



ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2013

6th Edition

A practical cross-border insight into cartels and leniency

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Allen & Overy Luxembourg

Allende & Brea

Ashurst Australia

Attorneys at law Borenus Ltd

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Odvetniki Šelih & partnerji, o.p., d.o.o.

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Skadden, Arps, Slate, Meagher & Flom LLP

Szecskay Attorneys at Law

Webber Wentzel

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Sub Editors

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Suzie Kidd

Senior Editor

Penny Smale

Group Consulting Editor

Alan Falach

Group Publisher

Richard Firth

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
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Canada

Fraser Milner Casgrain LLP



Susan Paul

1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis of cartel prohibition in Canada is the Competition Act, which contains both civil and criminal prohibitions against cartel activity.

1.2 What are the specific substantive provisions for the cartel prohibition?

Criminal cartel provisions came into effect in March 2010 which created a dual-track approach to cartel prohibition.

The criminal track is intended for prosecution of “hard-core” cartels. Amendments to section 45 of the Competition Act provide that any person who conspires, agrees or arranges with a competitor:

- (a) to fix, maintain, increase or control the price for the supply of a product;
- (b) to allocate sales, territories, customers or markets for the production or supply of a product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of a product,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years or to a fine not exceeding \$25 million, or to both. Proof of impact on competition is not a requisite element of the offence. Conviction requires proof of the offence beyond a reasonable doubt.

A new civil track also came into effect which governs agreements or arrangements between competitors, which substantially prevent or lessen competition, or are likely to do so. Under this provision, the Commissioner of Competition may apply to the Competition Tribunal for an order prohibiting any person from acting pursuant to such an agreement. However, the civil track does not include monetary penalties or criminal sanction.

Other criminal offences under the Competition Act include implementation of foreign directives for the purpose of giving effect to a conspiracy entered into outside of Canada (section 46) and bid-rigging (section 47).

1.3 Who enforces the cartel prohibition?

Jurisdiction for enforcement of the Competition Act rests with the

Commissioner of Competition, the head of the Competition Bureau of Canada. The Commissioner conducts investigations and recommends criminal prosecutions to the Director of Public Prosecutions and trials are conducted by prosecutors before any court of criminal jurisdiction in Canada. The non-criminal provisions are enforced directly by the Commissioner.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Jurisdiction for enforcement of the Competition Act rests with the Commissioner of Competition, the head of the Competition Bureau of Canada. The Commissioner conducts investigations and recommends criminal prosecutions to the Director of Public Prosecutions and trials are conducted by prosecutors before any court of criminal jurisdiction in Canada. The non-criminal provisions are enforced directly by the Commissioner.

1.5 Are there any sector-specific offences or exemptions?

Collective bargaining activities are generally exempt from the provisions of the Competition Act.

Criminal cartel provisions do not apply to underwriting agreements, and agreements or arrangements between teams, clubs and leagues pertaining to participation in amateur sport are also not subject to the provisions of the Act.

The Act includes industry-specific criminal offences for professional sports and federal financial institutions. Section 48 prohibits any agreements to unreasonably limit the opportunities for any person to participate in a professional sport or to negotiate with the team or club of his choice in a professional league. Section 49 prohibits agreements between federal financial institutions relating to interest rates, service charges and types of services to be provided to a customer and loan amounts and conditions.

1.6 Is cartel conduct outside Canada covered by the prohibition?

It is a criminal offence for corporations that carry on business in Canada to implement a directive or instruction from a foreign corporation or person which would, if entered into within Canada, amount to a breach of the section 45 conspiracy provisions of the Act.

Where foreign conspiracies have an impact in Canada or are directed at Canada, they will be investigated by the Commissioner. Over the past several years, many foreign corporations have

negotiated guilty pleas in such circumstances, although the extent of the Canadian courts' jurisdiction over extra-territorial cartels has not yet been established.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes*	Yes*
Carry out compulsory interviews with individuals	Yes*	Yes*
Carry out an unannounced search of business premises	Yes*	Yes*
Carry out an unannounced search of residential premises	Yes*	Yes*
■ Right to 'image' computer hard drives using forensic IT tools	Yes*	Yes*
■ Right to retain original documents	Yes*	Yes*
■ Right to require an explanation of documents or information supplied	Yes*	Yes*
■ Right to secure premises overnight (e.g. by seal)	Yes*	Yes*

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

The Canadian Charter of Rights and Freedoms (the "Charter") extends constitutional protections to parties who are the subject of an investigation.

