

Cartel Regulation


In association with:

Dechert
LLP



2019

GETTING THE
DEAL THROUGH



Keep moving forward

When the stakes are high and you're facing extreme risk, you need sophisticated strategies and field-tested expertise to help you go the distance.

At Dechert, you'll work with lawyers who are courtroom ready and battle honed. With experience as United States Attorneys, Assistant Attorneys General and senior lawyers at government agencies, we are leaders in navigating complex and parallel multi-agency cartel investigations.

We have frequently secured the termination of grand jury investigations and aggressively lowered fines for clients in a range of positions and industries.

You can count on our team to take the lead, push boundaries and achieve results that keep you moving forward.

dechert.com/antitrust

Dechert
LLP

GETTING THE
DEAL THROUGH 

Cartel Regulation 2019

Contributing editor
A Neil Campbell
McMillan LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in January 2019
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law
Business
Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2001
Nineteenth edition
ISBN 978-1-912377-20-6

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between October and November 2018. Be advised that this is a developing area.

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



CONTENTS

Editor's foreword	7	France	99
A Neil Campbell McMillan LLP		Faustine Viala and David Kupka Willkie Farr & Gallagher LLP	
Global overview	8	Germany	107
Roxann E Henry and Lisa M Phelan Morrison & Foerster LLP		Thorsten Mäger and Florian von Schreitter Hengeler Mueller	
ICN	11	Greece	116
John Terzaken Simpson Thacher & Bartlett LLP		Marina Stavropoulou DRAS-IS	
Australia	14	Hong Kong	122
Jacqueline Downes and Robert Walker Allens		Natalie Yeung Slaughter and May	
Austria	21	India	130
Astrid Ablasser-Neuhuber and Florian Neumayr bvp Hügel Rechtsanwälte		Suchitra Chitale Chitale & Chitale Partners	
Belgium	29	Indonesia	136
Pierre Goffinet and Laure Bersou DALDEWOLF		Asep Ridwan, Farid Fauzi Nasution, Albert Boy Situmorang and Anastasia PR Daniyati Assegaf Hamzah & Partners	
Brazil	36	Italy	143
Onofre Carlos de Arruda Sampaio and André Cutait de Arruda Sampaio O. C. Arruda Sampaio – Sociedade de Advogados		Rino Caiazza and Francesca Costantini Caiazza Donnini Pappalardo & Associati	
Bulgaria	43	Japan	153
Anna Rizova and Hristina Dzhevlekova Wolf Theiss		Eriko Watanabe and Koki Yanagisawa Nagashima Ohno & Tsunematsu	
Canada	51	Kenya	160
A Neil Campbell, Casey W Halladay and Guy Pinsonnault McMillan LLP		Anne Kiunuhe and Njeri Wagacha Anjarwalla & Khanna	
China	61	Korea	168
Peter J Wang, Yizhe Zhang, Qiang Xue, Lawrence Wang and Yichen Wu Jones Day		Hoil Yoon, Sinsung (Sean) Yun and Kenneth T Kim Yoon & Yang LLC	
Colombia	68	Malaysia	177
Danilo Romero Raad and Bettina Sojo Holland & Knight		Sharon Tan and Nadarashnaraj Sargunaraj Zaid Ibrahim & Co	
Denmark	73	Mexico	185
Frederik André Bork, Olaf Koktvedgaard and Søren Zinck Bruun & Hjejle		Rafael Valdés Abascal and Agustín Aguilar López Valdés Abascal Abogados SC	
European Union	80	Netherlands	192
Anna Lyle-Smythe and Murray Reeve Slaughter and May Hans-Jörg Niemeyer and Laura Stoicescu Hengeler Mueller Jolling de Pree and Helen Gornall De Brauw Blackstone Westbroek		Jolling de Pree and Bart de Rijke De Brauw Blackstone Westbroek NV	
Finland	92	Portugal	202
Mikael Wahlbeck and Antti Järvinen Hannes Snellman Attorneys Ltd		Mário Marques Mendes and Alexandra Dias Henriques Gómez-Acebo & Pombo	
		Russia	212
		Evgeniya Rakhmanina Linklaters CIS	

Singapore	219	Turkey	268
Lim Chong Kin and Corinne Chew Drew & Napier LLC		Gönenç Gürkaynak and K Korhan Yıldırım ELIG Gürkaynak Attorneys-at-Law	
Slovenia	228	Ukraine	277
Stojan Zdolšek, Irena Jurca and Katja Zdolšek Zdolšek Attorneys at Law		Nataliia Isakhanova, Igor Kabanov and Andrii Pylypenko Sergii Koziakov & Partners	
Spain	234	United Kingdom	285
Alfonso Ois, Jorge de Sicart and Gonzalo Gómez EY Abogados, S.L.P.		Lisa Wright and Sophia Haq Slaughter and May	
Sweden	242	United States	299
Johan Carle and Stefan Perván Lindeborg Mannheimer Swartling		Steven E Bizar, Ethan E Litwin and Benjamin McAnaney Dechert LLP	
Switzerland	251	Quick reference tables	307
Mario Strebel, Christophe Rapin and Fabian Koch Meyeralustenberger Lachenal Ltd			
Taiwan	260		
Mark Ohlson, Charles Hwang and Fran Wang Yangming Partners			

Preface

Cartel Regulation 2019

Nineteenth edition

Getting the Deal Through is delighted to publish the nineteenth edition of *Cartel Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Belgium.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, A Neil Campbell of McMillan LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
November 2018

Editor's foreword

A Neil Campbell

McMillan LLP

This 19th edition of *Cartel Regulation* provides the most current and comprehensive information available about anti-cartel laws and enforcement around the world.

Cartel regulation has globalised over the past two decades. The proliferation and modernisation of competition laws and institutions in both developing and developed countries has been a major contributor to this phenomenon. The International Competition Network (ICN) has also helped to invigorate global competition law enforcement since it was established in 2001, as outlined in the ICN chapter contributed by Simpson Thacher & Bartlett LLP.

Anti-cartel laws are one of the three core pillars of any competition regime, along with unilateral conduct provisions and merger control. Two key areas of consensus have fuelled the international expansion of cartel regulation:

- 'Cartels are bad' – there is now near universal acceptance that certain types of competitor coordination are so unlikely to have pro-competitive or efficiency-enhancing benefits that they can safely be prohibited – and penalised severely – without the need for a case-specific assessment of anticompetitive effects.
- 'Leniency programmes work' – the US Department of Justice has been a leader in developing highly effective amnesty and leniency programmes by employing substantial 'carrot and stick' for cooperating parties. This approach continues to be embraced and refined by other jurisdictions around the world.

These two principles have effectively induced a degree of 'soft convergence' in international cartel enforcement. Nevertheless, there are enormous differences between specific regimes, many of which have significant implications in cross-border cases. The presence of criminal liability for corporations and individuals in some but not all jurisdictions adds further layers of complexity for cross-border cartel investigations and proceedings.

Cartel Regulation 2019 provides a detailed account of the state of play in this high-stakes field, including recent developments over the past year and an overview of future changes that may be expected in each jurisdiction. In addition to the in-depth coverage provided for 36 of the most active jurisdictions, this essential reference includes a global overview prepared by Morrison & Foerster. *Cartel Regulation 2019* includes a new country chapter on Belgium.

The structure of the deskbook continues to be based on a template that ensures consistent presentation and ready access to the relevant information about each subject from each individual jurisdiction. The country profiles include overview material on the legislation and enforcement institutions, information about the jurisdictional and substantive coverage of the regime and detailed discussions regarding the design and operation of immunity and leniency programmes as well as contested proceedings and penalties. In addition, private actions by affected customers and collective or class actions are now a prominent part of the landscape in many jurisdictions, and interfaces with agency proceedings are addressed as well.

The country chapters in *Cartel Regulation* are prepared by top experts in each jurisdiction. We are grateful for their efforts to provide thorough reports on their regimes, which include practical advice on how enforcement really works in practice and tips for 'getting the fine down'. I would also like to thank Dan White and his terrific *Getting the Deal Through* team at Law Business Research for all the work they do to produce this excellent annual volume.

If you have comments or suggestions that you would like us to consider for future volumes, I would be delighted to hear from you at +1 416 865 7025 or neil.campbell@mcmillan.ca.

A Neil Campbell
Co-chair, Competition and International Trade
McMillan LLP
Toronto, Canada

Global overview

Roxann E Henry and Lisa M Phelan

Morrison & Foerster LLP

The need for rules to define appropriate play on the economic battlefield has received global acceptance. The most entrenched and widely accepted of these rules is that forbidding cartels. Compliance requires teaching the rules and enforcing them. Yet enforcers, companies and individuals continue to struggle with old and new challenges regarding these rules because they are not necessarily intuitive to an ordinary business person, and enforcement comes in many forms from many directions using varying definitions.

We explore here a few undercurrents influencing today's global cartel enforcement and how they may affect businesses and their efforts to avoid violating the rules, including (i) the trend to push onto these corporate enterprises more of the workload to teach government's rules and enforce them; (ii) how the rules are becoming more complicated with algorithms, big data and market indices; and (iii) the constant tension with sovereignty rights and jurisdictional cooperation.

The government–corporate partnership with leniency and compliance programmes

Only individuals can actually perform the conduct that constitutes a violation of cartel rules. Corporations are a government-sanctioned means for individuals to pool resources and collaborate in pursuit of an overall common profit objective in a single enterprise. This vehicle has been found to be so efficient that most business now is conducted through such government-chartered collaborative enterprises. Cartel rules, which focus on concerted behaviour, accept corporate coordination and come into play only for inter-enterprise conduct, not intra-enterprise conduct. But the cost for sanctioning corporation coordination is the now near unanimous acceptance among enforcers worldwide that corporations should take responsibility for teaching cartel rules, finding any deviations, and then assisting government enforcers to impose sanctions.

Policies for leniency and to incentivise compliance programmes reflect this trend to push more work onto corporations. Striking at the profit objective of these enterprises, steep fines and other monetary penalties are designed to drive corporations to give attention to cartel rules. Unfortunately, global developments may be changing the scales on the costs and the benefits for companies to take on this work. As leniency policies and cartel enforcement has spread across jurisdictions the simple balance that has weighed in favour of corporate disclosure may be adversely affected. Leniency now means substantially preparing the case against the co-conspirators with all available witnesses and documents, and doing that for multiple jurisdictions. Coordination across jurisdictions' competing demands is not easy. Some jurisdictions that have developed a more aggressive enforcement agenda have leniency policies that are unpredictable. The costs and the complexity of meeting the terms for leniency have reduced transparency. Add to that the proliferation of private civil damage actions, spreading from the United States to Europe to Australia to Latin America and beyond, and the cost of disclosure has dramatically increased. Some in the defence bar have questioned whether the leniency prize is still worth the price because of the costs and unpredictability of dealing with multiple jurisdictions. Enforcers need to grapple with the concern that the corporate incentives for partnering with enforcement agencies via leniency programmes is significantly diminished when the burdens and inconsistencies in programmes become overwhelming and consider affording some relief.

With regard to compliance programmes, developments have been more favourable. A growing number of jurisdictions have determined that leniency programmes alone may not be sufficient to incentivise companies to undertake comprehensive training and aggressive monitoring. Some enforcers apply a discount to the monetary penalty of a company that has engaged in misconduct if the company previously had implemented a 'good' competition compliance programme. Discounts of up to 50 per cent may be available for a compliance programme. Other jurisdictions, notably the United States, historically have refused to give any discount to a company with a pre-existing compliance programme on the basis that the programme obviously was not 100 per cent effective. In more recent years, however, the United States has given a sentencing discount for compliance programmes implemented after an investigation has started that dramatically change the culture of the company. On the other side of the balance, the United States has imposed a monitor when the company did not appear to have sufficiently embraced a compliance culture. Moreover, the Antitrust Division of the US Department of Justice held a Corporate Compliance Roundtable in April 2018 to explore how it could better support compliance programming and has suggested that the policy against discounting fines for comprehensive compliance programmes, even if not fully effective, is under review.

Budgetary and practical constraints limit the activities of government enforcement agencies. Pushing more of the work onto corporations spreads the workload and the expense, and corporations are well-placed to assist with teaching the rules, monitoring compliance and pulling together the evidence of wrongdoing. It would be unfortunate if the global adoption of leniency programmes detracted from the incentives of companies to shoulder these burdens.

Complications for cartel rules

Algorithms, the internet and big data are changing the way businesses are making strategic decisions, including on pricing. Algorithms that collect and analyse large amounts of relevant market data have clear benefits for the businesses that use them. They can help businesses become more efficient, maximise profits and provide more targeted product recommendations. Without the algorithm, it would be virtually impossible to collect and analyse a similar volume of data. The use of algorithms has the possibility of driving consumer benefit and also to help businesses develop and produce more personalised products and services, and potentially with more personalised prices.

At the same time, use of pricing algorithms may constitute or facilitate collusion, and some enforcers fear 'digital cartels'. Algorithms designed to price products take in a broad set of factors and then run a complicated analysis. This technology allows a business to react extremely quickly to a change in a competitor's price or run a very complicated analysis into the pricing of competitive products. These same analyses could be run to help sustain a cartel by detecting attempts to cheat on an agreement. Moreover, there is a concern that algorithms could collude without human agreement. According to the head of competition enforcement in Russia, new types of anticompetitive agreements without human participation are already a modern reality, and the agency is taking steps to enforce against 'digital cartels'. Margrethe Vestager, the European Commissioner for Competition, has warned that companies need to understand what the algorithms they use actually do: 'What businesses can and must do is to ensure antitrust

compliance by design. That means pricing algorithms need to be built in a way that doesn't allow them to collude.'

The United States, however, has signalled that without a human agreement to fix prices, use of algorithms will not give rise to liability, at least criminally. Senior officials have emphasised that algorithms are a tool, or a means, to achieve a particular goal, but that it is humans that still determine and agree on that goal. But the internet and algorithms still raise cartel concerns. An example is the US case against a senior manager of an e-commerce business who agreed with a different company to use particular pricing algorithms with the intention of coordinating prices for the sale of wall posters on Amazon Marketplace.

Enforcers around the world are looking closely at creative means of addressing internet and data issues, and this seems also to be resulting in a greater blurring of vertical and horizontal enforcement. The Lithuanian Competition Authority found that online travel agencies had violated competition law when Eturas limited the possibility of applying more than a 3 per cent discount when the agencies used the Eturas online travel booking system. Eturas sent a message to travel agencies announcing a new technical restriction that put a cap on discount rates, whereby any discounts in excess of the cap would be automatically reduced. The European Court of Justice found that the agencies that knew of this message, even if they had not taken any further action in response, could be presumed to have participated in a cartel. There was no explicit agreement to collude on price. It was the use of the same pricing algorithm by the travel agencies to monitor prices, and knowing that others were using the same algorithm, that were subject to the cartel allegations.

Further blurring the lines, the European Commission brought its first resale price maintenance case in years, imposing fines on four electronics manufacturers for fixing the prices offered by their online retailers. According to the Commission, the manufacturers intervened with online retailers who offered products at prices the manufacturers considered to be low. The manufacturers threatened to block supplies from the retailers offering 'low' prices. The manufacturers were able to effectively track the resale prices through the use of an algorithm. The Commission indicated that since most retailers use algorithms that automatically adjust retail prices to those of competitors, the resale price maintenance practice had a vertical impact (between the manufacturer and retailer) and also a horizontal impact (across retailers).

While there remains significant uncertainty in this area, we can be confident that use of algorithms has the attention of enforcers and that companies will need to focus on this ever-changing area.

Market manipulation of indices has triggered high-profile investigations and convictions. Conduct related to foreign currency exchange rates (forex), the London Interbank Offered Rate (LIBOR), and the Euro Interbank Offered Rate (EURIBOR), have resulted in significant fines from enforcers around the world, as well as massive follow-on civil litigation. For example, the largest fine paid for a US antitrust violation is that for US\$925 million for forex manipulation. And private civil litigation in the US has challenged the use of other pricing indices where horizontal competitors pool pricing information then use the index for contract pricing.

Some enforcement of market manipulation has used cartel rules while other enforcement has focused on fraud charges or regulatory requirements. Some market manipulation conduct is consistent with the hallmarks of a cartel – albeit using newer technology, as daily chat rooms replaced the proverbial smoke-filled room – but most of the benchmark manipulation cases move beyond the simple bid rigging, price fixing, and market allocations one normally associates with a classic cartel. Instead, market manipulation today often deals with intangible, complex digital tools, indices or benchmarks that then may arguably influence pricing, and not necessarily the pricing of the product that is the subject of the index. In addition, in a traditional cartel, the cartel members' incentives and benefits are aligned, as they all hope to profit from higher prices. In some of these cases, however, the financial benefit to the firms is not clear. Both participants and victims may have heterogeneous positions in products that can be adversely or positively impacted from multi-directional manipulation. Many of the manipulated benchmarks also reset daily, further complicating the potential harm analysis.

Market manipulation represents an area of substantial enforcement overlap among enforcers, even within the same jurisdiction, as any given scheme can fall within the jurisdiction of several competition and other enforcement agencies across multiple countries. Some have

argued that combating market manipulation is best achieved through cartel enforcement over sector-specific regulatory rules, or vice versa. Others are more comfortable with a dual approach. In September 2018, the chief executive of the UK's Competition and Markets Authority recognised that well-structured regulations can foster competitive conditions, specifically cautioning competition authorities to 'be neutral across tools and across institutional boundaries.' At a minimum, when a group of traders call themselves 'The Cartel' and engage in conduct that justifies the moniker, cartel enforcement will likely remain a significant part of the conversation.

Today, companies involved with market indices or benchmarks, especially those that require competing companies to pool information, should promote compliance with the understanding that market manipulation can constitute a somewhat square antitrust peg being inserted into a round enforcement hole. In addition to discouraging intra-firm communication and promoting good document hygiene – while warning that 'documents' include chats, texts, snapchats and social media – companies must try to understand how the tools are used and the manner in which their employees' conduct can affect the tools.

Sovereignty and jurisdictional cooperation

Each country or jurisdiction has its own set of laws and regulations that address cartel conduct. Some are more focused on local or domestic cartels, while some are more focused on international cartels. There are wide variations in the types of systems (criminal versus civil versus administrative) used to deter and punish cartels, as well as in the range of conduct penalised, the evidence standard required to trigger penalties, and the potential range of sanctions (criminal or civil corporate fines, administrative sanctions, incarceration for executives, debarment and more). Differences in each country's system and concerns for sovereignty can make jurisdictions reluctant to condone another jurisdiction's efforts to prosecute cartel conduct that took place within its borders or to allow another jurisdiction to prosecute its companies or citizens under legal standards inconsistent with its own.

Some jurisdictions, like the United States, have a cartel enforcement agency that combines the investigative functions and competition expertise with prosecution functions, including criminal prosecution, in a single agency. US cartel enforcers investigate cartel offences, decide whether to proceed criminally or civilly, administer the leniency programme, choose which companies and executives to target, and negotiate to resolve charges, subject to judicial review. Other jurisdictions have a system with one government agency with a competition law focus and expertise investigating cartel conduct, while another entity, usually a general public prosecutors office, has authority to bring criminal charges. Canada and Japan exemplify this type of dual agency system. The latter type of system can face challenges having both necessary government entities share the same knowledge, experience and priorities regarding whether and which potential cartel cases should be pursued and subject to criminal sanctions. Likewise, such a split system can create complications in the efficient and transparent processing of cartel leniency applications. This year Canada went through an extensive intra-governmental agency process to develop a revised leniency programme, which required support by both the Canadian Competition Bureau and the Crown Prosecutors Office.

Jurisdictions have communicated frequently over the past two decades through organisations such as the International Competition Network (ICN) and various bar association programmes and conferences, as well as technical assistance and secondment programmes. But the world is still far from consensus and consistency in rules, laws and best practices in cartel enforcement. Significant sharing of evidence across borders, mutual legal assistance in the form of witness interviews and document seizure, on behalf of other jurisdictions, and extradition of fugitives have all increased in the past decade. Still, jurisdictions vary in their willingness to accept another jurisdiction's legal action and in a willingness to extradite individuals, particularly its own citizens, for cartel offences elsewhere. The ruling in *United States v Allen*, 864 F.3d 63 (2d Cir. 2017) held that evidence obtained from witnesses in the UK, under due process procedures different from those required in the United States, and then shared across borders with US prosecutors, tainted other evidence in the US case. The ruling should remind enforcers working across jurisdictions that differences in their systems are real and legally significant, and while international cooperation can be a boon to prosecutors, it is not without risk. The ruling also reminds defence counsel to probe such cooperation.

While jurisdictions may cooperate and play nicely on the world enforcement stage, each has independent interests. ‘State action’ is generally exempt from antitrust enforcement. Countries retain discretion to refuse to act upon international assistance requests and to oppose what is perceived as another jurisdiction’s overreach. And countries do not always accord deference to others. The US Supreme Court in *Animal Science Products, Inc v Hebei* (decided 14 June 2018), rejected giving automatic deference to China’s Ministry of Commerce to defend four Chinese sellers of vitamin C on the ground that Chinese law required them to fix the price and quantity of vitamin C exports, but focused on whether deference should be given to the Ministry’s interpretation of Chinese law, not whether the law could be a defence.

There is still hope for growing consensus. This summer, US Assistant Attorney General Makan Delrahim launched an effort to attempt to standardise antitrust enforcement, requesting that 140 competition commissions worldwide sign on to a framework of common principles on issues such as transparency, confidentiality, conflicts of interest and judicial norms. Talks among regulators around the globe are ongoing, but will no doubt be a major focus of the upcoming ICN meeting this autumn and beyond. Multiple cartel enforcement agency leaders, including from the US and EU, have stated publicly

this year that they appreciate the burdens of prompt and full compliance with leniency programmes around the world simultaneously, and will make an effort to coordinate and streamline requests, to minimise duplication where possible. Defence counsel will need to hold them to these promises.

Conclusion

Without transparency and clear rules, it can be challenging for global corporations to understand and fulfil their roles. Where dozens of jurisdictions are not only imposing different rules and practices regarding cartel conduct, but investigating and reaching decisions in ways that vary dramatically, international companies and business people can find themselves caught between a rock and hard place, and exhausted from attempts to understand expectations and prohibitions in each jurisdiction. And the costs of defence and sanctions continue to grow. Yet, the trend to have firms teach and enforce cartel rules in the digital world has firmly taken root, and the challenges are likely to multiply.

* *The authors would like to thank Megan E Gerking and Robert W Manoso for their assistance with the chapter.*

Morrison & Foerster LLP

Roxann E Henry
Lisa M Phelan
Megan E Gerking
Robert W Manoso

rhenry@mofocom
lphelan@mofocom
mgerking@mofocom
rmanoso@mofocom

2000 Pennsylvania Ave NW
Washington, DC 20006
United States

Tel: +1 202 887 1500
Fax: +1 202 887 0763 / 0764
www.mofocom

ICN

John Terzaken

Simpson Thacher & Bartlett LLP

Driving global coordination and convergence in international cartel enforcement

Globalisation is the overarching theme of modern antitrust cartel enforcement. Once stubborn cultural attitudes regarding cartel activity are now gradually shifting. Many jurisdictions have moved to give their competition authorities broad jurisdictional reach and aggressive investigative tools, such as wiretap authority and compulsory process. There is also a burgeoning movement to criminalise cartel activity in places where it has previously been regarded as wholly or principally a civil matter. And the growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives for institutions to turn against their co-conspirators.

In this constantly evolving and increasingly crowded enforcement environment there is a distinct need for cartel enforcers to closely coordinate. The International Competition Network (ICN) Working Group was formed in 2004 to address this need: to drive global cooperation and convergence among cartel enforcement authorities in the prevention, detection, investigation and punishment of cartel conduct.

A need for coordination and convergence

For over half a century, from the enactment of the Canadian Competition Act in 1889 and the Sherman Act in 1890 to the mid-1940s, Canada and the United States were the only nations prohibiting cartels. In Europe, cartels were then still widely regarded as at least partly beneficial to the national economy. Several European nations even enacted legislation in response to the Great Depression, enabling the government to establish compulsory cartels or to force outsiders to join already existing ones. Especially during the Second World War, excessive concentration of economic power was used to create 'national champions', which were easy to control and which could outperform their foreign rivals.

In the aftermath of the war, the United States pressured Germany and Japan to break up their existing cartels and to put in place cartel enforcement regimes. At the same time, the United Kingdom adopted a new antitrust regime as part of its social policies to stimulate employment. Antitrust law was subsequently included in the 1957 Treaty of Rome as one of the key policy areas of the European Economic Community, laying the foundation for the European Commission's cartel enforcement practice. In the past few decades, cartel enforcement has spread from North America and Europe to virtually every major jurisdiction in the world. There are now antitrust authorities in over 125 countries across all continents actively pursuing cartel activity, and that list is growing.

Cartel enforcement by individual authorities over the years has also become more intensive and tougher than ever before. Both mature and new antitrust regimes have come to regard aggressive prosecution of cartel offenders as a primary policy objective. This is reflected in the ever-increasing penalties imposed on cartel offenders, the expansion of jurisdictions that are moving from mere civil or administrative enforcement towards a regime of criminal prosecution, as well as the growth in use of leniency programmes by regimes worldwide.

At the same time new and better-equipped enforcers are rapidly emerging on the world stage, and extraterritorial cartel enforcement has become standard practice for major enforcement jurisdictions. Whereas the United States was sharply criticised at first for the application of the Sherman Act to foreign conduct, the global antitrust

environment has come to firmly embrace the principle of extraterritorial cartel enforcement.

The ICN Working Group

In recognition of the increasingly crowded cartel enforcement environment, in 2004, the ICN established the Working Group to drive global cooperation and convergence among cartel enforcement authorities. The Working Group comprises cartel enforcers from around the world. Seven agencies govern the Working Group, with three agencies acting together as co-chairs of the Working Group and two agencies co-chairing each of the Group's two subgroups – namely, the Legal Framework and the Enforcement Techniques subgroups. Leadership of the Working Group is rotated among agencies to create an inclusive environment that provides a varied perspective by bringing together newer and older agencies and those in various geographical locations. It also helps ensure continuity of the work and long-term initiatives.

Among the principal functions of the Working Group is the development of best-practice resources for authorities. Equally important is the role the Working Group plays as a platform for bringing authorities together to promote information-sharing among jurisdictions.

Encouraging best practice

Fulfilling its mandate to address challenges in cartel enforcement and to bring together the wide-ranging experience and resources of ICN members, the Working Group provides digital seminars and resources designed to promote best practice in cartel enforcement. The Working Group's digital offering includes a mix of call and webinar series.

A call series on leniency was initiated by the Working Group in 2012. This series provides a platform for the sharing of experience and expertise and provides members with information regarding specific enforcement efforts and policy initiatives in other jurisdictions. The calls have ranged in topics from leniency fundamentals to common pitfalls and problems to interactions with private enforcement and multi-jurisdictional investigations. Some specific topics within these calls included presentations on the impact of criminal sanctions and private rights of action on leniency programmes, the role of markets in leniency programmes and the threshold for granting conditional immunity from the European Commission perspective.

A shorter series of Asia-friendly calls was also initiated to address how to design and implement leniency programmes. The first call in the Asia series showcased perspectives from Singapore and Taiwan, whereas the second call brought a different variety of experience by having the US Department of Justice as one presenter discuss how to design an effective programme. Over 40 member agencies participated in these calls and the content and slides of these calls are now available online for continued consultation and reference.

Between 2014 and 2015, two different substantive discussion calls were also held. The first was on the investigative powers to fight international cartels and the second was on sanctioning international cartels in the context of multi-jurisdictional investigations. This call series remains a focus and priority for the Working Group in the future.

In a move to further promote accessibility to information among jurisdictions, the Working Group made a commitment to release webinar series on areas of special concern and enforcement trends. The webinars have focused on topics including the impact of private enforcement on public anti-cartel enforcement and increasing cartel

deterrence through compliance programmes. The Working Group's current work plan calls for organising a webinar series on issues such as parental liability, international cooperation, and ex officio investigations.

Along with the more interactive platform the Working Group designed for information-sharing in the digital context, the Working Group shares a wealth of knowledge in published reports. For example, volume one of the Building Blocks Report details the basic concepts of hard-core cartel conduct, the institutional and legal framework of agencies' anti-cartel units and the effectiveness of current penalties. The Working Group also provides the Anti-Cartel Enforcement Manual to serve as a tool for information sharing and best practices. The manual provides an overview of effective and successful anti-cartel enforcement techniques. The widespread reach of ICN members allows for a compilation of experiences and expertise that covers the nuances in jurisdictions. Instead of a static book relying on antiquated practices, the living document style of the online manual allows for up-to-date information on international experiences in the anti-cartel enforcement context. The wealth of knowledge present in the manual includes dialogue on topics ranging from investigation strategies and interview techniques to more cutting-edge topics of digital evidence-gathering and the relationships between competition agencies and public procurement bodies. The recent inclusion of the chapter 'Cooperation with Procurement Agencies' offers a practical toolset for working with procurement bodies and ensuring that public bidding procedures promote free and fair competition. The manual also provides an overview of searches, raids and inspections and the inclusion of other topics such as cartel case initiation and investigation strategies. Such depth and diversity in global best practice serves as a valuable practical resource for practitioners and regulators alike.

Notable additional resources have been added over the past year, including a checklist for efficient and effective leniency programmes and an updated version of the 'Setting of Fines for Cartels in ICN Jurisdictions' report that was initially published in 2008. The checklist provides a list of elements that should be considered when designing or revising a system of leniency. The report on setting fines addresses four preliminary issues, including:

- objectives and philosophy behind the imposition of fines;
- legal basis for imposing fines;
- role of the competition agency in setting fines; and
- position of fines in the arsenal of sanctions on cartels.

The report also discusses the basis for fine calculations, along with aggravating and mitigating elements.

Additionally, the Cartel Awareness and Outreach portal provides the world's largest collection of cartel awareness and outreach materials. The compilation provides a vast array of substantive information relating to the awareness of the prevention, reporting and prosecution of anti-cartel conduct. The collection continues to grow and additional agency submissions are regularly submitted. Included in the Cartel Awareness and Outreach portal, the Working Group provides a categorisation breakdown for materials relating to cartel awareness. Materials are divided into the following categories for ease of reference: materials that explain cartels and cartel enforcement policies; materials promoting leniency programmes; materials related to public procurement; materials aimed at businesses, SMEs and compliance programmes; and videos and other media. Outreach and awareness materials are provided by individual jurisdictions to form a discussion series of diverse presentations. A small sampling of presentations from this series includes: the Federal Antimonopoly Service of the Russian Federation's Practice on Suppression of Bid Rigging; Brazil's Leniency Programme Awareness Tools; and Cartel Criminalisation as Cultural Change: a report from findings of a survey of the Australian public. Like many of the Working Group's initiatives, this is an evolving effort with input and submissions continuously added by member agencies.

Promoting convergence of standards and procedures

Information-sharing among members is critical to the Working Group's efforts to promote convergence of standards and procedures. As investigations and cases continue to grow in international scope, spanning across multiple jurisdictions, communication is key for the effectiveness of global anti-cartel enforcement. In this regard, the Working Group is currently working to compile a catalogue on investigative

powers for newer agencies and continues to promote the sharing of non-confidential information between jurisdictions.

The Working Group has also established a vast resource of cartel enforcement templates for various jurisdictions. The templates are provided and maintained by ICN members. The exhaustive list of available jurisdictions is accessible via the Anti-Cartel Templates page on the Working Group's website. Members have provided information on relevant legislation, the implementation of rules and regulations and information regarding relevant cases. Specific topics covered in these templates also include the process for filing a complaint, decision-making, sanctioning cartel conduct, investigative tools, leniency, rights of defendants and confidentiality. Along with jurisdiction-specific information, the Working Group provides global templates for authorities to utilise in securing procedural and substantive waivers of confidentiality in cartel investigations. These templates are conveniently located on the Working Group's website and each is accompanied by an explanatory note that clarifies certain guidance on the proper understanding and use of the templates.

Facilitating relationship building through the ICN member network

Perhaps the most valuable role the Working Group plays, however, is the wide-ranging network of individuals and member agencies it brings together. The Working Groups hosts annual ICN Cartel Workshops that bring together authorities from countries around the world. These workshops provide a unique opportunity for the global sharing of best practice and experience on leniency programmes, analytical tools for detecting cartels, and information-sharing in cartel investigations. In addition to serving as a unique learning opportunity, these workshops enable individual jurisdictions to receive recognition by other enforcers for work or research done in a specific area of cartel enforcement over the course of a year. The 2017 workshop was held in Canada in October. The theme for this workshop was Combating Cartels in Public Procurement and sessions were offered in the following areas: detection, investigation and deterrence; debarment from public procurement processes; cartel prevention and detection training for public procurement officials; and screening of public procurement data.

The Working Group is also consistently looking for other ways to strengthen relationships and promote increased information-sharing among global enforcers. In this regard, the Japan Fair Trade Commission (JFTC) recently made a proposal to enhance the Working Group's goal of facilitating greater sharing of non-confidential information through the establishment of an 'ICN Framework for Promotion of Sharing of Non-Confidential Information for Cartel Enforcement'. The proposal envisions seamless lines of communication to enhance cooperation in global cartel enforcement among member agencies. Specifically, the proposal invites ICN members to complete an information form and to register liaison officers to serve as initial contact points for international coordination. The member agencies are also asked to provide basic information on their respective regimes. Requests for information can then be exchanged among registered member agencies, acknowledging that an agency would only share information to the extent permitted under its own legislative mandate. This proposal envisions facilitating both formal and informal information requests between authorities.

As a starting point for the JFTC's more detailed proposal, the Working Group already makes available charts summarising information-sharing mechanisms in each jurisdiction. The charts provide helpful information such as the relevant point of contact at an agency and the formal and informal mechanisms the agency has in place to alert other competition agencies to matters under investigation.

The road ahead

The efforts of the ICN Working Group have increased cooperation and coordination by enforcement authorities globally and, as a result, have dramatically heightened the detection of cartel offenders. Among its greatest impacts, the Working Group has contributed to what is now routine coordination among authorities at the outset of joint investigations. Indeed, as evidenced by nearly every recent global antitrust investigation, dawn raids are routinely taking place in close coordination between multiple enforcement agencies.

Going forward, the Working Group is committed to continuing to enhance the sharing of the most effective enforcement techniques

and tools. Because global enforcement requires the inclusion of newer and smaller agencies, ensuring that these agencies have access to the experiential knowledge of more mature agencies is critical to effective global enforcement. The Working Group welcomes all agencies to become members and to learn from each other. Therefore, the Working Group is committed to continuing to expand its membership in the organisation and to increasing involvement from non-government agencies.

The Working Group's proposed annual plan for 2017-2018 consists of eight proposed projects stemming from the two subgroups within the Working Group. The Legal Framework subgroup has proposed the following projects:

- key elements for efficient and effective leniency programmes and their application;
- webinars and call series on parental liability;
- webinars and call series on international cooperation to fight against cartels;
- webinars and call series on ex-officio investigations; and
- continuation of the Asia-friendly calls.

The Enforcement Techniques subgroup has proposed the following projects:

- a new chapter in the Anti-Cartel Enforcement Manual on private enforcement;
- the 2017 ICN Cartel Workshop (Canada); and
- implementation of the ICN framework for the promotion of the sharing of non-confidential information (ICN liaison) and completion of the anti-cartel enforcement template updates.

