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Our Insights into Global Antitrust Trends 2016

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"Welcome to our third annual review of global antitrust trends. The centrepiece of our report this year is our analysis of antitrust enforcement decisions of the European Commission, from the inception of the current enforcement regime in 2004 to present. We present insights from this review in terms of general trends and statistics and on a sector-by-sector basis.

We also discuss trends in antitrust and merger control enforcement in all major jurisdictions, as well as a number of specific issues that we believe should be on businesses' compliance agenda for 2016.

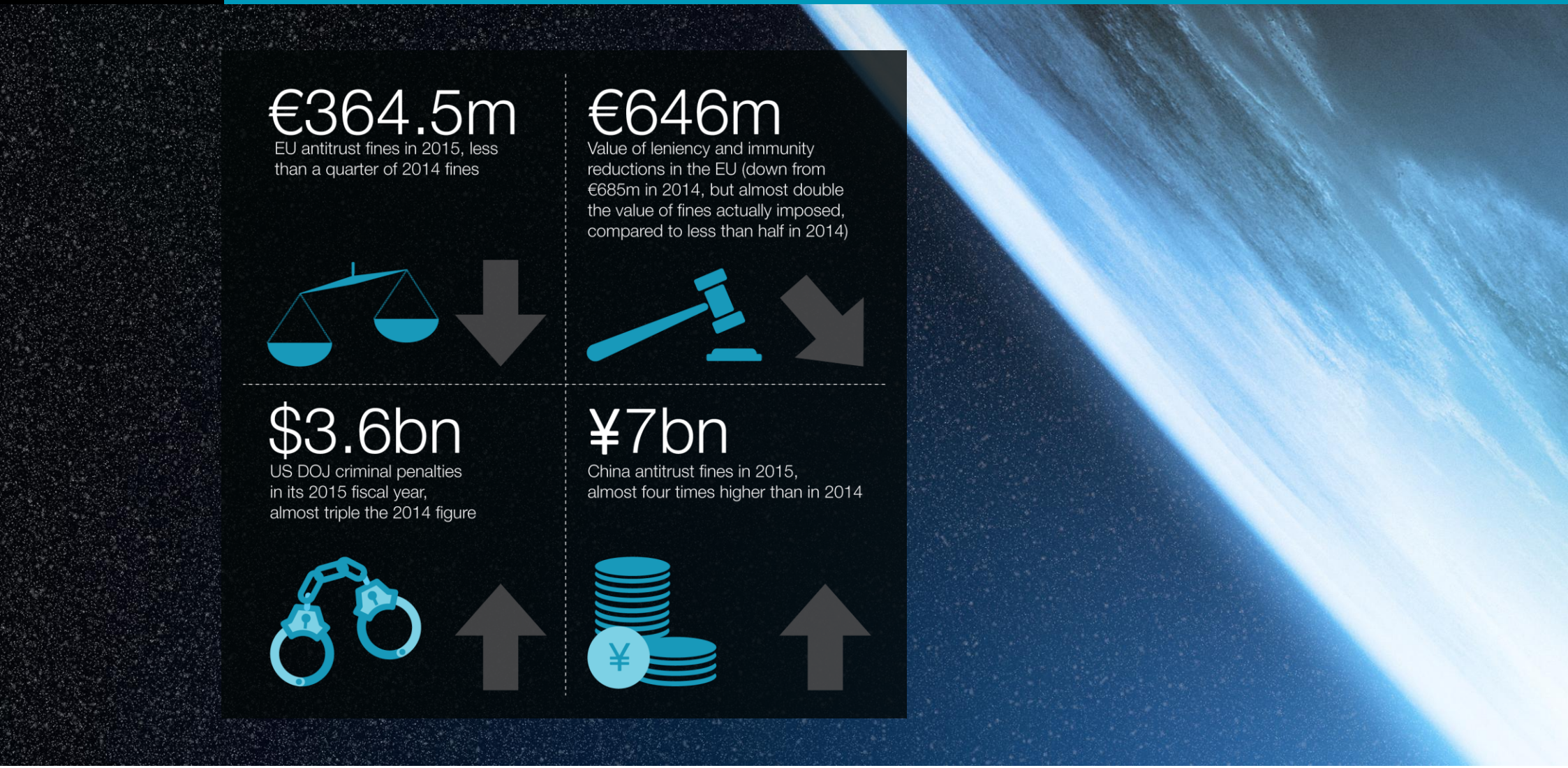
We can of course only touch on the complex issues raised by many of these themes in this report, but if you would like to know more about them, and their implications for your business, the lawyers in Clifford Chance's Global Antitrust Practice would be happy to discuss them with you. Speak to your usual Clifford Chance antitrust contact, or any of the contacts listed at the back of this report, to arrange a discussion."

Thomas Vinje
Partner and Chairman of Global Antitrust Practice
Clifford Chance LLP

Some key insights from this year's report:

- In the EU, procedural options such as settlement, commitments and leniency are subject to a number of important trends. Our report presents **insights and statistics that should inform defence strategies for all businesses under investigation** by the European Commission.
- EU antitrust **enforcement has affected different sectors in different ways**, depending on the risk metric applied: impact on revenues and profits or exposure to business disruption and litigation. Our insights can be used to **refine compliance efforts** and to **identify and mitigate potential risks** in subsidiaries and prospective investees.
- Businesses are facing **new and novel antitrust risks** in respect of their **investor relations** in the US, their **dealings with business partners** in the EU, **the impact of sanctions** in Russia and the **new opt-out procedure** for collective antitrust damages claims in the UK.
- For merger control, our analysis indicates that, in most jurisdictions, **rising numbers of deals adversely affected by antitrust issues is largely a function of rising M&A** volumes, rather than a more interventionist stance of regulators.
- However, the **US merger control authorities are becoming more litigious** and businesses contemplating large-scale M&A in Europe should be aware of our insights into **important recent changes in the European Commission's approach to reviewing complex mergers**.
- Numerous jurisdictions are introducing **new merger control and antitrust enforcement and leniency regimes**, adding to the long-term trend towards greater complexity for cross-border M&A and multi-jurisdictional investigations.

1 Global antitrust enforcement



Global trends in antitrust enforcement

Current global themes in public and private enforcement of antitrust laws are, by and large, continuations of long-running trends towards increasing internationalisation of antitrust enforcement

Investigations by antitrust agencies continue to increase in complexity, as more jurisdictions develop their antitrust enforcement regimes. Jurisdictions such as Indonesia and Thailand are introducing leniency regimes and others, such as Japan, are enhancing theirs.

International cooperation between enforcers continues to proliferate. The most recent additions to the ever-growing web of agreements and memoranda of understanding include one between Brazil, Russia, India, China, and South Africa and a number of bilateral arrangements between authorities in China, Japan and Australia.

Trends in **cartel fines** are less consistent this year. Financial penalties in 2015 are up significantly in the US and China, and Taiwan imposed its highest ever international cartel fine. But fines in the EU were less than a quarter of those imposed in 2014.

"Trends in global antitrust enforcement invariably go one way: towards ever-increasing complexity. This is driven by factors such as the emergence of new civil and criminal enforcement and leniency regimes, more cross-border cooperation between enforcers and the increased availability of damages for antitrust breaches."

Emmanuel Durand, Partner, Paris

Criminalisation of competition law breaches is growing, albeit slowly. Chile and South Africa are currently contemplating the criminalisation of cartel conduct, although New Zealand recently decided against this, and Indonesia appears likely to do the same.

Convictions in those jurisdictions that do have criminal penalties are also on the rise. The US Department of Justice (DOJ) brought criminal antitrust charges against 66 individuals in its fiscal year to September 2015 – a 50% increase on the previous year – and the UK Competition and Markets Authority (CMA) secured the first conviction for breach of the criminal cartel offence in seven years, and has recently commenced prosecution of another individual.

Private enforcement is continuing its upwards trend. This is particularly true for the EU, where ongoing implementation of the Damages Directive is facilitating both follow-on damages claims and standalone actions, and where the UK has introduced opt-out collective proceedings in relation to breaches of competition law.

The **scope of conduct caught by antitrust laws** grows every year. In part, this is a reflection of competition laws evolving with the fast-moving markets that they regulate. In part, it is driven by shifts in the economic thinking that underpins antitrust laws (recent EU and US investigations of price signalling and investor relations are examples). On rarer occasions, it is because enforcement priorities are skewed by policy considerations unrelated to competition.

Antitrust enforcement in the US

New guidance on unfair competition

In 2015 the Federal Trade Commission (FTC) finally issued formal guidance on the scope of Section 5 of the FTC Act, which broadly prohibits unfair methods of competition. Unfortunately, the "guidance" provides little more than vague principles that most practitioners already believed the FTC followed. These include the notion that the FTC will be guided by promoting consumer welfare; that a rule of reason-type analysis will be applied, taking into account any cognizable pro-competitive benefits of the relevant conduct; and that the FTC is unlikely to challenge conduct solely under Section 5 of the FTC Act if the Sherman or Clayton Act can be used.

A continued focus on punishing individuals

The DOJ and FTC continue to push the notion that the most effective deterrent when combating anticompetitive conduct is punishing those individuals involved, particularly high-level employees at the defendant corporations. To that effect, the DOJ issued a memorandum stating that, "in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct." We expect this to result in increased individual prosecutions, longer delays in corporations qualifying for cooperative credit, and even possibly instances of corporations losing cooperative credit.

Cascading cartels

Investigations into international cartels continue to have cascading effects, with one investigation leading to another related one. Nothing bears this out more than the numerous auto-parts investigations. As a practical point, before seeking leniency or when initially subject to a US antitrust investigation, companies should take immediate measures to ensure that other areas of their business are not also part of anticompetitive cartels or agreements.

The DOJ has over 100 ongoing cartel investigations, about half of which arose from corporate immunity applications.

Increasing use of disgorgement remedies

All signs point to the DOJ and FTC relying more regularly on disgorgement as a remedy where they believe the defendants unlawfully profited to the financial detriment of consumers or the government. In 2015 the FTC obtained its first disgorgement settlement since it withdrew its previous policy statement that limited disgorgement to "exceptional" antitrust matters.

Investor relations under scrutiny

The DOJ is continuing its investigation into suspected coordination of capacity reductions by a number of US airlines. One area of inquiry is whether the airlines' capacity reductions were coordinated by or through their major shareholders, with the DOJ requesting details of all meetings with major institutional investors.

"The DOJ's investigation into communications between airlines and their shareholders could, depending on its outcome, lead to fresh scrutiny of investor relations in other industries. Institutional investors and asset managers should consider whether their compliance policies need updating to reflect these risks."

