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Consequences of non-compliance: The EU experience

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[1] The content of this speech does not necessarily reflect the official position of the European Commission.
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TABLE OF CONTENTS

1. INTRODUCTION - DETERMINANTS OF COMPLIANCE

Competition law in China is very recent. The Anti Monopoly Law was adopted August 2007 and entered into force on 1 August 2008. The Anti Monopoly Enforcement Authorities were also established in August 2008. Mofcom (The Ministry of Commerce) was designated as merger review authority and as such it has received notifications since day one. Mofcom has therefore taken a significant number of merger review decisions under the Anti Monopoly Law. Unfortunately only few of Mofcom's decisions are published. NDRC (National Development and Reform Commission) and SAIC (State Administration of Industry of Commerce) do not receive notifications and they are both obliged to find their cases themselves. Very little has been published about these authorities' enforcement activities so far.

In this situation business has very little guidance on the activities of these authorities and on the consequences of non-compliance. However, it is natural that new authorities need time to establish themselves and earn respect – like any new player on a market.

The experience of the European Commission is that this respect will be earned through a transparent enforcement of the law and the publication of a solid body of decisions taken which will guide business and influence its behaviour and lead to higher levels of compliance.

There is of course no precise instrument to measure respect and the level of compliance. Moreover, it would be hard to establish the facts, especially with regard to a new system. In this situation, what should one answer to the question from a businessman who asks:

> *'Why should my company comply with the costly requirements of competition law?*'

While I have been asked to concentrate today on the possible consequences of non-compliance, there are many other good reasons to comply with competition law other than suffering the consequences of non-compliance, if you are caught, such as:

- Compliance does not need to be expensive (I am sure that most of us have a gut-feeling about when we are breaking the law) and being a law compliant company gives the directors and the company a good public image.

- If you are genuinely a competitive company, you do not need to worry about your competitors, because you will do well competing against them.

In answering, I would also have to refer to the consequences of non-compliance and tell the businessman that he would have to distinguish between merger laws and cartel laws, as the consequence of non-compliance with those two sets of rules differ:

- Non-compliance with merger law entails monetary sanctions, uncertainty, perhaps unscrambling the transaction, contractual claims (from sellers or buyers), claims from other parties, complications in future transactions, reputational loss etc.

- Non-compliance with cartels laws entails fines, in some countries criminal sanctions, private damage litigation, reputational damage, disputes with overcharged customers.

As an official of the European Commission I have to highlight that a violation of the competition rules is a serious offence which may have grave professional and personal consequences sanctions for the perpetrators.

This was also the message I gave when I was a private practitioner in Denmark. Other than being a law abiding citizen and, as such, convinced that one must respect the laws of the country, let me highlight four concrete reasons for complying with competition law[2]:

The risk of detection combined with sanctions in terms of high fines on undertakings and combined with potential private enforcement measures seeking compensation of damages is a major incentive to comply with the law. In certain jurisdictions within the EU sanctions may even take the form of criminal prosecution of individuals.

Moreover, the burden caused by investigative measures by competition authorities may also turn out to be very time consuming and costly. Inspections on their premises - which firms are obliged to accept - may disrupt day-to-day work for quite some significant time. Preparation of a legal defence may occupy considerable resources and give rise to significant expenses for legal advice and representation.

The risk of reputational damage is another reason for compliance. Companies subject to investigations or a negative decision for infringing competition rules may suffer from a general loss of reputation and face hostile reaction of clients and consumers or their own shareholders who feel cheated. This may also lead to the destruction of shareholder value.

The latter point on shareholder value is linked to the increase over the last years in corporate governance requirements and expectations.

Fortunately, most companies share the moral values of law abiding citizens. For the great majority of companies, the Business and Industry Advisory Committee (BIAC)[3] is of the view that the strongest driver for compliance with competition law is the desire to conduct business ethically and to be recognised as doing so.