These eight projects provide a broad foundation to give guidance going forward and are among the more ambitious of those the Working Group has tackled to date.

Through these and future efforts, the Working Group will continue to play a critical role in addressing the challenges in global coordination that lie ahead. In particular, the Working Group will find itself at the epicentre of the growing demand for coordination among authorities at the level of charging decisions and punishment, where authorities will have to grapple with overlapping mandates and overcome their competing sovereign interests in punishing cartel offenders. This next level of coordination will present new and unique challenges for the Working Group.

Simpson Thacher

John Terzaken

john.terzaken@stblaw.com

900 G Street NW
Washington DC
20001
United States

Tel: +1 202 636 5500
Fax: +1 202 636 5502
www.stblaw.com

Australia

Jacqueline Downes and Robert Walker

Allens

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Australia's competition legislation is the Competition and Consumer Act 2010 (Cth) (CCA). The cartel provisions are contained in Part IV, Division 1.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Australian Competition and Consumer Commission (ACCC) investigates alleged cartel conduct and determines whether to bring civil proceedings. The ACCC can also refer serious cartel conduct to the Commonwealth Director of Public Prosecutions (CDPP) for criminal prosecution.

Ultimately, it is the Federal Court of Australia (or sometimes the Supreme Court of an Australian state in criminal cases) that determines whether there has been a contravention of the civil or criminal cartel provisions and the appropriate sanctions and penalties.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The CCA was amended in November 2017 by the Competition and Consumer (Competition Policy Review) Amendment Act 2017 (CPR Amending Act). The CPR Amending Act:

- clarifies that cartel conduct must take place in 'trade or commerce' (ie, within Australia or between Australia and places outside Australia);
- repeals the per se prohibition on exclusionary provisions and expands the definition of 'output restriction' in the prohibition against cartel conduct to cover restrictions on acquisition (in addition to restrictions on production, capacity and supply); and
- amends the joint venture (JV) exception to cartel conduct by:
 - extending the exception so it more clearly applies to JVs for the acquisition of goods or services (in addition to JVs for the production or supply of goods or services);
 - broadening the exception so it applies to a provision contained in an arrangement or understanding (in addition to a provision contained in a contract);
 - imposing additional requirements on the party wishing to rely on the exception. In addition to demonstrating that the cartel provision is 'for the purposes of' the JV, a party is now required to demonstrate that:
 - the cartel provision is reasonably necessary for undertaking the JV; and
 - the JV is not being carried on for the purpose of substantially lessening competition; and

- increasing the standard of proof so a party wishing to rely on the exception must prove the relevant matters 'on the balance of probabilities' (previously, a party only needed to produce evidence of 'a reasonable possibility' that relevant matters exist).

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

It is a civil and criminal offence to make or give effect to a contract, arrangement or understanding between actual or potential competitors that contains a 'cartel provision'. Cartel conduct is per se prohibited, regardless of the impact on competition.

A cartel provision is a provision that has:

- the purpose or effect of fixing, controlling or maintaining the price of goods or services supplied by any or all of the parties; or
- the purpose of:
 - preventing, restricting or limiting production, capacity, supply or acquisition of goods or services by any or all of the parties;
 - allocating customers or territories supplied by any or all of the parties; or
 - rigging bids.

To establish criminal liability, the elements of the offence must be proven to the criminal standard of beyond reasonable doubt. It is not necessary to show dishonesty or that the parties knew it was cartel conduct or illegal. However, there must be knowledge or belief of the relevant elements.

If a company is a party to a contract, arrangement or understanding containing a cartel provision, then related bodies corporate are also deemed to be a party to the contract, arrangement or understanding.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

Prior to the CPR Amending Act coming into effect there was a sector-specific prohibition relating to price signalling in the banking sector. However, the CPR Amending Act repealed these provisions, on the basis that they would be redundant following the introduction of a prohibition against concerted practices.

Part X of the CCA (which deals with competition in the international liner cargo shipping industry) contains partial exemptions from the cartel prohibitions for certain shipping conference agreements provided that these are registered with the Federal Department of Infrastructure and Regional Development.

There are no general exceptions for government-sanctioned activity except that the cartel prohibitions do not apply to conduct that is specifically authorised by federal or state legislation. In addition, certain government entities are only subject to the CCA insofar as they carry on business.

6 Application of the law

Does the law apply to individuals or corporations or both?

The prohibitions against cartel conduct apply to both individuals and corporations.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The cartel prohibitions apply to conduct that has taken place in trade or commerce within Australia or between Australia and places outside Australia. In addition, where the cartel conduct occurs outside Australia, the conduct only falls within the CCA if it is carried on by:

- companies carrying on business within Australia;
- Australian citizens; or
- persons ordinarily resident in Australia.

The law in relation to carrying on business in Australia is quite complicated. However, it is quite likely that a foreign parent company will be considered to be carrying on business in Australia where an Australian subsidiary acts on its behalf as agent. Further, where a foreign company communicates by means of telecommunication such as fax, email, letter or telephone to officers of its Australian subsidiaries (and the communication was expected to be and was received in Australia), the conduct can be regarded as taking place in Australia.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is an exception for cartel provisions that relate exclusively to the export of goods or services from Australia. For the exception to apply, full and accurate details of the provision must be submitted to the ACCC within 14 days of the relevant contract, arrangement or understanding being entered into.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The ACCC is responsible for investigating both civil and criminal cartel conduct (although the decision to prosecute criminal cartel activity is a matter for the CDPP). The ACCC has significant discretion as to the timing and conduct of an investigation. Investigations may take months or years depending on the conduct being investigated.

Parties to the alleged conduct will usually be asked to provide information, produce documents and appear before the ACCC to answer questions. The ACCC may do this on a voluntary basis but will more typically use its evidence-gathering powers under section 155 of the CCA (see below).

Once the ACCC has obtained sufficient evidence, it will form a view as to whether a contravention has occurred. If the ACCC considers that there has been a contravention, it can:

- refer the matter to the CDPP for possible criminal prosecution (serious cartel offences);
- commence civil litigation in the Federal Court seeking penalties, injunctions and other remedies; or
- in less serious cases, resolve the investigation by accepting commitments from the individual or company to cease the conduct and take steps to ensure that it does not recur. This could be in correspondence, by agreement or by way of an enforceable undertaking under section 87B of the CCA.

In practice, cartel matters are generally resolved through court proceedings.

The time between the commencement of an investigation and any court proceedings by the ACCC (or the CDPP) varies depending on the complexity of the investigation. Penalty proceedings may be brought at any time within six years after the contravention occurs. In practice, it is often several years before investigations are brought to their conclusion.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The ACCC has broad investigatory powers under the CCA.

Under section 155, where the ACCC has reason to believe that a person can provide information or documents relating to a possible contravention of the CCA, the ACCC can require that person to produce information or documents or appear before the ACCC to give evidence on oath or affirmation. The ACCC cannot issue a section 155 notice after it has instituted proceedings, unless it is seeking an interlocutory injunction. Failing to comply with a section 155 notice or providing false or misleading information is a criminal offence subject to fines (and prison terms for individuals). The ACCC is not required to obtain court approval before issuing a section 155 notice.

The ACCC also has the power to enter premises to conduct searches and to seize documents where the ACCC has reasonable grounds to believe that there is evidentiary material on the premises that is relevant to a contravention of the CCA. The ACCC must obtain a search warrant or the consent of the occupier before entering the premises.

In criminal cartel investigations conducted jointly by the ACCC and the Australian Federal Police (AFP), the AFP can apply for a warrant to intercept telephone conversations or place a listening device to record conversations. The ACCC can also apply for a warrant to access emails, text messages, etc, stored on equipment operated by a telecommunications company or internet service provider in a criminal or civil investigation.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The ACCC regularly coordinates with international agencies, including to assist in cross-border investigations.

The ACCC is a member of the International Competition Network, which provides competition authorities with an informal venue for maintaining regular contacts and addressing practical competition concerns. In addition, there are a number of formal agreements that provide for cooperation and communication between the ACCC and foreign regulators. For example, Australia is party to a treaty with the United States that allows both countries to cooperate, provide assistance and exchange information in competition law and antitrust enforcement actions. The ACCC is also party to a number of agreements and memoranda of understanding with various authorities including regulators in Canada, China, the European Union, Korea, New Zealand and the United Kingdom.

The ACCC has a broad discretion to disclose protected information (ie, information provided to the ACCC in the course of an investigation) to foreign regulators and does not require a waiver to disclose the information. In practice, the ACCC usually requests a waiver from an immunity applicant before disclosing their information to a foreign regulator.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The ACCC regularly investigates and takes enforcement action in relation to alleged cartel conduct that has cross-border aspects. Recent examples include the ACCC's proceedings against companies in the electrical cable, international shipping, international currency and air cargo industries.

International cooperation assists the ACCC with cross-border matters in a number of ways, most particularly through the exchange of information about the conduct of concern. This information may trigger the ACCC's investigation in the first place or assist the ACCC to progress the investigation more efficiently than would otherwise have been possible.

Cartel proceedings

13 Decisions**How is a cartel proceeding adjudicated or determined?**

Civil and criminal cartel cases are heard by the Federal Court of Australia (or sometimes the Supreme Court of a state or territory in criminal cases).

Civil proceedings are commenced when the applicant files an originating application. From there:

- If the respondent does not admit liability and contests the matter, the case will go to a civil trial on liability. The usual pretrial steps will be undertaken, including exchange of relevant documents through discovery and filing of written evidence (usually through affidavits and supporting documentation). The matter then proceeds to a hearing where witnesses and experts may be subject to cross-examination and the parties make submissions in support of their case. If the court finds that the offences have been proved, it will make declarations of contravention, and a further hearing takes place to determine the appropriate penalty.
- If the respondent admits liability, the parties will file an agreed statement of facts and admissions with the court and potentially also a suggested penalty (see further below).

Once the CDPP has decided to lay charges for a criminal cartel offence, an initiating process or summons is sent to the defendant and filed with the court. A committal hearing takes place in which the magistrate decides if there is sufficient evidence for the matter to proceed to a criminal trial. The CDPP then files an indictment listing the relevant charges. The CDPP may call witnesses and produce other forms of evidence during the trial. Following the delivery of the verdict, the judge will sentence the defendant. If the respondent pleads guilty and cooperates with the CDPP, the CDPP may require the party to file admissions, agree to a statement of facts or provide evidence in the trial of other cartel members.

14 Burden of proof**Which party has the burden of proof? What is the level of proof required?**

The party alleging the cartel conduct has the burden of proving its case. In civil cases, the conduct must be proved on the balance of probabilities. In criminal cases the prosecution must prove its case beyond reasonable doubt.

15 Circumstantial evidence**Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?**

A contravention can be proved by direct evidence, circumstantial evidence or a combination of both. Arrangements and understandings can be inferred from circumstantial evidence; however, the requirement for there to be a consensus or a 'meeting of the minds' must still be discharged. The party relying on circumstantial evidence must show that the circumstances give rise to a more probable inference of the existence of an arrangement or understanding than not.

16 Appeal process**What is the appeal process?**

The full Federal Court (usually constituted of three judges) hears appeals on points of law from a decision of a single judge of the Federal Court. Parties may appeal full Federal Court decisions to the High Court if it grants special leave.

The ACCC or the defendant can initiate an appeal by filing a notice that outlines the relevant grounds of appeal. Appeals are confined to points of law and do not involve re-examination of the facts.

In criminal cartel cases, appeals must involve 'a question of law alone', otherwise leave must be granted by the court. Appeals must be allowed in certain circumstances, such as where there has been a substantial miscarriage of justice.

Sanctions

17 Criminal sanctions**What, if any, criminal sanctions are there for cartel activity?**

For individuals, the maximum criminal penalty is 10 years' imprisonment, a fine of A\$420,000 per offence, or both. Individuals can also be subject to orders disqualifying them from managing a corporation, and community service orders.

For companies, the maximum fine for each criminal cartel offence is the greater of:

- A\$10 million;
- three times the total benefits that have been obtained and are reasonably attributable to the commission of the offence; or
- where the benefits cannot be determined, 10 per cent of the corporate group's annual turnover connected to the supply of goods and services in Australia.

The court can also impose injunctions.

There have been two criminal cartel convictions in Australia since the criminal provisions were introduced in 2009. In 2017, Japanese cargo shipping liner NYK pleaded guilty to criminal cartel conduct and was fined A\$25 million. In 2018, another Japanese shipping company, Kawasaki Kisen Kaisha (K-Line), pleaded guilty to criminal cartel conduct. At the time of writing, the sentencing hearing for the *K-Line* case was scheduled for late 2018.

Criminal charges have also been laid against:

- Country Care Group, a manufacturer of healthcare equipment, as well as its managing director and a former employee;
- Australia and New Zealand Banking Group, Citigroup and Deutsche Bank, as well as six senior executives from the banks; and
- the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU), as well as a divisional branch secretary.

18 Civil and administrative sanctions**What civil or administrative sanctions are there for cartel activity?**

For individuals, the maximum civil penalty is A\$500,000 per offence.

For companies, the maximum civil penalties are the same as for the criminal cartel provisions as outlined above.

In 2018, the ACCC Chairman stated that the ACCC will be seeking higher penalties to promote deterrence.

The highest penalty imposed under the cartel laws was a A\$46 million penalty paid by Japanese-based automotive parts supplier Yazaki Corporation, which was increased on appeal from an original penalty of A\$9.5 million. The ACCC's action followed similar enforcement actions against Yazaki and other cartel participants by competition regulators in the US and Japan.

The next highest penalty imposed under the cartel laws was a A\$36 million fine paid by packaging company Visy in 2007 for civil contraventions in relation to a cartel involving rival packaging company Amcor. This was followed by a class action in which 4,500 businesses were awarded total damages of A\$95 million against the companies.

19 Guidelines for sanction levels**Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?****Civil penalties**

The court must consider all relevant matters when determining the appropriate pecuniary penalty. Relevant factors include:

- the nature, extent, duration and deliberateness of the conduct;
- any loss or damage caused by the conduct;
- prior contraventions;
- general and specific deterrence;
- the size of the company and the degree of market power;
- whether the conduct was carried out by senior management or at a lower level;
- the corporate culture of the company, as evidenced by educational programmes and internal compliance measures; and
- contrition and cooperation with the ACCC.

Criminal penalties

In sentencing offences for criminal cartel conduct, the court takes into account a range of factors including:

- the nature and circumstances of the offence;
- the extent to which the conduct was deliberate, systematic and covert;
- the duration and scale of the offending conduct;
- the seniority of the employees involved, corporate culture of the company and any compliance programmes;
- the profit or benefit attributable to the conduct;
- whether the offences constitute a single course of conduct;
- the personal circumstances of any victim, and any loss or damage caused by the conduct;
- any cooperation, including past and future cooperation, with the ACCC and law enforcement;
- the degree to which the defendant has taken measures to ensure future compliance;
- any contrition shown and the prospects of rehabilitation;
- specific and general deterrence;
- the need to adequately punish the defendant;
- character and previous conduct; and
- any early guilty plea.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment is not a recognised sanction. However, if the ACCC applies to the court for an injunction, the court has broad powers to grant the injunction on any terms that the court determines to be appropriate. In addition, government procurement processes usually require disclosure of regulatory breaches or convictions and these matters will be taken into account by government in evaluating the suitability of bidders.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

There are some limitations on the commencement of both criminal and civil proceedings for substantially the same conduct. These are:

- the court cannot make a civil penalty order in relation to a contravention of the cartel provisions if the person has been convicted of a criminal offence constituted by substantially the same conduct; and
- civil proceedings will be stayed if subsequent criminal proceedings are commenced in relation to substantially the same conduct.

However, even if a court has imposed a civil penalty against a person, criminal proceedings may still be commenced in relation to substantially the same conduct (although this is unlikely in practice).

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Private parties who have suffered loss or damage as a result of cartel conduct may bring an action (including a class action) for damages against the cartel participants. In addition, private parties may seek a range of other orders, such as injunctions.

The ACCC can also take a form of representative proceeding on behalf of private parties who have suffered loss or damage as a result of cartel conduct.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are an established and important part of the Australian legal landscape. There are a number of third-party litigation funders and a growing number of plaintiff class action legal practices.

In Australia, a class action can be commenced if:

- there are seven or more persons with claims against the same person;
- the claim is in respect of or arises out of the same, similar or related circumstances; and
- the claim gives rise to one substantial common issue of law or fact.

Consent of the members of the class is not required to initiate a class action. However, members can opt out and bring their own action.

There have been a number of class actions brought following on from alleged cartel conduct, including in relation to the markets for vitamins, cardboard boxes and air cargo. Most class actions are settled.

As noted above, the ACCC can also bring representative actions for damages on behalf of people who have suffered loss or damage as a result of cartel conduct.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The ACCC's Immunity and Cooperation Policy sets out the ACCC's policies in relation to applications for both civil and criminal immunity from ACCC-initiated civil proceedings and criminal prosecution. While the ACCC is only responsible for granting civil immunity (criminal immunity is a matter for the CDPP), the ACCC is the sole point of contact for applicants seeking civil or criminal immunity. Annexure B to the Prosecution Policy of the Commonwealth sets out the CDPP's policy when considering an application for immunity from criminal prosecution.

Civil immunity

Civil immunity is only available to the first eligible party to disclose the cartel conduct to the ACCC.

The criteria for conditional civil immunity are:

- the applicant is or was a party to a cartel;
- the applicant admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the CCA;
- the applicant is the first person to apply for immunity in respect of the cartel;
- the applicant has not coerced others to participate in the cartel;
- the applicant has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel;
- the applicant's admissions are a truly corporate act (corporations only);
- the applicant has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously when making the immunity application, and undertakes to continue to cooperate fully throughout the ACCC's investigation and any ensuing court proceedings; and
- the ACCC has not received written legal advice that it has reasonable grounds to institute proceedings in relation to the cartel.

Conditional civil immunity will become final immunity after the resolution of any ensuing proceedings against the remaining cartel participants.

Criminal immunity

Where the ACCC considers that the applicant satisfies the conditions for civil immunity, it will make a recommendation to the CDPP that immunity from criminal prosecution also be granted to the applicant. The CDPP will exercise its own discretion when considering the recommendation.

Where the CDPP considers that the applicant meets the criteria for criminal immunity (which are the same as the conditions for civil immunity), it will initially provide a letter of comfort to the applicant. This is generally provided at the same time as the ACCC grants conditional civil immunity. Prior to instituting a criminal prosecution against any member of the cartel who does not have immunity, the CDPP will then provide the applicant with a written undertaking that grants conditional immunity subject to the applicant providing ongoing cooperation through the criminal proceedings. Once these conditions are fulfilled by the immunity applicant, the immunity becomes final.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Parties who are not eligible for 'first-in' immunity can nonetheless cooperate with the ACCC in relation to its investigations. The ACCC's policy on cooperation is also set out in the ACCC's Immunity and Cooperation Policy. While cooperation does not provide immunity from prosecution, it will typically result in more lenient treatment by the court (such as lower penalties). Unlike some jurisdictions, there are no pre-established discount levels.

Where the ACCC brings civil proceedings against parties to the cartel, the ACCC may require the cooperating party to make admissions, agree to a statement of facts or give evidence against the remaining cartel participants. Although the ACCC and the cooperating party may propose an agreed penalty to the court, and the ACCC will make submissions to the court regarding the party's cooperation, the court must ultimately determine whether the penalty is appropriate in all the circumstances.

If a party cooperates with the ACCC during a criminal investigation and the CDPP brings criminal proceedings, the CDPP may require the cooperating party to make admissions, agree a statement of facts or give evidence against the remaining cartel participants. The CDPP will then make submissions to the sentencing court about the party's cooperation. In sentencing the defendant, the court is required to take into account cooperation, any early guilty plea and the extent to which the defendant has demonstrated contrition for the offence. Ultimately, it will be for the court to determine the appropriate penalty or sentence, although the ACCC, the CDPP and the cooperating party can provide the court with a penalty range.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Civil and criminal immunity is only available to the first eligible party to disclose the conduct to the ACCC. However, if a party is not the first party to approach the ACCC, or does not meet the immunity criteria outlined above, that party may instead cooperate with the ACCC (see above).

In addition, a party who is cooperating with the ACCC in relation to one cartel may apply for immunity in relation to a second unrelated cartel and seek 'amnesty plus' for the original cartel conduct. Amnesty plus is a recommendation by the ACCC to the court for a further reduction in the civil penalty in relation to the first cartel. In criminal proceedings, the CDPP will advise the court of the full extent of the party's cooperation in relation to both cartels so that the cooperation is taken into account for sentencing purposes.

A party is eligible for amnesty plus if it:

- is cooperating with the ACCC in respect of the first cartel investigation; and
- it receives conditional immunity for the second cartel.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

The first step in an immunity application is to request a 'marker' from the ACCC. The marker preserves, for a limited period, the applicant's status as the first party to seek immunity. The ACCC then allows the applicant a limited time in which to investigate the conduct and seek conditional immunity if necessary. The time limit of the marker will be specified by the ACCC at the time the marker is granted, and will vary depending on the circumstances.

The applicant will then prepare a 'proffer', which provides specific detail as to the type of evidence that can be provided to the ACCC to establish the existence of the cartel. If the ACCC is satisfied on the basis of the proffer that the applicant has met the eligibility criteria for conditional immunity, the application will be granted. Conditional immunity will become final immunity at the conclusion of any ensuing proceedings provided the applicant does not breach any conditions of immunity and maintains eligibility under the immunity policy.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

As discussed above, to be eligible for criminal or civil immunity, the applicant must cooperate and provide full, frank and truthful disclosure in making the application and in any subsequent investigation or court proceedings. An immunity application should be made as soon as possible but can be made after the ACCC has commenced an investigation (providing the ACCC has not received written legal advice that it has reasonable grounds to institute proceedings). An application for criminal immunity is made to the ACCC at the same time as the application for civil immunity and the ACCC is responsible for both the civil and criminal investigations.

If a party does not apply for immunity (or does not meet the criteria), the party may instead cooperate with the ACCC. It is a condition of the ACCC's policy that cooperation be offered in a timely manner and that the party offers full, frank and truthful disclosure and cooperates on a continuing basis through the investigation and any proceedings. In criminal proceedings, cooperation and the timeliness of a guilty plea are taken into account by the court in sentencing the defendant.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The ACCC will use its best endeavours to protect confidential information provided to it as part of an immunity application, including the immunity applicant's details. The ACCC generally has a policy that it will accept confidential information from cooperating parties as well. However, once the ACCC commences proceedings, it will generally disclose to the other cartel participants all information and evidence that it is relying on to prove its case, which will include information and documents provided by the immunity applicant. Depending on the nature of this information, it is sometimes provided to external counsel subject to undertakings. Once proceedings are commenced, a party may also apply to the court seeking a confidentiality order. The court has a broad discretion to grant confidentiality orders and these are generally granted in relation to documents that are commercially sensitive and/or prejudicial to the interests of the party.

In addition, section 155AAA of the CCA grants the ACCC a broad discretion to disclose protected information in other circumstances, including:

- by the ACCC in the performance of its duties or functions;
- where the ACCC is required or permitted by law to make the disclosure (this includes where ordered by a court to disclose the

information under subpoena, except in relation to ‘protected cartel information’);

- to the minister, royal commission or designated government agencies; and
- where disclosure is made to a foreign government agency to perform its functions.

In practice, the ACCC has been reluctant to release confidential information as it has been concerned that this could interfere with its immunity process. It will generally not disclose to an overseas regulator protected information received from an immunity applicant without the applicant’s consent but this does not prevent the ACCC from having discussions about conduct that does not involve the disclosure of the confidential information.

Additional measures are in place where the protected information relates to cartel conduct and is provided in confidence (‘protected cartel information’). First, if the ACCC is party to proceedings, the ACCC is not required to produce protected cartel information to a court or tribunal except with leave of a court or tribunal. Second, if the ACCC is not a party to the proceedings (eg, a follow-on damages claim), the ACCC has a discretion to disclose protected cartel information. In exercising their discretion to disclose or order disclosure of protected cartel information, the court, tribunal or ACCC will have regard to:

- the fact that the information was given to the ACCC in confidence and by an informant;
- Australia’s relations with other countries;
- the need to avoid disruption to national and international law enforcement efforts; and
- whether disclosure would be in the interests of justice or securing effective performance of the tribunal’s or court’s functions.

Despite this, it is important to be aware that documents and information provided to the ACCC have the potential to be disclosed to third parties.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Civil offences

The ACCC does not have the power to impose a penalty itself. If the respondent admits to cartel conduct, the ACCC must still bring proceedings in order for a penalty to be imposed. Reaching a settlement with the ACCC in these circumstances generally involves the ACCC and the respondent agreeing on a statement of facts and the scope of the respondent’s admissions. The ACCC and the respondent may also potentially agree on a penalty and make joint submissions to the court as to why that penalty is appropriate. The court will make declarations that cartel conduct occurred if it is satisfied that the agreed facts and admissions amount to cartel conduct under the CCA. The court will order the penalty proposed by the parties if satisfied that it is appropriate in all the circumstances.

Criminal offences

In criminal cases, the defendant can admit to cartel conduct and, together with the CDPP, file an agreed statement of facts and admissions with the court. However, unlike in civil cases, it is not appropriate that the defendant, ACCC and CDPP propose a fine to the court. They can provide a penalty range; however, the appropriate penalty is a matter for the court in its discretion. The court will take into account a range of factors in sentencing, including:

- the degree to which the person has shown contrition;
- whether the person has entered an early guilty plea; and
- the degree to which the person has cooperated.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

When a corporation seeks immunity, it may apply for derivative immunity for related companies or current and former directors, officers and employees of the corporation who were involved in the conduct.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

See question 27.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

The ACCC’s current Immunity and Cooperation Policy was published in September 2014. In August 2017, ACCC Chairman Rod Sims announced the ACCC would be conducting another review of the Cartel Immunity and Cooperation Policy.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

A party against whom civil legal proceedings have been commenced may apply to the ACCC to be given copies of all documents in the ACCC’s possession that tend to establish the case of the respondent in the proceeding, and that were not created by the ACCC itself or obtained from the respondent. This right enables the respondent to a cartel proceeding to obtain a brief of evidence in the ACCC’s possession containing documents held by the ACCC in relation to the respondent’s case.

In criminal proceedings, the prosecution owes a duty of disclosure to the court, not to the accused. However, common law principles require that defendants are entitled to know the case against them, including the evidence that will be adduced in support of the charges and any other material that may be relevant to the defence. These principles are supplemented by a range of state and territory legislation, which requires the prosecution to disclose certain material to defendants. The CDPP’s ‘Statement on Disclosure in Prosecutions by the Commonwealth’, sets out the materials that the CDPP will disclose to the defendant, in addition to those required to be disclosed under state or territory legislation.

In addition, the respondent enjoys the usual rights including legal professional privilege and, in criminal matters, the privilege against self-incrimination for individuals (see above).

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

There is no absolute prohibition on counsel acting for both the employees and the corporation that employs them, unless there is a conflict of interest or the interests are adverse. In practice, many employees are separately represented, at least to an extent. Often, early in proceedings it is unclear what the involvement of an employee has been with the conduct under investigation. If proceedings are threatened, it will generally be advisable for employees to obtain separate legal counsel. Part of the ACCC’s assessment under its cooperation policy is whether individuals are separately represented.

36 Multiple corporate defendants**May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?**

There is no absolute prohibition on counsel representing multiple corporate defendants and this may occur if the companies are related. However, in many cases, companies will need separate representation because there will be potential conflict issues.

37 Payment of penalties and legal costs**May a corporation pay the legal penalties imposed on its employees and their legal costs?****Civil penalties**

A company must not indemnify a person against a civil liability or legal costs incurred in defending or resisting proceedings if the person incurred the liability as an officer of the company.

Criminal penalties

Under Australian corporations law, a company or related body corporate must not indemnify a person against any liability incurred as an officer of the company that is owed to someone other than the company or related body corporate and did not arise out of conduct in good faith. This prohibits indemnification of company officers for involvement in criminal cartel conduct.

A company or related body corporate is also prohibited from indemnifying a person against legal costs incurred in defending or resisting an action for liability incurred as an officer in criminal proceedings in which a person is found guilty. If the person is found not guilty, the company or related body corporate may indemnify the person for legal costs.

38 Taxes**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

It is not possible to deduct an amount payable by way of penalty imposed under an Australian or foreign law.

Regarding private damages awards, in general, a loss or outgoing is deductible to the extent that it is incurred in gaining or producing assessable income or is necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income, and is not a loss or outgoing of capital, or of a capital nature. If the payment of an award of private damages is not tax-deductible under general principles, the company would need to consider whether such a payment would be recognised for tax purposes in some other way (eg, whether it could give rise to a capital loss, or whether the company could deduct the amount over five years pursuant to the 'black hole' capital expenditure provisions in the Australian tax law).

39 International double jeopardy**Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

Other than the relevant maximum penalty, courts are not constrained when imposing penalties or awarding damages. There is no general principle that precludes the imposition of penalties on a corporation or individual where the corporation or individual has already been subject to sanctions overseas. However, if penalties are to be imposed on the basis of the corporation's annual turnover for the preceding 12 months, the court will disregard turnover in relation to goods or services supplied outside of Australia.

40 Getting the fine down**What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

Earlier cooperation is more likely to be effective in reducing the fine and genuine efforts to prevent further issues such as compliance initiatives can help in demonstrating commitment to future compliance.

Allens

Allens is an independent partnership operating in alliance with Linklaters LLP

Jacqueline Downes
Robert Walker

jacqueline.downes@allens.com.au
robert.walker@allens.com.au

Level 33
101 Collins Street
Melbourne
VIC 3000
Australia

Tel: +61 3 9614 1011
Fax: +61 3 9614 4661
www.allens.com.au

Austria

Astrid Ablasser-Neuher and Florian Neumayr

bpv Hügel Rechtsanwälte

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Cartel Act 2005 sets out rules on cartels and (other) horizontal restrictions, vertical agreements, abuse of dominance and mergers, as well as on enforcement of cartel regulation, including specific provisions on the enforcement of private damages claims. The Competition Act contains provisions relating to the Austrian national competition authority, the Federal Competition Authority (FCA), and its powers, as well as to the Commission on Competition, a body that advises the FCA.

Further, the Neighbourhood Supply Act includes certain rules on competition such as a non-discrimination obligation. While this piece of legislation primarily governs the relationship between suppliers and retailers, the Austrian Supreme Court has held that it basically applies to the relationships between all commercial entities that are not end customers (case 16 Ok 3/08 *Sägerundholz*). Finally, sector-specific legislation such as the Telecoms Act, which covers provisions on demopolisation in formerly protected sectors, must be mentioned.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The FCA investigates possible restrictions of competition and prosecutes violations by bringing actions before the Cartel Court. While the FCA is formally part of the Federal Ministry of Digital and Economic Affairs (BMDW), it is not bound by any government instructions. The second 'official party', the Federal Antitrust Prosecutor (FAP), is subject to instructions issued by the Federal Minister of Justice. The FAP also has the right to bring actions before the Cartel Court.

The Viennese Court of Appeals, sitting as the Cartel Court, is competent for all competition proceedings provided for in the Cartel Act 2005, and has, in principle, the sole right to issue binding decisions. Appeals from the Cartel Court go to the second and last instance, the Supreme Court sitting as the Cartel Court of Appeals.

The FCA has limited power to issue decisions. Since the entry into force of an amendment to the Austrian competition rules on 1 March 2013, the FCA can itself issue information requests and subsequently impose fines in the event that its requests are not followed. An appeal can be brought before the Administrative Court Vienna against such decisions by the FCA. Subsequently, a further remedy may be lodged before the Supreme Administrative Court or the Constitutional Court.

Finally, the Commission on Competition is empowered to issue expert opinions on questions of competition policy and may give recommendations concerning notified mergers.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The most recent amendment to the Cartel Act 2005, as well as to the Competition Act, entered into force on 1 May 2017 through the adoption of the Cartel and Competition Amendment Act 2017. The amendment entails several significant changes to Austrian competition law and predominantly results from the implementation of Directive 2014/104/EU, the Damages Directive. The directive, and, in turn, its transposition into Austrian law, aims primarily at facilitating the enforcement of private damages claims following on from competition law infringements. In this regard, the key changes introduced by Chapter 5 of the Cartel Act include the introduction of a rebuttable presumption of harm, meaning that, if a cartel between competitors is established, the infliction of harm is assumed leading to a shift of the burden of proof towards the defendant. The provisions, however, stay silent on vertical agreements. Furthermore, the law provides joint and several liability of all cartel participants, except for immunity recipients, who enjoy a certain privilege as they are, in principle, liable only to their direct and indirect purchasers or suppliers.

The amendment incorporates an additional (rebuttable) and conditional presumption that damage inflicted by an infringer was passed on to next level of the supply chain. The defendant can involve its direct or indirect purchasers (or suppliers) in the damages proceedings via a third-party notice. In addition, limitation periods for damages claims have been extended to five years (from three years) starting from the cessation of the infringement. At the same time, an absolute limitation period of 10 years beginning with the occurrence of the damage has been introduced.

The most far-reaching change concerns rules governing the disclosure of evidence, which were previously unknown in the Austrian legal system. A court will be able to oblige the opposing party (claimant as well as defendant) or a third party (this may even be evidence from files of courts and authorities) to disclose evidence, even if it contains confidential information. Protection from disclosure is granted only to leniency statements and settlement submissions. Other aspects of the directive, such as an explicit rule on the right to claim compensation for damage resulting from antitrust infringements or the binding effect of final decisions by competition authorities, had already been existing law.

Another change concerns the opportunity to appeal against Cartel Court decisions on the ground of errors of fact, which had barely been possible previously. In addition, the amendment now allows for the exemption from the cartel prohibition for agreements between publishers and press wholesalers. As regards the power of the FCA to submit fining applications, from now on every act of investigation or enforcement by the FCA interrupts the limitation period (of five years) as long as the affected undertaking is notified of this measure. An absolute limitation period of 10 years from cessation of the infringement still applies. The FCA is now also explicitly empowered in the context of dawn raids to inspect documents and data accessible at the premises of the undertaking irrespective of the place of storage and may enforce access by collecting penalty payments.

Moreover, the scope of application of Austrian merger control has been extended as well. The legislature introduced a new notification threshold, which no longer takes only turnover figures into consideration, but also the transaction value. The objective is to cover acquisitions in the digital arena, where often target companies do not generate sufficient turnover to be governed by merger control provisions. From 1 November 2017, acquisitions have to be notified when:

- the combined worldwide turnover exceeds €300 million;
- the combined Austrian turnover exceeds €15 million;
- the value of the consideration of the transaction exceeds €200 million; and
- the target is to a significant extent active in Austria.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The substantive law on cartels in Austria is set out in sections 1 and 2 of the Cartel Act 2005.

Similar to article 101(1) of the Treaty on the Functioning of the European Union (TFEU), section 1(1) of the Cartel Act 2005 prohibits all agreements between undertakings and decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition. Section 1(2) sets out a non-exhaustive list of prohibited practices. Pursuant to section 1(4), cartels by recommendation, summarising recommendations to observe specific prices, price limits, rules of calculation, trade margins or rebates that restrict or are intended to restrict competition may also be caught by the prohibition of cartels.

Similar to article 101(3) TFEU, section 2(1) of the Cartel Act 2005 provides for an exemption from the prohibition of cartels where the behaviour in question contributes to improving the production or distribution of goods while allowing consumers a fair share of the resulting benefit; it also applies to promoting technical or economic progress, and does not impose restrictions that are not indispensable to the attainment of these objectives or afford the possibility of eliminating competition in respect of a substantial part of the products in question.