Robert Houck, Partner, New York

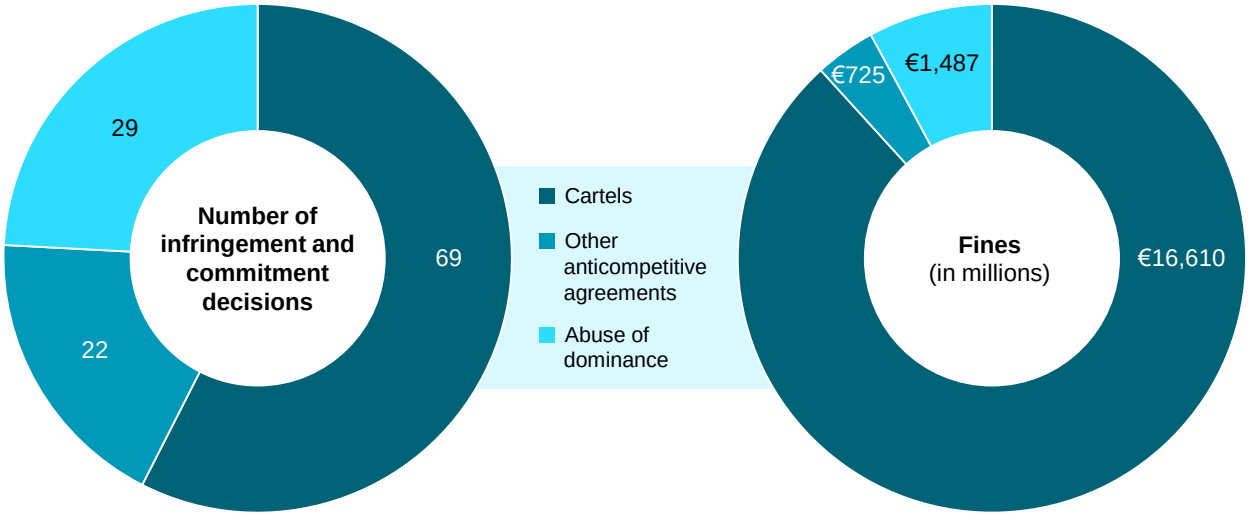
EU antitrust enforcement in statistics

A number of recent trends are revealed by our analysis of the European Commission's antitrust record since the introduction in 2004 of the current regime for the enforcement of the prohibitions on anticompetitive agreements and abuse of dominance

Key facts and figures from our review of over 180 Commission case files are below. For a copy of our forthcoming more detailed report, speak to your usual Clifford Chance antitrust contact.

Enforcement mix

Cartel enforcement dominates both in terms of adverse decisions and fines imposed.



"While the Commission receives the most complaints in respect of alleged abuses of dominance, it is cartel enforcement which dominates its output. With the Commission's renewed interest in vertical distribution arrangements and online sales, action against non-cartel anticompetitive agreements may feature more heavily in its future enforcement mix."
Michel Petite, Avocat of Counsel, Paris

Duration of investigations

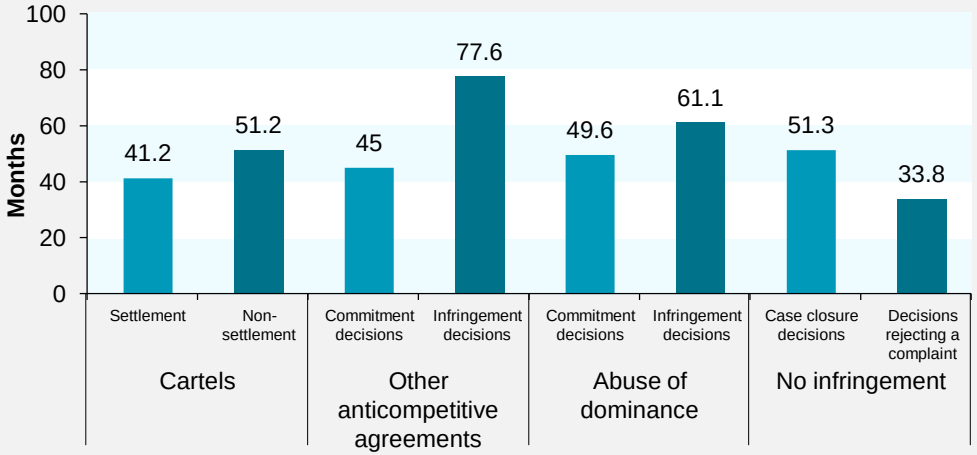
As the first chart on the page opposite shows, companies under investigation can significantly shorten their period of scrutiny through the use of available procedural options:

1. Investigations were almost a year shorter on average for abuse of dominance cases in which binding commitments were offered and accepted, and over 32 months shorter for non-cartel anticompetitive agreements.

2. Cartel cases that were closed under the settlement procedure that was introduced in 2008 were on average 10 months shorter than those in which the normal procedure was followed.

3. In non-cartel cases, there have been no reductions in fines for cooperation and admission of guilt for over a decade. However, the EU Competition Commissioner – Margrethe Vestager – indicated recently that she is open to this.

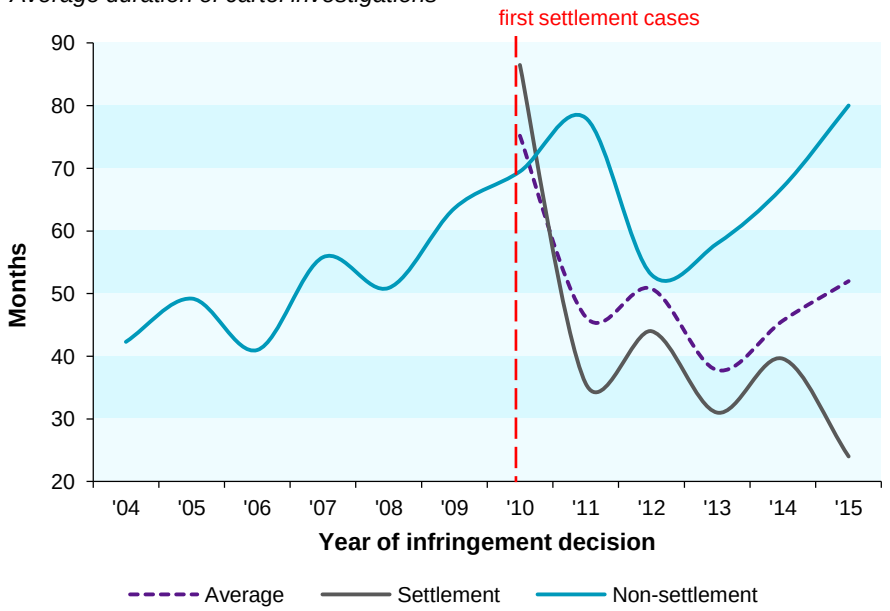
Average duration of different types of proceedings from first investigative step (e.g. dawn raid or questionnaire) to final decision



The number of parties under investigation also makes a difference. Investigations into cartels involving ten defendants or more took on average 19 months longer than those with fewer defendants.

"Competition authorities worldwide have made great improvements in their investigative techniques and technologies, as was evident at last year's meeting of the International Competition Network in Colombia. However, if the example of the European Commission is representative, the most effective route to shorter and more efficient investigations is the offer of a reduction in fines in return for an early settlement and admission of guilt."
Luciano Di Via, Partner, Rome / Brussels

Average duration of cartel investigations



Recent trends in the duration of cartel investigations indicate that:

Settlement cases are getting shorter (a lightning-fast two years for cases that ended in 2015) and the procedure has succeeded in reducing the overall average duration of cartel probes.

But non-settled investigations are growing longer. This is likely due to ever-increasing volumes of electronic documentary evidence and increasing complexity of confidentiality and due process considerations.

EU antitrust enforcement in statistics (continued)

Leniency and immunity

The immunity regime favours those who are among the largest players in a cartel. Our analysis indicates that firms that blow the whistle on a cartel and secure immunity from fines are disproportionately among those that have benefitted most from the cartel, and that would have received the largest fines.

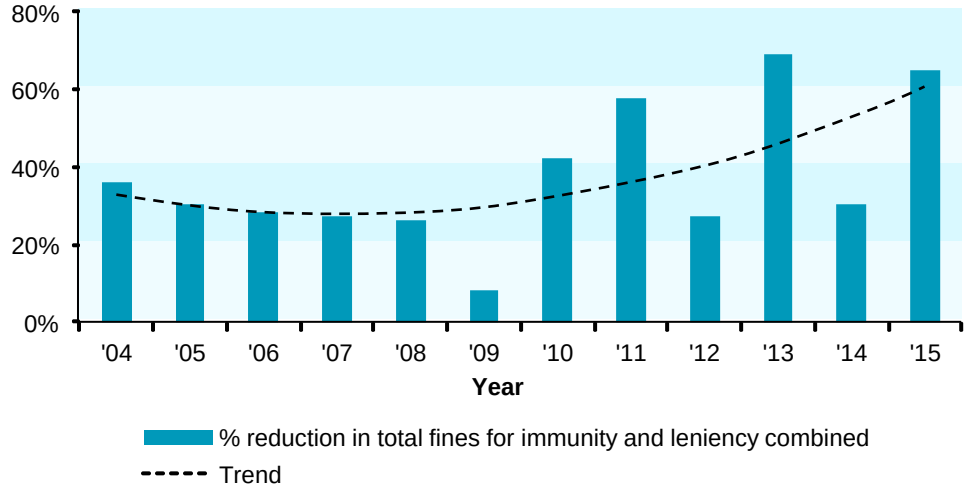
In 74% of cases in which immunity was granted, the value of the fine that would have been imposed on the immunity applicant was greater than the average fine that would have been imposed on other co-conspirators but for their leniency reductions.

On average, the value of immunity was well over double (2.4 times) the average value of fines that would have been imposed on individual co-conspirators:

- The high water mark for this trend was the yen interest rate derivatives cartel, in which UBS avoided a €2.5 billion fine: the largest EU antitrust fine that never was.
- A notable exception is the TV and computer monitor tubes cartel: the €17 million value of Chunghwa's immunity was paltry in comparison with the €1.47 billion fine imposed on other cartelists.

This effect is likely due to a combination of larger firms' better resources for compliance and detection, and their greater financial incentives to blow the whistle.

In addition, recent years have seen a trend towards more, and more generous, reductions in overall fines for immunity and leniency applicants. The chart below shows the combined value of immunity and leniency reductions as a percentage of the cartel fines that would otherwise have been imposed. In three of the last five years, the value of those reductions exceeded the value of the fines actually imposed. This is the case even before reductions for settlement are taken into account, which added further 10% reductions in fines (not shown in the chart below) in 18 cases in the past six years.



€151m
Average value of immunity

€32m
Average value of an individual leniency reduction

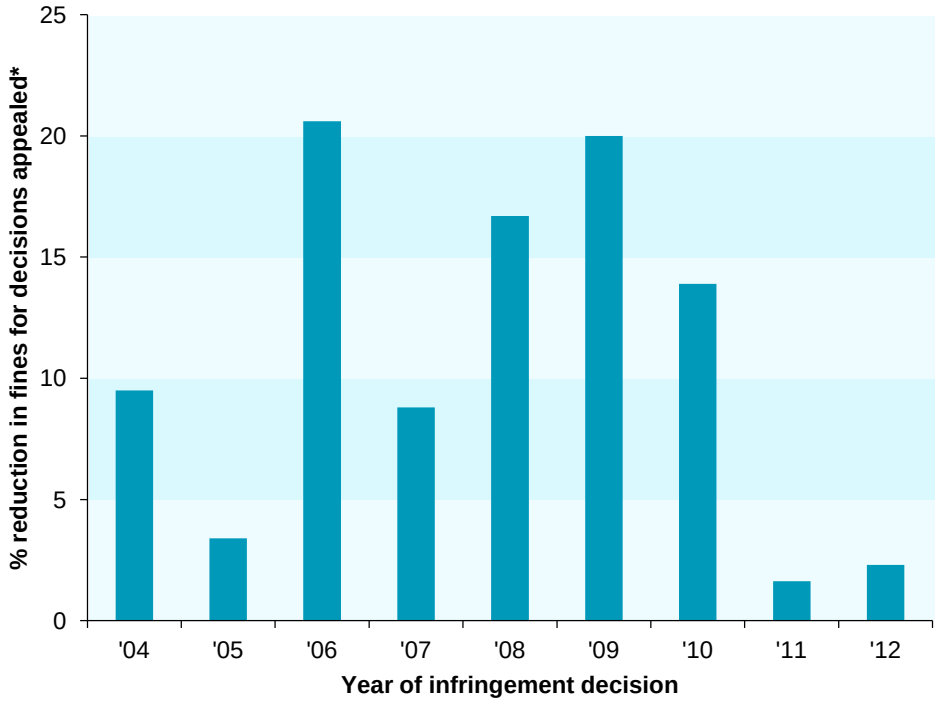
22%
of leniency and immunity applications were unsuccessful

"There are a number of factors that may be contributing to the trend towards larger reductions for leniency and immunity applicants. These include an increase in the size of fines avoided by immunity applicants, and the availability of additional reductions in cases dealt with by settlement."
Liz Morony, Partner, London

Appeals

Since 2004, the EU Courts have knocked around €2.6 billion off the €15.4 billion of fines that were appealed to them: 17.5% of the total.