2. THE EUROPEAN COMMISSION'S EFFORTS TO PROMOTE COMPLIANCE

Before speaking in more detail about the factors determining compliance, I wish to highlight that the European Commission not only works on the putting an end to competition law infringements, but also seeks to *prevent* infringements of the law. It therefore engages actively in advocacy actions directed at companies. We want to help companies understand the rules, stay on the right side of the law, and take their own responsibilities seriously. The European Commission aims to promote a culture of compliance in the business community that minimises the need for sanctions.

Vice-President Almunia said earlier this year that the European Commission services will support in every possible way businesses that intend to comply and that he would consider additional forms of support – such as exchanges of guidance and best practices – especially for smaller businesses, which cannot afford large legal departments and

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2 For more background on these issues, see Roundtable on promoting compliance with Competition Law, http://www.oecd.org/dataoecd/12/17/48849015.pdf

3 BIAC is an independent international business association devoted to advising government policymakers at OECD and related fora on the many diversified issues of globalisation and the world economy. www.biac.org/

expensive competition lawyers.[4] The European Commission has made this support concrete by publishing a brochure this week "*Compliance matters*" and by creating a dedicated website on compliance.[5]

In order to ensure compliance with EU competition rules, companies must be aware of these rules and of potential conflicts with these rules. They should also know how to avoid conflicts at all levels of the company, from employees to top management. To help companies take that responsibility, the European Commission has developed different ways of clarifying the applicable EU competition rules.

2.1.1. Guidance on EU competition law

The European Commission has invested a lot in clarifying and explaining the scope of application and the substance of the EU competition rules.

First, the European Commission has exempted certain types of agreements from the general prohibition on anticompetitive agreements contained in Article 101(1) Treaty of the Functioning of the European Union (TFEU) if their restrictive nature can be justified by countervailing benefits/efficiencies. Guidance on whether an agreement is deemed exempted or not from this prohibition, is provided in particular by way of so-called Block Exemption Regulations. Such regulations exempt a number of restrictions in certain categories of agreements (*e.g.* R&D[6], or Distribution agreements[7]) up to a particular level of market power, defined in terms of market share, provided certain conditions are met. Additional guidance is provided in accompanying guidelines[8] published by the European Commission which set out its policy and decisional practice on a variety of contentious competition issues such as information exchange.

As regards abusive behaviour, the European Commission has published guidance on its enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings.[9]

The guidance on the substantive competition rules is regularly reviewed in close cooperation with different stakeholders, including representatives from the business and legal communities, through their involvement in public consultations on drafts.[10]

In addition to guidance on the applicable rules, the European Commission has set out its fining policy in a European Commission Notice.[11] These guidelines clarify the financial risk which companies run if they do not comply with EU competition rules.

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4 Joaquín Almunia Vice President of the European Commission responsible for Competition Policy Cartels: the priority in competition enforcement 15th International Conference on Competition: A Spotlight on Cartel Prosecution Berlin, 14 April 2011. SPEECH/11/268. http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/268&format=HTML&aged=0&language=EN&guiLanguage=en

5 http://ec.europa.eu/competition/antitrust/compliance/index_en.html

6 Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, Official Journal L 335, 18.12.2010, p. 36. http://ec.europa.eu/competition/antitrust/legislation/horizontal.html

7 Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. Official Journal L 102, 23.4.2010, p.1-7

8 For example: Commission notice - Guidelines on Vertical Restraints. Official Journal C 130, 19.05.2010, p. 1

9 Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings**.** http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224(01):EN:NOT

10 http://ec.europa.eu/competition/consultations/open.html

Moreover, the European Commission encourages firms which are involved in cartels to come forward and denounce cartels and to fully cooperate with it during the investigation. Under its Leniency Notice[12], the European Commission provides firms with incentives to unveil secret horizontal cartels or to hand over evidence which is decisive in proving that such a cartel exists. The conditions to be met by firms to qualify for immunity or for a reduction of the fine, which would otherwise be imposed on them, are explained in the Notice.