Section 2(2) contains the revised *de minimis* exemption and exempts certain practices from the prohibition in section 1. To come within the *de minimis* exemption, the undertakings concerned, provided that they are competitors, must not have a combined market share of more than 10 per cent of the relevant market or, in the case of non-competitors, their market shares must remain at or below 15 per cent. In addition, it is stipulated that agreements do not profit from the exemption if hard-core restrictions, such as price fixing or market allocation, are involved. Further specific exemptions relate to certain agreements in the book and press sector, now explicitly including agreements between publishers and press wholesalers, restrictions of competition between members of a cooperative insofar as they are justified by the aim of the cooperative and certain restrictions of competition within the agricultural sector.

According to section 3(1) of the Cartel Act 2005, the Federal Minister of Justice may exclude by block regulations certain groups of cartels from the cartel prohibition. However, since the Cartel Act 2005 came into force, the Federal Minister of Justice has not yet adopted such regulations.

Finally, as Austria is a member of the European Union, article 101 TFEU is directly applicable, and the case law of the European courts, as well as Commission practice, is observed.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

As mentioned above, there are certain industry-specific exemptions listed in section 2(2) of the Cartel Act 2005. Apart from that, competition law is fully applicable also to regulated sectors such as telecoms.

6 Application of the law

Does the law apply to individuals or corporations or both?

Section 1(1) of the Cartel Act 2005 refers to 'entrepreneurs', which includes individuals and corporations. The functional term comprises every independent economic entity, regardless of its legal form and manner of financing.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

According to section 24(2) of the Cartel Act 2005, Austrian competition law applies only to facts that affect the domestic market; however, it does so regardless of whether they have occurred in Austria or abroad. This effects principle is also relevant with regard to the above-mentioned Neighbourhood Supply Act (Austrian Supreme Court case 16 Ok 3/08 *Sägerundholz*). The basis for such jurisdiction is seen in the statutes referred to in question 1. An effect on the Austrian market is regarded as sufficient nexus.

When Austrian procedural rules shall be invoked in the context of enforcing articles 101 or 102 TFEU abroad (in particular, when the FCA is requested by another competition authority to perform an investigation on its behalf), it is only relevant whether the facts of the case in question may affect trade between member states; if they do, Austrian procedural rules apply (Austrian Supreme Court case 16 Ok 7/09 *Fire Trucks*).

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

As mentioned above, the effects principle pursuant to section 24(2) of the Cartel Act 2005 has as a consequence that any conduct, which does not affect the domestic Austrian market, does not fall within the national jurisdiction. Therefore, even if the facts of the case are established in Austria, Austrian competition law is not applicable as long as only foreign markets are affected.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

Typically, the FCA takes the first steps in an investigation (see below). The outcome may be shared with the undertakings concerned (section 13 of the Competition Act). If they consider competition law to be infringed, the FCA or the FAP (or both) may file a motion for cease and desist, finding or fines with the Cartel Court. Often, the FCA enters into settlement talks with the undertakings concerned prior to bringing an application before the Cartel Court. Typically, the undertakings are to acknowledge certain facts and their legal qualification for a reduced fine. As the Cartel Court cannot go beyond the fine applied for by the official parties, an undertaking prepared to settle in such way has some certainty what its fine will be and the proceedings are by far less elaborate (as taking of evidence, etc, hardly takes place).

The Cartel Court is not restricted though to the evidence offered by the parties to the proceedings; rather, it may further investigate the truth *ex officio*. The proceedings may end with a decision or dismissal (on technical grounds or on substance) of the motion. The duration of the proceedings (from the start of the investigation to the Cartel Court's decision) varies on a case-by-case basis and depends on the complexity of the particular case at issue.

As mentioned above, an appeal to the Cartel Court of Appeals is available against a decision by the Cartel Court. Usually, it takes at least six months before a respective decision can be expected.

Meanwhile, Austria has also seen several follow-on private damage claims. For example, in the *Driving Schools of Graz* case, damages were awarded (Higher Regional Court of Graz for Civil Law Matters case 17 R 91/07p). In the *Europay* case, the Viennese Commercial Court has found the claims time-barred (case 22 Cg 138/07y). Other cases, in particular, following on from the *Austrian Elevators and Escalators* case, are still pending. As regards the time frame for civil proceedings, practice

has shown that such proceedings can last several years but they may well take much less time to be finally decided.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Pursuant to section 11 of the Competition Act, the FCA may conduct any investigation necessary to fulfil its statutory purpose. It may employ (external) experts, question witnesses and (representatives of) the undertakings concerned.

In particular, the FCA may request information from (associations of) undertakings; inspect and make copies of business documents, irrespective of their format (including electronic information), which includes any documents or data accessible from premises of the undertaking affected, irrespective of the place of storage; and request the answering of questions (section 11a(1) of the Competition Act).

Since the amendment in 2013, the FCA can issue binding decisions in this respect (section 11a(3) of the Competition Act) instead of asking the Cartel Court for help (see question 2). Subsequently, in the event of failure to comply with such court order, it may impose administrative fines up to €75,000 (section 11a(5) of the Competition Act).

If necessary, the Cartel Court can also order an investigation of the business premises, often referred to as a dawn raid (section 12 of the Competition Act). In such an investigation, the FCA has the above-mentioned powers. The FCA's powers have also been strengthened in this regard. Since 1 March 2013, the search can only be objected to (claiming a legal privilege or that something falls outside the scope of the dawn raid) with regard to individually specified documents, whereas a general sealing of documents is no longer possible (section 12(5) and (6) of the Competition Act). It also has the right to seal rooms of the premises during such dawn raids (section 12(4) of the Competition Act).

The FCA is also empowered to execute EU rules and, in particular, to collaborate with the European Commission in its investigations (inter alia, sections 3 and 12 of the Competition Act).

Finally, the FCA may also conduct sector inquiries and collaborate with other authorities in competition matters (section 2(1), (3) and (4) of the Competition Act).

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

As mentioned above, the FCA collaborates with the European Commission in its investigations. Moreover, the FCA is integrated into the network of European competition authorities. In particular, the FCA exchanges information and documents with the Commission and competition authorities of other EU member states (section 10(1) of the Competition Act). Information obtained from the network in connection with a leniency application must, however, not be used for an application for fines – such application may be based on information obtained from other sources (section 11(7) of the Competition Act). The FCA is also very active in bilateral contracts with other national competition authorities and has signed memoranda of understanding with other competition authorities (see www.bwb.gv.at). Further, there is also an inter-agency cooperation on a national level that has experienced a strengthening by the recent amendment. It is now explicitly laid down in the Competition Act that the criminal police, the federal prosecutor's office and the courts can submit to the FCA personal data that they gained in criminal proceedings so that it can fulfil its tasks, in particular for the enforcement of the antitrust prohibition (section 14(3) of the Competition Act). Moreover, during dawn raids, the public security organs (ie, the police) may assist the FCA in securing documents (section 14(2) of the Competition Act). To the best of our knowledge, the FCA does have informal contact with other competition authorities, in particular with the German Federal Cartel Office.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

See, in particular, questions 10 and 11.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

As mentioned above, the Cartel Court is solely competent to issue material decisions in competition cases in Austria. It is, therefore, the Cartel Court that adjudicates cartel matters upon application by the official parties or – unless in fine proceedings and merger cases – by affected undertakings.

Private enforcement motions may be brought before the Cartel Court if seeking cease-and-desist orders or decisions for fining; other private actions such as claiming damages need to be brought before the ordinary civil or commercial courts (see also question 18).

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In principle, the burden of proof rests on the party claiming a breach of competition law. Only in abuse cases there are some rebuttable presumptions in effect shifting the burden of proof.

As mentioned above, the Cartel Court is not restricted to the evidence offered. Austrian law does not restrict the forms of permissible evidence. Expert evidence is accepted, although in practice, the courts often only rely on expert witnesses that they have appointed rather than on the opinions of expert witnesses instructed by one of the parties.

However, it is established case law that the party claiming a breach of competition law must state all relevant facts on the basis of which an infringement may be found (see Supreme Court 8 October 2008, 16 Ok 8/08 *Immofinanz*).

Moreover, the court must be convinced by the relevant evidence. Regarding damages under the Unfair Competition Act (see question 18), the Supreme Court has lowered the standard of proof by holding that the plaintiff only has to establish with a high probability that (some) harm has occurred (see Supreme Court 15 September 2005, 4 Ob 74/05v).

Under certain circumstances (in particular, where the plaintiff has, for objective reasons, considerable difficulties in proving something), courts are also willing to accept some prima facie evidence. For example, in predatory pricing cases, it has been held sufficient that the applicant establishes that sales were below cost by analysing data of comparable undertakings (see Supreme Court 9 October 2000, 16 Ok 6/00 and 16 December 2002, 16 Ok 11/02).

Where a damages claim is based on the infringement of a protective rule (the prohibition of cartels is considered to be such a rule), the defendant must prove that it bears no fault. Moreover, according to court practice, which, however, can no longer be fully upheld, the plaintiff only has to prove the infringement and formerly was required to also prove that harm has occurred; it does not have to prove causality (see, eg, Supreme Court 16 September 1999, 6 Ob 147/99g).

Pursuant to the most recent amendment (section 37c(2) Cartel Act), there is a statutory presumption of harm caused by cartels between competitors – addressing the horizontal level – that shifts the burden of proof towards the defendant. There is no such presumption regarding vertical cartels. Moreover, if a final decision by the Cartel Court (of Appeals) has already established an infringement, a civil court is bound by the finding of an infringement of antitrust law. As a result, the plaintiff enjoys the presumption of harm, possibly together with a binding decision regarding an infringement, while the defendant in the future needs to rebut this presumption and prove that there was no harm.

Further, an indirect purchaser may claim damages from the defendant, if it proves that the damage has been passed on along the supply chain. Also in this context, the indirect purchaser benefits from the presumption of a passing-on, if it proves that:

- the defendant committed the infringement;
- the infringement resulted in a price mark-up; and
- it purchased goods or services that were affected by the infringement.

Also, the defendant may submit a passing-on defence against a direct purchaser claiming damages; however, the defendant bears the full burden of proof.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

As outlined above, in the context of an antitrust proceeding, the party claiming the infringement is required to state all facts based on which the alleged infringement may be found. As regards the evidence, prima facie or circumstantial evidence is, in principle, insufficient to prove the assertions and convince the court. However, it may well be that courts accept circumstantial evidence in individual cases where the plaintiff is objectively not in the position to provide full evidence of an infringement. As regards interim measures such as interim injunctions, the Cartel Court of Appeals accepts prima facie evidence owing to the proximity of the defendant to the evidence on condition that the facts are at least indirectly made probable (see, eg, Supreme Court 16 December 2002, 16 Ok 11/02).

16 Appeal process

What is the appeal process?

In general, an appeal against a decision by the Cartel Court must be filed within four weeks of service of the decision. Since the 2013 amendment, the Cartel Act 2005 stipulates a shorter appeal period of two weeks for, inter alia, interim injunctions, as well as for decisions concerning the content of the publication of the decision (since 2013, all Cartel Court decisions have been published, but the parties may specify business secrets). The Cartel Court of Appeals serves as second and last instance; while errors of fact by the Cartel Court could rarely be challenged owing to tight limits and strict case law, the most recent amendment introduces the opportunity to base an appeal on the ground that there is substantial doubt as to the correctness of the facts underlying the Cartel Court's decision.

In private enforcement before the civil courts, there are typically three instances. Decisions must be appealed within four weeks. A respective appeal can be based on erroneous findings of facts as well as on an incorrect legal assessment. The Supreme Court as last instance only decides on questions of significant legal importance and provided that a specific jurisdictional value is at stake (over €30,000). For amounts between €5,000 and €30,000, the Court of Appeals must declare whether a subsequent appeal is admissible. As far as a motion for disclosure of evidence is concerned, the Cartel Court's disclosure order can be separately challenged within two weeks. On the contrary, the Cartel Court's decision to reject a disclosure motion may only be challenged together with the final decision.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Under the current Austrian competition regime cartels do not, in principle, trigger criminal sanctions. However, cartel behaviour may, in particular, qualify as bid rigging or fraud (or both), being criminal offences (sections 168b and 146 et seq of the Austrian Criminal Code, respectively).

Bid rigging is punishable by up to three years in prison and fraud, depending on the severity of the offence, by up to 10 years. It should also be mentioned that, pursuant to the Corporate Liability Act, corporations may also be held liable for the criminal offences of their management and employees. In one bid-rigging case, the defendants were subject to prison sentences ranging from nine to 11 months and fines (see Supreme Court 26 September 2001, 13 Os 34/01). In another case, one defendant was sentenced to six months in prison and a further 18 months of parole. The other defendants in the case received prison sentences of up to 20 months, which were suspended and the other

defendants were released on probation for a three-year period (see Supreme Court 6 October 2004, 13 Os 135/03 – *Lower Austrian Window Cartel*). Another trial resulted in a five-year prison sentence for the defendant. However, in that case the defendant was charged not only for serious fraud, but also for other crimes, including embezzlement (see Supreme Court 28 June 2000, 14 Os 107/99).

Several criminal proceedings concerning bid rigging in the tender procedures for a long-distance heating plant in Vienna are currently pending (two convictions are not yet legally binding). The public prosecutor's office is not only investigating the individuals involved pursuant to the Criminal Procedure Act, but also the undertakings involved in accordance with the Corporate Liability Act. Owing to the limited number of decisions with regard to bid rigging and fraud (in cartel cases), no conclusions about a trend can be drawn.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

A cartel law infringement may lead to administrative fines of up to 10 per cent of the group's turnover in the year prior to the verdict (section 29 of the Cartel Act 2005). Section 30 of the Cartel Act provides guidance as to the calculation of administrative fines (see question 19). In a primarily vertical case that also had horizontal elements (hub and spoke), Spar (a large food retailer) was fined €30 million for coordinating final selling prices in 2015 – the highest fine ever imposed on one single undertaking in Austria. According to the website of the FCA, in 2015, for example, the Cartel Court and the Cartel Court of Appeals (in the Spar case) imposed fines following applications by the Official Parties in the amount of about €34,436,735.

Apart from private actions before the ordinary civil courts or motions before the Cartel Court (see, in particular, question 13), private enforcement in Austria may also be based on section 1 of the Unfair Competition Act. Under the unfair competition law rules, the commercial courts may issue cease-and-desist orders, have judgments published and award damages if the cartel law infringement cannot be justified by a reasonable construction of the law (see Supreme Court 14 July 2009, 4 Ob 60/09s *Anwaltssoftware*).

A number of civil cases are pending before the ordinary civil courts, but apart from the already mentioned *Driving School* case (which only concerned a small value at stake and is not as such publicly available since only the judgments rendered by the Supreme Court are generally publicised), no final decisions have been rendered. Private enforcement is further facilitated by section 37(i) of the Cartel Act, which declares final decisions by European competition authorities (such as, in Austria, the Cartel Court) binding on the civil court that hears a private enforcement case. As elaborated earlier (see question 3), the transposition of the EU Damages Directive into Austrian law foresees several further provisions that are meant to facilitate private enforcement, such as a presumption that a horizontal cartel causes harm.

No maximum amount of compensation for damages is set. In Austria, the inflicted damages are to be reimbursed. Tort law has no punitive character, meaning that there are, for example, no treble damages.

In principle, there are two methods for calculating damages. According to the specific calculation method, a comparison is made between the plaintiff's property after and (hypothetically) without the harmful event. Pursuant to the abstract calculation method, the specific circumstances (of the person harmed, etc) are not taken into account. Rather, the 'objective value' of the harmed items (typically, their market price) is determined. While the specific calculation quasi-automatically takes into account any passing on, etc (resulting in lower or no damages), the abstract calculation does not. For this reason, most commentators favour the specific calculation. However, there are dissenting opinions and cases (not concerning competition infringements) where the abstract calculation has been applied.

Moreover, where it is certain that a party is entitled to damages but the exact amount is impossible or unreasonably difficult to establish, section 273, paragraph 1 of the Code of Civil Procedure entitles the court to assess the amount in its discretion. The interplay of this provision with the implementation of the EU Damages Directive (establishing a presumption of harm) can be expected to further facilitate private enforcement. Where some claims raised within the same action are comparatively insignificant, or where single claims do not exceed

€1,000, the court may even assess both whether damages should be granted at all and the exact amount that should be awarded according to its discretion (section 273, paragraph 2).

Exemplary damages are not available under Austrian law. Since the amendment, the Cartel Act foresees that the court, when ascertaining the damage pursuant to section 273 of the Civil Procedure Code, may take into account the advantage gained by the defendant or defendants as a result of the infringement (section 37a paragraph 1 of the Cartel Act).

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

According to section 30 of the Cartel Act, the criteria taken into account when determining the amount of a fine are:

- the gravity and duration of the infringement;
- the gains (if any);
- the level of fault involved; and
- the economic strength of the infringing undertaking.

The provision additionally contains aggravating and mitigating circumstances (similar to those in the fining guidelines of the European Commission). Notably, one aggravating reason that allows for the imposition of higher fines is repeated offending (eg, when a fine has already been imposed on an undertaking, or where the undertaking has previously been found guilty of committing a violation of cartel law). Equally, where the respective undertaking was the leader or instigator of the infringement of cartel law, this will lead to a higher fine. On the other hand, mitigating reasons are taken into account in particular cases, such as if the undertaking's involvement in the infringement is substantially limited; the undertaking stopped the infringement itself; or the undertaking has significantly contributed to the clarification of the infringement.

In the case of an infringement of the prohibition of cartels, the cooperation of the undertaking in relation to the infringement will also be taken into account (as an attenuating factor). Jurisprudence has made it clear that the geographic scope of the market concerned, the market shares of the cartelists and the type of infringement are also important factors that will be taken into account when ascertaining a fine. In view of these rather general principles, both the FCA and the Cartel Court have taken the fining guidelines of the European Commission into consideration in past cases, although they have not applied them word for word.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Yes, a conviction may lead to the exclusion from future public tenders pursuant to the Austrian Federal Procurement Act. According to section 68(1) Austrian Federal Procurement Act, the contracting authority has to exclude undertakings – save for very limited exemptions – from the participation in a procurement procedure in case that the contracting authority has knowledge of a final conviction for bid rigging or fraud.

However, under certain conditions, it is possible – after taking certain quite rigorous internal measures – to become eligible as a bidder again.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

The same conduct may well lead to criminal, civil and administrative sanctions in Austria.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Private damage claims can be brought under general Austrian civil law before the ordinary courts. Most commentators and the Supreme Court agree that the prohibition of cartels (as well as the abuse of market dominance provisions) are protective rules within the meaning of section 1311 of the Austrian General Civil Code that also protects customers (and not only competitors). Further, the Cartel Act now contains special provisions on private enforcement. According to these rules, an aggrieved competitor as well as harmed customers may bring damage claims against undertakings that have violated competition law. Private plaintiffs may of course also invoke contractual claims and concepts such as illicit gains.

In addition, those indirectly harmed (eg, the customer of someone who purchased from a cartelist) can have standing, if they show that damages were passed on to them. The defendant cartelist can notify the direct and indirect customers, respectively, with a view to show that passing-on took place or did not take place (as the case may be). Pursuant to the private enforcement provisions in the Cartel Act, a private damage claim by the direct purchaser is not excluded by the fact that the goods or services have been sold on, which constitutes – to some extent – a limitation of the passing-on defence; however, on the level of ascertaining the damage, passing-on issues may be brought up (potentially limiting the compensation to the directly harmed).

In Austria, only single damages will be awarded but interest is generally payable as from the point in time when the harm occurred, which can lead to very substantial claims. The new rules in the Cartel Act now also expressly refer to section 273 of the Austrian Code of Civil Procedure, which, under certain circumstances, allows the civil courts to estimate (rather than strictly ascertain) the compensation to be awarded to plaintiffs; the amendment made it also clear that when estimating compensation, the civil courts can take into account any gains from the cartel behaviour. As to the reimbursement of legal costs, see question 37.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Regarding class actions, a draft amendment to the Code of Civil Procedure, which would have introduced group trials and what could be referred to as 'specimen proceedings', was heavily criticised and has not become law. Thus, there is only limited scope for collective claims. Individual proceedings can be brought together typically by way of assignments or subsequently be joined by the competent court. In that regard, it can also be possible to sue several defendants in Austria even if only one of them is seated in Austria.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

As of 1 January 2006 a leniency programme has been in force in Austria. The statutory basis is section 11 of the Competition Act; it is supplemented by a handbook published on the FCA's website. It has to be noted, that in Austria leniency is exclusively administered by the FCA and not in court proceedings.

According to section 11(3) of the Competition Act, the FCA can (entirely) refrain from applying for a fine against an undertaking (full leniency, amnesty), if four conditions are met:

- the respective undertaking has ended its involvement in an infringement of section 1 of the Cartel Act or of article 101(1) TFEU;
- it has informed the FCA of this infringement prior to the FCA having knowledge about the infringement, the leniency applicant

provides enough information to enable a dawn raid or even a direct fine application to the Cartel Court;

- the undertaking cooperates fully, promptly and truthfully with the FCA and must submit all evidence concerning the infringement in its possession or available to it in order to clarify the circumstances of the case completely; and
- it did not coerce other undertakings or associations of undertakings to participate in the infringement.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Principally, only the 'first in' may obtain full leniency (see question 24). However, if the 'second in' provided so much information to directly allow for an application for fines to the Cartel Court while the 'first in' had only provided enough to enable a dawn raid or less, there may still be amnesty.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Subsequent undertakings can qualify for reductions of fines. According to the leniency handbook, the following reductions will typically be granted if all the criteria of section 11(3) of the Competition Act are met and information of significant additional value is provided to the FCA:

- a second undertaking, reduction of 30 per cent to 50 per cent;
- a third undertaking, reduction of 20 per cent to 30 per cent; and
- all later undertakings, reductions of up to 20 per cent.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

As mentioned above, it is important to be as early as possible in contacting the FCA. Where the FCA already has knowledge, the leniency applicant must provide enough information to enable a dawn raid, or even enough details to enable the FCA to directly apply for a fine before the Cartel Court. There are no deadlines in the narrow sense. However, when pursuing a marker-type approach, it is advisable to also try to discuss expectations regarding the swiftness of cooperation with the FCA.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

Leniency applicants must not only cooperate fully and promptly, but also truthfully, and must submit all evidence concerning the infringement that is in their possession or available to them. This may be seen in the *Print Chemicals* case, where the original leniency applicant was eventually fined the highest amount as it had not included a market affected by the cartel in its leniency cooperation. Moreover, there is a different expectation in relation to subsequent cooperating parties, since they must provide significant additional value (eg, information that the FCA does not already possess).

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

In general, all leniency information is kept confidential. In this regard, section 39, paragraph 2 of the Cartel Act provides that, in

principle, third persons may only access the cartel court file with the consent of the parties to the proceedings concerned. This provision was tested in a request for preliminary ruling before the ECJ (C-536/11 *Bundeswettbewerbshilfe v Donau Chemie*), where the court indeed found this provision to be incompatible with EU law. Rather, the national court must determine whether access is allowed by balancing the legitimate interest of confidentiality and the protection of the leniency programme against the individual's interest in the enforcement of its rights. The most recent amendment explicitly determines in section 37k(4) Cartel Act that leniency statements and settlement submissions enjoy absolute protection from disclosure. This, however, does not hold true for documents that are part of the authority's file independently of any proceedings. As regards other files of a competition authority, the balancing of interests conducted by the court also has to take the effectiveness of public enforcement into consideration.

Further, the Austrian Supreme Court (28 November 2014, 16 Ok 10/14b and 16 Ok 9/14f) has held that access to file must also not be generally denied in cases not containing a 'foreign element'. The Austrian Supreme Court further stated, that the criteria for being granted access to file must not impose an excessive burden on the ones who seek damages. The most recent amendment has now clarified that in damages proceedings, the court may, on the basis of a reasoned request and after having balanced the various interests, oblige the opposing party or a third party to disclose evidence. The court applying this proportionality test may even order to disclose confidential information pursuant to section 37j (2) and (4) Cartel Act.

In addition, the Supreme Court has made it clear that the Cartel Court's file is to be given to the criminal prosecutor upon request (OGH 22 June 2010, 16Ok 3/10).

Generally, proceedings before the Cartel Court are public; everyone can follow the proceedings. However, upon application by a party the general public can be (partially or fully) excluded from oral hearings if regarded necessary for protecting business secrets. In addition, the Cartel Court is obliged to publish final decisions on:

- the cessation of violations;
- the finding of infringements;
- the imposition of fines; and
- certain requests in concentration proceedings.

The names of the undertakings concerned as well as the essential content of the decision, including imposed sanctions, have to be published. Nevertheless, the Cartel Court has to take into account the legitimate interests of undertakings in the protection of their business secrets. Further, the Cartel Court must provide the parties with the opportunity to identify the parts of the decision, which they want to have excluded. The new legislation, which primarily covers the implementation of the Damages Directive, introduces minor changes as regards the publication of Cartel Court decisions. First, also decisions rejecting or dismissing (not only granting) an application have to be published. In addition, the operative part of final decisions has to be published on the FCA's website immediately (in leniency cases the name of the immunity recipient has to be included). Further, also in settlement cases the Cartel Court's written decision has to contain a detailed reasoning. The FCA on its part is empowered to inform the public about proceedings 'of public importance'. In general, the decisions of the Cartel Court of Appeals are also published.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Although a settlement procedure is not explicitly provided for by the law, settlement procedures are available. The FCA published a guideline on settlements reflecting its practice. The FCA being in favour of settlements is of importance, since it is for the FCA to negotiate settlements with the undertakings concerned. Both sides agree on the facts of the case and the amount of the fine to be paid. The settlement reached, however, must not be misunderstood as ceasing the proceedings as a whole. Rather, the undertaking acknowledges its misconduct and the Cartel Court, on the basis of the application filed by the FCA, renders

a decision. As regards oversight, the Cartel Court examines the FCA's application only concerning its conclusiveness, but without conducting its own evidence taking. The Cartel Court is bound by the FCA's application as it cannot impose higher fines than determined by the FCA; but the court is free to impose lower fines. As far as legal protection is concerned, the undertaking in any case has the right to appeal against the Cartel Court's decision, although from a practical point of view, the chances of success are negligible, because the misconduct had to be acknowledged in the first place. A settlement as such therefore needs to be carefully considered, as this decision by the Cartel Court is binding on the civil courts adjudicating follow-on private enforcement cases.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

An undertaking's employee (or ex-employee) who has personally participated in illicit behaviour may be subject to individual (criminal or private) prosecution. Individuals who have helped in uncovering cartel behaviour may, however (like the corporate defendant), profit from section 209b of the Code of Criminal Procedure. Pursuant to this provision, the FCA can inform the criminal prosecutor, and the criminal prosecutor can close investigations if the contribution to the uncovering of cartel behaviour was such that a criminal prosecution would not be appropriate. Further, individuals may also try to avail themselves of section 209a of the Code of Criminal Procedure if they directly approach the criminal prosecutor and provide (comprehensively) their information on cartel behaviour.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

As mentioned above, the leniency application form should be completed and any queries by the FCA responded to accurately, comprehensively and swiftly.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

The FCA has published a leniency handbook on its website (see www.bwb.gv.at/SiteCollectionDocuments/Leniency%20Handbuch%202014.pdf) setting out details on the law and practice of leniency and immunity applications in Austria.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

Pursuant to the Cartel Act, both the Cartel Court and the Cartel Court of Appeals have to apply the proceedings as in non-litigious matters. In the proceedings before the Cartel Court, the parties must be given the opportunity to gain knowledge about the matter of the proceedings, the requests, the pleading of the other parties as well as of the findings of the investigations and they must also be given the opportunity to comment on them. The parties must be provided with the opportunity to comment on all facts and results of evidence, which the decision will be based on.

As regards investigations by the FCA (including requests for information and dawn raids), the FCA must give the defendant to the application the opportunity to gain knowledge about the results of the investigation and to comment on them within reasonable time in case the FCA intends to file certain applications to the Cartel Court (application to cease, application to declare commitments binding or application for a declaratory judgment).

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

As there can easily be a conflict of interest between the corporation and its employees, it is generally advisable that employees seek individual legal advice as early as possible, as they may have to disclose information that might be used against them.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Again (at least under Austrian Bar rules), this mainly depends on whether the defendants may have a conflict of interest. In practice, counsels regularly represent multiple corporate defendants.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

In general, a corporation may pay the legal costs of and penalties imposed on its employees. It is prohibited, however, to guarantee upfront, meaning before any infringement has happened, to pay all the costs, if the case comes up. Since fines against single employees are meant to punish the individual, even a guarantee by the corporation to pay could not be enforced. The employee would have to pay by himself

bpv HÜGEL RECHTSANWÄLTE

Astrid Ablasser-Neuhuber
Florian Neumayr

astrid.ablasser@bpv-huegel.com
florian.neumayr@bpv-huegel.com

ARES-Tower
Donau-City-Strasse 11A
1220 Vienna
Austria

Tel: +43 1 260 50 206
Fax: +43 1 260 50 133
www.bpv-huegel.com
www.bpvlegal.com

or herself. The company still remains free to reimburse its employees for fines and legal costs.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Since the coming into force of section 20(1) subparagraph 5 lit b of the Income Tax Code, fines or other penalties paid after 1 August 2011 are expressly not tax-deductible.

Private damage awards, on the other hand, can be tax-deductible if the relevant wrongdoing is attributable to the business sphere (as opposed to private actions) (Supreme Administrative Court 2008/15/0259). With cartel activities, this will usually be the case.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

In general, any infringements that have effects in Austria may lead to fines imposed by the Cartel Court. Hence, provided that such effects can be determined, a fine will be imposed regardless of whether an undertaking has already been fined in another country. It can thus be concluded that there is no double jeopardy defence available for infringing undertakings.

40 Getting the fine down

What is the optimal way in which to get the fine down?

Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

There is no optimal way, but timely leniency applications and thorough collaboration with the FCA, a settlement where possible and subsequently the Cartel Court may get the fine down or even result in immunity from fines.

It may be noted in this context that a compliance programme does not in itself mean that there is a reduction in fines (Supreme Court 27 June 2013, 16 Ok 2/13). However, a working compliance scheme may well help to prevent a fine in the first place. Compliance initiatives undertaken after the beginning of the investigation will generally not affect the level of the fine. (In Austria, there is no such scheme as in France, where the fine can be reduced by 10 per cent in the case of an introduction of a compliance scheme, which corresponds to certain guidelines published by the French competition authority.)

Belgium

Pierre Goffinet and Laure Bersou

DALDEWOLF

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

In Belgium, cartel prohibition is contained in article IV.1 of the Belgian Code of Economic Law (CEL). The Belgian Competition Authority (BCA) rules on cartels that appreciably prevent, restrict or distort competition on the relevant Belgian market or within a substantial part of it. Under Regulation 1/2003, the BCA should also apply article 101 of the Treaty on the Functioning of the European Union (TFEU) in cases likely to affect trade between EU member states.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The BCA is an independent administrative authority with legal personality. The BCA is directed by a managing board (the Board). The Board is responsible for daily management, the identification of priorities and management terms, and the preparation of guidelines in antitrust matters. The Board is composed of the president, the Competition General Prosecutor, the chief economist and the general counsel.

The BCA comprises a prosecution authority (ie, the Investigation and Prosecution Service (IPS)), and a decision-making body (ie, the Competition College).

The IPS is entrusted with the investigation of cartel cases. Each cartel case is looked into by a team of investigators who are placed under the supervision of the Competition General Prosecutor and a competition prosecutor to whom the case is allocated. The IPS is in charge of handling complaints, handling and organising cartel investigations, closing or settling cartel cases and drawing up reasoned draft decisions to the Competition College if the case is neither closed nor settled.

The Competition College decides on the merits of cartel cases that are not closed or settled by the IPS.

The Market Court within the Brussels Court of Appeals has exclusive jurisdiction to hear appeals lodged against the BCA's decisions. Set up in January 2017, the Market Court consists of chambers that shall specifically adjudicate on cases belonging to the exclusive competences conferred on the court, for example antitrust cases. The Market Court replaced the former Chambers of the Brussels Court of Appeals where appeals against the BCA's decisions were introduced. The Market Court is said to be better equipped to deal with technical cases, such as antitrust cases, more expeditiously.

Appeals should be introduced within 30 days as of the date of notification of the decision.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

There is a proposal to increase the fine cap of 10 per cent of the Belgian consolidated turnover (for details about this cap, see below) to 10 per cent of the worldwide consolidated turnover. This will change the incentives for companies to apply for leniency in Belgium.

In January 2017, the Market Court became operational to deal with appeals against the BCA's decisions. The Market Court replaced the former Chambers of the Brussels Court of Appeals competent to adjudicate cartel cases.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

According to article IV.1 CEL (which is very similar in its drafting and application to article 101 TFEU), all agreements between undertakings, all decisions by associations of corporate undertakings and all concerted practices, the aim or consequence of which is to prevent, restrict or distort significantly competition in the Belgian market concerned or in substantial part of that market are prohibited, and in particular those that consist in:

- directly or indirectly fixing purchase or selling prices or any other transaction conditions;
- limiting or controlling production, markets, technical development or investments;
- sharing markets or sources of supply;
- applying, with regard to business partners, unequal conditions for equivalent services, this putting them at competitive disadvantage; and
- concluding contracts subject to acceptance, by the other parties, of supplementary services that, by their nature or according to commercial usage, have no connections with the subject of such contracts.

Such agreements shall be automatically null and void.

Participating in cartel activities constitutes a restriction of competition by object. Consequently, the BCA should not prove the anticompetitive effects of an agreement on the relevant market.

The finding of liability does not require the knowledge of the illegal nature of cartels or intention to participate in cartel activities.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are not yet any industry-specific provisions under Belgian law. However, pursuant to article IV.4(2) CEL, industry-specific exemptions (ie, EU Block Exemption Regulations) are applied in Belgium even when the practices under scrutiny do not affect trade between member states.

6 Application of the law

Does the law apply to individuals or corporations or both?

Article IV.1 CEL applies to any undertaking, either individuals or companies.

The notion of undertaking is very broad and encompasses any entity engaged in an economic activity, regardless of its legal status or financing. An economic activity is an activity of offering goods or services on a given market.

Individuals engaged in cartel activities on behalf of a company may be held liable for antitrust infringements. Fines ranging from €100 to €10,000 may be imposed on individuals. Individuals may apply for immunity from fines.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Article IV.1 CEL applies to cartels that take place outside the jurisdiction of the BCA provided their anticompetitive effects occur within the Belgian territory or a substantial part thereof.

The BCA could apply article 101 TFEU in cases likely to affect trade between member states. The BCA should adjudicate these cases in cooperation with the European Commission and/or the other national competition authorities (NCAs) of the member states where the case is also investigated.

On 27 July 2015, the BCA adopted provisional measures imposing on a professional association, the *Fédération Equestre Internationale* (FEI), the provisional suspension of an exclusivity clause (contained in its World General Regulation) in several EU member states and in countries outside the EU (among others, the US, China, Mexico and Qatar). This decision has been confirmed by the Brussels Court of Appeal (see Case 2015/MR/1, *Fédération Equestre Internationale*, judgment of 28 April 2016).

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The CEL does not provide such an exemption or defence. It applies to any agreement or concerted practices that take place or produce effects within the Belgian territory (or part thereof).