Judicial intervention was at its strongest in respect of cartel investigations concluded by the Commission between 2006 and 2010. So far, rulings in appeals of more recent infringement decisions have been much less favourable.



** 2010 figure excludes annulment of air freight cargo cartel decision (41% if included).*

Appeals in non-cartel cases were less likely to succeed and had minimal impact on fines:

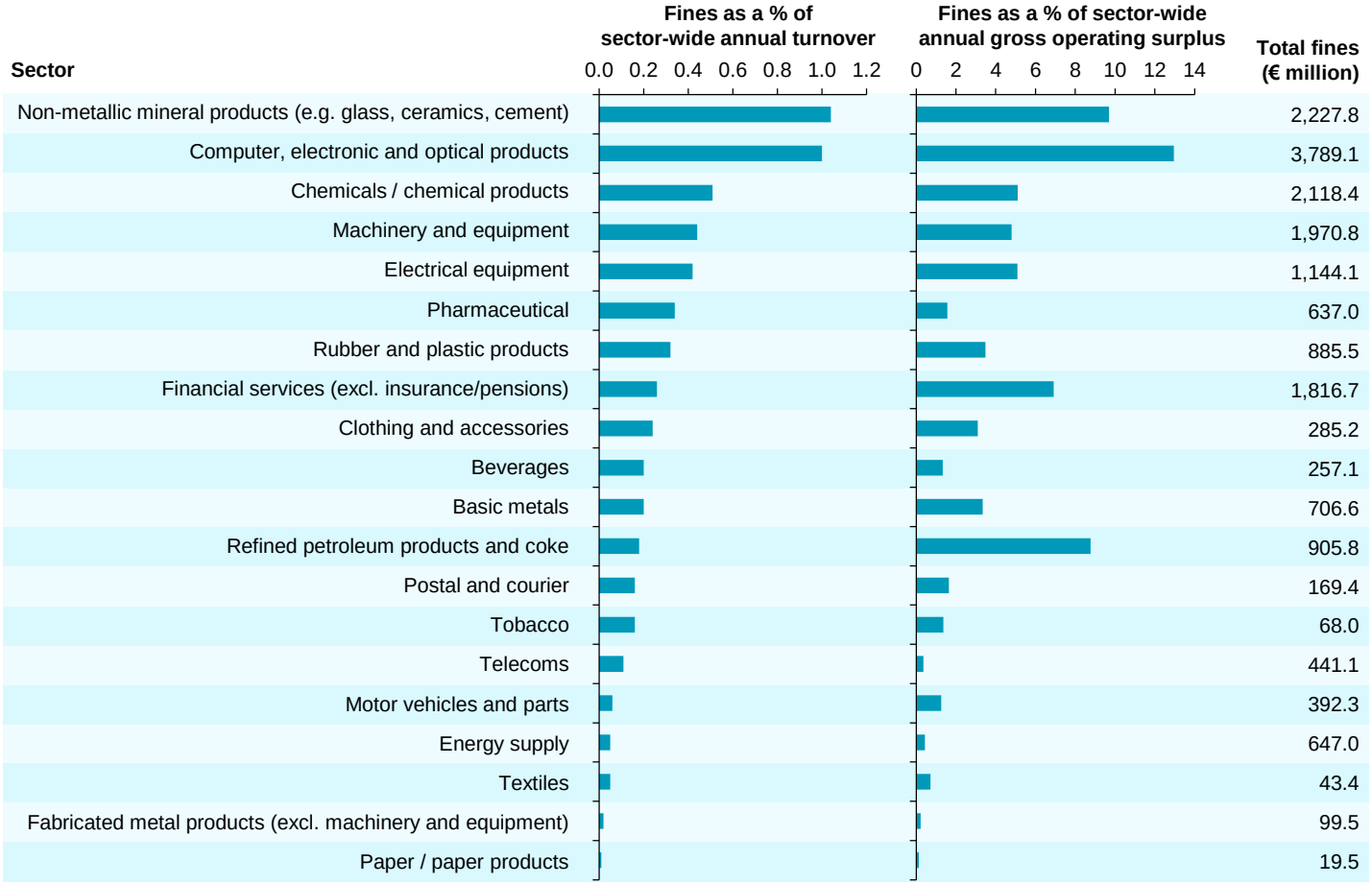
Type of decision	Average reduction in fines for each appealed decision (€ millions)	% reduction of total fines appealed	% of decisions successfully appealed by at least one defendant
Cartels	68.5	19.1%	83%
Other anticompetitive agreements	1.3	0.1%	75%
Abuse of dominance	1.3	2.0%	20%

"To date, cartel fines that were imposed in 2011 and 2012 have been subject to much lower reductions when subsequently appealed to the EU Courts. However, a number of appeals of decisions from those years have yet to be heard, so it is too early to conclude that the Commission has succeeded in making its decisions more robust and appeal-proof."
Luke Tolaini, Partner, London

EU antitrust enforcement risks by sector

The computer, electronic and optical products sector has seen the highest total EU fines since 2004 and suffered the greatest impact on profits, whereas the impact of fines on revenues was highest for the production of non-metallic mineral products

Impact of fines



Source: Eurostat structural business statistics, adjusted for imports and exports

The chart on the left shows the antitrust fines imposed by the European Commission in each major sector since the introduction of the current enforcement framework in 2004.

Sectors are ranked in order of the proportion of annual sector-wide EU turnover accounted for by those fines. Fines as a proportion of annual EU sector-wide gross operating surplus (the closest proxy for profits available from the EU's Eurostat database) are also shown.

Computer, electronic and optical products sector

- Highest overall fines were imposed.
- Second highest as a proportion of sector-wide turnover (1%) and the highest as a proportion of profits (12.9%, although this may be exaggerated due to data limitations).
- This sector saw both the highest ever EU fine imposed on an individual firm (€1.06 billion on Intel for abuse of dominance) and the highest ever EU fine imposed on an individual cartel (over €1.4 billion imposed on the TV and monitor tubes cartel).

Air transport

- Fines imposed on the air freight cartel in 2010 are not included in the chart opposite, as they were mostly annulled by a recent ruling of the EU's General Court. As that annulment was on procedural grounds, it cannot be excluded that fines will be re-imposed, albeit possibly at a lower level.
- The fines in that one case amounted to the largest proportion of sector-wide profits by some distance: an enormous 24.8% of annual sector-wide gross operating surplus, reflecting the fact that many airlines were loss-making during the period in question.
- They would also represent the third highest proportion of sector-wide revenues, at 0.65%, despite accounting for only the 10th highest volume of aggregate fines.

Financial services

- Saw high levels of fines (5th highest overall) but these accounted for a smaller proportion of turnover (8th highest).
- Also saw the highest reductions in fines for leniency and immunity (see page 10).

Refined petroleum products and coke

- Relatively low margins meant that fines had a larger impact on profits: 8.8% of annual sector-wide gross operating surplus.

Non-metallic mineral products

- Fines imposed amounted to the highest proportion of EU-wide sales and the second highest proportion of gross operating surplus. This was primarily due to three separate sets of cartel fines imposed on glass producers.

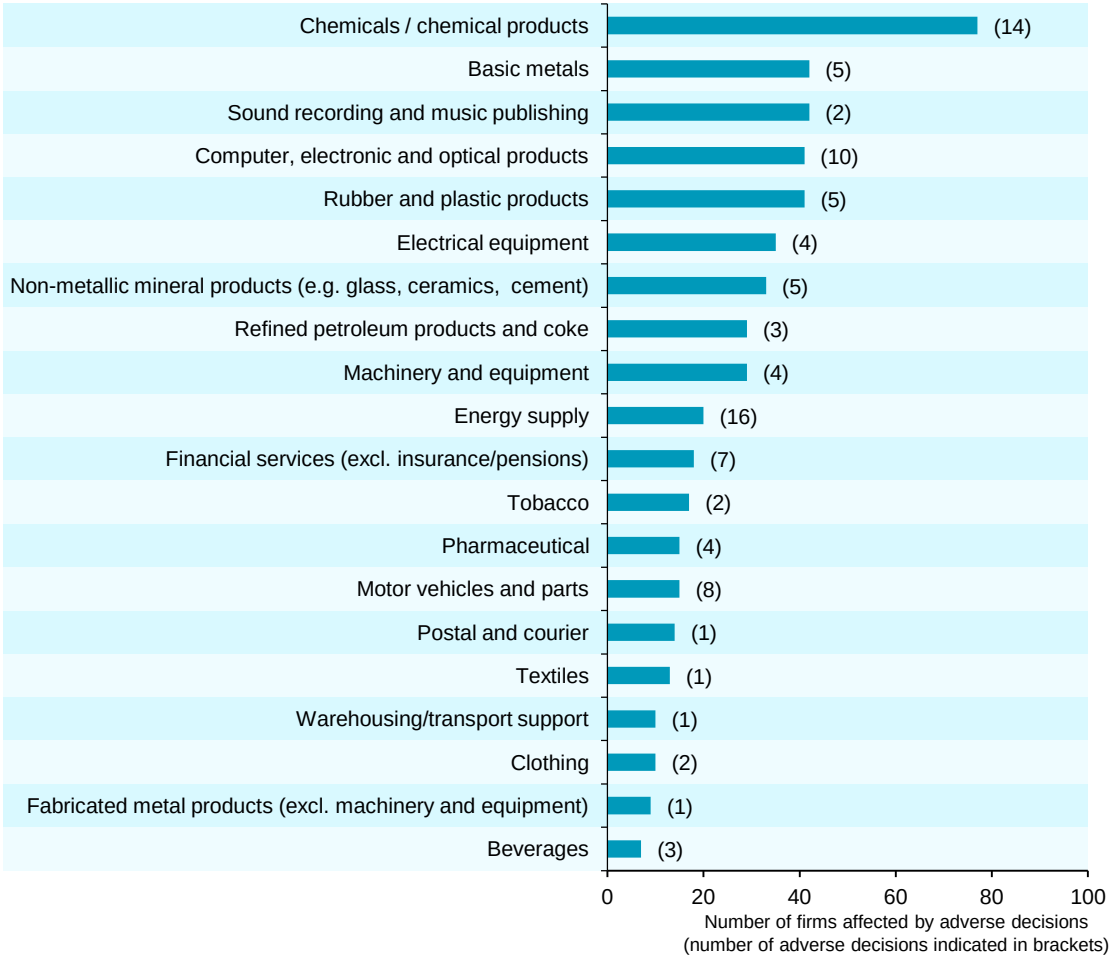
"For the financial services sector, antitrust fines are only part of the picture. In some instances, parallel action by various national securities regulators against the same conduct has inflated the overall penalties imposed. Additional disruption has arisen from the trend towards resolution of industry issues by regulation."

Greg Olsen, Partner, London

EU antitrust enforcement risks by sector (continued)

The chemicals sector saw by far the highest number of investigations and firms affected by adverse antitrust decisions, but a higher percentage of firms were affected in the tobacco products manufacturing sector

Business disruption and risk of litigation



The chart on the left shows the number of undertakings that were addressees of an infringement decision or a commitment decision in each sector since 2004, including cases in which no fines were imposed. It reflects antitrust risks that go beyond the imposition of fines, but are harder to quantify, in particular the risks of:

- changes to business practices and models that are imposed in an infringement decision or offered as commitments to secure an end to an investigation. These are usually behavioural obligations, but at the extreme can include requirements to divest profitable businesses; and
- follow-on damages claims by third parties that have suffered harm as a result of the infringement (although this risk is considerably lower for cases in which no fine was imposed).