The jurisdiction of the Competition Bureau to "image" computer hard drives located outside of Canada, but accessible from within Canada, is not clear and has not been subject to judicial interpretation. In several cases, however, the Bureau has undertaken such imaging.

2.3 Are there general surveillance powers (e.g. bugging)?

Pursuant to sections 183 and 184.2 of the Criminal Code of Canada, the Competition Bureau may intercept private communications through electronic means, with prior judicial authorisation, when investigating criminal cartel activities, bid-rigging or criminal deceptive telemarketing.

2.4 Are there any other significant powers of investigation?

The Commissioner can seek court orders to require the production of documents and other records, to require the delivery of a written return of information under oath or to require individuals to attend

for examinations under oath on matters relevant to an inquiry by the Commissioner. These orders are not limited to targets of an investigation, but can also be directed to third parties not under investigation who the Commissioner believes are in possession of information relevant to the inquiry. In the case of individuals subject to such investigative orders, the Competition Act prevents the use of the evidence obtained in subsequent criminal proceedings against that individual. No such limitation exists in the case of corporations subject to such orders.

The Mutual Legal Assistance Treaty (MLAT) between Canada and the United States provides a framework for each country to invoke compulsory legal processes in the other country, including search warrants, to respond to formal requests for information.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches of business or residential premises are carried out by Competition Bureau officers, sometimes accompanied by police officers, who are named in the warrant. While the Competition Bureau is not required to wait for legal advisors to arrive before commencing the search, they will typically wait a reasonable period of time for their arrival before the execution of the warrant, if requested to do so.

2.6 Is in-house legal advice protected by the rules of privilege?

Yes, provided that it is purely legal advice.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Claims of solicitor and client privilege asserted during a seizure or in response to a court order to produce documents are protected by a procedure governing resolution of the claim of privilege. The documents seized are sealed and placed in the custody of a defined public official or party agreed on by the Commissioner and the party asserting the privilege, until resolved by a judge of the Federal Court or a provincial superior or county court. It is also possible for the Commissioner and the party to agree that privilege issues be resolved by a mutually acceptable third party.

Seizures conducted under the Competition Act are also subject to the overriding provisions of the Canadian Charter of Rights and Freedoms which protect against unreasonable search and seizure.

The Competition Act provides that, with limited exceptions, confidential information obtained by the Competition Bureau through its investigatory powers under the Act, and information voluntarily provided to the Competition Bureau under the Act, may not be communicated to third parties except law enforcement agencies. The Bureau's Bulletin on Communication of Confidential Information under the Competition Act outlines the Bureau's approach to the management of such information.

Individuals who are subject to court orders compelling attendances to answer questions under oath, as described in question 2.4, are protected by a provision of the Competition Act which prevents the use of that testimony against the individual in subsequent criminal proceedings. However, information obtained from individuals can be used against a corporation.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

There are sanctions for the obstruction of investigations under the Competition Act. Section 64 of the Act provides that any person who impedes or prevents any investigation, or attempts to do so, is guilty of a criminal offence. The maximum penalty is a fine in the discretion of the Court or imprisonment for up to ten years, or both. Destruction or alteration of documents or records, which are required by court order or warrant to be produced, is also an offence and subject to the same penalties. Parties who engage in obstruction after applying for immunity of leniency risk exclusion from these Programmes.

The only obstruction conviction in the context of a cartel investigation was a fine of C\$550,000 levied in 2004 against a corporation under the obstruction of justice provisions of the Criminal Code of Canada.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The maximum sanction for companies under the criminal cartel provisions of section 45 of the Competition Act is a fine not exceeding C\$25 million for each charge laid, and involvement in cartel conduct may result in multiple charges. There are no maximum penalties for companies for the offences of bid-rigging or implementing a foreign-directed conspiracy.

In addition to the Commissioner's powers to investigate alleged cartels, individuals or corporations may bring private actions to recover losses or damages arising from cartel conduct, under section 36 of the Competition Act. Such actions are commenced in the superior courts of the provinces and are governed by provincial rules of civil procedure. Generally, those rules provide for extensive documentary and oral discovery. If found liable, a defendant may be ordered to pay damages in the amount of the loss proven along with an additional amount to cover the cost of the investigation of the cartel activity.