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The IPS is in charge of investigating cartels. It may initiate an investigation following a complaint, ex officio or at the request of the Minister of Economy while taking into account the priorities of the BCA.

If the IPS considers that the information gathered is not sufficient to continue investigating the case, it closes the file. In such a case, if the investigation followed a complaint, the BCA can only close the case by a reasoned decision concluding that the complaint is inadmissible or ungrounded, or prescribed by time-limitation (article IV.42 CEL). The IPS can also drop a complaint by a reasoned decision in view of the available resources and the priorities. This decision shall be notified by registered letter to the complainant, indicating that the file can be consulted at the BCA's premises. The complainant may bring an appeal to the President of the BCA within 30 days against the decision to close the case.

If the IPS considers that the information gathered is sufficient to continue investigating the case, the IPS may ask the companies whether they are interested in initiating discussions on settlement proceedings (see below). In the event no settlement is reached or possible, the IPS prepares a statement of objections indicating the antitrust objections and defining the infringement. The statement of objections is sent to the companies (and individuals) concerned. They should reply to the statement of objections within one month and may access the non-confidential version of case's file. The written phase of the investigation is then closed. Based on the replies or in the absence thereof, the IPS submits a draft decision to the President of the BCA. The draft decision is also notified to the parties. In the draft decision, the IPS states the objections, defines the infringement, and proposes a decision to be taken by the Competition College. The parties are also allowed to access the non-confidential version of the case's file. They should submit their written observations within two months. The hearing before the Competition College shall take place within two months of submission of the written observations. The Competition College decides on the merits of the case within one month after the hearing.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Members of the IPS may conduct unannounced inspections with the prior authorisation of an examining judge ('dawn raids'). In this case, they can access the premises of the undertakings, transport means and any other locations where relevant information may be found. Members of the IPS can also access homes of the directors and other employees of the undertakings. Moreover, they can question the undertaking's staff regarding facts or documents relating to the purpose of the inspection warrant. The members of the investigation team may seize elements relative to their investigation. They may review information and documents, both in paper and electronic form, to the exclusion of documents which are either legally privileged or out of scope of the inspection warrant. They may affix seals for the duration of their inspection without, however, exceeding 72 hours.

They may also announce that they will visit the premises of a company without the prior authorisation of a judge (but they cannot seize any element).

Members of the IPS may send a request for information to a company or an association of corporate undertakings. The request for information indicates a deadline within which the information should be provided. The request for information may be sent either under article IV.41(3) or article IV.41(2) CEL. In the latter case, the provision of inaccurate or incomplete information or the absence of response within the deadline may amount to the imposition of fines or penalties.

The members of the IPS may hear any witness, both orally and in written and draft minutes of any statement made by any witness or of any infringement or fact (which constitutes prima facie evidence ('*faisant foi jusqu'à preuve du contraire*').).

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The BCA is a member of the European Competition Network (ECN), the European Competition Authorities (ECA), the International Competition Network (ICN) and the Competition Committee of the OECD.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The BCA cooperates significantly with the NCAs of neighbouring countries (ie, France, Luxembourg, Germany and the Netherlands), as well as the United Kingdom. After Brexit, cooperation with the UK authorities might be affected.

This cooperation helps the BCA to collect evidence in different jurisdictions. On the other hand, it enables the cartel participants to claim a reduction of the fine on the basis of the 'non bis in idem' principle if a neighbouring NCA has already penalised a company according to the same facts (see the BCA Decision of 28 February 2013 in Case 13-10-06 *Meel* and the judgment of the Brussels Court of Appeals of 12 March 2014 in Case 2013/MR/6 *Brabomills*). The Guidelines on the method for setting adopted by the BCA on 26 August 2014 also provide that the amount of the fine may be increased where the companies continue or repeat the same or a similar infringement after the European Commission or an NCA of a neighbouring country of Belgium (as listed above), has made a finding of an infringement of article 101 TFEU.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The Competition College shall adjudicate a cartel case in light of Belgian or EU antitrust rules.

It shall decide on the merits of the case based on a draft decision prepared by the IPS. The Competition College may adopt a binding decision that concludes that an antitrust infringement exists and shall order it to cease. In such a case, the Competition College may impose fines or periodic penalties. Conversely, the Competition College may decide that no antitrust infringement exists, provided that it does not affect trade between member states.

The Competition College may also adopt interim measures intended to suspend the effects of an allegedly anticompetitive practice under investigation. Interim measures shall be adopted if there is an urgent need to avoid a situation likely to cause serious, imminent and irreparable damage to undertakings whose interests are affected by such practices or likely to harm the general economic interest.

Judicial courts may also adjudicate concerted practices under Belgian or EU antitrust rules. Judicial courts may decide whether a practice constitutes an antitrust infringement. They may adopt a cease-and-desist order and declare the agreement null and void. On this basis, judicial courts may also award damages in private litigation. However, they are not entitled to impose fines or remedies.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

There is no specific rule on the burden of proof in antitrust matters. Each party should demonstrate the elements it invokes. Regarding the standard of proof, the BCA applies the same rules as the European Commission (ie, sufficiently precise and consistent evidence to establish the existence of an infringement).

Before the BCA, the burden of proof of an antitrust infringement rests on the IPS. However, companies can demonstrate that the agreement falls within the scope of an EU Block Exemption Regulation or challenge the IPS's finding on the existence of appreciably restrictive effects.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The BCA may use circumstantial evidence in cartel cases, either exclusively or together with direct evidence. However, circumstantial evidence is often used in conjunction with direct evidence. Circumstantial evidence is considered as a whole, in light of its cumulative effect, and not on an item-by-item basis.

16 Appeal process

What is the appeal process?

Decisions adopted by the Competition College may be appealed to the Market Court within 30 days of the date of their notification. An appeal may be lodged by (i) the undertaking or the individual concerned; (ii) the complainant; (iii) any party with a sufficient interest and authorised to be heard by the Competition College; or (iv) the Ministry of Economy. The IPS cannot appeal the decisions of the Competition College.

The Market Court decides with full jurisdiction, including the power to substitute the contested decision with its own decision. However, on 20 December 2013, the Belgian Supreme Court decided that the full jurisdiction of the Market Court in antitrust matters is limited to the infringements established by the Competition College. Accordingly, the Market Court cannot rule on facts or elements that have neither been adjudicated by the Competition College nor taken into account by the IPS in its reasoned decision. Furthermore, the Market Court cannot exercise its full jurisdiction in cases regarding the application of article 101 TFEU. In such cases, the Belgian Supreme Court decided that the competence of the Market Court is limited to the (total or partial) annulment of the Competition College's decisions (see case H.13.0001.F).

The appeal does not suspend the effects of contested decision. The parties can request the Market Court to suspend these effects. However, the standard for obtaining a suspension measure is very high (ie, the applicant should demonstrate that its grounds of appeal on the merits are prima facie serious and that it is urgent to remedy an imminent damage which is serious and difficult to repair, if not irreparable (see, for instance, Case 2015/MR/1, *Fédération Equestre Internationale*, judgment of 22 October 2015)).

The Market Court may ask the BCA to communicate the procedural file and other documents submitted at the BCA.

Finally, the Competition College's decision to dismiss a request for interim measures may also be appealed to the Market Court within 30 days of the date of its notification.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions for antitrust infringements, except in bid-rigging cases of public procurements where imprisonment or payment of fines may be imposed by a criminal court.

Individuals found guilty of an improper use of information obtained in the course of an investigation or for breaking seals affixed by the BCA can also face criminal sanctions.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Participation in cartel activities may lead to the imposition of administrative fines.

The Competition College may impose fines of up to 10 per cent of the consolidated turnover realised both on the Belgian market and through exports from Belgium ('the Belgian consolidated turnover'). Upon request from the IPS, the Competition College may impose daily penalties of up to 5 per cent of the average daily turnover in the case of non-compliance with the relevant decision.

Fines of between €100 and €10,000 can be imposed on individuals having participated in cartel activities.

Judicial courts adjudicating a cartel case are not entitled to impose fines.

On 22 June 2015, the BCA imposed a total fine of €117 million on 18 supermarkets and suppliers of personal care, hygiene and cleaning products. This is the highest total fine imposed by the BCA to date. The fines were imposed in the context of a cartel settlement procedure.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

On 26 August 2014, the BCA adopted the Guidelines on the method of setting fines. They are not binding on the BCA. However, any debarment should be well reasoned.

According to the Guidelines, the BCA shall apply the European Commission's Guidelines on the method of setting fines. However, the BCA's Guidelines contains some adjustments concerning the value of sales to take into account, and the leniency and settlement programmes.

The basic amount of the fine will be related to a proportion of the value of the sales achieved in Belgium (15 to 25 per cent), depending on the degree of gravity of the infringement, multiplied by the number of years of infringement. The basic amount may then be adjusted in light of mitigating or aggravating circumstances.

The basic amount may be increased in the case of aggravating circumstances, such as a refusal to cooperate or the fact that the undertaking endorsed a role of leader. The basic amount of the fine may also be reduced in the case of mitigating circumstances, such as the circumstance that the anticompetitive conduct has been authorised or encouraged by public authorities or legislation.

The final amount of the fine shall not, in any event, exceed 10 per cent of the Belgian consolidated turnover in the preceding business year of the company or association of corporate undertakings participating in the antitrust infringements (see, however, the proposal for changes below).

Finally, if a settlement is reached with the undertaking, the amount of the fine is first calculated on the basis of the Guidelines and then further reduced owing to the settlement (ie, a supplemental reduction of 10 per cent of the final amount of the fine is applied by the BCA).

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

According to article 69 of the Public Procurement Act of 17 June 2016, public authorities may debar from a public procurement procedure an applicant or a tenderer who participated in cartel activities (less than three years ago). The debarment may occur at any stage of the procedure. The debarment is not automatic and is not available if the applicant or tenderer has demonstrated to have adopted measures to prove its reliability.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Under Belgian law, cartel activities can be sanctioned with administrative fines but not with criminal penalties. As regards bid rigging of public procurements, parallel proceedings are possible by both the BCA and a criminal court. However, the lack of cooperation between both authorities may justify the application of the 'non bis in idem' principle.

Judicial courts can also condemn undertakings involved in cartel activities to the payment of damages.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Plaintiffs can lodge an action with the judicial courts. The action would be based either on tort law (article 1382 of the Belgian Civil Code) or on contractual law (article 1142 of the Belgian Civil Code). In both cases, the plaintiff should demonstrate a fault, a damage and a causal link (such a causal link is assumed in the case of an established cartel). If based on tort law, the action should be filed within five years as from the moment the plaintiff knows or should have known of the facts giving rise to liability. If based on contractual law, the action should be filed within 10 years.

Compensation is only available for the loss incurred by the plaintiff (be it the direct or indirect purchaser). In line with article XVII.83 CEL, judicial courts may take into account a passing-on defence invoked by the defendant (ie, the possibility to mitigate the company's liability by demonstrating that all or part of the overcharges have been passed on the victims' customers).

There are no double, treble or exemplary damages available under Belgian law.

The unsuccessful party should pay the procedural indemnity. It varies between a minimum of €150 and a maximum of €30,000.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Since 1 September 2014 a collective redress mechanism has been available under Belgian law for consumers seeking to obtain compensation from antitrust rules infringements (although not limited to antitrust matters).

Class actions may only be filed by accredited consumers' protection associations acting as a group representative. The Brussels Court of Appeals has exclusive jurisdiction to adjudicate claims filed through a collective redress mechanism.

The mechanism is based both on an opt-in and opt-out system. For consumers living in Belgium, they should express their willingness not to participate in the collective action (opt-out mechanism). For consumers not based in Belgium, they should express their willingness to be part of the collective action (opt-in mechanism). However, in both

cases, the consumers should express their interest to participate in the collective action regarding physical and/or moral damages.

If the parties have concluded an agreement before the filing of the action with the Brussels Court of Appeals, the Court could be asked to homologate the agreement. In the absence of such an agreement, the Brussels Court of Appeals should first judge on the admissibility of the action. If admissible, the Brussels Court of Appeals should fix a time limit enabling the parties to reach an agreement regarding compensation for the harm suffered. Such an agreement will then be homologated by the Brussels Court of Appeals but shall not constitute a finding of liability of the defendant. If no agreement has been concluded, the Brussels Court of Appeals shall decide on the merits of the case.

The Brussels Court of Appeals shall appoint a liquidator in charge of distributing the damages among the plaintiffs, based either on an agreement or a judicial decision.

On 22 March 2018, the Belgian parliament approved a bill of law extending the scope of the class action provisions to small and medium-sized enterprises (SMEs).

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Belgian leniency programme is set out in article IV.46 CEL and the Leniency Guidelines of the BCA of 22 March 2016. The leniency programme is only applicable to cartels (including hub-and-spoke infringements).

Under the leniency programme, both companies and associations of corporate undertakings as well as individuals can obtain immunity for infringement of the cartel prohibition.

For companies and associations of corporate undertakings who apply first, full immunity (Type 1) from fines is available.

Full immunity (Type 1) can be obtained in two types of situations (Type 1A and Type 1B) and provided that the applicant has not coerced another company or association of corporate undertakings to participate in a cartel and complies with the obligation to cooperate.

Immunity type 1A is granted if:

- the applicant is the first to submit information and evidence that enables the BCA to carry out targeted inspections in connection with the alleged cartel; and
- the BCA does not, at the time of the application, have enough information to justify an inspection.

Immunity type 1B is granted if:

- the applicant is the first to submit information and evidence that enables the BCA to establish an infringement; and
- the BCA did not have sufficient evidence to find an infringement in connection with the cartel.

For individuals, such as directors or senior employees of parties to a cartel, immunity from fines is available if:

- the individual is involved in one or more of the prohibited practices of price fixing, output limitation or market allocation; and
- the individual contributes to proving the existence of these prohibited practices, by providing information the BCA did not have at the time of the application or acknowledging the existence of a cartel.

Both companies and individuals must also respect other procedural conditions to benefit from full immunity (among others):

- the applicant cooperates genuinely, fully, on a continuous basis and expeditiously;
- the applicant cannot contest any fact communicated to the BCA in the context of its leniency application or the existence of the practices;
- the applicant has an obligation not to disclose the facts or any of the contents of its application; and
- the applicant ends its involvement in the alleged cartel, except if agreed otherwise with the Competition Prosecutor.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

For companies and associations of corporate undertakings that cooperate after an immunity application has already been made, partial immunity (Type 2) can be obtained if they provide the BCA with evidence of the alleged cartel that represents significant added value relative to the evidence already in the authority's possession at the time of the application and if they meet all other procedural conditions to qualify for leniency (genuine, full, continuous and expeditious cooperation, confidentiality of the leniency application, ending of the alleged cartel, etc).

Regarding individuals, full immunity applies no matter the rank of their leniency application. However, the immunity applications of natural persons are not taken into account to determine the rank of an undertaking. In other words, a company could benefit from full immunity despite the fact that an individual was the first to apply for immunity.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The Belgian leniency programme is based on the first-come, first-served principle.

The first applicant for immunity can obtain full immunity from the fine whereas for subsequent applicants only fine reductions are available. The second applicant can obtain a fine reduction in the range of 30 to 50 per cent, a 20 to 40 per cent reduction can be obtained by the third applicant, and finally a 10 to 30 per cent reduction is available for subsequent applicants.

There is no 'immunity plus' or 'amnesty plus' option available under Belgian law.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Leniency or immunity applicants may contact the Competition General Prosecutor anonymously or through a 'marker' (ie, an application protecting the rank of the applicant) to verify whether immunity is still available. Once the Competition General Prosecutor confirms that immunity is available, the applicant must immediately apply for immunity if it has anonymously contacted the Competition General Prosecutor or within two weeks if a marker has been submitted. This period of two weeks can be extended by the Competition General Prosecutor dependent on the cooperation of the applicant in the collection of evidence.

After the submission of the immunity/leniency application (and when the investigation is sufficiently advanced if the Competition General Prosecutor has decided to open proceedings), the Competition General Prosecutor submits a draft 'opinion' to the Competition College setting out the reasons why the applicant should or should not benefit from immunity. The applicant shall then have eight business days to submit its observations. The Competition College shall decide upon the conditional or provisional immunity or leniency within 20 days of receiving the draft opinion.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

Immunity applications can be made by a company, association of corporate undertakings or an individual who has been involved in a cartel. The applicant should be the first to submit evidence to the BCA. The level of cooperation is significantly higher than for a subsequent applying company (with regard to the timing of cooperation, see question 27).

An individual who participated in a cartel can apply for immunity from fines. The standard for obtaining immunity is high but not as high

Update and trends

The latest development concerned the functioning of the Market Court since 1 September 2017 and a law extending the scope of the class actions provisions to SMEs.

Moreover, there is also a (draft) bill of law currently pending which should have a major impact on cartel enforcement in Belgium as it will enable the BCA to cap the fines to a maximum of 10 per cent of the worldwide turnover.

as for companies. In the event an individual did not apply for immunity, he or she can only be prosecuted and found guilty if a company is also prosecuted and found guilty for the same offences.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Applications for immunity or leniency will be treated in a confidential manner. That means that the access to the immunity application is restricted to the addressees of the draft decision (statement of objections) and granted subject to the condition that it will not be used for any other purposes but the procedure in which the immunity application was made. Third parties and private litigants do not get access to the immunity applications: the BCA is explicitly prohibited from transferring immunity applications to the national courts for the purpose of awarding compensation for private damages. The BCA can only transfer the applications of a company to the European Commission or to other NCAs under the conditions of the ECN Notice and if the receiving NCA guarantees the same level of protection against disclosure as the BCA (see above regarding the lack of cooperation with criminal courts).

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

During the investigation but before the submission of the draft decision on the merits, the IPS can ask the companies if they are interested in starting discussions in order to conclude a settlement agreement. If so, the IPS indicates the range of fines that would be imposed on the company outside a settlement procedure. The IPS issues a draft decision based on the bilateral discussions where it identifies the objections and the infringements. The parties can submit observations on the draft decision. The parties are authorised to access the non-confidential version of the case's file.

In order to reach a settlement agreement, the company must acknowledge its participation in the cartel activities as well as its liability. The companies should also agree on the indicated fine. The IPS would then reduce the final amount of the fine by 10 per cent. Moreover, it is always possible to persuade the IPS to reduce the scope of objections during the bilateral discussions. In addition, a commitment to pay claims resulting from private damage actions can be taken into account in the setting of the fine. Finally, settling companies also agree not to appeal the decision based on a settlement.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Since the entry into force of the CEL, individuals may be found liable for antitrust infringements. Accordingly, employees or former employees of a company involved in cartel activities may be held liable, even if the company obtained immunity from or a reduction of the fine.

However, employees and former employees involved in cartel activities may apply for immunity from fines if they cooperate in the demonstration of the infringement. Individuals may do so regardless of the rank of their application. Moreover, applications from individuals will not necessarily deprive the companies from full or partial immunity.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Companies or individuals willing to file an application for immunity or leniency can contact the Competition General Prosecutor to schedule a meeting. Immunity or leniency applicants must provide the identities of the cartel participants; the products concerned and the affected territories; the nature of the cartel activities; and its estimated duration. The leniency or immunity application is deemed to be submitted at the meeting with the Competition General Prosecutor.

Leniency or immunity applicants shall be required to submit a corporate statement containing (i) the name and address of the leniency applicant and of the other companies having participated in the cartel, and name and functions of the employees involved in the cartel activities; and (ii) a detailed description of the alleged cartel arrangement, including, for instance: its aims, activities and functioning; the product or service concerned; the geographic scope; the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contact. Evidentiary elements should accompany the corporate statement as well as information about the leniency applications submitted in other countries.

Summary applications may be filed with the BCA in cases where an immunity or leniency application has been submitted to the European Commission. Summary applications should include a short description of the cartel activities, including the identities of its participants, the estimated duration, the products concerned and the affected territories.

Leniency or immunity applications may be made orally in the premises of the BCA, unless the applicant has disclosed the content to third parties. The IPS shall record and transcript the content of the oral application. The application is entitled to verify the accuracy of the transcription.

Leniency applicants may request to obtain a marker from the Competition General Prosecutor. Such a request can be made orally or by a written application and should include the name and the address of the applicant, the reasons for requesting a marker, the participants in the cartel, the products concerned, the affected territories, the nature of the cartel and its duration. The Competition General Prosecutor shall adopt a decision regarding the marker request and provide the applicant a deadline within which additional information should be provided (the first deadline is usually two weeks).

Following receipt of the leniency or immunity application (and when the investigation is sufficiently advanced if the Competition General Prosecutor has decided to open proceedings), the Competition General Prosecutor submits a draft 'opinion' to the Competition College. If the Competition College considers that the full immunity application meets all the requirements, it decides to provisionally grant full immunity. Conversely, if it decides that the full immunity application does not meet all of the requirements, it may decide to provisionally grant partial immunity from fines.

If the applicant fulfils all the requirements to obtain full or partial immunity, the final decision adopted by the Competition College on the merits would grant the definitive full or partial immunity.

Immunity or leniency applications and summary applications should be made in one of the official languages in Belgium (ie, Dutch, French or German). However, they can also be made in English provided that a translation into one of the Belgian official languages is submitted within two business days (or within a longer period as agreed with the Competition General Prosecutor). Evidentiary elements should be submitted in their original language (the Competition General Prosecutor can, however, request a translation).

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There is no proposal to amend the immunity/leniency regime.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

A defendant may access the case file of the IPS. The file contains the documents and data used by the IPS to make the statement of objections sent to the companies or to write the draft decision submitted to the Competition College (ie, it includes the immunity/leniency applications of all the applicants). However, the access is limited to the non-confidential documents contained in the file. The confidential nature of documents is determined on a case-by-case basis with regard to each natural or legal person accessing the file. In any event, a defendant could not access settlement proposals.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Counsel may represent both a company and its employees involved in cartels activities, provided, however, that their respective interests are aligned.

DALDEWOLF

Pierre Goffinet
Laure Bersou

pgo@daldewolf.com
lbe@daldewolf.com

Avenue Louise, 81
B-1050 Brussels
Belgium

Tel: +32 2 627 10 10
Fax: +32 2 627 10 50
www.daldewolf.com

36 Multiple corporate defendants**May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?**

Counsel may represent multiple companies involved in cartels activities, provided there is no conflict of interests.

37 Payment of penalties and legal costs**May a corporation pay the legal penalties imposed on its employees and their legal costs?**

Companies may commit to pay legal penalties imposed on its employees and bear the legal costs incurred from their defence.

38 Taxes**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

Neither fines, penalty payments nor damages awards are tax-deductible under Belgian law.

39 International double jeopardy**Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

The BCA may take into account fines imposed in other jurisdictions in setting the amount of the fines imposed on the company if an NCA has already penalised a company according to the same facts, in line with the 'non bis in idem' principle (see the BCA Decision of 28 February 2013 in case 13-10-06 *Meel* and the judgment of the Market Court of 12 March 2014 in case 2013/MR/6 *Brabomills*).

Moreover, in case of settlements, the IPS may take into account the commitment from the cartel participant to grant compensation for the damage occurred to the private victims in setting the fine to be imposed. Accordingly, overlapping liability for damages in other jurisdictions could normally be indirectly taken into account by the BCA (see article IV.54 CEL).

40 Getting the fine down**What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

The undertaking may enter into the leniency programme and into settlement to avoid or reduce the amount of the fine.

Undertakings may invoke mitigating circumstances to obtain a reduction of the total amount of the fine imposed by the BCA. However, compliance initiatives are not considered to constitute a mitigating circumstance. In the case of settlement, a commitment to pay claims resulting from private damages actions can lead to a reduction of the fine.

Brazil

Onofre Carlos de Arruda Sampaio and André Cutait de Arruda Sampaio

O. C. Arruda Sampaio – Sociedade de Advogados

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The current Brazilian Antitrust Act is Law No. 12,529/2011, which became effective on 29 May 2012 (replacing Law No. 8,884/94). Law No. 12,529/11 is applicable to companies and individuals alike. There are additional provisions in the form of resolutions and ordinances. The individuals may also be criminally prosecuted in Brazil for cartel offences, according to Law No. 8,137/90.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Administrative Council for Economic Defence (CADE) is the Brazilian antitrust agency responsible for prosecuting and adjudicating cartel cases in the administrative sphere. Two of CADE's departments are relevant for cartel cases: the General Superintendency and the Administrative Tribunal. CADE's General Superintendency is responsible for the investigation and prosecution while CADE's Administrative Tribunal adjudicates the cases investigated and prosecuted by CADE's General Superintendency.

In the criminal sphere, cartels are prosecuted by the federal or state criminal prosecutors (that are completely independent from CADE). Criminal cases will be adjudicated by a criminal court.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

There is a bill under Federal Senate analysis that proposes the following changes to the Brazilian Antitrust Act No. 12,529/2011:

- fines related to cartel conducts by companies or their economic groups to be proportional to the duration of the infraction to the economic order;
- establishing double reimbursement to the parties affected by the antitrust violation, with the exception of the defendants that executed leniency or settlement agreements;
- establishing the interruption of the statute of limitation during the term of the administrative process; and
- becoming CADE's final decision able to motivate the granting of evidence protection in an eventual damage recovery lawsuit filed by third parties affected by the antitrust violation.

Currently, the proposed bill is being analysed by the Federal Senate's Committee on Economic Affairs.

Recently, CADE issued Resolution No. 21/2018 (of 5 September 2018), which regulates the confidentiality of documents and information. Further details are set out in question 29.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

A cartel is the conduct that produces, or has the potential to produce, the effects listed in article 36 of the Brazilian Antitrust Act, and its paragraph 3 exemplifies the types of conduct that result (or may result) in such effects.

Article 36 defines in general terms that conduct (notwithstanding its form) resulting in:

- limiting, restraining or in any way injuring free competition or free initiative;
- controlling the relevant market of goods or services;
- arbitrarily increasing profits; or
- exercising a dominant position abusively may be characterised as 'violation to the economic order' (antitrust violation), regardless of fault, even if effects are not achieved (ie, even if anticompetitive effects are only potential).

Article 36, paragraph 3, contains examples of types of conduct that, if resulting (or potentially resulting) in any of the above effects, may be deemed antitrust violations. Specifically, regarding a cartel, the following items of paragraph 3 are applicable:

- to agree, join, manipulate or adjust with competitors, in any way:
 - the prices of goods or services individually offered;
 - the production or sale of a restricted or limited amount of goods or the providing of a limited or restricted number, volume or frequency of services;
 - the division of parts or segments of a potential or current market of goods or services by means of, among others, the distribution of customers, suppliers, regions or time periods; and
 - prices, conditions, privileges or refusal to participate in public bidding.

In practice, CADE classifies a cartel, based on article 36, paragraph 3, as conduct that:

- regulates markets of goods or services by establishing agreements to limit or control research and technological development, the production of goods or services, or impairs investment for the production of goods or services or their distribution;
- limits or prevents the access of new companies to the market; and
- creates difficulties for the establishment, operation or development of a competitor company or supplier, acquirer or financier of goods or services, among others.

Because the Brazilian Antitrust Act establishes that only the conduct that may result in the anticompetitive effects mentioned above can be characterised as antitrust violations, a cartel is not a per se violation in Brazil. Therefore, a case-by-case analysis must be carried out, taking into account the circumstances and specifics of the case and the characteristics of the market involved.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

Neither the Brazilian Antitrust Act nor CADE's resolutions make reference to any industry-specific violations or exemptions.

However, on 28 February 2018, CADE and the Brazilian Central Bank (BACEN) executed a memorandum of understanding (MoU) to align CADE and BACEN's jurisdiction over financial institutions. According to the executed MoU, CADE is the one responsible for investigating financial institutions regarding antitrust violations. In addition, in order to increase the technical consistency of its decisions, CADE also may request information from BACEN.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Brazilian Antitrust Act is applicable to both corporations and individuals. On the other hand, the criminal law applies only to individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Brazilian Antitrust Act applies to antitrust violations (even if potential) that occur on Brazilian territory and to those that take place outside Brazilian borders, but may have direct or indirect effects in Brazil.

In other words, international cartels that result or may result in direct or indirect effects within Brazilian territory are under CADE's jurisdiction, even if no illegal conduct is carried out in Brazil.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no specific exemption in the Brazilian Antitrust Law regarding export cartels.

However, in a recent precedent from 5 September 2018, CADE's Tribunal adjudicated a case in which the American Natural Soda Ash Corporation (ANSAC) was charged as an export cartel that allegedly violated the Brazilian Antitrust Law. CADE carried out an analysis based on the rule of reason and on the possible harmful effects of ANSAC's exports into the Brazilian market. CADE's Tribunal concluded that ANSAC's exports did not result in harmful effects to the competition on the Brazilian market and thus shelved the case.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The investigation is initiated by CADE's General Superintendency ex officio or upon a complaint being filed by any interested party.

Following the initiation of the administrative process, all defendants shall be served. The defendants shall provide their defences within 30 days. The 30-day deadline starts from the date that the last defendant is served. This deadline will be doubled (to 60 days) if there is more than one defendant represented by different attorneys. The defence deadline may also be extended for an additional period of 10 days at the defendant's request, subject to CADE's discretion. After the filing of such defences and within 30 working days (this deadline is to be considered as a reference), the General Superintendent will determine the evidence to be submitted, which may include the hearing of witnesses, requesting of additional information from the defendants, companies, associations or other entities, economic studies, etc.

At the end of the fact-finding phase, defendants will be required to submit new statements within five working days (10 working days if there is more than one defendant represented by different attorneys). After that, the General Superintendency shall issue its

recommendation (either for the condemnation or for the shelving of the case) and forward the records to the CADE Tribunal for the final decision.

The case will be randomly assigned to a Reporting Commissioner at the CADE Tribunal. The Reporting Commissioner may request that the CADE Attorney General's Office or the Federal Prosecutor issue their opinions within 20 days.

The Reporting Commissioner may also determine supplementary fact-finding steps at his or her discretion. After an eventual supplementary fact finding, the defendants shall submit their final statements within 15 working days (30 working days if there is more than one defendant represented by different attorneys).

After that, the Reporting Commissioner will schedule the trial for the case. The adjudication takes place during a public hearing at CADE's plenary session. The final decision by the CADE Tribunal may be challenged only before the federal courts.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

CADE's General Superintendency is responsible for investigating anti-trust violations, including cartels.

While conducting the investigation, the General Superintendency has the power to request information and documents from any individual or legal entity, state bodies and authorities, whether public or private.

The General Superintendency can also summon any individual or legal entity (whether private or public) for a hearing.

Refusal to comply with CADE's request is punishable with a daily fine starting from 5,000 reais, which may be increased up to 20 times if necessary to ensure its effectiveness (article 40 of Law No. 12,529/11).

However, the Brazilian Constitution guarantees the right against self-incrimination, in the sense that a witness may remain silent if the answer may result in self-incrimination. If the request for information demands a written answer, the company or individual may also refuse to answer in case of self-incrimination, but it is important to submit a document in compliance with the defined deadline stating that it will remain silent, otherwise there is the risk of being punished by not complying with the RFI's deadline.

The General Superintendency may conduct inspections at the head offices, establishments, offices, branches or subsidiaries of the investigated company where inventories, objects, papers of any nature, as well as commercial books, computers and electronic files may be searched. An inspection is dependent on the agreement by the company. Such agreement is necessary because according to the Brazilian Constitution, the same law making a home inviolable is extended to any company's office or establishment. This legal barrier can only be removed by agreeing to an inspection or by a court order. If the company does not want an inspection, it is advised to register its disagreement in case CADE interprets any inaction as an agreement.

The General Superintendency may also request, through CADE's Attorney General, a search warrant (dawn raid) in the federal court to search for objects, papers of any nature, as well as commercial books, computers and electronic files in the interest of an administrative investigation. This situation is different from the inspection in the sense that the company cannot refuse to allow the search in case of a federal court order. In practice, due to difficulties within the court system to grant warrants for dawn raids, the General Superintendency usually depends on evidence provided in leniency agreements to convince the federal judges to authorise them.

CADE's General Superintendency does not have the power to perform or request wiretapping or email monitoring. This is only possible in criminal investigations through specific court authorisation upon the request of the police or the criminal prosecutor. However, this evidence may be used as evidence in CADE's administrative proceedings. CADE recently executed a series of cooperation agreements with Criminal Prosecutor's Bureaus from different Brazilian states.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Yes. CADE has signed a number of cooperation agreements with other antitrust authorities in jurisdictions such as Argentina, Canada, Chile, Colombia, Ecuador, the EU, France, Japan, Peru, Portugal, South Korea, the US and the other BRICS members (Russia, India, China and South Africa). By means of these agreements the authorities may exchange non-confidential information regarding current antitrust investigations.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

CADE's General Superintendency has significant interplay with US and EU authorities, which has resulted in a series of international cartel investigations in Brazil following investigations started by US and European authorities.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

A cartel proceeding is adjudicated by CADE's Tribunal. As explained above (see question 9), the General Superintendency is responsible for the administrative investigation and prosecution of antitrust violations and the Tribunal is responsible for the final adjudication in the administrative sphere.

At the CADE Tribunal antitrust violation cases such as cartels will be adjudicated in a public adjudication session by the Tribunal full court. The defendant has 15 minutes to orally provide the defence arguments before the Reporting Commissioner reads his or her vote. After that, the votes of other Commissioners are collected. The decisions are taken by a majority of votes (the CADE Tribunal is composed of one president and six commissioners).

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

CADE's General Superintendency that has the burden of proof to sustain the charge against the defendants. Such proofs can be collected ex officio and also through a leniency agreement or settlement agreements executed between the authority and individuals or companies involved in the antitrust violation. The standard of proof is defined case by case according to the market characteristics, the dynamics of the misconduct and the evidence gathered in dawn raids, leniency agreement and settlement agreements.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes, CADE uses circumstantial evidence to support condemnations.

16 Appeal process

What is the appeal process?

A CADE Tribunal decision can be challenged only before the federal courts. The scope of the appeal is broad and may regard the due process, the merit of the case, as well as the balance of the penalties. It is important to clarify that lawsuits in Brazil are not expeditious, usually lasting between 5 to 10 years or more. It is also important to mention that to challenge CADE's adverse decision it is necessary to deposit in a court's bank account the full amount of the fine imposed by the tribunal.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

A cartel is a federal crime defined in article 4, item II, of Law No. 8,137/1990. The criminal penalty for a cartel is imprisonment from two to five years, plus a criminal fine. Only individuals may be criminally prosecuted for cartel offences.

The administrative prosecution of cartels (performed by CADE) has been more effective than criminal prosecutions (performed by criminal public prosecutors) in the past years. However, the criminal prosecution of cartels has been increasing lately. In light of this, CADE has recently signed a series of cooperation agreements with Criminal Prosecutor's Bureaus from different Brazilian states.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The administrative sanction is imposed by the CADE Tribunal, pursuant to article 37 of the Antitrust Act. The main penalties are fines, such as:

- for companies, a fine ranging from 0.1 per cent to 20 per cent of the gross revenues of the company, group or conglomerate, registered in the last fiscal year before the initiation of the administrative proceeding, in the field of the business activity in which the violation occurred, which will never be less than the advantage obtained, when possible the estimation thereof;
- for individuals in managerial positions (for example, CEOs, directors, managers), directly or indirectly responsible for the violation committed, if their fault or wilful misconduct is proven, a fine ranging from 1 per cent to 20 per cent of the fine imposed on the company; and
- in the case of other individuals or public or private legal entities, as well as any association of persons or de facto or de jure legal entities, even if temporary, incorporated or unincorporated, which do not perform business activity, not being possible to use the gross sales criteria, a fine of between 50,000 and 2 million reais.