Chemicals

- 77 firms affected by adverse decisions – far higher than any other sector.
- 14 adverse decisions in total – all cartel infringement findings.
- But not a focus of recent or ongoing enforcement (see page 16).

Energy

- While not subject to the highest of fines, this sector saw numerous companies required to enter into commitments to end abuse of dominance investigations.
- Energy companies also suffered the highest number of investigations that were opened by the Commission – ex officio or following a complaint – and then closed with no action.

Sound recording and publishing

- Numerous collecting societies and music publishers were affected by the Commission's moves to spur cross-border competition in licensing of rights.
- Focus has now shifted to cross-border licensing of pay-TV content (see page 16).

Basic metals and rubber and plastic products

- Cartels in these two sectors had unusually large numbers of participants, e.g. 17 in the pre-stressing steel cartel and 16 in the industrial bags cartel.

Concentrated industries face higher enforcement risks

We compared the number of firms affected by adverse European Commission decisions with Eurostat data on the number of firms active in the EU for each sector. The sectors that are revealed to be the most susceptible to antitrust risk on this measure include manufacturing of tobacco products (6.5% of all EU firms affected) and refined petroleum products (2.5% of all EU firms affected). Pharmaceuticals and financial services also ranked highly, albeit with lower scores (each 0.4% of all EU firms affected).

Concentrated markets increase risks in a number of ways:

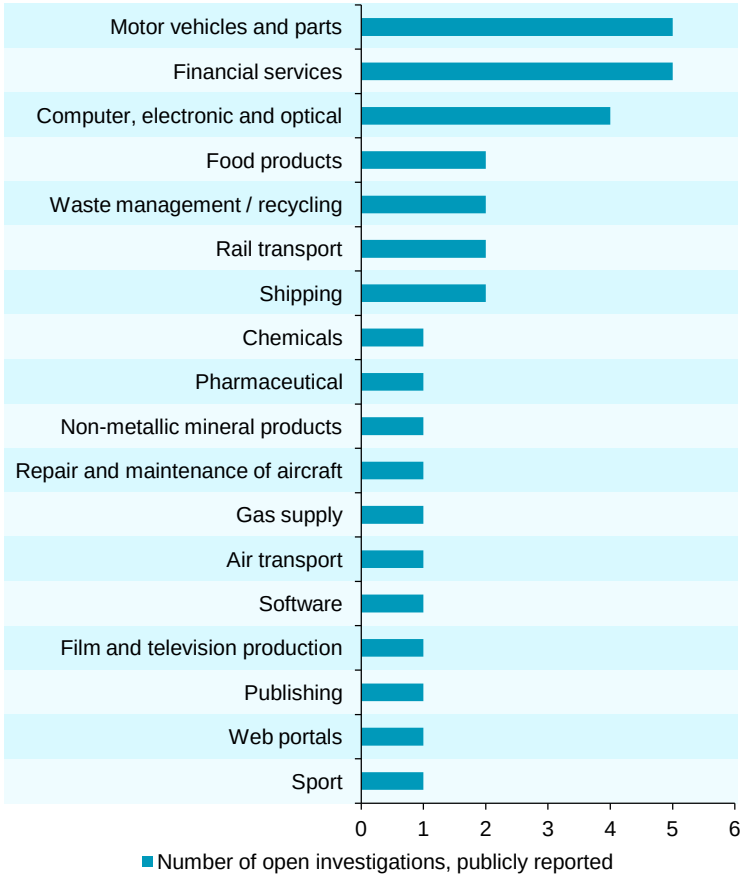
- They make formation of a stable cartel possible (cartels with large numbers of market players tend to be less stable).
- They are more likely to be home to a dominant firm which may attract enforcement under abuse of dominance laws.
- And with fewer firms in the sector, each is statistically more likely to become the subject of any enforcement action that is taken.

EU antitrust enforcement risks by sector (continued)

Sectors facing the highest numbers of ongoing EU investigations include automotive parts, financial services and technology-related products and services

Looking ahead – sectors in the spotlight

The chart below shows the sectors in which there are publicly-reported ongoing investigations by the Commission.



- Automotive parts and financial services remain a focus, with five investigations each reported.
- For other sectors, past results do not guarantee future enforcement:
  - The numerous cartel investigations in the chemicals sector since 2004 appear to have triggered a strong compliance reaction: no adverse decisions since the consumer detergents cartel in 2011, and only one ongoing investigation.
  - Scrutiny of the pharmaceutical sector also appears to have tailed off, suggesting that enforcement action against pay-for-delay settlements has had the Commission's desired impact of curtailing such settlements.
  - The Commission closed a number of cases with no finding of infringement in 2015 (plastic pipes, cement, oil benchmarks, mobile LCD screens and most of its credit default swaps investigation), with a view to prioritising stronger cases.
- Some sectors that previously avoided substantial enforcement are now subject to fresh attention, the technology sector in particular:
  - The Commission's e-commerce sector inquiry may lead to new antitrust investigations. Questionnaires sent out reportedly cover a range of producers, wholesalers and retailers of consumer goods – such as consumer electronics, clothing, software, sports goods and cosmetics – and operators of online platforms on which such goods are sold.
  - Digital content is a current focus: as well as forming part of the e-commerce sector inquiry, restrictions on cross-border access to pay-TV content are the subject of an ongoing infringement investigation, with a parallel legislative process reviewing the harmonisation of national copyright laws in the EU.
  - While the EU Competition Commissioner, Margrethe Vestager, has stated that "I don't think we need to look to competition enforcement to fix privacy problems", Germany's Bundeskartellamt, it seems, has no such doubts. It launched an investigation in March 2016 to determine whether Facebook has abused a dominant position in the market for social networks by (allegedly) violating data protection laws in its terms of service, in particular by requiring users to agree to the collection and use of their data as a condition of using Facebook. French and German authorities are also due to publish shortly the results of their joint market study into "big data" and market power.

"The technology sector continues to be in antitrust enforcers' cross hairs in a big way. In the online world, whether in relation to merger review or antitrust investigations, regulators are taking a closer look at the importance of user data, the extent to which scale in data confers market power, and how this impacts their substantive assessment of particular transactions or conduct."
Dieter Paemen, Partner, Brussels

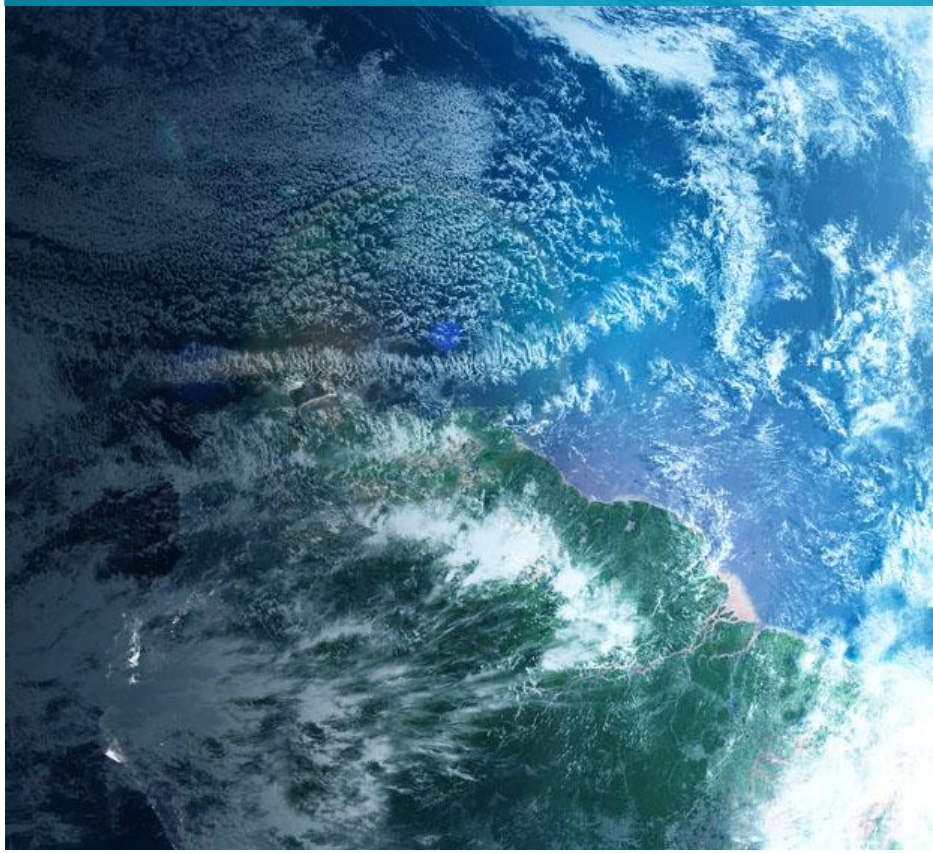
Antitrust due diligence

- Beyond looking at which sectors have faced antitrust risks in the past, it is no easy task to identify antitrust liabilities in potential M&A targets or investee companies if no existing investigations are disclosed during due diligence. In the rare instances in which a written cartel agreement exists, you will not find it in the data room.
- For investors, identifying potential antitrust liabilities can be doubly important: not only can antitrust infringements committed by investee companies impact the value of the investment, they can also bring liability for the investor itself. For instance, Goldman Sachs has recently been drawn into a damages claim in the UK, following a European Commission decision in 2014 that found it to be jointly and severally liable for infringements committed by an investee company of its private equity arm that was sold in 2009. This is despite Goldman Sachs having not participated in, facilitated or even been aware of the investee company's conduct at the time.
- Economic research has identified a number of factors that may guide buyers in deciding whether it may be appropriate to engage in more thorough antitrust due diligence, or to implement a detailed compliance audit, post-acquisition. These include:
  - the degree of market concentration;
  - high entry barriers;
  - symmetry of market shares, production costs and capacities;
  - homogeneity of rivals' products; and
  - the frequency of interaction between firms through trade associations, JVs and investments.

"Research has shown that industries become more susceptible to cartels when they undergo demand shocks that lead to substantial spare capacity. This may be particularly pertinent for a number of industries in the current economic climate. For acquisitions in those sectors, there may be significant value in stronger antitrust warranties and a more intensive antitrust due diligence exercise."

Alex Nourry, Partner, London

For a copy of our forthcoming detailed report analysing EU antitrust enforcement by sector, speak to your usual Clifford Chance antitrust contact.



Antitrust enforcement in the Asia-Pacific region

China: National Development and Reform Commission (NDRC)

In 2015, NDRC imposed a total of RMB 7.01 billion (€977 million) of fines on companies in ten cases, including the Qualcomm case. This represented a huge leap in the amount of fines imposed by NDRC compared to that in 2014 (RMB 1.8 billion / €251 million).

- **Qualcomm** – In February 2015, NDRC imposed a fine of RMB 6 billion (€836 million) on Qualcomm: the biggest fine that NDRC has ever imposed.
- **Automobile** – Enforcement in the automotive sector continues to remain a high priority for antitrust regulators in China. In April and September 2015, two of NDRC's local counterparts imposed RMB 350 million and RMB 123 million on Mercedes Benz and Dongfeng-Nissan for resale price maintenance.
- **Cartels** – Cartel enforcement is becoming more of a focus for NDRC. In December 2015, NDRC imposed RMB 407 million on eight international shipping companies for horizontal price-fixing. In January 2015, NDRC's local counterpart in Jiangsu imposed fines in the car insurance sector for price-fixing.
- **Abuse of administrative power** – As forecast by the head of NDRC at the beginning of the year, NDRC and its local branches have focused on administrative monopolies in 2015 and concluded 4 cases relating to abuse of administrative power. The investigated government bodies include The Health and Family Planning Commission of Bengbu city, Sichuan Province and Zhejiang Province, and the Gansu Provincial Department of Transport.
- Six new enforcement guidelines are being drafted on the auto industry, intellectual property, leniency, calculation of fines, suspension of investigations and exemption of monopolistic agreements.