Clarity and predictability about the European Commission's policy and practice is further provided through constant dialogue with all stakeholders including business representatives. Officials of the European Commission regularly participate in conferences where they highlight the most important developments and priorities of the European Commission and provide further guidance for companies on its enforcement action and policy.[13]

The European Commission also publishes an annual report[14] on competition policy and informative brochures explaining EU competition policy.[15] The annual report gives a yearly overview of recent developments in competition rules and the enforcement action of the European Commission. This is complemented by a number of brochures which target different audiences and allow them to become familiar with EU competition policy from different angles.

2.1.2. Application of competition law to individual cases

The European Commission is conscious of the fact that it does not suffice for companies to consider the law in isolation but that their behaviour in the market should be considered against a specific factual background. To guide them in defining the appropriate actions in conformity with EU competition rules, the European Commission makes all its competition decisions publicly available on its website. These decisions are normally accompanied by a press release that helps to bring them to the attention of a much wider audience than the limited number of companies directly involved. Such guidance on the legal framework and its enforcement enables companies to better assess their actions in the market and helps prevent their involvement in any anti-competitive conduct.

3. THE RISK OF DETECTION AND SANCTIONS

After having spoken about prevention, let us now turn to how the European Commission investigates and puts an end to competition law infringements.

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11 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, p. 2-5. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT

12 Commission notice on immunity from fines and reduction of fines in cartel cases Official Journal C 298, 8.12.2006, p. 17. http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html

13 Joaquín Almunia Vice President of the European Commission responsible for Competition Policy Compliance and Competition policy Business Europe & US Chamber of Commerce. Competition conference Brussels, 25 October 2010. Speech 10/586. http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/586&format=HTML&aged=0&language=EN&guiLanguage=en

14 http://ec.europa.eu/competition/publications/annual_report/index.html

15 Brochure: The Competition rules for supply and distribution agreements. http://ec.europa.eu/competition/publications/brochures/rules_en.pdf

3.1. Introduction to risk of detection and sanctions

When I was a young apprentice lawyer in Copenhagen my principal reminded me about the oath to uphold the law I swore when I obtained my law degree and was admitted to the Bar. He went on to say that working in his law firm was about giving advice on the interpretation of the law and never about the risk of detection of illegal behaviour, regardless what I thought about any given law or its enforcement. I think that was sound advice and it has remained my guiding principle throughout my professional life.

I have always practised competition law and his approach was particularly useful in Denmark in the late 80's. I have a good part of my legal education from Brussels and I was duly impressed by EU Competition Law and its enforcement by the European Commission. However, when I worked in Copenhagen in the late 80's, the national competition law applicable in Denmark at the time was not very strong and the legal community did not consider the national competition enforcement authority to have strong teeth. Moreover, there were only very few EU competition cases involving Danish companies, as Denmark had recently joined the EU. Furthermore, Denmark is a small country and has many small companies which do not often come under scrutiny of the European Commission.

Colleagues in Denmark at the time therefore simply said – don't bother with competition law requirements – nothing happens. Danish companies who followed this approach did not act wisely, and I am sure a lot of them have regretted this lax attitude towards competition law compliance, as they later felt the negative consequences.

The honeymoon period with EU competition law was certainly over for Danish companies in the 1990s. I joined the European Commission in 1992 and I was regularly on inspections or so called 'dawn raids' in Danish companies who had forgotten to take the prohibition against cartels seriously.

One of the inspections I remember particularly well took place within the context of the pre-insulated pipe cartel case.[16] The cartel was established in 1990 in Denmark. It was extended to Italy and Germany during 1991 and after a re-organisation in 1994 it covered the entire European Union market. Cartel members engaged in market sharing, price setting, bid rigging, coordinated predation and delaying of innovation. The European Commission fined the cartel in 1998 and in 2005 four Danish municipalities successfully sued three cartel members and received large damage payments. These companies together paid €75 million in fines and the settlement that they reached in 2005 totalled €21 million.