In addition to the penalties mentioned above, pursuant to article 38 of the Antitrust Act, other penalties may also be cumulatively imposed (together with the fines) by CADE, such as:

- the requirement to publish the adverse decision in a newspaper of wide circulation;
- a prohibition on contracting with public financial institutions and of participating in biddings held by public bodies for no less than five years;
- a split-up of the company or a divestiture of certain assets;
- the recommendation to the relevant public bodies to grant compulsory licence of intellectual property rights when the offence is related to the use of these rights;
- the recommendation to the relevant public bodies not to grant the payment of federal taxes in instalments or to cancel, in whole or in part, tax incentives or public subsidies;
- the prohibition on performing commercial activities on their own behalf or as a corporate representative for a period of five years (for individuals);
- the inclusion of the perpetrator in the National Consumers Roll; and
- to determine any other act or measure in order to eliminate the harmful effects to the economic order.

Regarding civil liabilities, the Brazilian Antitrust Act expressly recognises the independence between administrative and civil liabilities, meaning that a civil damages recovery lawsuit does not depend on a previous CADE Tribunal's adverse decision. Civil damages recovery lawsuits (individual claims or class actions) can be filed by any affected third parties, following articles 186 and 927 of the Brazilian Civil Code, which set a general obligation to the party at fault to indemnify the damages caused to others.

The complainant seeking damages compensation must prove:

- the violation of the Antitrust Act;
- the damage; and
- the causal link between the violation and the damage.

Nonetheless, damages recovery lawsuits motivated by antitrust violations are still uncommon in Brazil. One of the most important difficulties in carrying out civil damages recovery lawsuits is the time frame before a final decision is reached. This may take several years, with more than a decade being not uncommon.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Pursuant to article 37, paragraph 1 of the Brazilian Antitrust Act, the CADE Tribunal shall consider the following criteria when imposing fines:

- the seriousness of the violation;
- the defendant's good faith;
- the advantage obtained or intended by the defendant;
- the materialisation or not of the violation;
- the degree of damage or danger to harm, to free competition, to the national economy, to consumers or to third parties;
- the negative economic effects produced in the market; and
- the defendant's economic status.

The Antitrust Act also states that the fine is doubled in the event of recurrence.

There is no specific guideline regarding the interpretation of these criteria and they are assessed on a case-by-case evaluation by the CADE Tribunal. However, recurrence is the main aggravating factor that can double the fine. There are no specific mitigating factors in the Brazilian Antitrust Act other than cooperation through leniency or settlement agreements that may result in full immunity or fine reduction, respectively.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

As mentioned above (see question 18), there are other penalties that may also be cumulatively imposed with fines. One of them is the prohibition on contracting with public financial institutions on participating in bids held by public bodies. If this specific ancillary penalty is imposed, it will be valid for no less than five years. Ancillary penalties are applied at CADE Tribunal's discretion. There are some CADE precedents concerning bid rigging in which this was applied.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Administrative, criminal and civil liabilities are completely independent. As a consequence, the same conduct can be prosecuted in the administrative and criminal spheres as well as being subject to a civil recovery lawsuit at the same time (in parallel). In practice, CADE's decision is the fastest, so it is often used as evidence in both the criminal prosecution and the civil recovery lawsuits.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

The Brazilian Antitrust Act does not distinguish between 'direct or indirect purchasers'. The Act foresees in general the possibility for a damage recovery lawsuit to be brought by any party affected by the violation.

Civil damages recovery is calculated by the extension of the damages. There is no possibility of multiplying factor application.

Defendants in a damage recovery lawsuit are jointly and severally liable. It is important to clarify that private damage claims in Brazil related to antitrust violations are new and there are only a few cases under discussion in the civil court.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions to recover civil damages are possible in Brazil. The following entities are entitled to file class actions:

- the Federal Prosecutor;
- the union, the states, the municipalities and the federal district;
- the entities and bodies of public administration, specifically those destined to defending interests and rights protected by the Consumer Protection Code; and
- the associations legally incorporated in at least one year, which have among its institutional purposes, the protection of interests and rights within the Consumer Protection Code.

As mentioned previously, the Brazilian Antitrust Act expressly recognises the independence of administrative and civil liability, meaning that a civil damages recovery lawsuit does not depend on a previous adverse CADE decision. The complaint seeking damages compensation before the civil court must prove:

- the illegal act;
- the damage; and
- the causal link between the illegal act and the damage.

There is a trend that public prosecutors are intensifying civil damages lawsuits related to cartel cases.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

In 2000, the Brazilian leniency programme was inserted by Law No. 10,149/00 and has been improved since then.

A successful leniency application entitles the applicants to criminal immunity and also to full immunity against CADE's fines or a reduction from one- to two-thirds of such administrative fines, if the General Superintendency already had prior knowledge of the reported violation. It also entitles individuals for full immunity against the antitrust criminal prosecution.

On the other hand, the leniency agreement does not grant immunity for civil damages recovery lawsuits.

A company or an individual is qualified for the leniency application before CADE if it participated in the antitrust violation and if it fulfils the criteria below, cumulatively:

- it is the first to apply for the leniency in relation to the disclosed violation;
- it ceases participation in the disclosed violation;
- at the time of the leniency application the General Superintendency did not have enough evidence to guarantee the conviction of the applicant;
- it confesses its participation in the violation;
- it provides full and permanent cooperation with the investigation and respective administrative process, attending any investigation action when requested at its expenses; and
- the cooperation results in:
 - the identification of the other participants involved in the violation; and
 - information and documents that prove the disclosed violation.

The effects of the leniency agreement may be extended to other entities of the same economic group and its employees. However, this extension is not automatic and it is mandatory that these other entities and employees adhere to the leniency agreement to be protected.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Full immunity in the leniency programme is granted only to the first applicant. However, the subsequent companies and individuals that did not come first may execute settlement agreements (TCCs) with the authority, qualifying for an administrative fine reduction.

According to the settlement agreement programme, the companies and individuals that are defendants in an administrative proceeding may settle an antitrust investigation if they:

- confess their misconduct;
- fully cooperate with the investigation; and
- pay a pecuniary contribution (in the case of cartel investigation).

26 Going in second

What is the significance of being the second cooperating party? Is there an ‘immunity plus’ or ‘amnesty plus’ option?

Regarding the settlement agreement programme, the main advantages for a defendant to execute a TCC are:

- reduction in the expected fine;
- the administrative process will be suspended in relation to the applicant; and
- it does not have to support the defence costs. In contrast to the leniency agreement, the TCC does not grant criminal immunity for individuals.

The reduction of the expected fines in a settlement agreement negotiated by the General Superintendency varies according to the collaboration offered by the applicant and the timing of the TCC application (the sooner the application, the larger the discount), following the ranges below:

- a reduction of 30 per cent to 50 per cent for the first TCC applicant;
- a reduction of 25 per cent to 40 per cent for the second TCC applicant;
- a reduction of up to 25 per cent for the remaining TCC applicants, but subsequent reductions shall be always lower than the previous one; and
- a reduction of up to 15 per cent if the TCC application is requested when the records are already at the CADE Tribunal for adjudication.

In practice, for individuals in managerial positions, the pecuniary contribution is usually defined as up to 5 per cent of the pecuniary contribution applied for the company and for the individuals in non-managerial positions it usually varies from 50,000 to 150,000 reais.

There is also a possibility of a higher reduction for TCC applicants called leniency plus.

A leniency plus consists of the reduction by one-third to two-thirds of the applicable penalty for a defendant (company or individual) that did not qualify for a leniency agreement in the conduct under investigation, but has information regarding a different conduct and thus may qualify for a new leniency agreement regarding another violation that General Superintendency had no prior knowledge.

Where applying for leniency plus, the following parameters for discounts on the expected fine will be applied to the TCC:

- the first proponent of a TCC with leniency plus: from 53.33 per cent to 66.67 per cent;
- the second proponent of a TCC with leniency plus: from 50 per cent to 60 per cent; and
- for all other proponents of a TCC with leniency plus: up to 50 per cent.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no deadlines to apply for a leniency agreement. However, after the initiation of the administrative process the applicant will be

qualified to a fine reduction and not to full immunity of CADE’s fines. It is also important to state that the leniency agreement is executed at General Superintendency discretion that will have a less incentive after the initiation of the administrative process.

If the applicant does not have all the necessary information and documents on hand to formally submit the leniency application, it may request a marker in order to secure a place at the front of the queue for the leniency application.

The marker request may be submitted to the General Superintendency orally or in writing and shall contain the following information (even if partially), regarding the conduct to be reported:

- complete identification of the leniency applicant, as well as the identity of the other known companies and individuals participating in the violation to be reported;
- the products and services affected by the reported violation;
- the estimated duration of the reported violation, when possible; and
- the geographic area affected by the violation. In the case of an international cartel, it must be stated that the conduct has at least the potential to generate consequences in Brazil.

If the marker is available, the General Superintendency will issue a statement securing the marker within five working days and will establish the deadline for the applicant to provide all relevant information and documents.

There is also no deadline for applying for a TCC. However, considering that the position in line for the TCC and the timing of the application (according to the phase of the administrative process) directly influences the amount of discount in the pecuniary contribution, it is recommended that any defendant interested in applying for a TCC submits its request as soon as possible.

CADE also uses a marker system to monitor TCC applicants and the level of discount in the pecuniary contribution will depend on the position of the applicant in the TCC’s line. The date of the TCC’s marker application is what defines the position of the applicant in the TCC’s line.

CADE’s Internal Rules, updated on 13 June 2017, foresee that if a marker for a leniency agreement is not available, the applicants on the waiting list for the leniency agreement’s proposal will be given the opportunity to negotiate for a TCC, if they want to, in the same chronological order they arrived for the leniency agreement’s proposal.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The applicant of a leniency agreement must provide evidence supporting the disclosed violation and shall cooperate fully and continuously with the investigation. The amount of information necessary to secure a leniency agreement may vary from case to case. Usually, the documents requested by the General Superintendency are documents and emails exchanged with competitors evidencing the reported violation. Copies of telephone records, agendas, employee meetings, etc, may also be requested.

In a TCC, the cooperation will influence the amount of discount in the pecuniary contribution. In this sense, the more evidence provided, the greater the discount.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The process of requesting and negotiating leniency and settlement (TCC) agreements is confidential. After these agreements are executed, their confidentiality will be regulated by the recently issued CADE Resolution No. 21/2018 (of 5 September 2018).

The following documents and information are confidential according to article 2 of Resolution 21/2018:

- the history of conduct (including amendments and attachments) of leniency and settlement agreements;
- those listed in articles 44, section 2º, 49, 85, section 5º e, and 86, section 9º of the Brazilian Antitrust Law No. 12/529/2011, as well as in articles 91 to 94 and 219 of CADE's Internal Resolution;
- those containing trade secrets and related to the business activity of individuals or legal entities of private rights;
- those that constitute grounds for confidentiality under the legislation (article 6º, I e II of Order No. 7,724/2012);
- those whose confidentiality is ordered by a judicial decision; and
- those submitted by the proponents, during the negotiation of the leniency or settlement agreements and not executed, while they have not been returned to the proponents or destroyed by CADE.

After CADE's Tribunal casts its final decision regarding the case, all documents will be public, except those comprised in article 2, listed above.

According to article 3 of CADE's Resolution 21/2018, the documents deemed confidential may be exceptionally accessed by third parties in the following circumstances:

- legal determination;
- specific judicial decision; and
- authorisation by the signatories of leniency and settlement agreements, with CADE's consent.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

CADE's General Superintendency may propose a settlement agreement to the defendants of an administrative investigation.

If a CADE decision is challenged in the federal court, CADE's Tribunal may authorise CADE's Attorney General to terminate the lawsuit through a judicial agreement.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The protection deriving from a leniency agreement may be extended to other entities of the same economic group and to employees. However, this extension is not automatic and it is mandatory that these other entities and employees adhere to the leniency agreement to be protected.

In the TCC this extension will depend on the existence of specific clauses allowing the employees and former employees to adhere to the TCC negotiated by the company or the existence of an umbrella clause, by which the TCC automatically covers other entities of the same economic group and its employees.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The leniency agreement application can be divided in four phases:

- secure a marker;
- negotiate and submit the content of the history of conduct (a document with a detailed description of the conduct) and the evidentiary documents to be provided;
- execute the leniency agreement; and
- the final declaration of compliance of the leniency agreement by the CADE's Tribunal with consequent confirmation of immunity (such declaration of compliance will happen when CADE's Tribunal casts its final decision regarding the administrative process).

A TCC application can be divided into four phases:

- secure a marker;
- negotiate and submit the content of the history of conduct (with a detailed description of the conduct) and the documents of evidence to be provided;
- approval of the TCC by CADE's Tribunal and its execution with the consequent suspension of the investigations regarding the defendants covered by it; and
- the final declaration of compliance of the TCC when CADE's Tribunal casts its final decision regarding the administrative process.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or anticipated assessments or reviews of the leniency or settlement programmes.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

According to the Brazilian Constitution the defendants shall have full access to the records (including full content of the leniency and TCC agreements). In this sense, it is guaranteed that all information and evidence is made available to the defendants for the purpose of complying with the due process of law and of guaranteeing all rights of defence.

O. C. ARRUDA SAMPAIO
SOCIEDADE DE ADVOGADOS

Onofre Carlos de Arruda Sampaio
André Cutait de Arruda Sampaio

onofre@arruda-sampaio.com
andre@arruda-sampaio.com

Alameda Ministro Rocha Azevedo, 882, 8th floor
01410-002 São Paulo, SP
Brazil

Tel: +55 11 3060 4300
Fax: +55 11 3082 2272
www.arruda-sampaio.com

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Yes, counsel are able to represent not only the corporation involved but also its employees under investigation. Generally, employees are represented by the same counsel hired by the corporation. However, in case of conflict of interests between the corporation and the current or past employee, the employee shall be represented by separate counsel.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

It depends. It is possible if there is no conflict of interest.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

The Brazilian Antitrust Act does not prevent the company from paying individuals' penalties or legal costs.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Neither fines nor other penalties imposed by CADE nor private damages awards are tax-deductible.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The criterion to determine whether the anticompetitive violation is under Brazilian jurisdiction is if it has directly or indirectly produced effects in Brazil, even if potentially. In this sense, the Brazilian antitrust and criminal laws are fully applicable to those situations notwithstanding the existence of penalties imposed by other jurisdictions. Regarding private claims, a complainant cannot sue a defendant to recover the same damages more than once, owing to protection against double jeopardy.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The eventual adoption of a compliance programme has no influence over the fine calculation. Therefore, the best way to reduce a possible fine is to execute either a leniency agreement or a TCC.

Bulgaria

Anna Rizova and Hristina Dzhevlekova

Wolf Theiss

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation on cartel regulation in Bulgaria is the Law on Protection of Competition (LPC) promulgated in the State Gazette 102/28 November 2008. The cartel regulation is modelled closely on EU competition law. The cartel prohibition contained in the LPC mirrors article 101 of the Treaty on the Functioning of the European Union (TFEU), excluding the 'effect on interstate trade' criterion. An English-language version of the LPC is available on the website of the Bulgarian competition authority, the Commission for Protection of Competition (CPC).

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The relevant authority investigating cartels in Bulgaria is the CPC, which is responsible for cartel investigations and enforcement of cartel prohibition. The CPC also applies article 101 TFEU in relation to agreements and concerted practices affecting competition in Bulgaria.

The CPC is an independent administrative body and has jurisdiction for the entire territory of Bulgaria. The seven-strong CPC membership is elected by the Bulgarian National Assembly. The CPC administration consists of five departments, three of which handle competition law enforcement (Antitrust and Concentrations, Competition Law and Policies, and Unfair Competition and Abuse of Superior Bargaining Position).

While conducting on-site inspections (dawn raids), the CPC may request police assistance. The decisions of the CPC are subject to appeal before the Supreme Administrative Court (SAC).

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

In 2015, a new chapter on Prohibition of Abuse of a Superior Bargaining Position was introduced to the LPC.

In January 2018, an amendment and supplementation (the Private Damages Amendment) to the LPC became effective, implementing into Bulgarian law the provisions of Directive 2014/104/EU on anti-trust damages actions (the Private Damages Directive).

In September 2018, significant amendments were made to the Administrative Procedure Code, which changed the competent court to hear appeals against decisions and other acts of the CPC from the Supreme Administrative Court to the Administrative Court in Sofia. This amendment will enter into force on 1 January 2019 and considering that the Administrative Court in Sofia has never been involved in hearing competition cases, the timing and potentially the efficiency of the appeal procedures is expected to be affected, at least initially.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 15 of the LPC mirrors article 101 TFEU. The LPC prohibits agreements (horizontal or vertical) as well as concerted practices between undertakings, decisions of associations of undertakings, aimed at or with an intended result of preventing, restricting or distorting the competition on the relevant market. The law provides a non-exhaustive list of prohibited agreements, such as:

- direct or indirect fixing of prices or other trading conditions;
- sharing of markets or sources of supply;
- limiting or controlling the production, trade, technical development or investment;
- applying dissimilar conditions for same type of contracts to certain partners, whereas they are placed in competitive disadvantage; and
- setting the conclusion of contracts subject to undertaking additional obligations or entering into contracts by the counterparty, which, by their nature or according to commercial practices, have no connection with the subject of the main contract.

The LPC further defines cartels as agreements or concerted practices between undertakings – competitors on the relevant market, aimed at restricting competition by way of price fixing or other pricing conditions regarding the purchase or sale, allocation of production or sales quotas or markets, including bid rigging.

The LPC provides an exemption for restrictive agreements, decisions and concerted practices that have an insignificant effect on competition (*de minimis* – article 16 of the LPC). A *de minimis* effect on competition is determined based on the market shares of the parties to the agreement. However, the *de minimis* exemption does not apply to the cartels as defined by LPC.

Although rarely possible, the parties may demonstrate significant positive effects under article 17 of the LPC, similarly to article 101(3) TFEU. If successful, the cartels in question would not fall within the prohibited agreements under article 15 of the LPC. Any prohibited agreements or concerted practices, including cartels, are null and void.

The EU legislation, in particular article 101 TFEU, also forms part of the substantive law on cartels in Bulgaria, when the cartels have a direct anticompetitive effect in Bulgaria.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The framework on cartels under the LPC does not provide for exceptions or industry-specific infringements and applies across all economic sectors. There is no exception for government-sanctioned activity or regulated conduct.

At present, there are several block exemptions under article 18 of the LPC, including sector-specific, introduced by way of CPC Decision No. 55 of 20 January 2011 concerning:

- vertical agreements within the meaning of Regulation (EC) No. 330/2010;
- vertical agreements within the meaning of Regulation No. 1400/2002 and Regulation No. 461/2010 in the sphere of motor vehicles;
- agreements within the meaning of Regulation (EC) No. 1218/2010 for specialisation agreements;
- agreements within the meaning of Regulation (EC) No. 1217/2010 for research and development (R&D) agreements;
- agreements within the meaning of Regulation (EC) No. 1267/2010 for some agreements in the insurance sphere; and
- agreements within the meaning of Regulation (EC) No. 772/2004 (replaced by Commission Regulation (EU) No. 316/2014) for some agreements for transfer of technologies.

6 Application of the law

Does the law apply to individuals or corporations or both?

The LPC applies to all undertakings performing economic activity irrespective of their legal and organisational form. These could be corporations, partnerships, associations and professional organisations, individuals performing economic activity as sole traders, and so on. The LPC also applies to individuals who have assisted in a breach under the LPC, including cartels.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The LPC applies to market practices of undertakings that have taken place outside the territory of Bulgaria if they may have an effect on competition in Bulgaria (article 2). As long as the cartel does not affect the Bulgarian market, the LPC would not apply.

According to article 3(1) of 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 (Regulation No. 1/2003), the CPC has the authority to apply (and usually does so) article 101 TFEU in parallel with national anti-cartel provisions if the agreement or concerted practice may affect the trade between EU member states.

Where a material link between a cartel and the territory of Bulgaria exists and the CPC could effectively bring to an end the entire infringement and is able to gather evidence required to prove the infringement, under the Commission Notice on Cooperation within the Network of Competition Authorities the CPC could be considered a well-placed authority to apply article 101 TFEU.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The LPC does not provide for an exemption or defence for conduct that only affects customers or other parties outside Bulgaria. However, the LPC does not apply to conduct resulting in actual or possible restriction or distortion of competition in another state, unless otherwise provided for by an international treaty that is in force and to which Bulgaria is a party (article 2, section 2).

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

A cartel investigation procedure is opened by the CPC upon:

- a decision of the CPC;
- a request by a prosecutor;
- a written request by an affected legal entity or individual;
- a leniency application;
- a request by another national competition protection authority of an EU member state; or
- a request by the European Commission (EC).

Most often the CPC initiates a cartel investigation based on sector inquiries conducted by the Commission or upon written request by affected persons. Contracting authorities also notify the CPC about

suspected bid rigging in public procurement tenders. Although the CPC adopted and announced a leniency programme, currently no leniency applications have been submitted.

The investigation procedure is opened by a ruling of the chairperson of the CPC, whereby a working group (case handlers) and a supervising member from the CPC members are appointed.

The working group compiles information and sends questionnaires for information, such as market and financial data relevant for the investigation of the undertaking in question. Addressees are given approximately one month to provide the requested information. The CPC does not disclose the exact behaviour it is investigating, but has to inform on the legal grounds for the investigation, nor does it send a copy of the complaint. When the investigation has been initiated, following a decision by the CPC, more information on the particular reasons can be obtained from the CPC decision, which is publicly available on the CPC website (without the confidential information).

During the investigation, the case handlers are authorised to obtain information from market participants, associations and state authorities. The CPC may also obtain evidence through on-site inspections (dawn raids). In certain complex cases, the CPC may appoint external experts to cover technical, financial or sector-specific questions. The cartel investigation is not limited in time. In practice, it may take between six months and two years.

Once the working group has collected sufficient evidence, a detailed report is presented by the supervising member to the CPC in a closed session. Based on the report, the CPC shall issue:

- a decision of lack of violation and shall close the case;
- a ruling to return the case to the working group for additional investigation with mandatory instructions; and
- a ruling for serving a statement of objection to the defendant, where CPC arguments for the committed infringement are presented.

Each party to the case (defendant, claimant, affected third parties) will then have at least 30 days to make a written submission on the CPC's findings in the statement of objections and to present evidence. Parties are not given access to the report of the working group; however, at this stage, they will have access to the non-confidential file of the working group.

Since the cartels as defined by LPC are considered a material infringement of the competition, the CPC is not allowed to approve commitments by the alleged infringers in case of other types of prohibited restrictive agreements.

After the 30-day period, an open session of the CPC is scheduled, which cannot be earlier than 14 days. At the open session the parties present their positions and questions to clarify certain facts and circumstances that could be asked by the CPC members. The CPC may accept statements from other persons as well.

After the open session hearing, in a closed session, the CPC shall, after consideration of all statements, arguments and objections, issue:

- a final decision establishing:
 - violation under LPC and imposing sanctions; or
 - that no infringement has been committed by the defendant; or
- that there are no grounds for taking actions against the defendant for infringing article 101 TFEU;
- a ruling for serving a new statement of objections to the defendant; or
- a ruling for returning the case to the working group for additional investigation.

A non-confidential version of the CPC decision is published on the CPC website.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The CPC has a wide range of investigative powers. During an investigation the CPC case handlers are authorised to request information and evidence from the defendant, any third party, state authority or other competition authorities of the EU and member states that might have information relevant to the investigation. Requested parties should cooperate and provide all data in their possession, even if the information contains trade secrets. The CPC is obliged to protect any

confidential information and not disclose it to other parties. The CPC may fine any person who, without reasonable grounds, fails to comply with a formal information request.

The case handlers are also entitled to take oral or written statements from representatives of undertakings and other persons, as well as to conduct inspections of premises of undertakings. In addition, the CPC may conduct unannounced on-site inspections (dawn raids) in the premises of an undertaking suspected of cartel activity, including when assisting the CPC with collecting evidence needed for an EC investigation. Most cartel investigations in Bulgaria over recent years started with unannounced inspections at the headquarters of the undertakings where significant amounts of documents were seized and further reviewed by the case handlers.

For carrying out a dawn raid at the premises of the investigated undertakings, the CPC shall obtain an explicit authorisation from the Administrative Court in Sofia, based on which, it may enter all business premises used by the investigated undertakings irrespective of their location and means (offices, motor vehicles, etc). However, under Bulgarian law, private homes cannot be inspected by the CPC.

The CPC case handlers and other specified persons (such as IT experts) are authorised to:

- enter and search premises. During the unannounced inspections, the CPC case handlers are usually assisted by the police for entering the premises;
- take possession of relevant documents (in copy or original documents), or take necessary steps to preserve or prevent interference with such documents;
- require any person to provide an explanation for documents or information, to the best of his or her knowledge and belief, where it may be found;
- require any relevant information that is stored electronically and is accessible from the premises to be produced in a form that is legible and in which it can be taken away; and
- access servers accessible by computers and other means, located on the premises and take forensic images of any digitally stored information.

Bulgarian law recognises the attorney–client privilege in communications by undertakings with their external legal advisers. However, in-house legal counsel’s advice does not enjoy legal privilege and could be seized and used by the case handlers as evidence.

Unlike the EC, the CPC may seize not only evidence relating to the investigation in question, but any other document or evidence that raises a well-founded suspicion of other antitrust infringement under Bulgarian or EU laws.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The CPC participates in the European Competition Network (ECN) and International Competition Network and is actively involved in competition tasks undertaken by the Organisation for Economic Co-operation and Development.

The CPC is also involved in bilateral cooperation with competition authorities outside the European Competition Network, such as the Federal Antimonopoly Services of Russia, and competition agencies of Albania, Azerbaijan, Bosnia and Herzegovina, Croatia, Cyprus, Georgia, Kosovo, Macedonia, Moldova, Montenegro, Serbia, Turkey and Ukraine.

The CPC is a co-founder (together with the United Nations Conference on Trade and Development) of the Sofia Competition Forum – an informal platform for technical assistance, exchange of experience and consultations in the field of competition policy and enforcement between competition authorities in the Balkan region.

The CPC cooperates with the EC and other EU member states’ national competition authorities, by receiving and rendering assistance and exchanging information under the procedure set forth in Regulation No. 1/2003. Based on this, the CPC may forward information obtained during the course of its cartel investigations to the EC and EU member states’ competition authorities. This is an exception to the general rule that member states’ confidential information collected

by the CPC during the investigations shall not be disclosed and should only be used for the purposes of the LPC. The law requires that the recipient competition authority of confidential data should guarantee the same level of confidentiality for the obtained information as that ensured by the national competition authority of the member state that has forwarded the information.

The CPC is also a party to inter-institutions’ cooperation agreements, for example with the Ministry of Interior, the Bulgarian National Audit Office, the National Revenue Agency, the Public Procurement Agency, etc, based on how the competition authority uses information and recourses for its enforcement activity. For example, the police assists the Commission during dawn raids, the Public Procurement Agency notifies for potential bid rigging in public procurements, and the National Revenue Agency provides market and financial data needed during the course of cartel investigation.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The CPC’s most important partner in cross-border cases is the EC. In accordance with article 11 of Regulation No. 1/2003, the CPC informs the EC of any formal investigative measures under article 101 TFEU. Before a decision is adopted, including on a cartel case, the CPC is required to provide the EC with a summary of the case and a draft decision.

The CPC also informs national competition authorities of the member states on any of its cases with a cross-border effect and reviews information about the cases initiated by national competition authorities of member states to check whether they may affect competition on the Bulgarian market, so that cases may be reallocated within ECN members. So far, no cases have been reallocated from or to other national competition authorities.

The international inter-agency cooperation outside the ECN does not formally affect the CPC investigations of cartels, including in cross-border cases.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The CPC investigates and adjudicates cartel matters in Bulgaria. As mentioned in question 9, the CPC opens the proceedings for investigation of a cartel on the legal grounds provided for in the LPC, and on its own initiative.

Pursuant to the LPC, a cartel investigation is carried out by case handlers – experts (lawyers and economists) nominated by the chairperson of the Commission, supervised by a member of the CPC. Members of the CPC, based on the results of the investigation, make decisions on the case.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

As a main rule, the burden of proof lies with the competition authority. However, if an undertaking refers to an individual exemption under article 17 of the LPC or article 101(3) TFEU, the undertaking must prove that the requirements laid down in those provisions are fulfilled.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The CPC takes the position that circumstantial evidence often indicates that there is an anticompetitive agreement or intention to commit competition infringement, but it is not sufficient by itself to prove an infringement and should be considered alongside other evidence supporting the same conclusion (decision of the CPC No. 1628 of 22 December 2010). The SAC, at second instance, has accepted circumstantial evidence as sufficient proof where all such evidence indicates

the existence of an agreement or a concerted practice and where no other meaningful explanation for the undertakings' conduct exists (judgment of the SAC No. 11522 of 16 September 2013).

16 Appeal process

What is the appeal process?

CPC decisions are currently subject to appeal before the SAC according to the provisions of the Administrative Procedure Code. As mentioned in question 3, as of 1 January 2019 the competent court to hear such appeals will be the Administrative Court in Sofia.

Parties under cartel investigation are entitled to submit appeals against CPC decisions within 14 days of receipt of notification for the CPC decision. Any interested third party is also entitled to appeal the decision within 14 days of its publication on the CPC website.

The appeal should be submitted through the CPC. The entire CPC file is provided to the SAC. The evidence and information marked as confidential are kept in separate files to which only the judges have access. The appellant, the CPC and all interested parties may submit written statements on the appeal and are summoned to take part in oral hearings before the court. The court may appoint external experts on specific technical or financial issues. The SAC has significant power of judicial review over the decisions of the CPC and it may review both legal and factual questions, including the correctness and completeness of the facts established by the CPC, modification of the imposed fines and review of the CPC's interpretation of the economic facts. Usually, the appeal procedure can take between three months and two years.

The SAC judgment is subject to appeal before the SAC sitting on a panel of five judges. The SAC judgment may be appealed both by the defendant and the CPC in case its decision has been overruled by the first-instance court. The SAC's five-panel judgment is final and binding. The appeal usually takes about six months.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

No criminal sanctions for cartel activity are provided under Bulgarian law.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Civil sanctions

According to article 15, paragraph 2 of the LPC, agreements between undertakings having as their object or result restriction of competition are null and void. The consequences of this are governed by civil law – pursuant to article 26 of the Law on Contracts and Obligations, these agreements do not have any legal effect.

Administrative sanctions

Under the LPC, for cartel activity the CPC can impose administrative (pecuniary) sanctions on the undertaking to which the infringement of a cartel prohibition could be attributed, in an amount not exceeding 10 per cent of the total turnover of that undertaking in the preceding financial year. The exact amount of sanctions is determined by the gravity and duration of the infringement, as well as the circumstances mitigating or aggravating the liability of the undertaking outlined in the CPC Methodology for the calculation of fines (see question 19).

Recent CPC decisions on cartel cases show that the CPC is inclined to impose sanctions of almost the maximum amount provided in the law. For example, in 2012 the CPC imposed the highest fine for a horizontal anticompetitive cooperation at the total amount of 2,914,560 leva. The fine was imposed on three Bulgarian companies for bid rigging in a public procurement for supply of air tickets. One of the participants was sanctioned with the highest fine ever imposed by the CPC on a particular undertaking for horizontal cooperation – 2,818,800 leva. However, in 2016 the SAC repealed this decision.

The CPC may impose on undertakings a pecuniary sanction in the amount of up to 1 per cent of the total turnover in the preceding financial year for:

- failure to assist the CPC during the investigation;
- damaging the integrity or destroying the seals that have been placed during the dawn raids; and
- provision of incomplete, inaccurate, untrue or misleading information.

Most frequently, the CPC imposes sanctions (between 0.01 and 1 per cent) on undertakings for non-cooperation (non-provision of requested information) during the investigations. The SAC usually upholds such sanctions.

The CPC may also impose periodic pecuniary sanctions on an undertaking to the amount of up to 5 per cent of the average daily turnover in the preceding financial year for each day the undertaking fails to comply with a decision of the CPC ordering the termination of the cartel or a ruling of the CPC imposing interim measures. No such sanctions have been imposed for a cartel activity so far.

In addition to the monetary sanctions, the CPC is authorised to take all necessary measures to terminate the restrictive agreement, to remove the consequences of every action that has been taken unlawfully and to take all other necessary measures to restore the level of competition and status as before the infringement.

Pursuant to article 102 of the LPC, individuals who have assisted in the cartel commitment could be fined by the CPC between 500 leva and 50,000 leva. Individuals who fail to cooperate and assist the CPC during the investigation are fined between 500 leva and 25,000 leva.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

In 2009, the CPC adopted a methodology for calculating fines under the LPC. Since then, the methodology has been updated several times, most recently in 2015.

With regard to sanctions for cartel activity, fines are set by using a two-step approach – the basic amount of the sanction, which thereafter, is adjusted based on aggravating or mitigating circumstances. The basic amount is based on the value of sales of products affected by the cartel, depending on the gravity and duration of the infringement. According to the methodology, cartels are considered a serious infringement and therefore the basic amount is up to 10 per cent of the value of sales of the affected products. The basic amount may then be increased or reduced by 10 per cent for each aggravating or mitigating circumstance. The exact amount of the sanction cannot exceed the maximum amount of 10 per cent of the total turnover of the undertaking for the preceding financial year.

The following aggravating factors are to be taken into account by the CPC in setting the fine:

- commitment of the same or similar violation, established by the CPC, another national competition authority of an EU member state or the EC;
- refusing cooperation, hindering the CPC during its investigation or opposing the investigation;
- the undertaking initiated, led or incited the breach or exercised undue influence upon another undertaking to participate in the infringement;
- paying or offering to pay 'compensation' or 'damages' to other enterprises in order to include them in the violation;
- affecting competition of related or neighbouring markets; and
- other factors, depending on the facts of the case, taken on a case-by-case basis.

The mitigating factors that the CPC should consider include:

- passive behaviour of the undertaking or the association, playing a limited role in the violation or adopting the strategy of 'follow the leader';
- effectively cooperating with the CPC outside the scope of the leniency programme and the obligation for cooperating pursuant to the LPC;
- taking appropriate measures for restricting the detrimental consequences of the infringement; and
- other factors, depending on the case.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Under the Bulgarian Public Procurement Act, in force as of 15 April 2016, infringement of cartel prohibitions (whether under Bulgarian, other national competition law or article 101 TFEU) may lead to the exclusion of an undertaking from a public procurement procedure for a period of three years following the decision establishing the infringement. However, such a decision does not automatically lead to exclusion from procurement. It is necessary that the contracting authority has included such selection criteria in the tender. If the undertaking provides, with sufficient evidence, that all damages arising from the unlawful behaviour have been compensated, the contracting authority may allow the undertaking to participate in the tender process.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Pursuant to Bulgarian law, cartel activity does not qualify as a crime and only the administrative sanctions could be pursued in addition to the invalidity of the agreement stemming from the provision in the law.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

The Private Damages Amendment was introduced to facilitate efforts by victims of cartels and other antitrust infringements to claim compensation (see question 3). Under the LPC, any direct or indirect purchaser (a natural person or a legal entity) may claim full compensation for damages caused by an infringement of the respective provisions of European or Bulgarian competition law before the competent civil courts. The liability for cartel infringements is limited to direct damages only where the compensation will cover actual loss, loss of profit and payment of interest from the time the harm occurred until the payment of the compensation.