"Enforcement by the Chinese agencies SAIC and NDRC has been less frenetic recently, although we have seen a steady flow of cases which looks set to continue. A key issue for 2016 is likely to be ongoing procedural and institutional reform."
Richard Blewett, Partner, Beijing

China: State Administration for Industry and Commerce (SAIC)

Similar to last year, SAIC's enforcement actions have been growing steadily, targeting primarily domestic companies, although there are a couple of significant investigations against international companies in the pipeline. In 2015, SAIC and its local counterparts investigated and closed 14 cases in the sectors of water supply, public transport, telecoms, pharmaceuticals, insurance, flight tickets, shale bricks, concrete, software development, tobacco, cinema, and comics and animation.

The Hong Kong Competition Ordinance

On 14 December 2015, the Hong Kong Competition Ordinance came into full force. A series of guidelines and policy documents have also been issued to guide its enforcement. Under its new Enforcement Policy, the Competition Commission will prioritise cases involving cartels and other anticompetitive agreements that cause significant harm to competition, as well as abuses of substantial market power involving exclusionary behaviour by incumbents. The Commission has also introduced a Cartel Leniency Policy which allows immunity from fines to be granted to the first cartel member that reports a cartel, provided it meets various requirements for cooperation.

"The full entry into force of the Hong Kong Competition Ordinance has already prompted many businesses to adapt their commercial conduct. Trade associations are changing their approach to recommending prices and sharing information, retailers and their suppliers are looking at resale pricing and liner shippers have applied for a block exemption for their vessel-sharing agreements. The Competition Commission will be looking to make an example of businesses that have failed to make the necessary adjustments."
Emma Davies, Partner, Hong Kong

Indonesia

The Indonesian competition authority ordered six tyre manufactures to pay fines totalling IDR 150 billion (€10.5 million) for allegedly conspiring to control production and distribution in order to maintain prices.

Australia

As at September 2015 the Australian Competition and Consumer Commission (ACCC) reported that it had 12 cartel investigations underway and had commenced proceedings against 11 companies in relation to alleged bid rigging conduct involving mining exploration licences.

South Korea

The Korea Fair Trade Commission (KFTC) imposed total fines of KRW 7.5 billion (€5.7 million) on JTEKT and Schaeffler Korea for price-fixing in relation to automotive bearings between 2001 and 2008.

A foreign company is for the first time facing criminal prosecution in South Korea for its participation in an international cartel. Following fines imposed in 2014 on two Japanese companies, Minebea and NSK, for fixing the price of bearings supplied to electronics manufacturers, Minebea's case was referred to the Seoul District Prosecutor's Office. If found guilty of the charges, the company could face a fine of up to KRW 200 million (€150 million), with individual executives facing fines and/or up to three years imprisonment.

India

In November 2015, the Competition Commission of India (CCI) announced that it had passed the final order related to a complaint against a number of local airlines, alleging they had indirectly agreed on air cargo transport rates. Fines totalling INR 2.58 billion (€35 million) were imposed on IndiGo, Jet Airways and SpiceJet.

CCI's 2012 decision to fine cement manufacturers INR 63 billion (€855 million) for price fixing was overturned in December 2015 by the Competition Appellate Tribunal for violating the principles of natural justice, since the CCI Chairman, who signed the order, was not present at three of the CCI hearings.

Taiwan

In December 2015, the Taiwan Fair Trade Commission (TFTC) imposed its highest-ever international cartel fine of NT$5.8 billion (€162 million) on ten capacitor manufacturers for exchanging sensitive commercial information and discussing prices in meetings. Similar investigations are ongoing in several jurisdictions, including the EU, the US, Japan, South Korea, Singapore and China.

Malaysia

In February 2016, Malaysia's Competition Appellate Tribunal overturned antitrust penalties of MYR 10 million (€4.5 million) imposed by the Malaysia Competition Commission on Malaysia Airlines and AirAsia for allegedly agreeing to divide domestic routes up among themselves.

Class warfare

One of the latest jurisdictions to join the class action world is the United Kingdom

Opt-out collective proceedings

The Consumer Rights Act 2015 (CRA) allows opt-out collective proceedings in relation to breaches of competition law to be brought before the Competition Appeal Tribunal (CAT). Opt-out collective proceedings are those to which all members of the class are party unless they elect not to be and are contrasted with opt-in proceedings in which each claimant must agree to become a party. They are therefore more conducive to large collective actions, since it is not necessary to secure the consent of each member of the class.

There are, however, a number of limitations on the availability of opt-out collective proceedings under the CRA. Opt-out claimants must be domiciled in the UK; claimants from other jurisdictions are required to opt in to the proceedings, in the same way they had done before the CRA came into force. In addition, damages based agreements (the UK equivalent of the American contingency fee arrangement) are unenforceable if they relate to opt-out collective proceedings and exemplary damages are unavailable in any collective proceedings under the CRA.

Collective proceedings must be started by a person who proposes to act as representative in the proceedings, although the representative does not need to be a member of the class of claimants. As with other jurisdictions, such as the US, there is a judicial hurdle to overcome: the claim can only proceed if a collective proceedings order is made. In order to make such an order, the CAT will need to conclude that the person bringing the proceedings is someone the CAT could authorise to act as a representative and that the claims are eligible for inclusion in collective proceedings.

Collective settlements

The new legislation also provides for collective settlements of proceedings.

Collective settlements are subject to CAT approval. The parties must provide agreed details of the claims to be settled, and the proposed terms of settlement. The CAT can approve the settlement only if it believes the terms to be just and reasonable.

The settlement will then bind those who have opted in to the collective proceedings and (in the case of opt-out proceedings) those domiciled in the UK who did not opt-out.

Other changes

The CRA also makes provision for:

- voluntary redress schemes, subject to approval by the CMA;
- abolition of the two-year limitation period in the CAT, which will now apply the six year limitation period applicable to tort claims in the High Court, subject to certain transitional arrangements; and
- a fast-track CAT process for claims involving SMEs.

Impact

The impact of these developments on businesses may be to lead to an increase in private damages claims for breaches of UK and EU competition law, both follow-on claims based on a binding infringement decision and stand-alone claims in which the antitrust infringement has to be proven in the litigation.

The impact is likely to be felt greater in relation to smaller claims, where there is less individual incentive to incur the risks of bringing a claim and where a large body of claimants is located within the UK. This is borne out by the fact that, according to press reports, the first opt-out claim in the CAT is on behalf of a class or around 34,000, each of whom is said to have a claim of around £200 and all of whom appear to be UK-based.

Trends towards class actions

Although the CRA avoids some of the excesses of the US class action system, it fits with a growing global trend of introducing class action regimes.

It also fits with a European trend of facilitating private enforcement of antitrust law, exemplified by the EU Antitrust Damages Directive (covered in last year's Antitrust Trends), which is being implemented across the EU during the course of this year.

"Although the Consumer Rights Act has been trumpeted as a catalyst for more antitrust damages claims to be brought, the impact is likely to be limited for larger claims where each individual claimant already has sufficient incentive to sue. It may, however, lead to an explosion of smaller claims, such as those brought by consumers."

Matthew Scully, Partner, London

With friends like these...

It is becoming increasingly possible to incur antitrust liability as a result of the actions of others

Liability for emails sent by a third party

In its *Eturas* judgment, the EU Court of Justice (CJEU) held that travel agents could be found to have colluded to fix prices simply by having received an email from the administrator of an online booking platform that they had signed up to use. The operator's email stated that in order to "normalise" competition it would place a cap of 3% on the discount that could be offered by the agents for bookings through its system, and suggested that it was doing so at the request of some of the agents.

The CJEU stated that the agents participated in an illegal concerted practice if they were aware of the contents of the email, and did not take steps to distance themselves from it (e.g. by expressing objections to the platform operator or by systematically exceeding the 3% cap). Moreover, that awareness could be presumed, provided the agents had a realistic opportunity to rebut that presumption, e.g. by proving that they had not read the message.

"The Eturas judgment takes long-standing case law on meetings between competitors in smoke-filled rooms and applies it to the digital age. Not only does it confirm the dangers of skim reading your inbox, it also highlights the need to extend basic antitrust compliance training to all staff, including administrative, technical and IT employees."
Miguel Odriozola, Partner, Madrid / Brussels

Liability for acts of a sub-contractor

VM Remonts engaged a consultant to help prepare a bid for a public contract, but was unaware that the consultant was also engaged by other bidders and had used its information when preparing their bids.

An Advocate General issued an opinion (not yet ruled on by the CJEU), stating that companies sub-contracting tasks relating to their core competitive functions, such as price formation, to third parties should be subject to a rebuttable presumption of liability for related infringements committed by those third parties, even if they were not aware of that conduct, and even if the conduct exceeded the scope of the third party's mandate. That presumption could only be rebutted by proof that the company took precautions to prevent the third party from committing a breach, and steps to monitor its compliance.

If confirmed by the CJEU, the judgment would impose new and extensive obligations on companies to police compliance of their sub-contractors.

Liability for acts of a customer or supplier

In *AC Treuhand*, the CJEU confirmed that cartel facilitators can be held liable and fined, even if they are not party to the cartel, and are not active on any related market. While AC Treuhand fell very clearly within the definition of a facilitator (it organised meetings, collected and shared market data, and umpired disputes between the cartelists) it is unclear where the outer boundary of this concept lies.

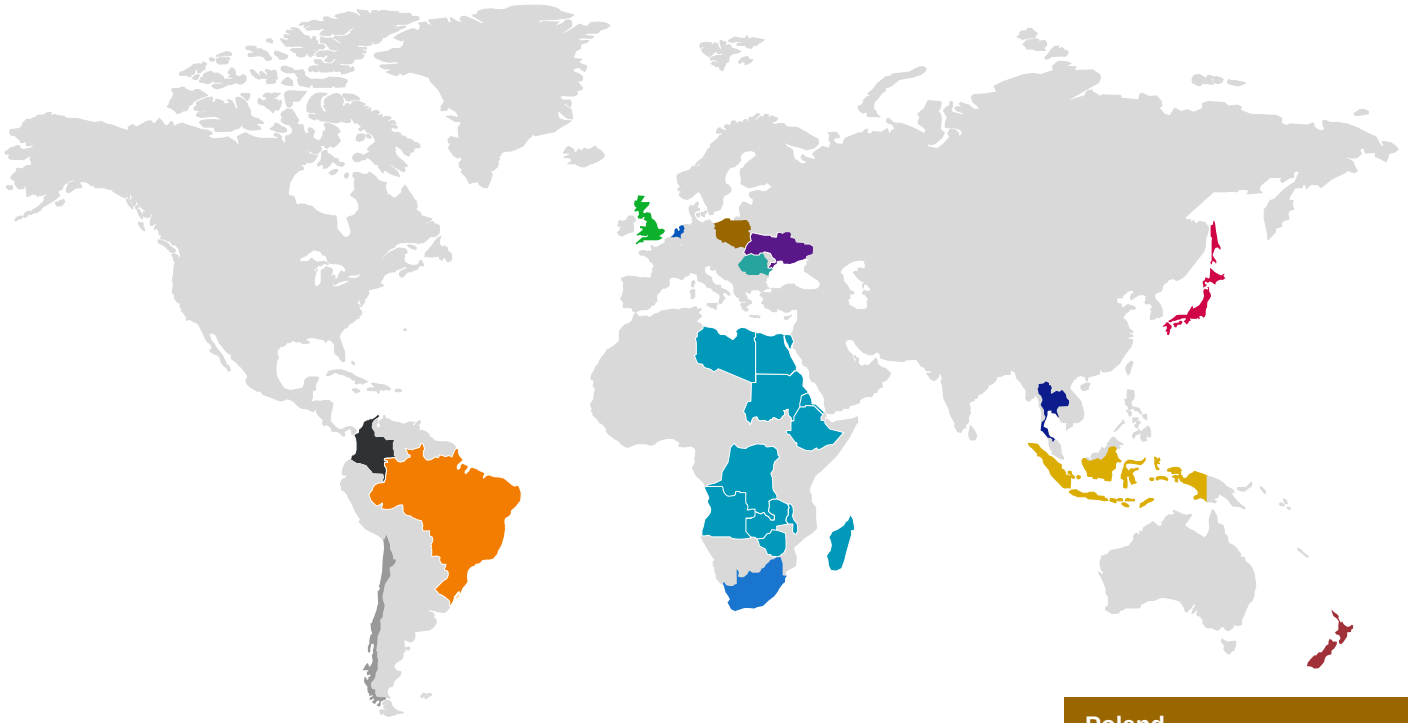
"These developments add to existing case law subjecting firms to a form of strict liability for the actions of their subsidiaries and agents, and national case law holding suppliers liable for acting as a "hub" for exchanges of information between their customers. The CJEU has also stated that purchasers may be party to an unlawful agreement if they knowingly buy products from cartelised suppliers. Effective antitrust compliance now requires companies to pay increasing attention to the actions of their business partners."
Patrick Hubert, Partner, Paris