The company which I inspected was a large 100% family owned business. When the case was over, the family owned only 10% of the company as it essentially had to sell the company to pay fines and damages. So the lack of compliance with the law did not pay off for that family. Moreover, I have heard that some of the senior persons of the companies in this cartel lost their jobs and had not been able to find any similar job later on. I suspect because they were tainted by the cartel case.

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[16] COMMISSION DECISION of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: - Pre-Insulated Pipe Cartel) OJ L OJ L 24, 30.1.1999, p. 1–70

In another cartel case[17] regarding one of the largest shipping lines in the world, where I was heading the inspection, the partner responsible for the cartel was demoted and ceased to be a partner of the firm and continued as an employee. This was a sound management decision, as the company's public image was, as a result, not too dented, compared to its cartel partner. The latter attracted much more negative publicity, due to what to the public eye looked like its failure to draw any consequences from the case.

I am sure that the companies and the managers in hindsight would have preferred not to have had these cases.

3.2. The situation in the European Union today

Where are we today in the EU?

In 1998 Denmark adopted a new Competition Act[18] and in 2004 the EU's competition law was 'modernised'.[19] This led to the creation of the European Competition Network[20] consisting of the European Commission and the national competition authorities. Modernisation essentially meant a certain harmonisation of the national competition legislation. National competition authorities were allowed to apply the EU competition provisions. The European notification system was abandoned and companies had to self-assess whether they would be compliant with the EU Competition rules.

What did all of this really mean?

This reform has led to a more intensified enforcement of competition law in the EU. It has meant that resources of the European Commission were freed up to intensify the hunt for cartels. National competition authorities got new instruments and were reorganised to intensify and undertake enforcement in a more efficient way. The establishment of the European Competition Network led to increased cooperation among the authorities and the proliferation of best practices among them. The new modernised approach has created a much more efficient enforcement of competition law in the EU.

3.2.1. Risk of detection

I have no statistics regarding the risk of detection. Such statistics would by their very nature be hard to establish given that we are not aware of the undetected cartels. However, the joining of forces of the European Commission and the National Competition Authorities in the European Competition Network, the presence of leniency programmes as well as the risk of complaints and law suits by unhappy customers has the consequence that there is a significant risk of detection. This is illustrated *inter alia* in the increase in number of cartel cases dealt with by the European Commission, which climbed from 11 in 1990-1994 to 33 in 2005-2009.[21]

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17 Commission Decision of 18 July 2001 relating to proceedings pursuant to Article 81 of the EC Treaty and Article 53 of the Agreement on the European Economic Area (Case COMP.D.2 37.444 — SAS Maersk Air and Case COMP.D.2 37.386 — Sun-Air versus SAS and Maersk Air) OJ L 265, 05.10.2001, p. 15 - 41

18 https://www.retsinformation.dk/forms/r0710.aspx?id=132775

19 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Official Journal L 1, 04.01.2003, p.1-25.
http://ec.europa.eu/competition/antitrust/legislation/regulations.html

20 http://ec.europa.eu/competition/ecn/index_en.html

21 European Commission Cartel Statistics (as of 13 April 2011), available at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf .

When considering the risk of detection a company should not only consider its national jurisdiction. The EU competition rules apply to all infringements that have an effect within the EU. In 2010 we adopted seven cartel decisions.[22] Four of them were purely European, while the remaining three involved companies from other world regions, including one – the cartel for LCD screens[23] – organised exclusively by Asian companies. At present the European Commission is investigating over 25 cartel cases, and only about half of them are limited to Europe in scope.

In this global age with economic interaction all over the world, it makes little sense to enforce our competition laws from behind national or regional fences. Moreover, in a situation where there is a proliferation of competition regimes throughout the world with currently over one hundred active competition law enforcement agencies around the world, international cooperation has become a keyword in competition enforcement.

In the EU, national authorities and the European Commission coordinate their actions within the European Competition Network on issues such as the allocation of cases and assistance in investigations.