The Private Damages Amendment increases the role of the judge in the determination of the amount of damages. In addition, for assessment of the damages caused, judges are authorised to seek the assistance of the CPC for the amount of the damages. The involvement of administrative bodies in the process of determining damages and in obtaining an assessment by independent experts is a novelty under Bulgarian law.

One of the key new provisions implemented with the Private Damages Amendment (and in line with the Private Damages Directive) is the rebuttable presumption that cartels always cause harm, which in turn reverses the burden of proof in favour of the claimant. Since such presumptions are unusual under Bulgarian law, the courts will have to decide the applicable standard of proof, which defendants will have to meet to rebut that presumption.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

The Bulgarian Civil Procedure Code allows class actions for the protection of a collective interest; however, in such proceedings damages can be claimed for harm caused to the collective interest concerned, but not to individuals. The class action mechanism has rarely been used in practice. To the best of our knowledge, no class actions concerning competition law infringements have been brought before the Bulgarian courts.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The LPC sets out the legal basis for granting full or partial immunity to an undertaking that participated in a secret cartel. The legislative rules are further developed in a leniency programme and Rules for Application of the Leniency Programme, adopted by the CPC in 2011.

There are two alternative options for granting full leniency to a participant in a secret cartel. The undertaking may benefit from full immunity if before any other participant the undertaking submits evidence that is a sufficient ground for the CPC to ask for court authorisation to carry out an on-site inspection (dawn raid), provided that at the time of the immunity application the CPC did not have enough evidence to proceed with such a request.

If the conditions for the above first option are not present, the cartel participant may still apply for full leniency provided that it presents ahead of any other participant in the cartel sufficient evidence that allows the CPC to prove the cartel infringement. In this case, the CPC should not have granted conditional immunity to another undertaking at the time of the immunity application and should not have had at its disposal sufficient evidence for adoption of a decision for cartel infringement.

Relevant to both cases above is the requirement that the undertaking applying for immunity has not taken steps to coerce any other undertaking to participate in the cartel and it has ceased its participation in the cartel at the time of the application, unless another instruction was made by the CPC.

The requirement of being 'first in' to cooperate relates to the possibility of the undertaking receiving full immunity. Only the first cooperating undertaking can be granted full immunity.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The CPC may grant partial leniency (fine reduction) where it has already started a cartel investigation even if an immunity application has been made by another member of the alleged cartel. The undertaking is eligible for such reduction if:

- at its own initiative and voluntarily, prior to the completion of the proceeding (statement of objections) it provides evidence that is of material importance for proving the infringement; and
- complies with the conditions for granting full leniency set out in the Rules for Application of the Leniency Programme (see question 24).

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Fine reduction is discretionary and depends on the order of evidence submission to the CPC. The second undertaking can benefit from a reduction of between 30 per cent and 50 per cent of the penalty, which would be otherwise imposed for the cartel infringement, provided that the undertaking at its own initiative and voluntarily presents evidence of material significance for proving the infringement before the CPC proceedings have been completed. For the third cooperating party, the fine reduction is between 20 per cent and 30 per cent. For any subsequent applicant – between 10 per cent and 20 per cent of the penalty.

The CPC leniency programme provides incentives for applicants to come forward with information about other cartels they are involved in. If, during an investigation, any cartel participant provides information regarding involvement in another cartel, such undertaking may benefit from an additional reduction of up to 10 per cent of the fine for the first cartel ('leniency plus'). If the undertaking provides information for disclosing the existence of more cartels, the CPC may reduce the

fine imposed for the participation in the first cartel by up to 10 per cent for any subsequent cartel, but by no more than 30 per cent universally.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

The undertakings participating in a cartel are advised to approach the CPC and apply for leniency as early as possible, since only the first cooperating party is eligible to full leniency. Later applications (when the proceeding has already started) should be well considered and filed only where the undertaking is almost sure that it possesses evidence of material significance.

In the case of a cartel that may affect trade between EU member states, the undertaking should also consider making simultaneous leniency applications to the EC and the relevant competition authorities of the member states. The leniency application to the EC will not be considered as an application to the CPC or any national competition authority and vice versa.

The leniency programme under the LPC sets out rules for markers applicable to both full and partial leniency applicants. At a request of the undertaking, the CPC may grant at its discretion a grace period to the undertaking that has filed an application for leniency but does not possess enough data and evidence to present with the application. The grace period could be extended at the CPC's discretion. In the marker application, the undertaking should provide, as minimum information concerning the participants, the affected products or services, the affected territory, the nature of the infringement (client and market allocation), the duration and a description of the functioning of the cartel (including telephone calls and emails).

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

According to the leniency programme and Rules on the Application of the Leniency Programme, all leniency applicants should cooperate in good faith, fully and continuously with the CPC from the submission of the application to the adoption of the decision by the CPC. The leniency applicant shall provide at its own initiative or at the CPC request all information and evidence that are at his or her disposal. In particular, the applicant should provide the authority with all non-legally privileged information, documents and evidence available regarding the existence and activity of the reported cartel and, where appropriate, making its current employees and managers and members of the management board of the undertaking (and as far as possible its former employees and managers) available for hearing or witness statements. The applicant should not destroy, conceal or fabricate any information. It shall not disclose in any way either the fact of the intention to participate in the leniency programme, nor its content prior to, or after the application, except to other authorities. The applicant should comply with instructions of the CPC regarding the cessation of the participation or its continuance. Failure to comply with these requirements could lead to the loss of all protection under the leniency programme.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Up to now there have been no immunity applications and many aspects of leniency implementation have not been developed in detail within the leniency programme.

The CPC does not reveal the fact of cooperation or the identity of the cooperating undertaking. The application and evidence provided can be used by the CPC only to evaluate the leniency application and apply for judicial authorisation for a dawn raid.

The applicant should keep confidential its intention to participate in the leniency programme, as well as the content of its application after its submission to the CPC. The leniency programme and the rules for application do not provide explicit terms until confidentiality is kept.

Access to the CPC file containing non-confidential information is given to the parties after the CPC has served a statement of objections to the alleged infringing parties or after the issuance of a decision for lack of infringement. Therefore, any documents marked as confidential are not accessible to the other parties.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

In addition to leniency, which is settled at an earlier stage of a cartel investigation, there are no other options regarding settlement procedures prior to the adoption of the CPC decision for relief or reduction of the penalty. The decision to apply leniency is part of the final CPC decision, where sanctions are imposed, and the decision may be appealed by any of the parties to the proceedings and a third party to the extent that it has a legitimate interest, as required by law. Each appellant party should prove its own legitimate interest to appeal the respective part of the CPC decision that is challenged, including whether the leniency application is challenged.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Under Bulgarian law, only undertakings are eligible for full or partial leniency. Individuals are not eligible to apply for immunity or reduction of fine under the leniency programme. Irrespective of the fact that an undertaking has been granted full or partial leniency, the individuals who have assisted cartel activities remain subject to penalties (fines).

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Undertakings wishing to take advantage of the leniency programme should contact the CPC and apply for leniency. The application has to be signed by a person who represents the applicant and should be submitted in the format adopted by the CPC. The application should contain information regarding the participants and detailed information about the cartel activity, including affected products or services, affected territories, nature of the infringement (price fixing, client and market allocation), duration of the cartel and a description of the way it functions (including telephone calls and emails). The undertaking shall supplement its application with relevant evidence. Leniency applications can also be submitted orally (through the CPC contact persons).

Leniency applications submitted to other competition authorities or the EC are not recognised by the CPC and will not give the protection admitted to leniency applications submitted to the CPC. If the EC is the best placed authority to investigate particular cartel activity, immunity applicants may submit applications to the CPC in short form.

It is possible, prior to the submission of a leniency application, that the undertaking (usually through its lawyers) will try to obtain on a no-name basis informal guidance from the CPC regarding the application, the content of the leniency programme and information about its eligibility to benefit from the programme.

The applicant may also use the markers' availability and request an extension (grace period) to submit evidence relevant for the establishment of an infringement.

Update and trends

In 2018, the CPC has neither initiated proceedings nor handed down decisions on cartel cases, unlike its practice in previous years. However, there are some indicative decisions, although related to other areas of competition law – dominance and merger control – that should be taken into account when tackling cartel proceedings. In these cases the CPC handed down two decisions and imposed heavy sanctions on procedural grounds. One of the decisions was imposed for failure to provide complete and accurate information by an acquiring undertaking in its initial submission for merger clearance. Although upon a request the notifying party submitted all relevant information, the CPC imposed a pecuniary sanction of 0.2 per cent of the total turnover of the notifying party (205,600 leva). In the other case, the CPC imposed a sanction of 1 per cent of the total turnover of a company subject to dawn raids for alleged retail price fixing, for failure to provide full assistance during the investigation. Although these sanctions are within the limits set by the CPC, they are not seen as usual practice but rather a clear statement by the CPC to the market that it will not tolerate only partial disclosure of information, irrespective of the focus of the competition proceedings.

Another notable set of decisions that give an indication as to what antitrust approach the CPC is taking relate to the proceedings against seven insurance companies for fixing the resale price of insurance brokers. During the proceedings the CPC distributed very detailed questionnaires, covering not only the alleged breaches subject to

pending investigation but also looking at other potential antitrust infringements, including cartels. This is in line with previous instances when antitrust proceedings were initiated upon a sector analysis undertaken by the commission. The majority, and probably the most substantial, antitrust cases, including cartel cases in past years, have started by ex officio proceedings of the CPC and been grounded on evidence and market knowledge gained during the sector analysis. This trend was clearly announced by the current commission upon their election. In her inaugural speech, the CPC chairperson, Julia Nenkvova, stated that this commission has the intention of being more active and taking a stricter approach when detecting and fighting potential antitrust abuses. Currently, analysis is being carried out in the banking services and energy sectors. A media sector review was recently completed, along with a review of the fast-moving consumer goods (FMCG) sector. No serious antitrust issues were detected in the media sector review, but in the FMCG review the focus was on food chains that faced severe fines for cartel proceedings in 2011, and may potentially open the door for new antitrust allegations.

It is notable in relation to cartel proceedings that so far, and to the best of our knowledge, the leniency programme of the CPC has not yet been applied to a whistle-blower. It also remains to be seen whether the more active approach of the CPC will lead to market players being more willing to report horizontal abuses.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

The present leniency programme was adopted in 2011. It replaced the former leniency programme from 2009. To the best of our knowledge there are no ongoing or anticipated assessments or reviews of the current leniency programme. Up to now, none of the leniency programmes adopted by the CPC have been applied in practice.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

During the investigation, the defendant is only provided with general information about the legal grounds for the investigation and the investigated undertakings. Where the investigation is opened on the grounds of a claim from another undertaking, the defendant is only aware of the claim, the claimant and names of the investigated undertakings.

No specifics on the alleged infringement or documents are given to the defendant until the CPC serves the statement of objections (SO) or issues a decision for lack of competition infringement. In both cases, the defendant would not be provided with access to information that is presented as confidential, nor to the internal documents of the CPC, including correspondence with the EC or with the national competition authorities of other EU member states. Whenever the CPC considers that certain information is not confidential, it shall issue a ruling that certain information could not qualify as confidential as per the criteria of the CPC and such information would be accessible by the parties to the CPC investigation.

Regarding the SO, the defendants would be given access to the CPC file (without access to the documents identified as confidential) only after the SO has been served. Defendants would not be provided with access to documents presented as confidential, even during the appeal proceedings before the SAC. In its case law, the SAC takes the view that parties' interests are not affected from the limited access to documents collected by the CPC as the SAC has unlimited access to the entire file.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

The LPC does not regulate this issue. Under the Bulgarian Bar Act, members of the Bar may not represent interests of two or more parties if the interests of those parties conflict. Therefore, the counsel may represent both the corporation and the employee if their interests are not conflicting. However, if a conflict of interest arises, counsel should withdraw as counsel for one of the parties.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

As long as there are no conflicts of interest, attorneys-at-law (members of the Bar) can represent multiple defendants.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

The LPC does not regulate this issue. Based on the general rules of the Bulgarian Obligations and Contracts Act, the corporation could pay fines imposed on its employees and legal costs.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Pursuant to Bulgarian law, fines are non-tax-deductible. According to the non-binding opinions of the Bulgarian tax authorities, private damages awards are deductible from the corporate tax base.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The CPC would not take into account penalties imposed in other jurisdictions.

To date, there are no precedents in Bulgaria for private damages cases resulting from cartels.

40 Getting the fine down**What is the optimal way in which to get the fine down?****Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

According to the CPC, pre-existence of a compliance programme is not considered by itself as a mitigating factor and does not affect the level of the imposed fine.

Under Bulgarian law, the optimal way to get the fine down for cartel activity is by the submission of a leniency application and termination of an infringement. Under the CPC methodology for the calculation of fines, termination of infringement immediately after the beginning of the investigation is not considered as a mitigating circumstance in case of cartel activity. The mitigating circumstances in cartel cases affecting the level of fine are:

- the overall passive behaviour of the undertaking in a cartel activity;
- limited role in the infringement or adopting the strategy of ‘follow the leader’;
- full cooperation with the competition authority during the investigation;
- undertaking due measures for remedying the unfavourable consequences of the infringement; and
- other circumstances, depending on the specific case.

Since cartels are considered a material infringement of the law, the CPC cannot adopt commitment decisions in cartel cases, even if certain commitments are proposed by parties.

WOLF THEISS

Anna Rizova
Hristina Dzhevlekova

anna.rizova@wolftheiss.com
hristina.dzhevlekova@wolftheiss.com

Rainbow Centre
29 Atanas Dukov Street
1407 Sofia
Bulgaria

Tel: +359 2 8613 700
Fax: +359 2 8620 370
www.wolftheiss.com

Canada

A Neil Campbell, Casey W Halladay and Guy Pinsonnault

McMillan LLP

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Canada has one statute governing all aspects of competition law: the federal Competition Act (the Act). This statute is applicable throughout the country; there is no provincial or territorial competition legislation in Canada.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Act is administered and enforced by the Commissioner of Competition (the commissioner) who serves as the head of the Competition Bureau (the Bureau), a unit of the Ministry of Innovation, Science and Economic Development. The commissioner is responsible for investigating alleged breaches of the criminal provisions of the Act. The Cartels Directorate in the Bureau, consisting of the senior deputy commissioner, a deputy commissioner, two assistant deputy commissioners, and approximately 40 officers, investigates all matters relating to cartels, conspiracies and bid rigging.

Canada's attorney general has ultimate discretion and authority to initiate criminal proceedings under the Act. The discretion of the attorney general is exercised by the director of public prosecutions (DPP), who heads the Public Prosecution Service of Canada (PPSC). A team of approximately 15 lawyers from the PPSC are responsible for the conduct of prosecutions under the Act. Prosecutions are brought before the provincial or federal courts.

In practical terms, cartel prosecutions are initiated only upon the commissioner's recommendation to the DPP. Similarly, negotiated resolutions under the Bureau's immunity and leniency programmes (see question 27) are initially handled by the Bureau but ultimately concluded by the PPSC, with the Bureau's input.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

In March 2010 the former 'partial rule of reason' approach to criminal conspiracies in section 45 was replaced with a per se criminal offence to address hard-core cartel conduct. A civil 'reviewable practice' was added in section 90.1 to address other anticompetitive agreements between competitors. The amendments also raised the maximum penalties for cartels to a fine of C\$25 million per count charged or up to 14 years in prison for the new conspiracy offence. The bid-rigging provision under section 47, which was also amended to include agreements to withdraw a previously submitted bid, carries the same imprisonment penalty or a fine at the discretion of the court.

In December 2009, the Bureau issued guidelines setting out its policy on competitor-collaboration agreements. These guidelines are discussed further below at question 33.

The Bureau conducted public consultations in October 2017 and May 2018 on proposed revisions to its immunity and leniency

programmes. New policy documents introducing the revised immunity and leniency programmes were jointly released by the Bureau and the PPSC in September 2018. These changes are discussed further in questions 9, 19 and 24 to 33.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Section 45 of the Act forms the core of Canadian cartel law. It provides that any person who, with a competitor (or potential competitor) in respect of a particular product, conspires, agrees or arranges any of the following is guilty of an indictable offence:

- fixing, maintaining, increasing or controlling the price for the supply of the product;
- allocating sales, territories, customers or markets for the production or supply of the product; or
- fixing, maintaining, controlling, preventing, lessening or eliminating the production or supply of the product.

As a result, price fixing, market allocation and output restriction conspiracies are illegal per se in Canada. Previously, the Act prohibited only conspiracies that had serious or 'undue' competitive effects, as determined under a 'partial rule of reason' analysis. Notably, there is no statute of limitations for the conspiracy or bid-rigging offences. Thus the former provision remains applicable to conduct that occurred prior to March 2010.

As with most criminal offences, a conviction under the Act requires the prosecution to prove beyond a reasonable doubt both the actus reus and the mens rea of the offence. The actus reus is established by demonstrating that the accused was a party to a conspiracy, agreement or arrangement with a competitor to fix prices, allocate markets or customers, or lessen supply of a product in the manner described above. To establish the mens rea of the offence, the prosecution must demonstrate that the accused intended to enter into the agreement and had knowledge of its terms.

The Act also prohibits Canadian corporations from implementing directives from a foreign corporation for the purpose of giving effect to conspiracies entered into outside of Canada (section 46), and prohibits bid rigging (section 47). In the past, resale price maintenance had been a per se illegal criminal offence. In 2009 this offence was repealed and replaced with a civil 'reviewable practice' under section 76 of the Act.

Section 45 focuses on agreements among actual or potential competitors in the supply of products (defined to include goods and services) that involve price fixing, customer or market allocation, or output restriction. Despite some older reform proposals to the contrary, it does not address group boycotts. Potentially, it could catch other forms of cooperation among competitors, including joint ventures and strategic alliances. However, the Bureau has indicated in its guidelines on competitor collaborations that the conspiracy offence will be reserved for 'naked restraints' on competition. Commercial activities such as dual distribution, joint ventures and strategic alliances will, instead, be assessed under the reviewable practice provision in section 90.1. However, these guidelines are not determinative regarding the availability of private damages actions, as they are not binding upon a court (see question 22).

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The Act creates two industry-specific offences, one for professional sports and the other for financial institutions. With respect to professional sports, the Act prohibits conspiracies to unreasonably limit the opportunities for any person to participate in a professional sport or to negotiate with the team or club of his or her choice in a professional league. Conspiracies among federal financial institutions are also per se illegal – no lessening of competition needs to be proven. Any agreement among such institutions with respect to interest rates, service charges, or the amount and conditions of loans is an offence. However, there are exceptions for the sharing of credit information and other matters.

Various sectors and activities are expressly excluded from the operations of the Act. These include labour relations, fishermen, shipping conferences, securities underwriting and amateur sport.

The Act now recognises the common law ‘regulated conduct defence’ under subsection 45(7). The new subsection provides that the rules and principles of the common law that render a requirement or authorisation by or under another act of parliament or provincial legislature a defence to prosecution under section 45 continue to apply.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Act applies to both individuals and corporations. Charges are often laid against both a corporation and individuals such as its senior managers, officers or directors. On conviction, a person is subject to a fine of up to C\$25 million or up to 14 years’ imprisonment per count charged. Senior Bureau officials have noted in speeches that the Bureau will look for appropriate cases in which to prosecute individuals and recommend that the PPSC seek jail terms. The Bureau and PPSC have charged numerous individuals in an inquiry into retail gasoline prices in Quebec. Similarly, in an inquiry into chocolate confectionery, three senior officers were charged in parallel with charges against several companies, although the proceedings were subsequently stayed against all parties. In the past 10 years more than 100 individuals have been prosecuted.

The Superior Court of Quebec decision in the matter of *R v Pétroles Global Inc* is the first ruling in Canada regarding an organisation’s criminal liability pursuant to section 22.2 of the Criminal Code. (An appeal to the Quebec Court of Appeal has been abandoned.) This provision incorporates amendments made to the Criminal Code in 2004 that were designed to facilitate the determination of criminal liability against corporations. The court held that corporate criminal liability may be established based on the actions of employees below the level of directors or the most senior executives if they have responsibility for the relevant decision-making.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

To take jurisdiction over activities occurring outside of Canada, a Canadian court must find that it has both subject-matter (or substantive) jurisdiction with respect to the alleged offence, and personal jurisdiction over the accused person.

Substantive jurisdiction

The Supreme Court of Canada’s 1985 decision in *R v Libman* sets out the following test for substantive jurisdiction:

This country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here ... all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada ... it is sufficient that there be a ‘real and substantial link’ between an offence and this country.

The issue of substantive jurisdiction over cartel conduct taking place outside Canada with effects in Canada has not been specifically canvassed in a contested criminal proceeding, although such conduct has formed the basis of numerous guilty pleas. Some uncertainty remains regarding the jurisdiction of Canadian courts over such conduct.

The commissioner has demonstrated a willingness to adopt an expansive interpretation of *Libman*. The Bureau’s position is that a foreign cartel that affects Canadian customers triggers substantive jurisdiction. Bureau guidelines and document production orders in various cases confirm the Bureau’s interest in claiming jurisdiction over indirect (as well as direct) sales into Canada. Foreign producers of fax paper, sorbates, bulk vitamins, automotive parts and numerous other products have pleaded guilty to violations under the former section 45 for price-fixing and market-allocation agreements that occurred wholly outside Canada but affected Canadian markets, prices and customers.

Personal jurisdiction

The general principle governing personal jurisdiction of a Canadian criminal court is that a person who is outside Canada and not brought by any special statute within the jurisdiction of the court is prima facie not subject to the process of that court. If there is no special statutory provision for the service of a summons outside the jurisdiction, then the court does not have jurisdiction and cannot try the accused, unless the person is present in Canada or voluntarily submits to the jurisdiction of the court. For persons who are not resident in Canada, a summons compelling attendance before a Canadian court cannot be served abroad for an offence under the Act. If no service has occurred, Canadian courts will not have personal jurisdiction.

The case of foreign corporations with no Canadian presence or assets in Canada is more complex. Where the accused is a corporation, notice (in the form of a summons to appear on indictment) must be served on the corporation pursuant to the Criminal Code by delivering it to ‘the manager, secretary or other executive officer of the corporation or of a branch thereof’ within the territory of Canada. Service upon the Canadian ‘affiliate’ of a foreign corporation is unlikely to be sufficient, given that an affiliate is a separate legal person and service outside of Canada on a foreign corporation is not specifically authorised. However, a corporation that does not have a branch in Canada may still be properly served if one of its executive officers is present in Canada to carry on the business of the corporation. If there is a Canadian affiliate of a foreign corporate conspirator, a prosecution may also be instituted against the local subsidiary under section 46 of the Act in respect of local implementation of the conspiracy, regardless of whether charges under section 45 are pursued against the foreign parent.

Extradition

Persons located in the US can be extradited to Canada pursuant to the Canada-US Extradition Treaty, which permits each state to request from the other extradition of individuals who are charged with, or have been convicted of, offences within the jurisdiction of the requesting state. While extradition will only be granted for offences punishable by imprisonment for a term of more than one year, the cartel and bid-rigging offences discussed above qualify because they provide for jail terms of up to 14 years. Extradition to Canada from the UK, or any other country that criminalises cartel activity and with which Canada has an extradition treaty, is also possible.

The procedure for extradition requires the Canadian government to make a formal request for extradition under the applicable treaty. The request documentation would have to include an arrest warrant. This procedure has been used for offences under the Act at least twice. In *Thomas Liquidation* – a misleading advertising case – the US authorities accepted a Canadian government request for extradition and issued a warrant for the arrest of an officer of the accused corporation who was individually charged under the Act. In a more recent case, three Canadians who operated a deceptive telemarketing scheme based in Toronto, which purported to offer credit cards to Americans for a fee but never delivered the cards, were extradited to the US and were sentenced by the US Federal Court in the Southern District of Illinois. This was the first time a Bureau investigation resulted in extradition.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Subsection 45(5) provides a defence for conduct that only affects customers or other parties outside of Canada:

No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

- (a) *has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;*
- (b) *has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or*
- (c) *is in respect only of the supply of services that facilitate the export of products from Canada.*

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The Bureau routinely commences informal investigations in response to complaints by marketplace participants, its own analysis of public information, or the evidence of informants. If such an investigation leads the commissioner to believe, on reasonable grounds, that a criminal offence has been committed, the commissioner will launch a formal inquiry under section 10 of the Act. In addition, the commissioner is required to commence an inquiry in response to a directive from the Minister of Innovation, Science and Economic Development (the minister) or by an application under oath by six residents of Canada. Commencement of an inquiry empowers the commissioner to exercise formal powers, such as obtaining judicial orders to compel the production of evidence, search warrants and wiretap orders (see question 10).

After evidence is obtained during an inquiry, the commissioner decides whether to discontinue the inquiry or refer the case to the DPP for prosecution. Unlike many other jurisdictions, Canada has no statute of limitations for the prosecution of indictable offences (such as price fixing or bid rigging). There is thus no statutory deadline within which the commissioner and DPP must decide whether to bring charges against the members of a cartel. While some Bureau investigations have been resolved expeditiously (initiation to resolution in under two years), others have taken several years depending on the complexity of the investigation and the availability of investigative and prosecutorial resources.

If the inquiry is discontinued, the commissioner must make a written report to the minister that summarises the information obtained from the inquiry and the reasons for its discontinuance. The minister may accept the discontinuance or require the commissioner to conduct further inquiry. Although a directive from the minister or a 'six-resident application' cannot compel the commissioner to take any particular enforcement proceedings, the requirement of a written report to the minister upon the discontinuance of an inquiry ensures that the commissioner will closely examine the facts in such cases. Consequently, the target of the inquiry may be required to incur significant costs, uncertainty and inconvenience in connection with such an inquiry, even though no formal charges are ever laid.

As described further in question 2, where a matter is referred to the DPP, it will make an independent decision whether to lay charges and pursue a prosecution. In May 2010 the Bureau and the DPP issued a memorandum of understanding clarifying their respective roles in this process. These roles were further clarified in the September 2018 revisions to the immunity and leniency policies, which are discussed below in question 32. It is also worth highlighting that the PPSC is a co-author of the revised immunity and leniency policies, which represents a change from previous editions of the policies where the Bureau was the sole author. As a result of this development, there is additional certainty that the DPP, as the head of the PPSC, will not act in a manner contrary to these policies, which had been a potential concern in the past.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

During an inquiry, the commissioner has extensive (judicially supervised) powers to obtain information by means of search warrants, orders for the production of data and records, and even wiretaps. These statutory powers supplement information supplied voluntarily by marketplace participants, cooperating parties, or enforcement agencies in other jurisdictions. The Bureau sometimes issues voluntary requests for information or 'target letters' to companies that it believes may have relevant information, before resorting to the formal investigative powers described below.

Search warrants

Warrants to search the premises of a business or the home of an individual can be obtained by means of an ex parte application under section 15 of the Act. Under that section, the commissioner must establish that there are reasonable grounds to believe that a criminal offence has been committed and that relevant evidence is located on the premises to be searched. Preventing access to premises or otherwise obstructing the execution of a search warrant is a criminal offence and the commissioner may enlist the support of the police if access is denied.

The Act expressly provides for access to and the search and seizure of computer records, including applications to the court to set the terms and conditions of the operation of a computer system. Bureau investigators have downloaded data stored outside Canada in the course of searches of computer systems located in Canada, although there continues to be some controversy as to the precise limits of the authority granted by a warrant authorising a search of computer systems in a cross-border context.

Documents that are subject to solicitor-client privilege cannot be immediately seized by officers under a search warrant. The Act contains a special procedure for sealing such documents and for determining the validity of privilege claims within a limited time. The Act also contains a provision requiring the commissioner to report to the court to retain seized documents. Because the affected company or individual can ultimately request a retention or privilege hearing, and because evidence procured through an illegal search can be excluded at trial, the courts have ruled that search warrant orders cannot be appealed. However, such an order can be set aside in special circumstances such as a material non-disclosure or misrepresentation in the affidavit (known as an 'information to obtain') supporting the commissioner's ex parte application, or where the inquiry giving rise to the order has ended without the laying of criminal charges.

Wiretaps

The commissioner has the power to intercept private communications without consent through electronic means – in other words, to use a wiretap. This power is restricted to conspiracy, bid rigging and serious deceptive marketing investigations, and requires prior judicial authorisation. The first use of wiretaps as an investigative tool led to the laying of criminal charges under the deceptive telemarketing provisions of the Act, an area that has been the subject of vigorous enforcement activity on the part of the Bureau. Subsequently, extensive wiretap evidence has been used in the investigation and prosecution of retail gasoline price-fixing conspiracies in Quebec and Ontario, in which the Bureau recorded 'thousands' of telephone conversations using its wiretap powers.

Subpoenas

As an alternative (or in addition) to executing a search warrant, the commissioner may apply to a court pursuant to section 11 of the Act to require the production of documents and other records or compel a corporation to prepare written returns of information under oath, within a certain period of time. On a section 11 application, the commissioner need only satisfy the court that an inquiry has been initiated and that a person is likely to have relevant documents in his possession or control. Such subpoenas may be issued against targets of an investigation as well as other third parties who may have relevant information.

Under subsection 11(2), a Canadian corporation that is an affiliate of a foreign corporation may be ordered to produce records held by its foreign affiliate. The precise scope of this 'long-arm' authority has not

been judicially determined, but it continues to be invoked in document production orders sought by the Bureau. The section 11(2) power was the subject of constitutional challenge by Toshiba in the *CRT* investigation and by Royal Bank of Scotland in the *Libor* investigation. In both cases, the litigation was settled before any final determinations on the provision's validity were made by a court.

Section 11 of the Act can also be used to compel witnesses who have relevant information to testify under oath for the purpose of answering questions related to the inquiry. Testimony obtained from a person under a section 11 order cannot be used against that person in any subsequent criminal proceedings. This limitation is consistent with decisions of the Supreme Court of Canada establishing use and derivative use immunity for persons compelled to give evidence under statutory powers of investigation. On the other hand, where an individual employee of a corporation has been compelled to give evidence under section 11, the evidence is generally considered admissible against the accused corporation.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

In international cartel cases, the Bureau will often cooperate closely with other competition agencies, either through formal procedures or informally.

Formal procedures involve the invocation of mutual legal assistance treaties (MLATs) with the US and other countries. While they have been used sparingly, the MLAT arrangements permit Canada and cooperating countries to undertake formal procedures in their own jurisdictions to obtain evidence for a foreign investigation. These arrangements also permit Canadian and other antitrust enforcement agencies to coordinate their enforcement activities, exchange confidential information and meet regularly to discuss case-specific matters.

The Bureau may also use competition cooperation agreements, such as those with the US, the EU, Australia, Brazil and others. In general, such agreements build upon the 1995 OECD Recommendation Concerning Co-operation between OECD countries and include provisions relating to notification and consultation when an investigation may affect the interests of another jurisdiction. However, these agreements generally do not provide for the exchange of documents or other evidence that is subject to domestic confidentiality protections, and they are therefore of limited use in cartel cases.

In practice, there may be wide-ranging informal contacts among Canadian and foreign investigative agencies on common issues during an inquiry even if confidential evidence is not exchanged. There has also been informal coordination of independent and parallel investigations into numerous international cartels. This has included parallel searches or other use of formal enforcement powers in several cases, including the investigation into air cargo surcharges. This form of cooperation has been very successful and is now the norm in investigations into cartels affecting North America. In addition, the Bureau now regularly requests that cooperating parties under its immunity and leniency programmes provide a 'waiver' allowing the Bureau to discuss common confidential information with the US Department of Justice and certain other cartel enforcement authorities.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

In light of the MLAT and other inter-agency cooperation discussed in question 11, a company defending a cartel investigation that has multi-jurisdictional implications, and particularly one involving the US or the EU, should be highly sensitive to the potential collaboration between the Bureau and the enforcement agencies in these jurisdictions. A coordinated defence strategy is increasingly critical, and the timing of approaches or responses to the authorities in each jurisdiction should be considered carefully. The exposure of key individuals to prosecution, and the lack of any limitation period for cartel conduct, in Canada are factors of particular concern in developing a comprehensive strategy.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel matters are prosecuted as indictable criminal offences. The charges are set out in an indictment and the accused must respond by entering a plea. In practice, many cases are resolved by negotiated plea agreements which are subject to court approval, as discussed further in questions 19 and 30.

If the accused pleads not guilty, a preliminary inquiry is held before a judge to determine whether there is sufficient evidence to order a trial. The DPP may and occasionally does skip this step by issuing a 'preferred indictment' and proceeding directly to trial.

Prosecutions may be brought in any of the regular provincial courts of superior jurisdiction or in the Federal Court – Trial Division. Procedure in these prosecutions is governed by the Criminal Code and, where matters are adjudicated in the provincial courts, the applicable court's rules of criminal procedure. Proceedings are normally undertaken in the provincial superior courts, which have well-established procedures for dealing with trials, evidence, custodial (and other) sentences, and other aspects of criminal proceedings.

Under the Act, a corporation has no right to a jury trial, although individuals may elect trial by jury.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In cartel cases, as in most other criminal matters, the onus is on the prosecution to prove each element of the offence beyond a reasonable doubt. The ordinary rules of evidence in criminal proceedings generally apply, although the Act expressly provides for the admissibility of statistical evidence that might not be admitted in some other criminal cases.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Pursuant to subsection 45(3) of the Act, a court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties. However, the conspiracy, agreement or arrangement must be proved beyond reasonable doubt.

16 Appeal process

What is the appeal process?

There is an automatic right of appeal, by the accused person or the DPP, on any matter that involves a question of law alone, to the provincial court of appeal or the Federal Court of Appeal, as the case may be. An accused person may also, with leave of the court appeal against a conviction on any ground that involves a question of fact or a question of mixed fact and law. The decision of a court of appeal may be appealed to the Supreme Court of Canada, but only if the Supreme Court grants leave to do so. Sentencing decisions may also be appealed by the accused person or the DPP with leave of the court.

On the hearing of an appeal against conviction, the court of appeal may allow the appeal where it is of the opinion that the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence, on the ground of a wrong decision on a question of law, or on any ground there was a miscarriage of justice. The court of appeal may dismiss the appeal where the appeal is not decided in favour of the appellant on any ground mentioned above, that no substantial wrong or miscarriage of justice has occurred, or notwithstanding any procedural irregularity at trial the court of appeal is of the opinion that the appellant suffered no prejudice thereby. Where a court of appeal allows an appeal it will quash the conviction and direct a judgment of acquittal or order a new trial. If an appeal is from an acquittal, the court of appeal may order a new trial, or enter a verdict of guilty.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Given their status as the most serious indictable offences under the Act, cartel prosecutions attract significant penalties – up to C\$25 million per count charged for companies and for individuals up to a C\$25 million fine or 14 years' imprisonment. There is no maximum fine for foreign-directed conspiracies or bid rigging. Courts have emphasised in both the competition law and general criminal law context that fines must be large enough to deter powerful companies and must not become simply a cost of doing business. C\$10 million is the highest fine to date for a single count conspiracy under section 45. This amount (the previous statutory maximum) was imposed for the first time in January 2006 in the *Carbonless Paper* case, and again in 2012 (in respect of conduct occurring under the old offence) in the *Polyurethane Foam* case. The section 46 offence relating to implementing a foreign conspiracy in Canada carries no fine ceiling, and in 1999–2000 SGL Carbon AG and UCAR Inc agreed to pay fines of C\$13.5 million and C\$12 million respectively under that provision in the *Graphite Electrodes* case.