Dealing with third party antitrust risks:

- Ensure all staff are able to recognise when competitively sensitive information is disclosed by a third party, and implement appropriate policies to reject or limit the flow of that information to others. Disclosing other suppliers' prices or quotes in pricing negotiations with a supplier is fine.
- When involving third party advisors or sub-contractors in the formulation of your pricing or strategic competitive conduct, ensure that they are subject to appropriate contractual restrictions to prevent them from using your competitively sensitive data in their work for rival suppliers, and monitor their compliance with those restrictions.
- Include agents and joint ventures in your antitrust compliance programme.

Global antitrust enforcement: other recent and pending developments

The outlook for 2016 is for increased criminalisation of cartel conduct, higher maximum fines and the implementation of new enforcement and leniency regimes



"The OCCP has two main priorities. First, to fight against bid-rigging, primarily in order to protect European funds that are flowing into Poland. Here, we expect increased cooperation between the OCCP and Polish security agencies and public prosecutors. Second, we are seeing more decisions on consumer protection issues, such as misleading advertising and misselling. While some are commitment decisions with no fine or finding of an infringement, they can still have a major impact on business."
Iwona Terlecka, Counsel, Warsaw

Ukraine

Gazprom was fined UAH 85 billion (around €2.9 billion) in January 2016 by the Antimonopoly Committee for abusing its dominant position on the Ukrainian gas transit market. This is the largest ever fine in the history of global antitrust. It is likely to become the largest ever unpaid fine too.

UK

A jury cleared two executives of criminal cartel conduct in June 2015, taking the view that their actions, while clearly price fixing, did not meet the legal requirement (now removed) for "dishonesty". A third participant pleaded guilty and received a six month suspended sentence. Another individual was charged in March 2016 in respect of a separate cartel.

Poland

The Polish Competition Authority (the OCCP) acquired powers in January 2015 to impose fines of up to PLN 2 million (around €450,000) on any person managing a business, who intentionally allows that undertaking to enter into an anticompetitive horizontal or vertical agreement.

Netherlands

A bill has been passed which increases the maximum fine for competition law infringements from 10% to 40% of annual group turnover. This is expected to take effect in July 2016.

COMESA

The Comesa Competition Commission announced in July 2015 that it intended to carry out its first ever market study into the impact of shopping malls on competition. South Africa and Botswana are conducting similar reviews of the grocery retail sector.

Indonesia

A draft new law, which is still being deliberated, would substantially increase the maximum available fines for antitrust breaches, and introduce powers for the Indonesian competition authority (the KPPU) to grant leniency.

Thailand

A draft legislative amendment scheduled for approval in 2016 would set up the competition authority as an independent institution, with new enforcement powers and a leniency regime.

New Zealand

A new Cartels Bill, expected to become law in 2016, will expand the definition of cartel conduct to include output restrictions and market sharing. Proposals to introduce criminal penalties were, however, dropped.

Brazil

The Competition Authority (CADE) published draft guidelines in August 2015 setting out the circumstances in which fines may be reduced for implementation of a compliance program.

Chile

Legislators are considering a bill that would introduce criminal penalties of up to 10 years imprisonment for cartel conduct, and increase maximum financial penalties.

Colombia

A record fine of COP 324.4 billion (around €93 million) was imposed in October 2015 on companies, individuals and a trade association for cartel conduct in the sugar industry.

Japan

The Japan Fair Trade Commission is developing legislation that would give it greater powers to reduce fines for leniency and cooperation.

South Arica

The government announced in February 2016 that it will introduce measures shortly to make it a criminal offence in any industry to collude and fix-prices.

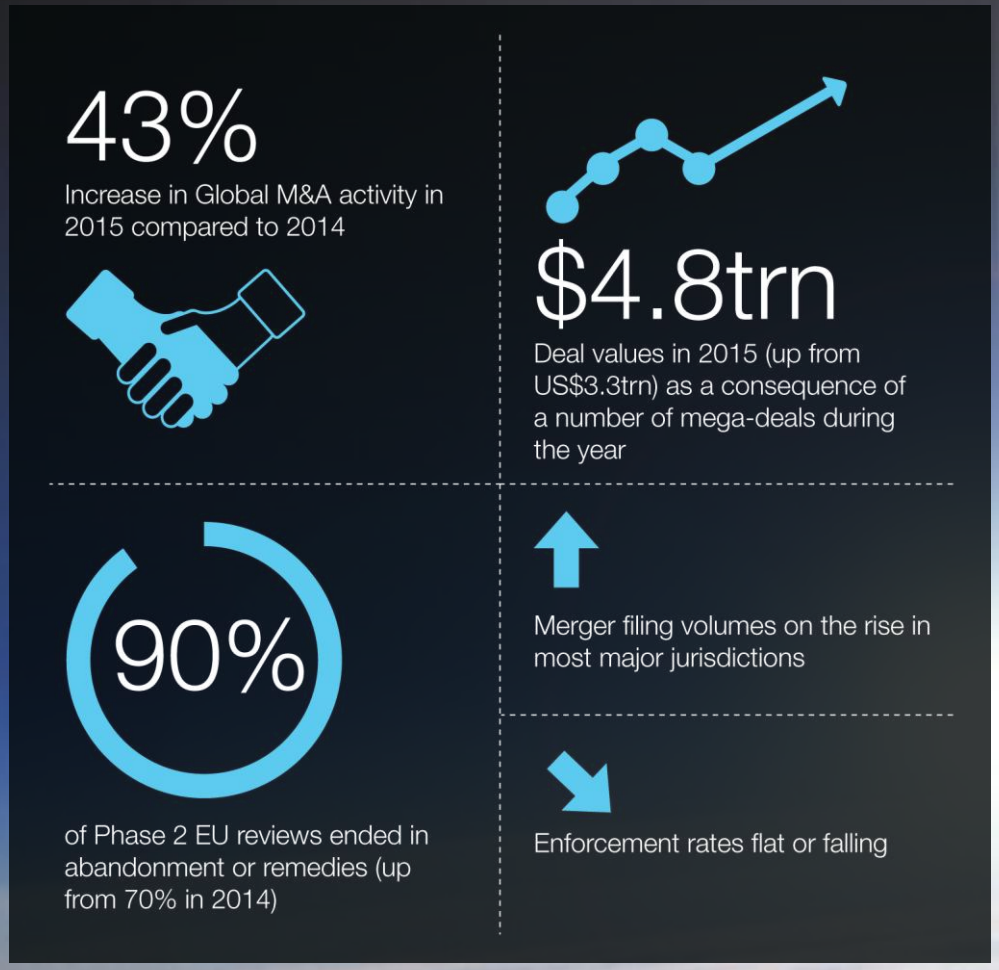
Romania

2015 saw the first grant of immunity, as well as record numbers of fines imposed and cases concluded under the settlement procedure.

"Proposed legislation in Indonesia would create substantial new antitrust risks for businesses with Indonesian operations. Leniency procedures would lead to increased enforcement, and while the Indonesian competition authority has opposed criminal penalties, higher financial penalties will be available."

Linda Widyati, Partner, Jakarta

2 Global merger control

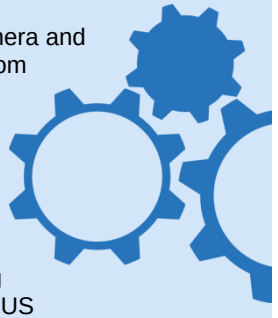


Global trends in merger control

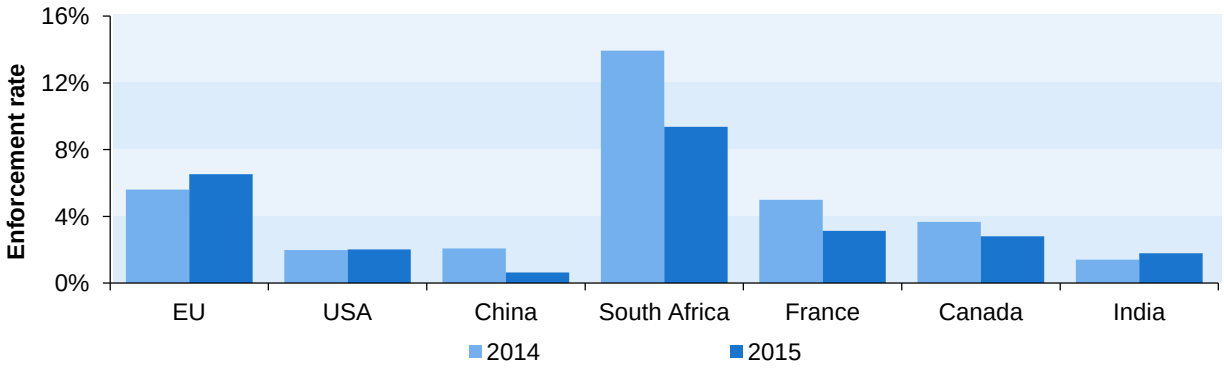
Despite rising volumes of M&A, merger control enforcement rates are falling

- Numerous deals hit the headlines in 2015 after running into objections from competition authorities.
- Those headlines may give the impression that the year was characterised by ambitious deal-making. While this was clearly true for some deals, our review of enforcement rates in major mandatory-filing jurisdictions for which 2015 data is available indicates that it is not a global trend.
- The enforcement rate is the number of mergers that were subject to an adverse merger control decision as a percentage of the total number of filings. Adverse decisions include all mergers that were blocked, altered, subject to remedies as a condition of clearance or withdrawn as a consequence of a challenge by an antitrust agency.
- Filing volumes rose considerably over the previous year: by between 10% and 30% in the EU, China, India and South Africa.
- But enforcement rates dropped or were flat everywhere except in respect of the EU and Indian merger control regimes (for India, this represented only two deals adversely affected by enforcement).
- This suggests that increased enforcement activity was primarily a function of rising M&A volumes, and not because deal-makers in general were less averse to antitrust risks.
- For the EU, our view is that the rising enforcement rate is attributable in no small part to a stricter approach of the European Commission to the substantive assessment of complex mergers, and more burdensome procedural requirements (see page 28).