Internationally, the International Competition Network is a very useful multilateral platform for convergence and policy developments. In addition, bilateral cooperation between major authorities covers several areas, from dawn raids to the timing of decisions. These more or less institutionalised forms of cooperation mean that there is quite some flow of non-confidential information between jurisdictions.

As a result of the mere fact that a jurisdiction launches an investigation of specific sectors or companies operating internationally, there is a significant chance that other jurisdictions might use this as a hunch for launching an investigation into the same sectors or companies in its own jurisdiction.

Therefore, what happens in other countries around the world and not only in Europe – in particular as regards leniency rules and fines – affects the decision of a company to report a cartel and cooperate in the different jurisdictions.

3.2.2. How does the European Commission detect infringements

Our own information gathering and complaints together with leniency applications are our upfront information sources.

3.2.2.1. Own initiative cases

Market and company information is of key importance if enforcement action is to be geared at the most damaging competition problems in the market. We keep up with market developments and make use of the focussed research tools available. We carefully read publicly available information, such as newspapers, the specialised business press, and the internet. We subscribe to commercial databases. We have regular contacts with market players, relevant national regulatory authorities, and through participation in seminars/workshops/conferences.

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22 http://ec.europa.eu/competition/cartels/cases/cases.html

23 Summary of Commission Decision of 8 December 2010 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area (Case COMP/39.309 — LCD) (notified under document C(2010) 8761 final).
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011XC1007(01):EN:NOT

We may carry out sector inquiries,[24] if we need a better understanding of a particular sector of the economy or a particular type of agreement with a view to ultimately identifying possible anti-competitive practices. Sector inquiries represent an enforcement tool and are carried out by making use of the European Commission's investigation powers, i.e. requests for information and inspections.

3.2.2.2. Complaints

Citizens and undertakings are encouraged to inform the European Commission about suspected infringements of competition rules.[25] When a formal complaint has been lodged, the European Commission has a duty to examine it and to inform the complainant of the action that it intends to take to follow up on the complaint. The European Commission therefore exercises a lot of care in the examination of complaints.

3.2.2.3. Leniency

Along with the other detection and investigation tools at the European Commission's disposal, its leniency policy has proven very successful in fighting cartels. I think two thirds of our cartel cases come from leniency applications.

Leniency also has a very deterrent effect on cartel formation by destabilizing their operation as it saws the seeds of distrust and suspicion among cartel members.

In order to obtain total immunity under the Leniency Notice, a company which participated in a cartel must be the first one to inform the European Commission of an undetected cartel by providing sufficient information to allow the European Commission to open an "on the spot" investigation or to enable it to find an infringement of the prohibition against cartels. If the Commission is already in possession of enough information to launch an inspection or has already undertaken one, the company must provide evidence that enables the European Commission to prove the cartel infringement. The company is moreover required to cooperate with the European Commission throughout the investigation and not divulge its cooperation to its cartel-partners.

3.2.3. Enforcement instruments available to the European Commission

Once an infringement of the competition prohibitions has been found, like most competition authorities over the world, the European Commission has essentially two strings of instruments which it can apply:

> (1) finding an infringement and punishing past behaviour (Article 7prohibition)[26],
>
> (2) obtaining a change in the future behaviour of a company (Article 7) decisions with a cease and desist order imposing structural or behavioural remedies, or Article 9 commitment decisions.

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[24] http://ec.europa.eu/competition/antitrust/sector_inquiries.html

[25] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty. Official Journal C 101, 27.04.2004, p. 65-77. http://ec.europa.eu/competition/antitrust/legislation/complaints.html

[26] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, and p.1-25.

The main difference between a prohibition decision pursuant to Article 7 and a commitment decision pursuant to Article 9 of Regulation 1/2003 is that the former contains a finding of an infringement while the latter makes the commitments offered by the company binding without concluding on whether there was or is still an infringement. A commitment decision concludes that there are no longer grounds for action by the European Commission. Moreover, commitments are offered by undertakings on a voluntary basis. By contrast, in prohibition proceedings, the European Commission imposes remedies and or fines on undertakings.