It is also possible for a prosecution to proceed with multiple counts, each constituting a separate offence. This can result in total fines in excess of the statutory maximum, which has occurred following guilty pleas in a number of cartel cases. These include some of the highest fines in the history of Canadian criminal law: C\$50.9 million against F Hoffmann-La Roche for multiple conspiracies involving vitamin products; and C\$30 million against Yazaki Corporation in April 2013 for bid rigging in the supply of wire harnesses (auto parts). The latter penalty is the highest fine ever imposed under the bid-rigging offence.

While the maximum prison sentences available under sections 45 (conspiracy) and 47 (bid rigging) of the Act are 14 years, the imposition of custodial sentences against individual cartel offenders to date has been relatively rare. Virtually all prison sentences for cartel conduct have been less than two years, with most of those sentences conditional (ie, to be served in the community). However, legislative amendments to the federal Criminal Code in 2012 have eliminated the availability of conditional sentencing for future section 45 and section 47 convictions.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Cartel cases are normally prosecuted under the criminal provisions of the Act and are primarily subject to the criminal sanctions of fines and imprisonment discussed in question 16. It is also common for the DPP to seek a prohibition order to prevent future repetition of the offence.

For competitor collaboration cases that do not fall into the traditional hard-core cartel pattern, the section 90.1 reviewable practice provisions permit the Bureau to pursue a prohibition order against the conduct in question. (Fines are not available.) Alternatively, it might be possible for the commissioner to bring an application under the joint abuse of dominance provisions in the non-criminal part of the Act. Such applications would be heard before the Competition Tribunal, an administrative body that considers the evidence on a civil standard of a balance of probabilities. Since 2009, the Competition Tribunal can impose administrative monetary penalties under the abuse of dominance provision of the Act of up to C\$10 million for a first order and of up to C\$15 million for subsequent orders.

To date there have been very few section 90.1 or joint dominance cases, and they have all been settled with consensual remedial agreements.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

While the federal Criminal Code enumerates a range of binding sentencing principles, they provide considerable latitude and the determination of sentence is ultimately a matter for the discretion of the court. In addition to sentencing principles, the Criminal Code provides the

following list of aggravating and mitigating factors to be considered when sentencing organisations (ie, corporations):

- any advantage realised by the organisation as a result of the offence;
- the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- whether the organisation has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
- the impact that the sentence would have on the economic viability of the organisation and the continued employment of its employees;
- the cost to public authorities of the investigation and prosecution of the offence;
- any regulatory penalty imposed on the organisation or one of its representatives in respect of the conduct that formed the basis of the offence;
- whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- any penalty imposed by the organisation on a representative for their role in the commission of the offence;
- any restitution that the organisation is ordered to make or any amount that the organisation has paid to a victim of the offence; and
- any measures that the organisation has taken to reduce the likelihood of it committing a subsequent offence.

The Bureau's September 2018 leniency policy establishes a framework for determining the recommendation that it will make to the DPP regarding the fine to be sought in cases involving cooperating parties. The policy uses an initial starting point of 20 per cent of the volume of commerce affected by the cartel in Canada. Of this 20 per cent starting point, 10 per cent is viewed as a proxy for the overcharge from the cartel activity and 10 per cent is viewed as a deterrent. If the precise overcharge can be calculated on the basis of compelling evidence, then the 10 per cent proxy will be replaced by the actual overcharge. Cooperation discounts (up to 50 per cent) and any aggravating or mitigating factors are then applied to the base fine. In addition to the aggravating and mitigating factors set out above, the September 2018 leniency policy notes that the existence of a credible and effective corporate compliance programme will serve as a mitigating factor in the calculation of the fine amount.

Prior to the September 2018 leniency policy, the 50 per cent cooperation discount, which was automatic, was only available to the first leniency applicant, with subsequent leniency applicants only eligible for discounts up to 30 per cent. The updated leniency policy permits a cooperation credit of up to 50 per cent for every leniency applicant, which is dependent on the value of the leniency applicant's cooperation. See questions 24 and 25 for additional details on the new immunity and leniency policies.

While these criteria and the Bureau recommendations are given significant consideration in the negotiation of guilty plea arrangements, they are not binding on the DPP or on the court when a guilty plea is presented to the court for acceptance. Nor would they bind the DPP when making submissions on an appropriate sentence after obtaining a conviction at trial.

If a guilty plea is negotiated with the DPP, it will usually include agreement upon a joint submission to the court as to the proper penalty. The court is not bound by this recommendation, but will not reject it unless it is either contrary to the public interest or brings the administration of justice into dispute.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

A new Integrity Regime was put in place by the Canadian government in July 2015. The regime applies to procurement and real property transactions undertaken by federal government departments and agencies.

A supplier is ineligible to do business with the government of Canada if it, or a member of its board of directors, has been convicted of bid rigging or any other anticompetitive activity under the Competition Act or a similar foreign offence. Where an affiliate of a supplier has been so convicted, an assessment will be made to determine if there was any participation or involvement from the supplier in the actions that led to the affiliate's conviction. If so, the supplier will be rendered ineligible. If a supplier is charged with an offence, it may also be suspended from doing business with the government pending the outcome of the judicial proceedings.

A supplier convicted of a Competition Act offence will be ineligible for 10 years, but may have its ineligibility period reduced by five years if it demonstrates that it cooperated with law enforcement authorities or has undertaken remedial action to address the wrongdoing. An administrative agreement would then be imposed to monitor the supplier's progress.

Exceptions to the policy may apply in circumstances in which it is necessary to the public interest to enter into business with a supplier that has been convicted. Possible circumstances necessary to the public interest could include:

- no other supplier is capable of performing the contract;
- an emergency;
- national security;
- health and safety; and
- economic harm to the financial interests of the government of Canada and not of a particular supplier.

In March 2018, the federal government announced that the Integrity Regime will be enhanced to introduce greater flexibility in debarment decisions and increase the number of triggers that can lead to debarment (including the addition of more federal offences, certain provincial offences, 'foreign civil judgments for misconduct' and debarment decisions of provinces, foreign jurisdictions and international organisations). The government announced that the enhanced Integrity Regime will be reflected in a revised Ineligibility and Suspension Policy, which will be released on 15 November 2018, and will come into effect on 1 January 2019.

Provincial (and also municipal) governments may also establish rules governing debarment from their procurement processes. For example, the Quebec Integrity in Public Contracts Act prohibits a corporation convicted of price fixing or bid rigging in the previous five years from entering into contracts with public bodies or municipalities.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Once proceedings have been initiated under the criminal provisions in Part VI of the Act, proceedings under the various civil reviewable practices provisions cannot be brought on the basis of substantially the same facts (and vice versa). The choice of which track to pursue is a matter of enforcement discretion for the Commissioner and the DPP. As noted in question 4, the Bureau has issued guidelines indicating that hard-core cartel conduct normally will be prosecuted criminally and that other types of competitor collaboration normally will be dealt with under the section 90.1 civil provisions.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Section 36 of the Act grants private parties the right to recover in the ordinary civil courts any losses or damages suffered as a result of a breach of the criminal provisions of the Act, as well as their costs of investigation and litigation. Only single damages are available. The Act expressly provides that a prior conviction for an offence is, in the absence of any evidence to the contrary, proof of liability. However, there are no conditions precedent to a private action under the Act, and the absence of a conviction, or even the refusal of the commissioner to

commence an inquiry, does not bar or provide a valid defence to such an action.

Both direct and indirect purchasers may bring private claims in Canada. The passing-on defence is not permitted. The Supreme Court of Canada held in 2013 that the possibility of double recovery is an issue to be dealt with when assessing damages at trial, and should not be a bar to indirect purchaser claims.

There is no private right of action in relation to the civil provisions of the Act. However, in some situations private parties may be able to use section 36 to bring a private action in respect of an alleged breach of the conspiracy or bid-rigging provisions even if it involves conduct that the Bureau, as a matter of enforcement discretion, would treat under the civil rather than criminal track.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are available, and are now a virtual certainty in multiple provinces in Canada after (and often before) a conviction under the Act in situations where cartel activity may have occurred. A vigorous and effective plaintiffs' bar has evolved in Canada, often acting in conjunction with US plaintiffs' counsel in cross-border cases. Claims are normally brought in provincial courts – most typically in British Columbia, Ontario, and Quebec – rather than the Federal Court. These provincial regimes follow an 'opt-out' model that allows individual purchasers to choose not to participate in a class action and proceed with their own individual claims. However, there is no formal procedure for consolidating parallel actions brought in multiple provinces.

To date, most cases have been resolved through settlements, which are subject to the approval of the court to ensure they are fair, reasonable and in the best interests of the proposed class. In recent class proceedings involving the foreign exchange markets, 12 defendants have thus far agreed to settlements which collectively exceed C\$107 million. More recently, plaintiffs have announced a settlement of C\$517 million in a long-running class action against Microsoft, but it has not yet been brought forward for court approval.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Bureau has an immunity programme whereby a company or individual implicated in cartel activities may offer to cooperate with the Bureau and request immunity. The term 'immunity' refers to a grant of full immunity from prosecution by the DPP on recommendation by the Bureau. As of September 2018, the first party to come forward where the Bureau is unaware of an offence, or before there is sufficient evidence for a referral of the case to the DPP for possible prosecution, is eligible for a grant of interim immunity. The applicant must have terminated its participation in the illegal activities and must not have coerced others to participate in the illegal activities. The grant of interim immunity is a conditional immunity agreement that sets out the applicant's ongoing cooperation and full disclosure obligations that must be fulfilled in order for the DPP to finalise the immunity agreement.

Pursuant to the grant of interim immunity, the applicant will need to provide complete, timely and ongoing cooperation throughout the course of the Bureau's investigation and subsequent prosecutions. This entails full, frank and truthful disclosure of non-privileged information and records. The applicant's counsel will first proffer what records, evidence or testimony can be provided. Once a grant of interim immunity is concluded with the DPP, witnesses will be interviewed and they may subsequently be called to testify in court proceedings.

As of September 2018, if a company qualifies for immunity, all current directors, officers and employees that desire immunity will need to demonstrate their knowledge of or participation in the unlawful conduct and their willingness to cooperate with the Bureau's investigation. If they do so, they will also receive immunity provided they offer complete and timely cooperation. Former directors, officers and employees of the company who admit their knowledge of or participation in

an offence under the Act may also be given immunity in exchange for cooperation, provided they are not currently employed by another member of the cartel that is being investigated. This determination is to be made by the Bureau on a case-by-case basis.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The Bureau has created a leniency programme that complements its immunity programme for candidates that are not eligible for a grant of interim immunity. The Bureau will recommend to the DPP that qualifying applicants be granted recognition for timely and meaningful assistance to the Bureau's investigation. An agreement to plead guilty and cooperate can earn a leniency applicant a reduction of up to 50 per cent of the fine that would otherwise have been recommended by the Bureau to the DPP. At the request of the first leniency applicant (ie, the first cooperating party after the immunity applicant) that is a corporate applicant the Bureau will also recommend to the DPP not to charge the directors, officers or employees of the applicant who admit knowledge of or participation in the unlawful conduct and are prepared to cooperate.

Providing all leniency applicants with the ability to receive a reduction of up to 50 per cent of the fine that otherwise would have been recommended is a new development in the September 2018 leniency programme. Previously, only the first-in leniency applicant was eligible for this 50 per cent reduction, which was automatic, with subsequent applicants only eligible for a fine reduction of up to 30 per cent. In the new programme, the percentage of the fine reduction is to be determined having regard to the extent that the leniency applicant's cooperation adds to the Bureau's ability to advance its investigation and pursue other culpable parties. The Bureau will take into account a number of factors, including the timing of the leniency application (relative to other parties in the cartel as well as relative to the stage of the Bureau's investigation), the timeliness of disclosure, the availability, credibility and reliability of witnesses, the relevance and materiality of the applicant's records, and any other factor relevant to the development of the Bureau's investigation into the matter. An additional fine reduction credit of 5 to 10 per cent is available to a party eligible for 'immunity plus' (see question 26).

All leniency applicants must meet the requirements of the programme, which are similar to those of the immunity programme, including full, frank, timely and truthful cooperation.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

A party will not be eligible for immunity if the Bureau has been made aware of the offence by another, earlier applicant for immunity in respect of the same alleged cartel conduct. However, the second party to offer to cooperate will, as a practical matter, be considered for favourable treatment and may, if the first party fails to fulfil the requirements of the immunity programme, be able to request immunity at that time.

Under the Bureau's September 2018 leniency programme, the timing of the leniency application is an important consideration in the determination of the percentage fine reduction that will be available to the applicant. In the previous version of the leniency programme, there was more certainty as the second party benefited from a penalty reduction of 50 per cent of the fine that would otherwise be recommended, but the new programme has made it clear that the extent of the applicant's cooperation will be one of the factors to be considered in this determination. The first-in leniency applicant will be able to obtain protection for its employees from prosecution, so long as they admit knowledge or participation in the unlawful conduct and are prepared to cooperate in a timely fashion with the Bureau's investigation in an ongoing manner. Other conspirators who seek to resolve their exposure later in the investigation will have progressively less ability to negotiate favourable fine reductions, unless they are able to demonstrate a higher value associated with their cooperation. In addition,

second and subsequent leniency applicants will have less ability to negotiate favourable terms in connection with the exposure of individuals to potential prosecution.

The concept of 'immunity plus' is also addressed in the leniency programme. Parties that are not the first to disclose conduct to the Bureau may nonetheless qualify for additional favourable treatment if they are the first to disclose information relating to another offence for which they may receive immunity. If the company pleads guilty to the first offence for which it has not been granted immunity, its disclosure of the second offence will be recognised by the Bureau and the DPP in their sentencing recommendations with respect to the first offence, resulting in an additional 5 to 10 per cent discount off the corporate fine for the first offence and potentially additional favourable treatment for individuals.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no deadlines for approaching the Bureau. However, the available benefits decline for subsequent cooperating parties as noted in question 26. To increase its likelihood of obtaining immunity or leniency, a party should approach the authorities as soon as legal counsel has information indicating that an offence may have been committed.

A 'marker' can be obtained that will allow counsel time to complete a full investigation. Once a marker is granted, the applicant has 30 calendar days to provide the Bureau a detailed proffer describing the illegal activity, its effects in Canada and the supporting evidence. If an applicant fails to provide its proffer within 30 days, or within any extended period of time agreed by the Bureau, the marker will automatically lapse. The marker can also be cancelled if the proffer is incomplete or insufficient. In situations involving multiple jurisdictions, a party whose business activities have a connection to Canada should consider contacting the Bureau either prior to, or immediately after, approaching foreign competition law authorities.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

A participant in the Bureau's immunity or leniency programmes must provide 'full, complete, frank and truthful disclosure of all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located, that in any manner relate to the anticompetitive conduct for which immunity is sought'. Participants must also take all lawful measures to secure the cooperation of current and former directors, officers and employees for the duration of the Bureau's investigation and any ensuing prosecutions, including appearing for interviews and potentially providing testimony in judicial proceedings. All such cooperation efforts are at the cooperating party's own expense.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Bureau treats as confidential any information obtained from a party requesting immunity or leniency. The only exceptions to this policy are when disclosure:

- is required by law;
- is necessary to obtain or maintain the validity of a judicial authorisation for the exercise of investigative powers;
- is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- is agreed to by the cooperating party;
- has already been made public by the party;

- is necessary for the administration or enforcement of the Act; or
- is necessary to prevent the commission of a serious criminal offence.

In addition, unless required by law or on consent, the Bureau will not inform other competition agencies with which it may be cooperating of the identity of an immunity or leniency applicant.

With respect to private actions, the Bureau's policy is to provide confidential information only in response to a court order. In the event of such an order, the Bureau will take all reasonable steps to protect the confidentiality of the information, including by seeking a protective order from the court.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

While the Bureau may make recommendations to the DPP with respect to the severity of any penalty or obligation to be imposed on parties that cooperate in cartel investigations (and those that do not), the DPP retains the ultimate discretion concerning decisions to prosecute, negotiation of plea bargains and sentencing submissions presented in court.

As discussed in question 19, the DPP and defence counsel may make recommendations but cannot fetter the sentencing discretion of the court. In practice, plea bargains with joint recommendations on sentencing have almost always been accepted. The common law encourages courts to accept joint recommendations, which can only be refused where the court's acceptance of the recommended sentence would 'bring the administration of justice into disrepute' or otherwise be contrary to the public interest.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

If a company qualifies for immunity, all present directors, officers and employees who admit their knowledge of or participation in the illegal activity as part of the corporate admission, and who provide complete, timely and ongoing cooperation, will qualify for immunity. Agents of a company and past directors, officers and employees who admit their knowledge of or participation in the illegal activity and who offer to cooperate with the Bureau's investigation may also qualify for immunity. However, this determination will be made on a case-by-case basis and immunity is not automatic for agents or past employees. Even if a corporation does not qualify for immunity – for example, if it coerced others to participate – past or present directors, officers and employees who come forward with the corporation to cooperate may nonetheless be considered for immunity as if they had approached the Bureau individually.

At the request of the applicant, the Bureau will recommend that no charges be brought against current employees of the second cooperating party (the first leniency programme applicant) who admit their knowledge of or participation in the illegal activity. Former employees are likely to be protected as well if they admit their involvement, assuming no other contrary factors (eg, subsequently working for another party to the cartel) exist.

Subsequent cooperating parties may be able to obtain protection for some of their directors, officers and employees, but these determinations will be made on a case-by-case basis. While immunity or leniency may be revoked where a party fails to comply with the immunity or leniency programme requirements, the revocation generally will only apply to the non-cooperating party. A company's immunity or leniency can be revoked while its cooperating directors, officers, employees and agents retain their protection. Likewise, an individual's immunity or leniency can be revoked while the individual's employer retains its immunity or leniency (provided it has discharged its obligation to take all lawful measures to attempt to secure the individual's cooperation).

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The immunity and leniency processes typically involve the following steps.

Initial contact and marker

Anyone may initiate a request for immunity or leniency in a cartel case by communicating with the deputy commissioner of competition – cartel directorate or their designate. Very basic information about the industry or product will need to be provided, usually through a hypothetical oral disclosure, to determine whether the Bureau is already investigating the matter. The party may be granted a 'marker' to secure its place in the queue, and will normally be asked to confirm its participation in the immunity or leniency programme within four business days of receiving a marker.

Following confirmation of a marker, the Bureau will expect the applicant to perfect its marker by proceeding promptly to provide a proffer. The usual deadline is 30 days, although extensions to provide additional information emerging from an ongoing internal investigation may be given in appropriate circumstances.

Proffer

If the party decides to proceed with the immunity or leniency application, it will need to provide a detailed description of the illegal activity and to disclose sufficient information for the Bureau to determine whether it might qualify for immunity or leniency. This is normally done by way of a privileged proffer by legal counsel that describes the conduct and potential evidence. At this stage the Bureau may request an interview with one or more witnesses, or an opportunity to view certain documents, prior to recommending that the DPP provide a grant of interim immunity or leniency. Recently, the Bureau has also been placing an emphasis on receiving information during the proffer stage about the volume of commerce affected by the cartel in Canada.

If the Bureau determines that the party demonstrates its capacity to provide full cooperation and that it meets the requirements of the applicable programme, it will present all relevant proffered information and a recommendation regarding the party's eligibility to the DPP. The DPP will then exercise its independent discretion to determine whether to provide the party a grant of interim immunity or leniency, as the case may be.

Grant of interim immunity or leniency agreement

If the DPP accepts the Bureau's recommendation, the DPP will issue a grant of interim immunity or enter into a plea agreement with the party that will include all of the party's continuing obligations.

Full disclosure and cooperation

After the party receives a grant of interim immunity or enters into a plea agreement with the DPP, it will be required to provide full disclosure and cooperation with the investigation and any ensuing prosecution of other parties (see question 28).

Immunity agreement (for the immunity programme only)

Once a party has satisfied all of its obligations under the grant of interim immunity, the Bureau will recommend to the DPP to finalise the grant of immunity to the applicant. The final grant of immunity will not ordinarily be finalised until either (i) the statutory period for any filing of a notice of appeal has lapsed in the case of any related criminal prosecution or (ii) the commissioner and the DPP have no reason to believe that further assistance from the applicant could be necessary.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

After the 2009 legislative amendments, the Bureau issued its competitor-collaboration guidelines in December 2009, an updated immunity bulletin in June 2010, a revised and updated leniency bulletin in September 2010, and revised immunity and leniency FAQ documents in September 2013. A public consultation regarding the

immunity programme was initiated in October 2017. The Bureau invited comments in May 2018 regarding revised immunity and leniency programmes. The revised immunity and leniency programmes were released in September 2018. These revised programmes have also incorporated the prior 'FAQ' bulletins under the immunity and leniency programmes.

Update and trends

The Competition Bureau's and the PPSC's new immunity and leniency programmes were released in September 2018 and are discussed in detail throughout this chapter.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The DPP is required to produce to the defence all relevant information, whether or not the DPP intends to introduce it into evidence and whether it is inculpatory or exculpatory. The DPP does have discretion to withhold information as to the timing of the disclosure where necessary to protect the identity of an informer or a continuing investigation. The discretion must also be exercised with respect to the relevance of information. This disclosure obligation begins at the outset of the prosecution at the first appearance and continues until the end of the proceedings. A violation of this constitutional right can lead to an abuse of process action, in which the court can stay the criminal proceedings and acquit the defendant.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

As individual employees and the company can both be charged with an offence under the Act, there is a potential conflict of interest if counsel acts for both the company and any employees that are also targets of an investigation or prosecution. For example, an employee may wish to obtain immunity in exchange for testimony which includes evidence contrary to the interests of the corporation, or the corporation may wish to claim that the employee's actions were not authorised by management. This is less of a concern when employees are not being targeted personally in the investigation and are providing cooperation pursuant to the company's participation in the immunity or leniency programme.

Counsel for a corporation must caution employees that he or she acts for the company alone and, if they believe that their interests may conflict with the company's, they should obtain independent legal advice. Counsel for the company will be free to act for both the corporation and the employee, if they both consent to a waiver of the potential conflict of interest and confidentiality arrangements as between them. However, the Bureau investigators or DPP prosecutor may resist joint representation if there is a risk of divergent interests.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Affiliated companies normally do not require separate representation.

There is a potential for conflicts of interest among multiple corporate defendants (who are not affiliates) during Bureau investigations and prosecutions, as well as in civil litigation where there are potential cross-claims between codefendants. However, on occasion, law firms have acted for multiple defendants where the defendants have consented and appropriate confidentiality and conflict management arrangements have been established between lawyers at the firm engaged in the matters. These arrangements have usually occurred where the parties concerned have been involved in related conspiracies, but the defendants were not in a situation of actual conflict.

As a matter of current practice, the DPP will be unlikely to participate in joint resolution discussions involving multiple parties.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

It is possible for a corporation to indemnify an employee for legal costs and fines incurred as a result of a criminal investigation or conviction. While most indemnity agreements or insurance policies contain exclusions for deliberate wrongdoing, there is no law prohibiting such indemnification if the corporation chooses to do so. However, there has been at least one instance in which a convicting court ordered a corporation not to pay the fine imposed on an individual employee.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Fines and penalties can be categorised as follows:

- judicial – these are imposed by a court of law for a breach of any public law; and
- statutory – these are imposed as a result of the application of statutes (for example, the Competition Act).

Damages include a payment in settlement of a damages claim to avoid or terminate litigation, even where there was no admission of any wrongdoing.

Paragraph 18(1)(a) of the Income Tax Act provides that, in calculating a taxpayer's income from a business or property, no deduction shall be made in respect of an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property. As stated by the Supreme Court of Canada in *65302 British Columbia Ltd.*: 'if the taxpayer cannot establish that the fine was in fact incurred for the purpose of gaining or producing income, then the fine or penalty cannot be deducted.'

For purposes of establishing whether a fine or penalty has been incurred for the purpose of gaining or producing income:

- the taxpayer need not have attempted to prevent the act or omission that resulted in the fine or penalty; and
- the taxpayer need only establish that there was an income-earning purpose for the act or omission, regardless of whether that purpose was actually achieved.

In the *65302 British Columbia Ltd* decision, the Supreme Court of Canada also stated that: 'it is conceivable that a breach could be so egregious or repulsive that the fine subsequently imposed could not be justified as being incurred for the purpose of producing income.' The court did not, however, give any further guidance in this respect, other than to indicate that 'such a situation would likely be rare'.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

It is possible that the Bureau may investigate and seek to prosecute individuals who also have exposure in other jurisdictions, assuming it can obtain personal jurisdiction over them. For example, in the *Vitamins* case the Canadian authorities negotiated guilty pleas with fines (but no custodial penalties) with three executives of F Hoffmann-La Roche that were also prosecuted in the US.

Similarly, the Bureau will take into account sales from foreign cartel participants to Canadian customers. It has on past occasions expressed the view that it can take into account indirect sales into Canada made by a cartel participant when asserting jurisdiction or imposing penalties. A possibility therefore exists for such 'double jeopardy' in

international cartel cases. In its leniency programme FAQs, the Bureau indicates that:

[W]here cartel members are penalised in another jurisdiction for the direct sales that led to the indirect sales into Canada, the Bureau may consider, on a case-by-case basis, whether the penalties imposed or likely to be imposed in the foreign jurisdiction are adequate to address the economic harm in Canada from the indirect sales.

Section 718.21 of the Criminal Code requires a court sentencing a corporation to take into consideration whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct. It has not been conclusively determined whether this provision should be interpreted as applying only to other sanctions imposed in Canada, or whether fines paid in other jurisdictions can also be considered. However, an obiter comment in a 2012 Federal Court sentencing decision (*R v Maxzone Canada Corporation*) suggested that the mere fact that a company or individual had been penalised in another jurisdiction should not be considered relevant when determining a sentence in Canada.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

In Canada, plea negotiations in criminal matters are a well-recognised and accepted practice. The single most effective consideration in negotiating a plea agreement and sentencing recommendation is the stage in the investigation at which the party decides to come forward. Even where there are serious aggravating elements – instigation, multiple charges, obstruction or previous convictions – if the party comes forward before the investigation is complete and at an early enough stage to provide valuable assistance to the investigators for the prosecution of other parties, a reduced fine or leniency for exposed individuals (or both) may be negotiated. Other substantive factors may also be important elements in a negotiated settlement of the company's exposure to prosecution, including the capacity to pay a fine, the existence or lack of an effective corporate compliance programme, the degree of management awareness of the actions of individual participants and passive or reluctant participation as opposed to instigation of the offence.

mcmillan

A Neil Campbell
Casey Halladay
Guy Pinsonnault

neil.campbell@mcmillan.ca
casey.halladay@mcmillan.ca
guy.pinsonnault@mcmillan.ca

Brookfield Place, Suite 4400
181 Bay Street
Toronto
M5J 2T3
Canada

Tel: +1 416 865 7000
Fax: +1 416 865 7048
www.mcmillan.ca

China

Peter J Wang, Yizhe Zhang, Qiang Xue, Lawrence Wang and Yichen Wu*

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Anti-Monopoly Law of China (AML) (promulgated on 30 August 2007 and effective as of 1 August 2008) is the main legislation governing cartels. In addition, both the Price Law of 1998 and Bidding Law of 2000 prohibit certain kinds of collusive activities. Unlike those antecedents, the AML imposes this prohibition in the context of a comprehensive competition law enacted for the purpose of protecting competition and enhancing economic efficiency.

Before the institutional reform of March 2018, both the State Administration for Industry and Commerce (SAIC) and National Development and Reform Commission (NDRC) had jurisdiction over enforcement of the monopoly agreement provisions of the AML. A number of rules had been adopted by both agencies, including:

- SAIC Procedural Rules Regarding the Investigation and Handling of Cases Relating to Monopoly Agreements and Abuses of Dominant Market Positions (effective as of 1 July 2009);
- SAIC Rules on the Prohibition of Monopoly Agreements (effective as of 1 February 2011);
- SAIC Rules on the Prohibition of Abuses of Intellectual Property Rights to Eliminate or Restrict Competition (effective as of 1 August 2015);
- NDRC Anti-Price Monopoly Rules (effective as of 1 February 2011);
- NDRC Procedural Rules on Administrative Enforcement against Price Monopoly (effective as of 1 February 2011);
- NDRC Provisions on Evidence of Price-Related Administrative Penalties (effective as of 1 July 2013);
- NDRC Provisions on Procedure of Price-Related Administrative Penalties (effective as of 1 July 2013);
- NDRC Rules on Review and Assessment of Price-Related Administrative Penalty Cases (effective as of 1 January 2014); and
- NDRC Provisions on Regulating Price-Related Administrative Penalty Authority (effective as of 1 July 2014).

In addition, NDRC and SAIC also issued for public comments several draft guidelines on various antitrust issues during 2016. Although none of those recent legislative efforts has resulted in the issuance of new rules, these draft antitrust guidelines shed light on how the Chinese antimonopoly enforcement authorities (AMEA) deal with antitrust substantive or procedural issues and are therefore worth discussing.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The SAIC and NDRC formerly investigated and enforced cartel behaviour. NDRC was responsible for enforcement against price-related monopoly agreements, while SAIC was responsible for investigating other monopoly agreements. Recently, the State Administration for Market Regulation (SAMR) was established under the Institutional Reform Plan, and consolidated the cartel enforcement functions of

SAIC and NDRC into its Anti-Monopoly Bureau. Under the AML, SAMR renders decisions independently without relying on the court.

AMEA may also authorise their provincial branches to be responsible for relevant antimonopoly enforcement. Provincial Development and Reform Commissions and Administrations of Industry and Commerce have been involved in many cartel cases with authorisation from SAIC and NDRC. It is probable that SAMR will follow this practice and continue to authorise its provincial branches to investigate cartel cases.

AMEA report to the Anti-Monopoly Commission of the State Council (AMC), which is responsible for organising, coordinating and supervising antimonopoly-related activities. The AMC generally serves as a policy making body and is not involved in the specific antitrust cases.

Monopoly agreements (with the exception of bid rigging) are not a criminal violation in China. Therefore, the criminal prosecution authorities' role is very limited in China's cartel enforcement.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

As mentioned, SAMR was established under the Institutional Reform Plan and has consolidated the antitrust enforcement responsibilities of NDRC and SAIC.

In September 2017, a number of seminars and workshops were held by the legacy antitrust enforcement agencies to discuss potential amendments to the AML. The consolidation of the agencies into SAMR is likely to accelerate the legislative process. Some important changes are anticipated in the near future.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 13 of the AML prohibits certain types of horizontal monopoly agreements among competitors, including:

- fixing or changing the prices of products;
- restricting output or sales volume of products;
- allocating sales or purchasing markets for raw materials;
- restricting the purchase of new technology or new equipment, or restricting the development of new technologies or new products;
- jointly boycotting; and
- other monopoly agreements as determined by the AMEA.

Though the AML does not expressly include bid rigging here, it may be seen as a type of cartel conduct. In practice, NDRC investigated and fined bid rigging related conduct applying article 13 of the AML in several high-profile cases, including the *Auto Parts and Bearings* case (2014) and the *Auto Maritime Transportation* case (2015).

Also, according to article 13 of the AML and agency regulations, concerted practices constitute a form of horizontal monopoly agreement. Finding concerted practices does not require the existence of any written or oral agreements between the competitors, rather only (i) uniformity of behaviour among competitors; (ii) some opportunity for communications or exchange of information between competitors; and (iii) the uniformity cannot be reasonably explained other than as the result of improper communication among competitors.

Although cartels theoretically are subject to exemption under article 15 of the AML, the agency effectively treats cartels as per se illegal. On the other hand, Chinese courts seem to consider the actual effects of a claimed cartel. Under the Supreme Court's Provisions on Several Issues concerning the Application of Law in the Civil Disputes Arising from Monopoly Conduct (2012) (the Supreme Court Anti-Monopoly Interpretation), the anticompetitive effect of a cartel is presumed. However, the presumption seems weak. In some cases (eg, the *Brick Maker* case (2017)), defendants have successfully rebutted the presumption of anticompetitive effects. In this sense, the courts' approach is more like the quick-look approach sometimes used in the US.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

Article 56 of the AML provides a block exemption for alliances or other concerted conduct by farmers and rural economic organisations in activities such as production, processing, sales, transportation and storage of agricultural products.

There are no explicit defences or exemptions for specific industries or government-sanctioned conduct.

6 Application of the law

Does the law apply to individuals or corporations or both?

Article 12 of the AML defines 'undertaking' as a natural person, a legal person or any other organisation that engages in the production or operation of commodities or provisions of services. As a result, the law generally applies to both individuals and corporations. However, when an employee is involved in a cartel on behalf of a corporation, only the corporation is liable as the corporation is the undertaking in that situation.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

According to article 2 of the AML, the law is applicable to monopolistic conduct outside the territory of China that has the effect of eliminating or restricting competition in the domestic market of China. There have been a number of cartel cases, including the *LCD Panel* case (2013), *Auto Parts and Bearings* case (2014), and *Auto Maritime Transportation* case (2015), where conduct outside China was found to be in violation of the AML.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Article 15(6) of the AML permits exemptions to be granted for monopoly agreements that are entered into for the purpose of protecting the legitimate interest of international trade and foreign economic cooperation. This provision is vague but seems to have been included to permit export cartels.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

A cartel investigation usually is started by a whistle-blower or a cartel member applying for leniency. AMEA may also initiate an investigation if they have reason to believe there has been a cartel infringement.

During the investigation, the undertakings under investigation have the opportunity to propose commitments for the purpose of eliminating the anticompetitive effects. The AMEA may decide to suspend the investigation in light of the commitments. However, as the NDRC draft Guidelines on Commitments of Undertakings have shown, they have been more and more reluctant to accept parties' commitments to suspend investigations in hard-core cartel cases.

When factual investigation is completed, the AMEA will send the parties a formal document called an Administrative Penalty Prior Notice to inform them of the agency's fact findings and legal analysis, and allow the parties a short time to respond.

After receiving responses from the parties, the AMEA will decide whether to impose penalty upon the parties. Usually, the penalty decision will be publicly announced by the AMEA and published on its official website.

There is no statutory timeline for a cartel investigation. In practice, the time spent on an investigation varies depending on the complexity of the case, the AMEA's internal priorities, the cooperation of the undertakings under investigation, etc.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Article 39 of the AML grants the AMEA broad investigative powers, including to:

- conduct on-premise inspections of the place of business of the investigated undertaking or other relevant places;
- question the investigated undertaking, interested parties, and other relevant entities and individuals, requiring them to provide relevant information;
- examine or copy relevant documents and information including related documentation, contracts, accounting books, business mails, and electronic data, etc, of the investigated undertaking, interested parties, and other relevant entities or individuals;
- seal up and detain relevant evidence; and
- enquire about the bank accounts of the undertakings.

The AMEA does not need to obtain court orders for searches, seizures, and other investigative actions. In practice, before any measures authorised by article 39 may be taken, a written report shall be submitted to the leadership of the AMEA for approval.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The AMEA have pursued bilateral cooperation with their counterparts in other jurisdictions. Since the enactment of the AML in 2008, they have entered into 55 cooperation agreements or MOUs with competition authorities in 28 countries and regions, including the US, the EU, the UK, Korea and Australia. For example, NDRC, SAIC and MOFCOM entered into a MOU with the US Federal Trade Commission and Department of Justice on 27 July 2011, stipulating a high level cooperation among the agencies. Cooperation at the level of individual cases is somewhat more limited.