Some of the deals thwarted in 2015:



- Danish telecoms JV between TeliaSonera and Telenor abandoned after opposition from the European Commission.
- Acquisition by Electolux of GE's electrical appliance division abandoned after challenge by the US Department of Justice.
- Merger between Applied Materials and Tokyo Electron called off following rejection of proposed remedies by the US DOJ and China's MOFCOM.
- Australian Competition and Consumer Commission blocked the proposed takeover of freight company Toll Marine by its rival Sea Swift.
- Edeka's acquisition of around 450 Kaiser's Tengelmann supermarket stores prohibited by the German Cartel Office.



US figure for 2015 is an estimate based on public reports and assumption of flat or increased filing volumes. Figures for Canada based on year ending 31 March and last three quarters of 2015.

"While a large number of deals were adversely affected by merger control in 2015, in most jurisdictions this appears to be primarily a reflection of rising volumes of M&A, rather than more ambitious deal-making or harsher regulatory reviews. With the right antitrust expertise, merger control need not deter efficient consolidation."

Jenine Hulsmann, Partner, London

Merger control and the impact of sanctions in Russia

New clearance requirements for joint ventures

- At the start of 2016, a new set of amendments to the Russian Competition Law, known as the “fourth antimonopoly package”, entered into force. Amongst the many changes, there is only one that businesses must really be aware of: mandatory clearance for Russia-related joint ventures between competitors, irrespective of whether or not the JV is full-function in nature.
- The notification thresholds for JVs are extremely low. Filing is required if the combined worldwide value of assets of the parties involved exceeds approximately €80 million; or their combined worldwide turnover exceeds approximately €125 million. As a result, most JV transactions between international groups extending to Russia are now subject to mandatory clearance.
- There is no clarity yet as to whether or not the rules also apply to potential competitors. In particular, it remains to be seen whether JV parties that have not been active in Russia prior to the establishment of a JV will need to obtain clearance. For the time being, it is advisable to assume that the conclusion of any Russia-related JV agreement must be notified, including JVs that involve new market entry. The degree of required nexus with Russia is not yet clear.
- For existing JVs, it may be worth noting that clearance is also required where agreements or documents envisage substantial changes to the business of the JV, or if a new party is entering the JV.
- In substance the review process focuses on potentially-restrictive contractual arrangements, rather than on strict merger control aspects. While there remain a number of uncertainties as to how the regulator will assess JVs, we consider that the mandatory clearance requirement will add significant legal comfort to many Russia-related JVs. Even before the amendment, it was our view that foreign partners were well-advised to seek voluntary clearance for their agreements, given that these regularly include non-compete, exclusive purchase or supply and other potentially restrictive arrangements.

Focus on sanctions

- The imposition of Western sanctions against Russia in response to the Ukraine conflict has led to a large number of market investigations. For numerous international groups, compliance with Western sanctions laws meant that they had to terminate their relations with Russian sanctioned companies and stop supplies to Crimea. For large players, this has meant a risk of being accused of breaching the Russian prohibition on abuse of dominance.
- So far, no formal cases have been opened by the Russian antitrust regulator. The regulator has stated that the disputes between Russia and other states are primarily a political matter that is dealt with by the Russian government. That said, it has made clear that it is on 'stand-by' and ready to act should the government instruct it to enforce Russian antitrust laws strictly.
- In order for the regulator to be prepared, there has recently been a series of investigations across a number of sectors, including industrial products, software and other IT, pharmaceuticals and medical devices, as well as payment systems and banks. Many international companies have had to respond to extensive information requests from the antitrust regulator and to justify their approach.
- We have not experienced any spill-over effect of sanctions on merger control reviews. However, in 2015 several Western companies experienced major delays in obtaining Russian foreign investment approvals, which may be required in addition to merger control clearance. We consider that this was, to a certain extent, in response to Western sanctions.

“Western sanctions against Russia have led to a clash of conflicting rules for many international companies. For us, this has meant an increasing demand for legal advice in a challenging area of antitrust law. Fortunately, up until now, our clients have been able to navigate safely through this difficult period of time.”

Torsten Syrbe, Partner, Moscow

Trends in EU merger control

EU merger control has recently undergone some significant changes in terms of both substance and procedure. This poses greater challenges for companies wishing to get their M&A deals approved swiftly and without any unacceptable remedies

More Phase 2 cases are resulting in remedies and prohibitions

- 90% of Phase 2 merger cases in 2015 resulted in remedies or an effective prohibition by the Commission. The average over the past decade was 67%.
- What has driven this uplift? We acted for merging parties in three out of the eleven Phase 2 cases opened in 2015 and two that are ongoing, as well as advising major third party interveners in a significant number of other cases. Our experience suggests that the following factors are at play.

Longer review process

- Pre-notification discussions with the European Commission are taking longer, and lengthy periods of pre-notification are offering lower prospects of securing Phase 1 clearance.
- Several cases in the last year were subject to detailed second phase investigations despite the parties having engaged in several months of pre-notification (and over 12 months for Halliburton's proposed acquisition of Baker Hughes).

More frequent challenges in relatively concentrated markets

- It has historically been relatively rare for the Commission to challenge mergers that create a market player without a market-leading position and with a market share of less than 40-50%.
- That appears to have changed. Anticompetitive "unilateral" effects are now frequently presumed to result from mergers in relatively concentrated markets, unless merging parties can prove that they are only distant competitors. This is rarely the case for 3-to-2 mergers, which are therefore likely to be qualified as anticompetitive, irrespective of counter-arguments.

Market feedback is becoming more decisive

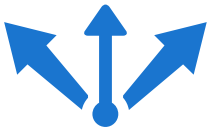
- The Commission has always relied heavily on the feedback from its own market testing with customers and competitors, but recently it has become more difficult for merging parties to counter negative feedback.
  - Customer surveys prepared by the merging parties are frequently rejected by the Commission.
  - Unsubstantiated negative market feedback is routinely accepted as probative.
  - It is not necessary for a majority of customers to raise concerns for the feedback to be decisive.
  - Efforts by the merging parties to explain the benefits of a deal to customers during the market testing exercise have in some instances led to the Commission excluding favourable customer feedback.

Internal documents: more burdensome reviews and increasing importance

- Continuing a long-standing trend, Phase 2 procedures now routinely involve extensive document disclosure (similar to a second request in US merger proceedings), with searches conducted on emails and files of relevant business people, including documents not prepared for the transaction.
- The Commission increasingly attaches more importance to such documents than to information provided in the parties' merger filing and related submissions.

Remedies are becoming more onerous

- The most important recent trend in EUMR remedies is the sharp increase in cases in which divestments are required to be agreed with an “upfront buyer” before closing of the main transaction can take place. This typically extends the effective review process, and the overall deal timetable, by several months.
- Another recent trend is for the Commission to require a “reverse carve-out”, whereby the merging parties divest the entire business and then take back the part of the business that is not problematic. For example, a pharmaceutical company may be forced to sell the global rights of a pipeline drug (even if the EU only accounts for a tiny fraction of expected demand) and then negotiate with the buyer the license-back of the non-EU rights.
- The Commission now usually insists that a divestment should represent a standalone business with all necessary assets and personnel, even if a suitable buyer already has the necessary assets or personnel and may therefore not be interested in purchasing such assets. This can undermine the likelihood of finding interested buyers.



Recommended approach

- Undertake a thorough analysis of the potential risks as early as possible in the process.
- Where competition concerns are possible (taking into account the Commission's current approach to substantive assessment), plan for a worst case scenario: prepare remedy proposals, identify suitable purchasers and, where appropriate, commence early remedy discussions with the Commission.
- Identify key internal documents and check for consistency with merger filings and submissions.
- Where confidentiality constraints allow, engage with customers to explain the benefits of the transaction well before the Commission's market testing exercise.
- Anticipate likely information requests. Most information requested by the Commission is not formally required by the filing form.
- Seek to agree in writing on an indicative timetable with the Commission including target dates for formal filing.
- Where appropriate, press the Commission during Phase 1 to identify in concrete terms the concerns that it considers preclude an unconditional Phase 1 clearance. If the Commission is unwilling or unable to do so, it is unlikely that it will change its position during Phase 2.
- Insist on obtaining as many key documents as possible from the Commission's market testing at the start of Phase 2.
- There is no downside to communicating the merits of the case to institutional stakeholders, but be aware that the Commission‘s hierarchy often forms its view early on in the review process.

“We are seeing a stricter approach from the European Commission towards the assessment of mergers in relatively concentrated industries, as well as increased procedural complexities. Anticipating and formulating remedy proposals early in the process is becoming increasingly important for successful clearance strategies.”

Tony Reeves, Partner, Brussels

US merger control and foreign investment trends

- As merger activity continues to grow, the DOJ and FTC are becoming more aggressive in litigating transactions that they believe raise competitive concerns, instead of settling them through consent orders.
- Assistant Attorney General Bill Baer – head of the DOJ antitrust division – stated that he believes companies are acting more risk tolerant in attempting transactions that may not pass antitrust scrutiny. However, our analysis suggests that this is only true for a sub-set of the deals that raised antitrust concerns, as the number of transactions that were litigated, abandoned or subject to a consent decree was broadly the same in 2015 as in 2014 (see page 26).
- In today's market place, we foresee companies continuing to attempt risky transactions and, in response, the number of transactions challenged by the US antitrust authorities to increase.
- Recently-released figures show that the Committee on Foreign Investments in the US (CFIUS) was very active in 2014, with 147 voluntary filings by companies seeking national security clearances, up from 97 in 2013. China was the leading source of investments reviewed by CFIUS – a trend that is likely to continue in 2016, with a number of deals involving Chinese buyers having recently been abandoned.

The US agencies continued to use the loss of a potential entrant as theory of competitive harm

Concerns that a merger will harm potential (but not actual) competition are most frequently raised in pharmaceutical cases.

However, in 2015 the FTC challenged a transaction between Steris Corporation and Syngenta Health plc under the theory that, but for the transaction, Syngenta was a likely future entrant in the market for contract sterilization in direct competition to Steris.

The district court, however, found that the FTC had failed to provide sufficient evidence that Syngenta was likely to enter the market in reasonable time. The court noted that Syngenta lacked customer support, the necessary financing, and the board support to move forward with entering the market. Therefore, Syngenta's decision to halt attempts to enter the market were for legitimate business reasons unrelated to the transaction.

While we do not expect the US agencies to forego challenging transactions under such a theory in the future, this development may make them more timid.

Recent deals raising antitrust and foreign investment issues

Go Scale Capital/Philips Lumileds:
Sale to a Chinese buyer blocked by CFIUS, which reportedly told the parties that they could not have predicted its national security concerns.

Sysco/US Foods:
Abandoned following grant of an FTC motion for injunction by the District Court in DC. Harmful internal documents of the parties and of a potential purchaser of proposed divestments were uncovered.

SABMiller/Anheuser-Busch InBev:
Anticipating antitrust concerns, SABMiller has agreed to sell its stake in MillerCoors to JV partner Molson Coors Brewing. Similar pre-emptive divestments have been agreed in China and Europe.

Applied Materials/Tokyo Electron:
Abandoned following objections raised by the DOJ and China's MOFCOM, and their rejection of proposed remedies. Concerns raised included effects on pipeline products and future manufacturing innovation.