3.2.4. Fines

For the violation of EU competition rules, the European Commission can impose fines on undertakings of up to 10% of the company's turnover. Fines or periodic penalty payments can also be imposed on companies for their failure to comply with procedural obligations.

Fines represent the principal tool in the European Commission's enforcement of EU competition law. The European Court of Justice has indicated that the underlying rationale for the imposition of fines is to ensure the implementation of Community competition policy. Fines therefore serve two objectives (i) the suppression of illegal activity and (ii) the prevention of recidivism.

The European Commission has imposed considerable fines in recent years, particularly in cartel cases, both overall and on individual undertakings. It should be noted that high fines may be imposed even where the illegal purpose of an infringement was not actually achieved. Members of a cartel, for example, which are found to have fixed prices, will face high fines irrespective of whether or not the price levels did rise as intended. The risk of engaging into anti-competitive behaviour is thus considerable for companies.

The total fines imposed at the EU level for cartel violations, adjusted for Court judgments, rose from 344 million Euros in the 1990-1994 period to 9.6 billion Euros during 2005-2009, a total increase of roughly 2700 per cent.[27] The average corporate fine grew from less than two million Euros in 1990-1994 to 46 million Euros during 2005-2009, or approximately 2200 per cent.[28] Meanwhile, the number of cartel cases decided by the European Commission climbed from 11 in 1990-1994 to 33 in 2005-2009.[29]

In 2010 we adopted seven cartel decisions. The industries involved last year include air cargo, memory-chip manufacturers, the manufacturers of additives for animal feed, and the producers of the steel that is used in the building industry. In the seven cartel decisions we took last year, we imposed fines of close to €3 billion; ranging from the €175 million in the animal feed case[30] to almost €800 million for the airlines in the airfreight cartel.[31]

Some voices coming from the business community claim that our fines are too high, especially in these difficult times. I disagree. Our fines must remain high, because

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27 European Commission Cartel Statistics (as of 13 April 2011). http://ec.europa.eu/competition/cartels/statistics/statistics.pdf .

28 Douglas Ginsburg & Joshua Wright, "Antitrust Sanctions," 6 Competition Policy International 3, 4 (2010);

29 European Commission Cartel Statistics (as of 13 April 2011), available at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf .

30 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/985&format=HTML&aged=0&language=EN&guiLanguage=en

31 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1487&format=HTML&aged=0&language=EN&guiLanguage=en

companies need to understand that cartels do not pay. But at the same time our objective is not to put companies out of business.

In the last few years, we have been refining our fining guidelines[32] to achieve optimal deterrence – which is our ultimate goal – and we will continue do to so. Our fines are set at levels designed to punish in a proportionate way companies that have broken the law and to deter them or others from engaging in anti-competitive behaviour.

3.2.4.1. Recidivism

The European Commission considers recidivism as a very serious aggravating circumstance which may give rise to a significant increase of the amount of the fine imposed on an undertaking. The first time that the European Commission applied a 100% increase was in the calcium carbide case[33] where at the time of the infringement a company was found guilty of involvement in four previous cartels. It is irrelevant whether the new infringement is committed in a different business sector or in respect of a different product. It is sufficient that the same undertaking has already been found by the European Commission or by a competition authority of an EU Member State responsible for similar infringements. The European Commission considers this to be an important deterrence tool since such recidivist undertakings were not effectively discouraged from infringing competition law by the fines already imposed upon them, and they thereby show a propensity to infringe competition law.

4. OTHER COSTS AND CONSEQUENCES INCURRED BY INFRINGING COMPETITION LAW

Fines imposed by competition authorities are far from being the only consequence of infringements of the EU competition rules.

4.1. Cost of investigation and defence

If a company becomes subject of an investigation the burden caused by investigative measures by competition authorities may also turn out to be very time consuming and costly. Inspections on their premises - which firms are obliged to accept – is likely to disrupt totally day-to day work during the time which an inspection lasts – plus the time spent with lawyers and the press immediately after.