In the case of civil conspiracies, persons (including corporations) found liable may be subject to prohibition orders issued by the Competition Tribunal.

3.2 What are the sanctions for individuals?

Effective March 2010, the maximum sanction for an individual under section 45 is a fine not exceeding C\$25 million and a term of imprisonment not exceeding 14 years, or both. There is no maximum fine for individuals for the offence of bid-rigging although the maximum term of imprisonment is 14 years.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

There are no provisions in the Act requiring that financial hardship be taken into account in sentencing. However, such hardship may be taken into account in plea negotiations and settlement discussions with the Competition Bureau. The Leniency Programme FAQs issued by the Competition Bureau provide that where the Director of Public Prosecutions determines that the leniency applicant's ability to pay should be considered, it may ask the Competition Bureau to verify the claim of financial hardship by

a business or an individual. The Competition Bureau may have a third party expert assess the financial records of a business. Individuals may be required to provide information about their financial situation, including information on sources of income, property owned, bank and investment records and tax returns. Assessments concerning reductions in fines are made on a case-by-case basis.

3.4 What are the applicable limitation periods?

There are no limitation periods for laying criminal charges for cartel conduct and no limitation period for the imposition of sanctions. There is a limitation period for private causes of action based on the Competition Act, which is two years from the day on which the conduct was engaged in, or the day on which any criminal proceedings relating to the conduct are finally disposed of. There is no limitation period for bringing proceedings under the civil provisions that provide for review of anticompetitive agreements among competitors. Limitation periods do apply in the case of private civil proceedings (see question 8.3, below).

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Yes, unless the court expressly prohibits it, which is possible but has rarely occurred.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

An employer can launch a claim against an implicated employee for damages (including financial penalties imposed on the employer and legal costs incurred by the employer). The claim would be asserted by way of private action.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The Competition Bureau has an established immunity programme, as well as a leniency programme for cooperating parties who do not qualify for full immunity.

The Bureau's published Immunity Programme provides that individuals or companies may admit involvement in criminal activity and offer to co-operate with the Bureau's investigation and subsequent prosecutions, in exchange for full immunity.

In order to qualify for immunity, the party must terminate or have terminated its participation in the criminal activity and must not have coerced the participation of other parties. Immunity is not available when the party seeking immunity is the only participant in the criminal activity.

The marker holder must provide a detailed description of the criminal activity, or proffer, and must disclose sufficient information to allow the Bureau to conclude that the applicant qualifies for immunity. The proffer is usually made on a hypothetical basis by the applicant's legal representatives and includes information on documents and records available to support the allegations made and evidence or testimony that potential witnesses can give. In some instances, the Bureau may request an interview with individuals, or production of some documentary

evidence, before recommending to the Director of Public Prosecutions that immunity be granted. A recommendation for immunity from the Bureau to the DPP includes all relevant information provided during the proffer process and the Bureau's recommendation as to whether the party is eligible for immunity. The DPP, and not the Bureau, determines whether or not a grant of immunity will be provided.

A party granted immunity must also disclose any additional criminal activities under the Competition Act known to it or in which it has participated. Full and ongoing co-operation is required, in the form of production of documentary evidence, securing the cooperation of current and former officers, directors, employees and agents and facilitating their attendance at interviews with the investigations Bureau officer and the provision of testimony in any subsequent judicial proceedings.

The Bureau may also recommend some form of leniency to the DPP when a party does not qualify for immunity but nonetheless cooperates with the investigation. The Bureau's Leniency Bulletin clarifies the considerations relevant to a recommendation for leniency and the leniency discounts that will be recommended. Leniency recommendations are not binding on the DPP or on the court. Successful leniency applicants will receive reductions in fines and sentences of up to 50%. Immunity may also be offered to the current directors, officers and employees of "second in" leniency applicants.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

There is a marker system which allows an applicant to communicate with the Senior Deputy Commissioner of Competition, Criminal Matters or the Deputy Commissioner of Competition, Fair Business Practices to seek a marker. The initial contact may be on the basis of limited hypothetical disclosure which identifies the criminal offence and the specific product involved. Typically, the marker is sought by legal representatives for the party and by telephone, since time may be of the essence. The Bureau will determine whether the party seeking immunity is "first in" and subsequently advise whether a market is available.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Applications can be made orally to minimise subsequent disclosure risks, although immunity co-operation does require that the immunity applicant provide all relevant documentary evidence to the Competition Bureau.