"The remainder of 2016 will see an uptick in both merger and conduct investigations by the DOJ and FTC. Both agencies have received funding to expand their enforcement workforce and are pushing to make precedent before an administration change."
Timothy Cornell, Partner, Washington

Merger control in the Asia-Pacific region

Australia

- **High filing volumes** – In the year to June 2015 the ACCC considered over 322 proposed mergers (up 8% on 2014). It provided informal, confidential "pre-clearance" for 278 of them, meaning the overwhelming majority of assessed mergers were cleared without remedies and within a short timeframe. One merger was opposed (see below) and two abandoned by the parties due to competition concerns raised by the ACCC. Of the remaining mergers that went to Phase 2, seven were resolved through the acceptance of undertakings.
- **Increasing number of Statements of Issues** – The past year also saw a significant number of merger applications escalated from initial market inquiries to the release of a Statement of Issues (SOI) by the ACCC, evidencing the need to consult more widely on complex transactions. The SOI process comes with heightened publicity in respect of the competition concerns and has been the subject of frustration for many merger parties, both in light of the delay it adds (a further 6-12 weeks) and the additional pressures of the very public consultation and information gathering process. Both of the merger review applications withdrawn from the ACCC in 2015 had been subject to the SOI process.
- **Opposition to mergers** – In July 2015, the ACCC opposed Sea Swift's proposed acquisition of Toll Marine, two large suppliers of marine freight services, on the basis that it would eliminate competition between them and result in increased barriers to market entry. The parties are understood to be appealing the decision to the Australian Competition Tribunal. GPC's proposed acquisition of the Covs Parts automotive parts business from AHG was initially opposed, but ultimately cleared in February 2016, following revision of the transaction structure to exclude some of the Covs Parts stores.

China

- **Number of cases comparable to the EU** – Over the course of 2015, MOFCOM cleared 319 cases, as many filings as the European Commission (318 cases), but imposed remedies in only two cases, compared to 20 remedy cases in Europe. Around 75% of the cases were placed under simplified merger review procedures in 2015.
- **MOFCOM reformed its internal review procedures** – The Consultation Division is now carrying out the same role as the other two case-handling divisions. Such restructuring has led to a more streamlined review process. In addition, MOFCOM is also revising its merger notification and review measures published in 2010, and drafting intellectual property guidelines relating to merger control.
- **MOFCOM steps up enforcement against gun-jumping** – In September 2015, MOFCOM published four decision imposing fines of RMB 150,000 to 200,000 (€21,000 to €28,000) on a number of Chinese and foreign companies for gun-jumping. The decisions serve as a reminder that foreign companies are not immune from fines for gun-jumping in China. By the end of the third quarter of 2015, MOFCOM had investigated more than 50 companies and concluded 31 failure to notify cases, of which 11 cases involving 17 companies led to penalties.

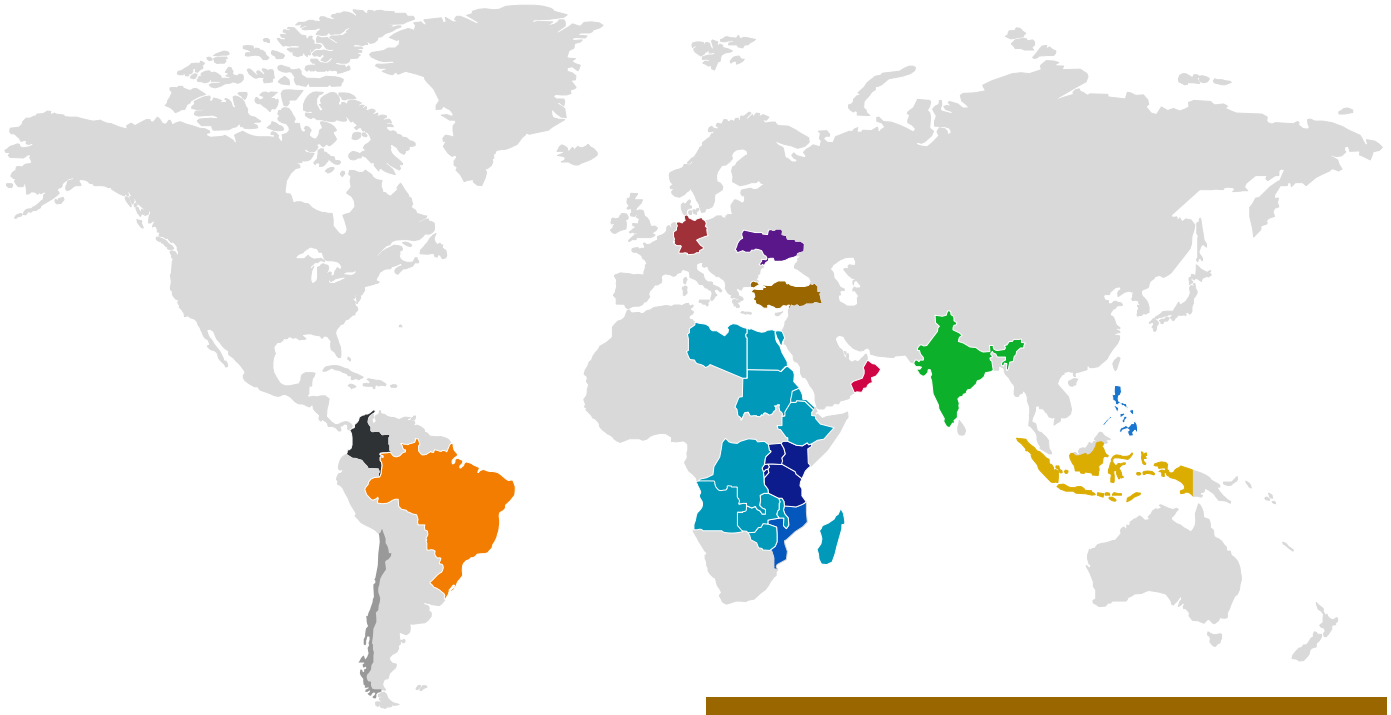
Other Asia-Pacific

- **Singapore** – The Competition Commission of Singapore issued a rare decision in the first quarter of 2015, to block the proposed acquisition of RadLink by Parkway Holdings Ltd. because of concerns in relation to the supply of radiopharmaceuticals and the provision of radiology and imaging services in Singapore.
- **Taiwan** – In October 2015, the TFTC imposed fines of NT$500,000 (€14,000) on Taiwan Taxi for failure to notify two proposed acquisitions.
- **ASEAN Competition Law** – The last year has seen developments in several newly established competition law regimes in ASEAN member states. Myanmar enacted its national competition law in February 2015. Laos became the ninth ASEAN member state to enact a competition law in July 2015. Also in July 2015, Philippines enacted the Philippine Competition Act. The Thai National Reform Council approved a new trade competition bill for various sectors in the third quarter of 2015 to replace the current, rarely-applied antitrust law.

"The ACCC is adopting an increased focus on international mergers, raising statements of issues in several high profile mergers such as Iron Mountain/Recall and Halliburton/Baker Hughes and only allowing others where merger remedies have been provided."
Dave Poddar, Partner, Sydney

Global merger control: other recent and pending developments

With new merger control regimes proposed or soon to be implemented, the outlook is for higher filing burdens and greater complexity for large, multi-jurisdictional transactions



"Decisions of the Turkish Competition Authority have endorsed a requirement for mandatory merger control filing where the turnover thresholds are exceeded, irrespective of whether any market in Turkey is affected. Early assessment of notification requirements prevents potential fines in foreign-to-foreign transactions with minimal or no effects in Turkey."

Itir Çiftçi, Partner, Istanbul

Ukraine

The Ukrainian Parliament passed a law reforming its antitrust regime, including the increase of the financial thresholds, now requiring certain turnover/assets from at least two parties (but still taking turnover and assets of the seller into account). Expected to come into force in April 2016. In addition, the Antimonopoly Committee of Ukraine introduced new guidelines providing for a time-limited amnesty for historic transactions which were subject to notification requirements, but were not notified.

India

The target-based exemption from the merger control filing requirement was extended on 4 March 2016, and the thresholds increased, resulting in fewer transactions becoming notifiable. The main (rarely applied) thresholds were also increased.

Turkey

The number of mergers subject to a Phase 2 review has increased in recent years, but behavioural remedies are becoming more accepted, as indicated by recent decisions such as the conditional approval of NV Bekaert's acquisition of the Turkish steel cord business of Pirelli Tyre in January 2015. Factors such as feasibility, efficiency and proportionality are expected to play an increasing role in the authority's assessment of behavioural remedies.

Indonesia

Draft legislation currently slated for approval in 2016 would, if passed, introduce mandatory pre-merger notification, in place of the existing post-merger filing requirement.

East African Community

The regional East African Community (EAC) has recently been seeking to set up an operational Competition Authority to handle merger filings. It remains uncertain if this will happen, but if it does, jurisdictional conflicts are likely, as many EAC member states are also members of the Common Market for Eastern and Southern Africa (COMESA), which has its own operational regional merger control regime.

COMESA

The COMESA Competition Commission increased filing thresholds and lowered filing fees in 2015. Consequently, the merger control regime is significantly more business-friendly.

Colombia

Draft legislation currently under consideration would significantly reform the filing thresholds, allowing for the introduction on new, turnover-based thresholds and moving away from criteria based on market shares and competitive links between merging parties.

Germany

The German Federal Cartel Office announced that it would welcome a new transaction size threshold which would lead to filing requirements in Germany. While there is no legislative proposal yet, the Antimonopoly Commission, which is an advisory body to the German government, has proposed a €500 million threshold. Margrethe Vestager, the EU Competition Commissioner, has indicated that a transaction value threshold is also under consideration for the EU merger regulation.

Philippines

The Philippines Competition Commission was set up with effect from 1 February 2016 and is preparing implementing rules and regulations for the new Philippine merger control regime. For the transitory period the Commission has adopted preliminary short form filing requirements for transactions valued at PHP 1bn (around €20 million) or more.

Oman

A new Competition Law was introduced in Oman in 2015, requiring transactions to be notified to and to be approved by the Consumer Protection Authority (CPA), if the concentration would lead to a market share of 35% or more of the relevant market in Oman. A transaction leading to a market share in the relevant market of more than 50% in Oman cannot be cleared by the CPA.

Chile

Legislators are considering a draft law that would introduce a mandatory merger filing regime, in place of the current voluntary system.

Brazil

Record gun jumping fine of BRL 30 million (around €7.3 million) imposed on Cisco and Technicolor. The parties' carve-out agreement was expressly rejected as excluding or mitigating liability. The Brazilian authority also issued guidance in May 2015 which, among other things, treats payment or part-payment of the purchase price prior to clearance as raising potential gun-jumping concerns.

Mozambique

Competition authority (and merger control regime) expected to become operational in 2016.

Our global antitrust expertise

With more than **140 antitrust lawyers** across the key hubs of **Europe, Asia-Pacific and the US**, we are able to support our clients on their most complex and strategically important antitrust matters. Our global team has an excellent track record of obtaining merger clearances from the European Commission and other local regulators and we are at the forefront of antitrust litigation, investigations and industry reviews.

With such an extensive global network, we provide local, regional and global insights to our clients, always mindful of the practical implications that antitrust issues may have on their business.

Behavioural Matter of the Year: Europe (for the second year running)

GCR Awards 2015

Merger Control Matter of the Year: Asia Pacific, Middle East & Africa

GCR Awards 2015

"Well-thought-out, pragmatic advice"
"Outstanding combination of economic and business acumen and legal know-how"

Legal 500 EMEA 2015: Competition: Belgium (Band 1)

Praised for its "availability, delivery and clarity of advice"

Legal 500 UK 2015: EU and Competition (Band 1)

"A go-to firm for complex, multijurisdictional antitrust matters"

Legal 500 EMEA 2015: Competition: Russia (Band 1)

"great team" has "broad competition knowledge" and "an ability to look at issues from new angles, suggesting creative solutions"

Legal 500 EMEA 2015: EU and Competition: Spain (Band 1)

"The lawyers are attentive and proactive, and understand perfectly the company's mechanisms and dynamics."

Chambers Europe 2015: Competition/European Law

"What I really enjoy in my work with Clifford Chance is that it is not as conservative as other firms – really hands-on, focused on clients and doing a great job as one of the biggest law firms."

Chambers Europe 2014: Competition/European Law

"I feel like part of the team; the lawyers are friendly, collaborative and deliver a high-quality service."

Chambers Europe 2013: Competition/European Law

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