Preparation of a legal defence may occupy considerable human resources and cause high expenses for legal advice and representation.

During one of the inspections in which I headed the inspection team, the in-house counsel used a legal argument and gave this as a reason why I could not legally carry out the inspection. However, the Director to whom I was trying to serve the inspection decision, said to the in-house counsel: Stop that argument – it has already cost us lots of money in legal fees before the European Court and we lost. We do not want to repeat this argument and loose again!

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32 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, p. 2-5

33 Summary of Commission Decision of 22 July 2009 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/39.396 – Calcium Carbide and magnesium based reagents for the steel and gas industries) (notified under document C(2009) 5791) (Text with EEA relevance) OJ C 301, 11.12.2009, p. 18–20

4.2. Corporate governance

The spread of compliance requirements to reflect developing norms in a wide variety of areas – from bribery and corruption, through environmental law, health and safety, employment and human rights to data privacy - creates an environment in which businesses are developing increasingly sophisticated compliance procedures and are monitoring their performance with the help of external directors and audit committees in risk assessment exercises.

As an example I would like to refer to the UK Corporate Governance Code (2010)[34] aimed at companies listed on the London Stock Exchange which requires the board to conduct an annual review of the effectiveness of the company's risk management and internal control systems. Companies listed on the LSE are required to disclose how they have complied with the code, and explain where they have not applied the code - in what the code refers to as 'comply or explain'.

I was once investigating a producer of film projection equipment for the abuse of dominance.[35] The case lasted for a couple of years but eventually we came to the conclusion there was no infringement which we wanted to pursue. During the time of the investigation, I got a call every quarter from the lawyer asking me whether we would soon close the case, as the company was listed on the Stock Exchange and it had to make its quarterly reporting. A first I did not understand why the lawyer was calling as regularly as a clock and I asked why. He explained that the company was very concerned about the negative influence which the fact there was an investigation would have on the share value and generally for the reputation of the company. Moreover, they found it hard to quantity the level of the potential fine for which they were making a reserve in their balance sheets.

4.2.1.1. Compliance programme

Part of good corporate governance may be putting into place a compliance programme and the European Commission encourages the use of compliance programs. An active and supportive strategy of compliance with the law can certainly serve to distinguish a firm for promotional and recruitment purposes, very much like an explicit environmental or family-friendly agenda would do. It can help to raise job satisfaction of staff and contribute to a constructive sense of belonging, even pride, within a firm. Staff which is aware of what constitutes illegal behaviour will also be more alert to infringements which competitors or other commercial partners commit and can help more actively to bring such market failures to the attention of the competition authorities in order to re-establish the level playing field.

The international business community has actually over the past two years discussed Best Practices for Antitrust Compliance Programmes and they have been endorsed by the International Chamber of Commerce - not as binding rules, but as a document that it advocates among its members.

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34 http://www.frc.org.uk/documents/pagemanager/corporate_governance/uk%20corp%20gov%20code%20june%202010.pdf

35 http://ec.europa.eu/competition/antitrust/cases/dec_docs/37761/37761_12_3.pdf

4.3. Reputational damage – loss of shareholder value

Can you keep the fact that your company is being investigated by the authorities for a competition infringement quiet?

No, is the simple answer. It always comes out. People talk and the press snaps up the information, and asks the European Commission, which confirms when investigations take place. France's Conseil de la Concurrence goes even further. It can order violators to pay for the publication of an infringement announcement in newspapers, or to put an announcement about the infringement in a company's own annual report.[36]

The risk for reputational damage should therefore not be neglected. Both corporations and individuals may suffer reputational damage if they are prosecuted for competition law violations. According to the BIAC contribution to the OECD Roundtable on promoting compliance with competition law at the June 2011 Roundtable Promoting Compliance with Competition Law: *"A company's reputation is seriously damaged by the adverse publicity attracted by a decision that it has violated the law and this damage can extend across the group, impacting business divisions not directly involved in the infringement and even hitting the company's share price."*

Companies subject to investigations or a negative decision for infringing competition rules may suffer from a general loss of reputation and face hostile reaction of clients and consumers or their own shareholders who feel cheated. I remember a case where an airline was involved in a cartel and many corporate customers went to the competition to buy transport as the airline had in particular surcharged on business tickets.