4.4 To what extent will a leniency application be treated confidentially and for how long?

Applications for immunity and leniency will be treated confidentially until criminal charges are laid against other cartel participants and disclosure of the prosecution's case against those cartel participants is required except where disclosure is required by law or disclosure is necessary to prevent the commission of a serious criminal offence. Disclosure of an applicant's identity and information to a court may occur where the Competition Bureau seeks a search warrant or an order compelling information or documents from other parties, but in those circumstances the Bureau will take all reasonable steps to prevent public disclosure of the information, including seeking court orders sealing files.

Disclosure may also occur where required by law when the immunity or leniency applicant consents or where disclosure is required to prevent the commission of a serious criminal offence.

The Competition Bureau will expect a leniency applicant to agree to a waiver entitling the Competition Bureau to communicate information provided by the leniency applicant to competition enforcement agencies in countries where the leniency applicant has made a similar application.

The Bureau's Immunity and Leniency Programmes both prohibit immunity or leniency applicants from disclosing the facts of their application for immunity or leniency without the consent of the Competition Bureau.

If a private party launches a civil conspiracy proceeding, the Competition Bureau will only disclose evidence in response to a court order. In such situations, the Competition Bureau will take all reasonable steps to protect the confidentiality of the information, including seeking protective orders from the court.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The continuous cooperation requirement ceases to apply at the conclusion of the Competition Bureau's investigation and the conclusion (including all appeals) of any prosecutions launched as a result of the investigation.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

The Competition Bureau's Leniency Programme includes provisions by which leniency applicants may, after disclosing details of additional criminal conduct, be granted immunity with respect to the disclosed conduct. If the applicant's disclosure of additional criminal conduct indicates that their involvement in the prior conduct (to which the leniency application applies) was broader or more significant than the applicant had originally admitted to, the subsequently acquired information will not be used in the consideration of the applicant's leniency application.

"Second-in" and subsequent immunity applicants may be granted additional leniency under this policy if they qualify and disclose information about further criminal conduct.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Section 66.1 of the Competition Act allows individuals to report cartel conduct independently of their employer and to request that their identity be kept confidential. The Competition Act contains whistle-blowing protections for such employees, including protection from discipline or dismissal by their employer.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Negotiations of plea agreements with the Competition Bureau and

the Director of Public Prosecutions are common and may occur before or after the laying of criminal charges. The plea agreement will include an agreed statement of facts outlining the admitted elements of the offence and a recommendation on sentencing on a guilty plea, which although not binding on the court, is usually followed.

7 Appeal Process

7.1 What is the appeal process?

Prosecutions may take place in the superior courts of the provinces or in the Federal Court of Canada. Appeals in the former are to the Court of Appeal of the province and then to the Supreme Court of Canada. Appeals from the Federal Court are to the Federal Court of Appeal and then to the Supreme Court of Canada. Appeals to the Supreme Court of Canada require leave of that court which considers whether an appeal raises issues of national importance.

7.2 Does an appeal suspend a company's requirement to pay the fine?

The appellate court, or a judge of the appellate court, may suspend payment of the fine pending hearing of the appeal where it is considered to be in the interests of justice.

7.3 Does the appeal process allow for the cross-examination of witnesses?

With rare exceptions, new evidence is not admissible on appeals and cross-examination of witnesses takes place at trial and not on an appeal.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Actions are commonly commenced in respect of cartel activity and may be commenced before or after a criminal conviction. Claims for civil damages arising from loss suffered as a result of cartel conduct can be brought in the Federal Court of Canada or in the superior court of any province. Claims can be commenced as individual actions or as class proceedings. Permission of the court is required to prosecute an action as a class proceeding.

8.2 Do your procedural rules allow for class-action or representative claims?

Provincial procedural rules allow for class actions or representative claims arising from cartel conduct.

