaged in a price cartel for certain bearing products exported to China. The NDRC exempted Nachi-Fujikosh from penalties under its leniency programme, and fined the other companies from RMB 109.36 million to RMB 174.92 million.

Noteworthy SAIC anti-cartel enforcement in 2014 and 2015 included market allocation cases in the firecracker, stone material, cement and shale brick industries. Unlike the NDRC, the SAIC's enforcement has been almost exclusively through its provincial-level offices with the authorization of central SAIC. The SAIC's targets also tend to be much smaller companies than those targeted by the NDRC, with the resulting fines being smaller as well.

SIDLEY AUSTIN LLP SIDLEY

Peter K Huston
Ken Daly
Lei Li

phuston@sidley.com
kdaly@sidley.com
lei.li@sidley.com

555 California Street
Suite 2000
San Francisco, CA 94104
United States

Tel: +1 415 772 1200
Fax: +1 415 772 7400

NEO Building
Rue Montoyer 51
B-1000 Brussels
Belgium

Tel: +32 2 504 6400
Fax: +32 2 504 6401

Suite 608, Tower C2, Oriental Plaza
No. 1 East Chang An Avenue
Dong, Cheng District
Beijing 100738
China

Tel: +86 10 5905 5505
Fax: +86 10 6505 5360

www.sidley.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment & Climate Regulation
Executive Compensation &
Employee Benefits
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Cartel Regulation
ISSN 1473-3420



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law