Involvement in cartels may lead to the destruction of shareholder value. In case of due diligence connected with mergers or takeovers the liability due to competition law infringements will be quantified and have a very negative impact on the assessment of a company and its value. Involvement in antitrust infringements decreases the value of the business sold and may even result in the abandoning of deal.

The Swiss giant chemical and pharmaceutical maker Roche Holding is reported to have stated publicly that the image-bruising vitamin price-fixing case from the 1990's was taking a growing toll on its finances.[37] Moreover, when Roche sold its vitamin and fine chemicals division to DSM, the DSM webpage stated:

> *"The total consideration of the transaction is EUR 2.25 billion. The present and future liabilities from the vitamin price fixing case will remain with Roche."*[38]

In the press it was said that Roche had dropped the price by €200m because of the legal issues due to its involvement in the Vitamins cartel and also retained liability for court costs and compensation arising from these legal issues.[39] Roche had allegedly set aside more than $ 4 bn. to cover the costs of lawsuits in the matter.

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36 Article L464-2 I, para. 5 of the Commercial Code (cited in Lusty, supra n.67 at 346).

37 http://www.nytimes.com/2002/10/11/business/roche-increases-reserves-for-price-fixing-lawsuits.html

38 http://www.dsm.com/en_US/cworld/public/media/pages/press-releases/26_02_Roche_vitamins.jsp

39 http://www.pharmaceutical-technology.com/projects/isando/

4.4. Civil liability - risk for law suits

Private actions for damages arising from competition law violations increase the deterrent effect of fines imposed by enforcement agencies. They also put money back in the pockets of the cartel victims rather than in the public treasury. In addition, private actions may raise the probability of detection.

In Europe competition damages actions are becoming more and more important: ten, fifteen years ago, there were hardly any damages claims against infringing undertakings. Nowadays, damages actions are routinely brought after competition authorities have found an infringement.

Fines and payment of compensation to customers for damages suffered are added: paying the fine does not mean that an infringing undertaking will not have to pay compensation - and vice versa. It is as if you go through a red traffic light and you crash into another car; you are liable to pay both a fine and damages to the hurt party. In many instances, the payment of compensation will end up being higher than the fine - although fines are themselves pretty substantial.

5. CONCLUSION

Competition law in China is very recent and it is yet to be understood fully how the law will be enforced as the Anti Monopoly Enforcement Authorities still have to refine the application of the Anti Monopoly Law.

Rather than seeing the Anti Monopoly Law as another burden, it should rather be seen as an opportunity to maintain a level playing field where companies can compete on their merits.

It is for businesses to comply with the law. They are ultimately responsible. I recommend companies to engage in serious efforts to ensure compliance with competition rules that minimises the need for repression by the authorities, as the resources committed to prosecution and defence does not create value for society or for business.

However, government also has a responsibility. Rules have to be clear and they have to be applied in a transparent and non-discriminatory manner. This means that you should avoid rules that are ambiguous (e.g. market share as a criterion for merger notification) and they should be published. Transparent application means publication of fully argued enforcement decisions. Well-publicised sanctions can be particularly important when competition laws are first introduced, to draw attention to the seriousness with which the new laws are to be taken.

In an ideal world, business people would not operate a cartel because they would understand their responsibility towards their customers and society at large. As we do not live in an ideal world, we have no choice but to repress cartels through effective investigation and the imposition of fines that need to be deterrent. The European Commission has a well-established cooperation with the Chinese competition authorities and it would be happy to develop this relationship even further to include concrete cooperation in competition law enforcement where relevant.