8.3 What are the applicable limitation periods?

Civil claims for recovery of damages arising from cartel activity are subject to a statutory limitation period which expires on the later of two years from the day on which the conduct was engaged in or two years from the day on which any criminal proceedings relating to the conduct were finally disposed of. Claims can also be asserted

in tort against conspirators and are subject to the limitation periods defined in each province's limitations legislation, which can be complex but which are typically between two and ten years.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

A "passing on" defence is recognised in civil damages claims. The defence generally arises in the context of class actions, with plaintiffs seeking certification of direct and indirect purchaser classes. Passing on defences are raised by defendants both in opposition to class certification proceedings and as a defence to the claims asserted. Jurisprudence on certification of indirect classes is currently somewhat unsettled in Canada with some courts certifying such classes and others refusing to do so. The issue is currently before the Supreme Court of Canada.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

As a general rule, the successful party in any case, including a follow-on claim in a cartel case, is entitled to recover at least a portion of its legal costs from the unsuccessful party.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

Civil damage claims against cartel participants are now common and have been successful. Generally speaking, these take the form of class action proceedings, many of which are settled following resolution of criminal cartel proceedings. Stand alone claims are less common.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

By statutory amendment in March 2009 (and effective in March 12, 2010), the criminal cartel provisions of the Competition Act were amended as described in question 1.2, above, removing the requirement that an undue lessening of competition be proven. At the same time, a civil cartel track was established.

The Competition Bureau released its Leniency Programme Information Bulletin on September 29, 2010. This programme allows persons who qualify for the programme, and who provide information regarding the illegal acts in which they engaged to the Bureau, to apply for leniency in sentencing. Additionally, this programme allows leniency applicants to apply for immunity to prosecution for additional criminal acts in which they engaged if they qualify, and if they comply with voluntary disclosure obligations. On June 7, 2010, the Bureau released the Immunity Programme Information Bulletin. This programme allows applicants who qualify, and who are the "markers" immunity from prosecution for the criminal acts in which they were involved.

Several recent class-action cases relating to cartel damage claims have lessened the evidentiary burden required of plaintiffs, resulting in a more "plaintiff-friendly" environment for the certification of class-actions.

On December 23, 2009, the Competition Bureau released the Competitor Collaboration Enforcement Guidelines. The Guidelines outline the Bureau's approach to the examination of agreements between competitors and detail the respective circumstances under which such agreements will be reviewed under the criminal or civil tracks described above.

9.2 Please mention any other issues of particular interest in Canada not covered by the above.

The amendments to the criminal cartel provisions, which came into force on March 12, 2010, establish a defence where a party to an agreement or arrangement can prove, on a balance of probabilities, that the agreement or arrangement is (a) ancillary to a broader, separate agreement or arrangement between the same parties, and (b) that it is "directly related to, and reasonable necessary for giving effect to" the broader agreement or arrangement. In Canada this ancillary restraints defence is new and has not been subject to judicial interpretation. The Competition Bureau's Competitor Collaboration Guidelines state that the criminal prohibition "is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked restraints" on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture)". If this is so, in the context of criminal enforcement, the ancillary restraints defence will rarely, if ever, arise as it will be confined to cases where the Bureau alleges that a joint venture, strategic alliance or collaboration is a sham. If the ancillary restraints defence does

apply, the Bureau will not refer the matter to the DPP with a recommendation to commence prosecution, but may pursue the matter under the civil provisions instead. Private litigants and courts are not bound by the guidelines so it is possible that this defence is more likely to be an issue in private damage claims.



Susan Paul

Fraser Milner Casgrain LLP
77 King Street West, Suite 400
Toronto, Ontario
Canada M5K 0A1

Tel: +1 416 863 4461
Fax: +1 416 863 4592
Email: susan.paul@fmc-law.com
URL: www.fmc-law.com

Susan Paul is a member of the Competition Law Practice Group of Fraser Milner Casgrain LLP (FMC) in Toronto and co-chair of the Firm's National Competition Law Group. She has successfully handled the competition law and Investment Canada aspects of numerous domestic and global mergers and acquisitions. She regularly advises clients on other aspects of competition law, including reviewable practices and marketing practices. Susan is experienced representing clients in international criminal investigations and prosecutions involving the Competition Bureau in Canada and competition authorities in the United States and Europe. She also has extensive experience in class actions litigation, including product liability proceedings and class proceedings relating to criminal investigations under the *Competition Act*.



With one of Canada's leading competition/anti-trust practices, FMC lawyers have been involved in precedent-setting decisions in Canadian competition law. In an increasingly global environment of merger regulation and competition enforcement, FMC lawyers work closely with competition lawyers in the United States, Europe and other countries to coordinate effective responses for our clients.

Our lawyers have extensive experience in international cartel matters and all types of corporate and business transactions. We have developed comprehensive competition law compliance programmes for Canadian and international businesses and advised on advertising, marketing and distribution strategies and other compliance issues.

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