In terms of multilateral cooperation, China is not a member of the International Competition Network, nor of the Organisation for Economic Co-operation and Development (OECD). As a UN member, China is involved in some work of the competition group of the United Nations Conference on Trade and Development (UNCTAD).

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Despite the bilateral cooperation and communication between the Chinese AMEA and antitrust enforcement agencies in other jurisdictions, this inter-jurisdictional cooperation remains high level, and so far there is no clear indication of working-level coordination between jurisdictions in specific investigations.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

After the AMEA establishes a finding of a monopoly agreement, it will issue a formal penalty decision and a public announcement. Usually the AMEA is obliged to issue a 'Administrative Penalty Prior Notice' to the investigated parties before issuing the formal penalty decision. The investigated undertaking may request for a formal hearing or otherwise submit a written representation or defence but often has only a few days to do so. There is no mandatory time limit between the issuance of the Prior Notice of Administrative Penalty and the formal decision, and the AMEA has the discretion.

The hearing or written submission provide the investigated parties with an opportunity to challenge the to-be-issued formal penalty decision before resorting to the appeal process. If the defence is accepted by the AMEA, no penalty will be imposed.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In public enforcement, the AMEA bears the burden to prove the existence of a cartel. As discussed above, once the AMEA has proved the existence of a cartel, it is hard for the parties to rebut the presumption of anticompetitive effects.

As to cartel-related private actions, according to the Supreme Court 2012 Anti-Monopoly Interpretation, for the types of specific cartel conduct listed under items 1 to 5 of article 13(1) of the AML, the defendant bears the burden to prove that the alleged agreement does not have the effect of eliminating or restricting competition. The plaintiff is responsible for proving the existence of a cartel, as well as standard items in civil litigations such as damages and causation between the alleged violation and the damages. Generally speaking, in Chinese civil litigation, the level of proof is balance of probabilities.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Circumstantial evidence is acceptable. In particular, concerted practices, which are considered a form of horizontal monopoly agreement, may be established by the finding of an exchange of information (or even the opportunity for such an exchange) and subsequent parallel competitive behaviours.

16 Appeal process

What is the appeal process?

There are two routes for an undertaking to challenge an administrative penalty decision of the AMEA after the formal penalty decision has been made: administrative reconsideration and administrative litigation. The two routes are alternative to each other. After the formal penalty decision is made, the undertaking has 15 days to pay the penalties. The application for administrative reconsideration or filing of administrative suit with the court will not halt the payment of penalties. In practice, these avenues for appeal only have been used by some domestic defendants, and not yet by multinational parties.

Administrative reconsideration

Administrative reconsideration is a procedure that generally applies to penalties imposed by different administrative agencies under different applicable laws. In the context of antimonopoly-related penalties, application for administrative reconsideration must be submitted to SAMR if SAMR makes the penalty decision. Decisions made by SAMR's provincial agencies can be challenged either at the provincial government or at SAMR, subject to the discretion of the applicant. The review is in principle limited to on-paper review, with the possibility of a hearing or consultation upon request by the applicant or the discretion of the reviewing agency.

In terms of timing, the undertaking must apply for administrative reconsideration within 60 days of receipt of the formal decision. The agency has 60 days from acceptance to make a decision, which can be

extended by up to 30 days upon approval. The applicant still has the opportunity to file an administrative litigation if it is unsatisfied with the administrative reconsideration decision.

Administrative litigation

An undertaking also can challenge an AMEA penalty decision via an administrative suit in the court. The undertaking must file the administrative suit within six months of receipt of the formal penalty decision. Administrative lawsuits are usually accepted at the time of filing if formalities are complete; if not, the court will provide a time limit for the plaintiff to supplement the formalities. The court must make its first instance decision within six months of acceptance of the case. This period is extendable upon approval of the High Court (or the Supreme Court if the court of first instance is the High Court). Either party can appeal the first instance decision within 10 or 15 days, depending on the nature of the court decision, after receipt of the first instance decision. The appellate court must make the final decision within three months of receipt of the appellate petition, which is also extendable similar to the above.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

As discussed, except bid rigging, cartels are generally not criminal violations in China.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

In terms of administrative sanctions, the AMEA shall order undertakings that enter into and implement monopoly agreements to cease and desist such conduct, confiscate their illegal gains, and impose fines amounting to 1 to 10 per cent of the total turnover of the undertaking in the previous year. However, it is worth noting that confiscation of illegal gains has become much less frequently used by the AMEA in recent years, mainly due to the difficulties involved in the calculation of illegal gains.

As a general trend, in recent years, enforcement against cartels has increased, with increasingly higher penalties imposed on the cartel members and any industry association organising the cartel activities. The highest fines against cartel conduct to date is the 2014 penalty decision against eight Japanese automobile parts companies totalling around 832 million yuan, representing 4 to 8 per cent of the penalised companies' annual turnover. In a 2017 penalty decision against 23 electricity companies and the electricity industrial association in Shanxi Province, the industrial association organising the price-fixing agreement was fined 500,000 yuan, the maximum fine available for industrial association under the AML.

In terms of civil sanctions, a plaintiff can file a civil lawsuit seeking compensation for damages caused by the alleged cartel activities. In addition, the party losing the litigation generally bears the litigation fees charged by the court; upon plaintiff's request, the court may also incorporate plaintiff's reasonable costs for investigation and prevention of the cartel activity into the amount of damages.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Some high level principles regarding the determination of fines are provided under the NDRC Provisions on Regulating Price-Related Administrative Penalty Authority. However, the provisions only applied to NDRC, the applicability of which becomes unclear in light of the consolidation of antitrust authority into SAMR.

The draft Guidelines on Calculation of Illegal Gains and Penalties issued by NDRC for public comments in 2016 provide some more detailed guidance on the determination of sanctions. However, currently it remains unclear whether and when the guidelines will be enacted.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

The AML and its relevant regulations do not provide for debarment as a form of penalty against anticompetitive conduct including cartel infringements. However, article 53 of the Bidding Law provides debarment for bid rigging. Specifically, for severe bid-rigging violations, the bidder shall be disqualified for one to two years from taking part in bidding for projects for which a bid invitation is required by law.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

It is possible for the same conduct to receive both civil and administrative sanctions. Indeed, there are examples of private litigation following an administrative penalty decision, claiming damages arising from the same penalised conduct. The first such case was *Tian Junwei* (2016), which was a follow-on private litigation of an NDRC penalty decision against baby formula manufacturers for resale price maintenance. Although the suit was dismissed for the plaintiff’s failure to meet the burden of proof, it demonstrates the possibility of parallel proceedings.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Neither the AML nor the Supreme Court 2012 Anti-Monopoly Interpretation distinguish between direct purchasers and indirect purchasers. Although it is still untested, indirect purchasers seem to be allowed to file antitrust civil actions with courts as no laws or precedents have prohibited this. Similarly, the passing-on and double recovery issues have not been addressed by courts or legislators at this point. However, it is clear that Chinese courts have been cautious not to overcompensate parties. Against this backdrop, it is more likely than not that the court will accept the ‘passing-on’ defence, by which defendants may argue that plaintiffs have passed price increases or other injury onto downstream customers.

Double or treble damages (or other kinds of punitive damages) are not available under the AML.

According to Supreme Court 2012 Anti-Monopoly Interpretation, upon request from the plaintiff, the court may consider the plaintiff’s reasonable costs for investigation and prevention of the monopoly conduct when deciding the amount of damages.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Under China’s Civil Procedure Law, there is a representative action regime, which has some similarities to the class action regimes available in other jurisdictions.

According to the Supreme Court 2012 Anti-Monopoly Interpretation, where several lawsuits have been brought by different plaintiffs against the same defendant for the same monopolistic conduct, the court may consolidate such cases. When the plaintiffs are numerous (more than 10), they may recommend a representative or representatives (two to five) to participate in the action.

If the exact number of plaintiffs is uncertain when the action is instituted, the court may publish a notice to describe the case and claims for potential plaintiffs to register within a certain period of time. The plaintiffs who have registered with the court may recommend a representative or representatives to participate in the litigation; and if the plaintiffs cannot reach a consensus on the representatives, the

court may determine a representative or representatives in consultation with the plaintiffs. The litigation conduct of such representatives shall bind all plaintiffs represented. However, to modify or relinquish any claims, admit any claims of the opposing party or reach a settlement, such representatives must obtain consent from the parties represented. The ruling issued by the court shall bind all plaintiffs who have registered. Such a ruling shall also apply to other parties who have not registered in the first place but later initiate actions within the statute of limitations.

The Civil Procedure Law also provides that if environmental pollution occurs or other acts harming the public interest are committed, ‘relevant organisations’ may bring actions to the courts on behalf of consumers. In theory, if a great number of consumers suffer losses caused by monopolistic conduct, consumer protection organisations, such as China Consumers Association, may bring private litigation on behalf of consumers. However, there has not been an antimonopoly class action or a public interest litigation in China yet.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being ‘first in’ to cooperate?

Leniency is an important enforcement tool for Chinese AMEA. Under article 46 of the AML, when an undertaking involved in a monopoly agreement reports to the AMEA and provides important evidence, the AMEA may grant to the undertaking a reduced penalty or immunity from the penalty. Both NDRC and SAIC adopted more detailed leniency rules in their respective regulations.

The leniency provisions in the SAIC’s and NDRC’s regulations differ on some important aspects, including whether leniency applies to the organiser of a cartel, the definition of ‘important evidence’, and the specific implementation of the leniency programme. The table below illustrates some of the inconsistencies:

Agency	Whether applicable to organiser	Definition of ‘important evidence’	Implementation of leniency	
SAIC	No	Evidence that plays a key role in the decision to initiate an investigation or in a finding of a monopoly agreement.	The first to voluntarily self-report and provide important evidence, and comprehensively and voluntarily cooperate with the investigation.	Should be exempted from penalties.
			Others that voluntarily self-report and provide important evidence.	Reduction of penalties at SAIC’s discretion.
NDRC	No clear prohibition	Evidence that will play a critical role in finding a price monopoly agreement.	The first to voluntarily self-report and provide important evidence.	May be exempted from penalties.
			The second to voluntarily self-report and provide important evidence.	May be granted a 50 per cent or more reduction of penalties.
			Others that voluntarily self-report and provide important evidence.	May be granted a 50 per cent or less reduction of penalties.

With the integration of antimonopoly authorities, it is expected that SAMR will be able to harmonise prior inconsistent rules and practices. However, it is likely that regulations promulgated by the respective legacy AMEA will remain in effect until new rules are available to replace them.

As is clear from the above table, the leniency programme is based on the principle of 'first come, first served' and only the first undertaking self-reporting to the AMEA can expect to get a full immunity, subject to the discretion of the agencies.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

As indicated above, according to NDRC's leniency programme, 'second in' and subsequent cooperating parties to a cartel investigation could benefit from a reduction in the fine.

Similarly, SAIC's leniency programme provides that 'second in' and subsequent cooperating parties will receive a reduction of the fine. However, the amount is not specified, and therefore subject to a case-by-case analysis.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Under the NDRC leniency programme, AMEA may reduce no less than 50 per cent of the penalties for the cooperating party who is the second volunteer to report a monopoly agreement and provide 'important evidence'.

Although the SAIC leniency programme does not specify the mitigation of penalties for the second voluntary reporter, SAIC may reduce the penalties by taking the circumstances into consideration.

In addition, according to the NDRC draft Leniency Guidelines, the AMEA may in general grant leniency to at most three undertakings in one case. However, if the case is significant and complex and the undertaking applying for leniency provides different important evidence, the AMEA may grant leniency to more than three undertakings.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Neither the AML nor the NDRC or SAIC regulations have specified deadlines for initiating or completing an application for immunity or partial leniency. The NDRC's draft Leniency Guidelines provide undertakings can file leniency applications before or after the AMEA takes enforcement measures.

The NDRC's draft Leniency Guidelines also introduce a marker system for leniency applications for the first time. According to the draft, an undertaking can first submit to the AMEA a preliminary report to preserve and protect its place in a leniency queue for a definite period of time. To obtain a marker, the undertaking need not provide all materials and information necessary for a formal leniency application. The AMEA will then issue a written order requesting relevant materials to be supplemented within 30 days or 60 days. If the undertaking can fulfil the request, the AMEA will treat the time the undertaking submits the preliminary report as the time of the leniency application.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

According to the draft Leniency Guidelines, the first applicant must report the circumstances of its cartel activities and provide 'important evidence' that can help the AMEA to start the investigation or to make the final decision, in order to obtain full immunity.

In addition, pursuant to the draft, the applicants should also fulfil the following obligations:

- timely stop the suspected illegal conduct;
- cooperate with the AMEA in the investigation in a prompt, continuous, comprehensive and faithful manner;

Update and trends

The most important development over the past year is the reorganising of the antitrust enforcement regime. As SAMR has consolidated the antitrust functions of the legacy AMEA, a series of changes may come in the near future.

- properly keep and provide evidence and information, and not conceal, destroy, transfer evidence or submit false material and information;
- not disclose information about the leniency application without prior approval of the AMEA; and
- not engage in any other conduct that may affect the enforcement.

The subsequent applicants are expected to do the same to obtain partial leniency.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

In practice AMEA keeps the identity of the leniency applicants confidential during investigations. However, the applicants' identities will be revealed in the AMEA's final decision. Usually the AMEA will publish the final penalty decisions and the decisions of exemption from penalties at the end of an investigation, which will disclose the leniency applicants' identities. For example, in the *Zhejiang Insurance Companies Cartel* case (2013), NDRC published its penalty decisions and the decision of exemption from penalties on its website and disclosed the identities of leniency applicants.

Except for identity information, the AMEA usually is cautious not to disclose other leniency-related information or materials. According to the NDRC's draft Leniency Guidelines, all reports submitted and documents generated under the leniency application will be kept in special archives by the AMEA and must not be disclosed to any third party without the consent of the undertakings concerned. No other agencies, organisations or individuals can obtain access to such information.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

During the process of an investigation, AMEA may accept commitments from undertakings and suspend an investigation. But as the draft NDRC Commitment Guidelines have shown, the AMEA is more and more reluctant to apply commitment and suspension to the hard-core cartel cases, which are thought to be the most serious antitrust violations.

In addition to the formal commitment and suspension scheme, the AMEA often settle a case through negotiation with the parties – therefore the final penalty decision reflects the consensus between the AMEA and the parties. That also helps explain why administrative litigations or administrative reconsideration cases are rare in practice.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Under the AML generally no civil or criminal liability will be imposed on current or former employees of a corporate defendant that is a party to a monopoly agreement. Therefore, the leniency programme does not apply to current or former employees of a corporate defendant.

32 Dealing with the enforcement agency**What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?**

In practice, an application for leniency could be filed with the AMEA by: (i) the legal representative of the undertaking; (ii) authorised legal counsel; and (iii) an employee who has specific authorisation to make the application. According to the draft NDRC Leniency Guidelines, undertakings can communicate, orally or in writing, anonymously or by name, with the AMEA before applying for leniency.

To secure leniency, an undertaking should report the monopoly agreement and provide important evidence. Although there is no standard application form, the following elements need to be included in the report:

- participants to the monopoly agreement and their basic information (including the names, addresses, contact information and representatives);
- details of the communications under the monopoly agreement (including the time, place, content of communication and participants);
- the products or services, prices and quantity that are involved in the monopoly agreement;
- the regions and market scale affected by the monopoly agreement;
- the duration of the monopoly agreement; and
- an explanation of the evidence submitted.

In addition to NDRC's and SAIC's regulations, the NDRC's draft Leniency Guidelines shed more light on what constitutes 'important evidence'.

33 Policy assessments and reviews**Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?**

As mentioned, the draft Leniency Guidelines may be finalised and promulgated by the newly integrated antimonopoly enforcement agency, SAMR, in the future.

Defending a case**34 Disclosure****What information or evidence is disclosed to a defendant by the enforcement authorities?**

Usually the parties have very limited access to the case information during the investigation. The AMEA may disclose information or evidence to the parties at its discretion. In addition, the AMEA is required to issue the Administrative Penalty Prior Notice to the parties before formally making a decision. The Prior Notice includes the basic facts found by the AMEA.

When challenging the AMEA's penalty decision in an administrative litigation or an administrative reconsideration, the parties theoretically may be able to gain access to the AMEA's case files.

35 Representing employees**May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?**

As mentioned, generally no civil or criminal liability will be imposed on employees of a corporate defendant. But the law does not prohibit counsel from representing employees as well as the corporation, provided there is no conflict of interest.

36 Multiple corporate defendants**May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?**

There is no specific rule on this under the AML. As a general principle, multiple corporate defendants in an antimonopoly investigation may be represented by the same counsel, if no conflicts of interest exist.

It does not necessarily depend on whether the corporate defendants are affiliated.

37 Payment of penalties and legal costs**May a corporation pay the legal penalties imposed on its employees and their legal costs?**

In general, no civil or criminal liability will be imposed on employees of a corporate defendant. However, under the AML, employees could be fined if they hinder the progress of the antimonopoly investigation. It is not clear if the penalties and the legal costs can be paid by their employers in this situation.

38 Taxes**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

According to the tax laws in China, fines, penalties and private damages awards are not tax-deductible.

39 International double jeopardy**Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

Under the AML, there are no specific rules on international double jeopardy for antimonopoly enforcement penalties or private damage claims. There also are no precedents in China suggesting that the

Contact:

Peter J Wang
Yizhe Zhang
Qiang Xue
Lawrence Wang
Yichen Wu

pjwang@jonesday.com
yzhang@jonesday.com
qxue@jonesday.com
lwang@jonesday.com
yichenwu@jonesday.com

32nd Floor, China World Office 1
No. 1, Jianguomenwai Avenue
Beijing 100004
China

Tel: +86 10 5866 1111
Fax: +86 10 5866 1122
www.jonesday.com

administrative or judicial authorities would take into account the penalties or damages imposed in other jurisdictions.

40 Getting the fine down

What is the optimal way in which to get the fine down?

Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The best way to reduce potential penalties is to cooperate with the AMEA. Voluntarily ceasing the suspected conduct and taking actions to eliminate the potential anticompetitive effects may persuade the AMEA to reduce a fine.

The AML is silent on whether the existence of a compliance programme affects the level of the fine. Based on the AMEA's past practice, the mere existence of a compliance programme is not recognised as a factor affecting the level of the fine. Establishing or strengthening the antitrust compliance programme going forward, even after the AMEA initiated an investigation, is more helpful as this shows that the parties are willing to cooperate and take the AMEA's competition concerns seriously.

* *Peter J Wang, Yizhe Zhang, Qiang Xue, Lawrence Wang and Yichen Wu are lawyers at Jones Day.*

Colombia

Danilo Romero Raad and Bettina Sojo

Holland & Knight

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Article 1 of Law 155 of 1959 establishes a general prohibition on competitors from entering into agreements that cause a restriction on competition in Colombia, and Decree 2153 of 1992 is the principal statute for cartel regulation. In addition, Law 256 of 1996 prohibits unfair methods of competition, and Law 1340 of 2009 establishes procedural aspects regarding investigations for restrictive competition practices, and benefits for competitors that cooperate with investigation and prosecution authorities.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Law 1340 of 2009 appointed the Superintendency of Industry and Commerce (SIC) as the national authority for the investigation and prosecution of cases regarding infringement of competition regulations, including cartel matters.

In addition, since 2011 the prosecution authorities have been empowered to investigate and penalise participants in bid-rigging cases.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

Bill 038 of 2015 was the most recent proposal for change that was submitted to the Colombian Congress. This proposal suggested changes to the business concentration and unfair competition regimes, the SIC's investigative and prosecution powers and the immunity regime for infringers of the competition regulations that cooperate with the authorities. The bill did not pass into law.

Bill 083 of 2018 was recently submitted to the Colombian Congress, suggesting an amendment to Law 80 of 1993 (Public Procurement Act) directly related to the competition regime. In fact, article 8 of Law 80 of 1993 establishes different situations that constitute inabilities for individuals to enter into agreements with public entities or to participate in public tenders. Bill 083 of 2018 suggests the inclusion of an additional situation of inability directly related to the infringement of competition regulations. In this sense, the proposal is to establish that individuals declared responsible by the SIC of conducts prohibited by the competition regime in Colombia will not be allowed to enter into agreements with public entities for a period of 20 years. At the same time, this inability will be extended to the corporations to which this individual was a part at the moment of performing the prohibited conduct as legal representative, manager or member of the board of directors.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 1 of Law 155 of 1959 establishes a general prohibition on competitors from entering into agreements that cause a restriction on competition in Colombia.

More specifically, Decree 2153 of 1992 prohibits the following types of competitor agreements, among others:

- price fixing;
- determining selling conditions or discriminatory marketing practices;
- market allocation within producers or within distributors;
- allocation of production or supply quotas;
- allocation or limitation of input sources;
- restriction to technical developments;
- tied selling;
- refraining from producing goods and services on the market or affecting their levels of production;
- bid rigging; and
- restraining competitors from accessing new markets or commercialisation channels.

These conducts are considered per se violations of article 47 of Decree 2153 when they are effectively perpetrated by competitors, but also when competitors have the intention of performing them. The simple intention of generating a restrictive effect among competitors will be sufficient for a finding of liability.

The intention or the effect of the conduct in the market may be determined from different perspectives, as agreements among competitors do not need to be formal or in writing. Agreements may result from repetitive conducts that have not been agreed among competitors, but that have the intention of generating a restrictive result on competition.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no industry-specific infringements, defences or exemptions regarding cartel conduct.

According to article 2 of Law 1340 of 2009, legislation regarding protection of competition in Colombia comprises regulations applicable to commercial restrictive practices, more particularly agreements, acts and abuse of dominant market position, and the business concentration regime; these regulations are applicable to anyone who performs an economic activity in the Colombian market, or to anyone that affects or may affect the development of this economic activity regardless of the economic sector where this activity is performed.

Notwithstanding the above, article 1 of Law 155 of 1959 states that the government is entitled to allow agreements that, despite restricting competition, have the purpose of defending the stability of a basic sector of the economy. Article 2.2.2.29.5.1 of Decree 1523 of 2015 regulates this, defining 'basic sectors' as all economic activities that will have an

essential importance in future in order to rationally structure the country's economy. With this in mind, Decree 1523 states as basic sectors the production and distribution of goods aimed at satisfying the needs of the Colombian population in nutrition, clothing, healthcare and housing, as well as the provision of banking, educational, utilities and transport-related services.

6 Application of the law

Does the law apply to individuals or corporations or both?

Article 2 of Law 1340 of 2009 states that legislation with regard to the protection of competition in Colombia applies to anyone who performs an economic activity, or to anyone that affects or may affect the development of this economic activity, regardless of its legal form. With this in mind, law applies to both individuals and corporations.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

No, the regime applies to conduct that occurs in Colombia.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

No, as stated in article 1 of Law 1340 of 2009, the applicable laws in Colombia related to the protection of competition are intended to protect and enable free competition in the national territory.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The SIC may initiate an investigation:

- voluntarily and based on information that the SIC possesses;
- relying on information received by a third party who submits a complaint before the SIC; or
- based on a reference made by another authority.

Based on the information that it holds, the SIC may decide either to close the case and not investigate, or start a preliminary investigation. In the latter case, the SIC will collect evidence for gathering broader information, in order to decide whether to open a formal investigation.

When the formal investigation is opened, the parties investigated will be notified and will have the chance to present evidence for the analysis of the case, or to present warranties before the SIC. The offer of warranties enables the SIC to conclude the investigation, as the investigated parties submit a pledge guaranteeing the cessation of the infringing conduct.

If the investigated parties submit evidence to the investigation, the SIC will study the evidence and, based on this analysis, the superintendent appointed will prepare a report to the Superintendent of Industry and Commerce (who will issue the final decision), stating if the investigated parties have infringed the applicable laws.

The investigated parties will have access to the superintendent's report, in order to prepare their closing arguments before the Superintendent of Industry and Commerce issues a final decision on the case.

There are no strict time frames in cartel investigations.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The investigative powers of the SIC include:

- access to work devices of the investigated parties (mobile phones and computers);
- requests for information by means of office action to the investigated parties and to related parties (other competitors, trade associations or different participants in the affected market);

- inspections at the investigated parties' premises for gathering more information and evidence without previous notice (dawn raids), including head offices, branches and subsidiaries; and
- inspections of the commercial books of the company.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Yes, inter-agency cooperation is generally established in trade agreements between Colombia and other countries (see question 12). Brazil, Chile, Ecuador, Mexico and the United States are among the countries that cooperate with Colombia in cartel matters.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Rules regarding cooperation between jurisdictions are generally established in trade agreements that Colombia has entered into. Colombia has subscribed to trade agreements with the following countries, among others: Canada, Chile, Mexico, the European Union and the United States.

Cooperation and competition policies are also covered by regional organisations in which Colombia participates, for example, the Andean Community, MERCOSUR and the Pacific Alliance.

These treaties are intended to generate cooperation in the area of competition policy and coordination between the respective authorities and consequently efficiency in the investigation, prosecution and penalising of cartel activity.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel cases are adjudicated by means of a written resolution issued by the Superintendent of Industry and Commerce (see question 9). The investigated parties may appeal against this final decision.

When the investigated parties submit an appeal, the Superintendent of Industry and Commerce is the authority in charge of studying the case again, as the superintendent represents the ultimate authority in the SIC with regard to cartel cases.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

An interpretation of article 11 of Decree 2153 of 1992 indicates that the SIC has the burden of proof to sustain the charges in cartel cases. As mentioned in question 10, this entity is entitled to perform dawn raids, to issue requests for information and documents not just to the parties investigated, but also to related parties in order to gather as much information as possible.

As mentioned in question 9, investigated parties have the opportunity to submit evidence in order to prove the lack of an infringement. However, the SIC retains the burden of proof.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes. As mentioned in question 4, agreements do not need to be formal or in writing.

Article 45 of Decree 2153 of 1992 defines 'agreement' as any contract, arrangement, concentration, concerted practice or consciously parallel practice between two or more companies. Cartels resulting from contracts and direct arrangements are easier to prove, as evidence is generally written.

However, concerted and consciously parallel practices result from repetitive conduct that has not been agreed between competitors, but that has a clear intention of creating an anticompetitive agreement. In these cases, circumstantial evidence is used in the investigation, as direct evidence of the actual agreement is not possible to collect.

16 Appeal process

What is the appeal process?

The investigated parties may file an appeal against the final resolution before the same officer that issued this final decision (ie, the Superintendent of Industry and Commerce).

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Bid rigging is the only restrictive conduct that is penalised under criminal law in Colombia. In 2011, Law 1474, which implemented administrative measures against corruption, introduced a new article (410A) in the Colombian Criminal Code in order to penalise cartels, but specifically restricted to bid rigging.

In bid rigging cases the Criminal Code imposes fines of between 147,543,400 and 737,717,000 Colombian pesos; and individuals may also face sanctions of between six and 12 years' imprisonment and debarment from government procurement procedures for eight years.

Additionally, article 410A of the Criminal Code establishes the following benefits for infringers who cooperate with the SIC during an investigation: reduction by one-third of the term of imprisonment, reduction of 40 per cent of the fine imposed and reduction of the time period of debarment from government procurement procedures up to five years.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The SIC may impose fines of up to 100,000 monthly minimum wages (approximately US\$25.4 million for 2017) to each corporation that had participated in a cartel, or if the fine must be higher, it may impose a fine up to 150 per cent of the profit derived from the cartel activity.

Regarding individuals, fines may be up to 2,000 monthly minimum wages (approximately US\$510,000 for 2017) for each individual participating in a cartel activity.

Civil penalties are currently higher as the level of fines increased in 2009 by means of Law 1340. Before this law was enacted, fines for corporations were up to 2,000 monthly minimum wages, and regarding individuals, fines were up to 300 monthly minimum wages.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

According to article 4 of Decree 2153 of 1992 (amended by means of articles 25 and 26 of Law 1340 of 2009), in order to decide the amount of the sanction the SIC shall take into account the following criteria, which are binding for this entity:

- for corporations:
 - the impact of the conduct in the market;
 - the extent of the affected market;
 - the benefit obtained by the infringer with the conduct;
 - the offender's degree of participation;
 - the offender's behaviour during the process;
 - the market share of the infringing company, as well as its assets and sales involved in the infringement; and
 - the wealth of the company; and
- for individuals:
 - the persistence of the conduct;
 - the impact of the conduct on the market;
 - the reiteration of the prohibited conduct;

- the offender's behaviour during the process; and
- the offender's degree of participation.

The degree of participation and the behaviour during the process are the main aggravating and mitigating factors for establishing a penalty.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is available as a discretionary sanction in bid-rigging cases. Infringers may be debarred for up to eight years.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

As the SIC does not have criminal powers, in bid-rigging cases the same conduct may be pursued by the SIC from the administrative perspective, and by criminal courts at the same time in order to establish criminal sanctions. In addition, civil courts may impose civil sanctions if consumers submit a complaint for damage.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Private damage claims are available for direct purchasers; nevertheless, the SIC does not have civil powers in order to pronounce with regard to damage claims for antitrust infringements. This was a proposal in Bill 038 of 2015 to amend the competition regime; however, as mentioned in question 3, this bill did not pass into law.

The authorities in charge of damage claims in Colombia are the civil courts. However, damage claims for antitrust infringements have not been recurrent, and at present there is no relevant precedent regarding this matter in Colombia.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are possible regarding damage claims for antitrust infringements.

Class actions are regulated in Law 472 of 1998, and the main requirements are as follows:

- no fewer than 20 individuals in order to submit a class action;
- the class action must be submitted during the two years after the date the damage was caused, or after the termination of the action that caused the damage; and
- class actions may be presented by both individuals and corporations that have suffered prejudice individually.

There are no precedent cases in Colombia regarding class actions in cartel matters.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Yes, the Benefits for Cooperation Programme was established for the first time in article 14 of Law 1340 of 2009, and was subsequently regulated by means of Decree 1523 of 2015.

According to this programme, benefits are awarded to corporations and individuals who have participated in the infringing conduct, and decide to inform to the authority about the existence of the cartel, or to cooperate by providing information and evidence (including the identification of other parties).

In order to apply for immunity, the informer must submit its request for benefits before the time frame given to the investigated parties to submit evidence during a formal investigation (see question 27). For entering into an Agreement of Benefits for Cooperation with the applicant, the SIC will analyse the following requirements:

- if the applicant has recognised its participation in the cartel;
- if the information and evidence provided is useful in order to establish the existence, form, duration and effects of the conduct, as well as the identity of the participants, its degree of participation and the benefit obtained by means of the prohibited conduct;
- if the applicant complies with the office actions and instructions issued by the SIC during the negotiation of the agreement; and
- the commitment of the informer to cease its participation in the cartel activity.

In order to determine the informer's benefits, the SIC will take into account the following factors:

- date of filing of application, in order to establish who is the 'first in' to cooperate, and who are the subsequent cooperating parties;
- the efficiency of the cooperation in the clarification of the facts and the perpetrated conduct; and
- the pertinent time when informers submitted the information and evidence.

Benefits include the total or partial exemption of the fine, depending on the time when informers submit their application (see question 26). Nevertheless, the cartel's initiator is completely banned from benefits.

The importance of being 'first in' to cooperate is the complete exemption of the sanction (100 per cent).

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Yes. See question 24.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The second participant applying to the Benefits for Cooperation Programme will have a reduction of between 30 and 50 per cent of the fine, depending on the utility of the information and evidence submitted.

Information and evidence are considered useful by the SIC when they add value to the information and evidence that it already possesses, including that submitted by other applicants or informers.

In addition, third and subsequent applicants will have a reduction of up to 25 per cent, depending on the utility of the information and evidence submitted.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

According to article 2.2.2.29.2.5 of Decree 1523 of 2015, the informer must submit its application within the time frame given to the investigated parties to submit evidence and arguments during a formal investigation: 20 working days after the formal opening of the investigation by the SIC. Markers are used in order to establish who is the first applicant and who are the subsequent applicants.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

It is expected that information and evidence provided by applicants will be useful to determine the existence of the cartel and its operation, including the following: objectives, main activities, operation, identity of participants, degree of participation, participants' residence, product or service involved, geographic area affected and estimated duration of the cartel.

As mentioned in question 26, information and evidence submitted by subsequent parties are considered useful when they add value to the information and evidence that the SIC already possesses, including that submitted by other applicants or informers.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

According to paragraph 2 of article 15 of Law 1340 of 2009, as per the informer's request, the SIC shall grant its identity confidentiality when according to SIC criteria the informer may be exposed to commercial retaliation because of the information and evidence provided.

In addition, according to article 15, the investigated parties can request that information related to trade secrets, or any type of information classified as confidential, is kept confidential.

These confidentiality standards apply to all informers and participants, regardless of whether they are 'first in' to cooperate or subsequent cooperating parties.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

If the applicant fulfils the admission requirements of the Benefits for Cooperation Programme, the corporation or individual will subsequently submit an Agreement of Benefits for Cooperation with the SIC (see question 24). This agreement constitutes the settlement between the enforcement agency and the informer resolving liability and penalty of the latter with regard to the alleged cartel activity, and the corresponding benefits for the informer are established by means of this document.

In order to conserve the benefits settled in the agreement, the informer must refrain from the conduct listed in question 32.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Benefits granted to a corporation are extended to its current and former employees to the extent that they apply and qualify for the Benefits for Cooperation Programme.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

As stated above, the informer and the SIC negotiate and submit an Agreement of Benefits for Cooperation, by means of which the benefits for the informer are settled before concluding the investigation.

The benefits agreed in this document are granted by means of the final decision in the case; therefore, to conserve these benefits, the informer must refrain from the following conduct:

- denying during the investigation facts that were acknowledged during the negotiation of the agreement;
- obstructing the testimony of its employees or representatives;
- disregarding office actions issued by the SIC to verify information provided and facts acknowledged;
- destroying or obstructing access to relevant information or evidence with regard to the cartel activity; and
- breaching any of the obligations settled in the agreement.

The informer also loses all benefits if it is proven at any time during the process that it is the cartel's initiator.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

Not currently. The most recent review of this regime was in 2015 with Bill 038 (see question 3).

This bill proposed the following amendments, among others:

- to enable the cartel's initiator to have access to the Benefits for Cooperation Programme;
- the non-disclosure of the existence of an informer, its identity and the evidence provided, information that will be disclosed by means of the final decision of the Superintendent of Industry and Commerce; and
- confidentiality of the process of negotiation of the Agreement of Benefits for Cooperation.

This bill did not pass into law.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The information or evidence disclosed to a defendant is that gathered by the SIC by its own means, and that submitted by other defendants and by informers during the investigation.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Counsel may represent both the corporation and its employees.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Counsel may represent multiple corporate defendants to the extent a conflict of interest does not exist.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

No, employees must pay the legal penalties. They must submit their income tax return to the SIC.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Neither private damages awards nor fines are tax-deductible.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

When deciding the amount of the fine to be imposed on individuals or corporations the SIC does not take into account penalties imposed in other jurisdictions, and regarding private damage claims, overlapping liability for damages in other jurisdictions is not taken into account.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The level of the fine is decided by the SIC while negotiating the Agreement of Benefits for Cooperation with the informer, but the amount initially decided by the SIC may be recalled if the informer performs any of the conduct detailed in question 32.

On the other hand, regarding investigated parties that do not cooperate with the authorities, the amount of the fine imposed by means of the final resolution of the Superintendent of Industry and Commerce may be reduced if the defendant submits an appeal against this decision; however, this depends on the arguments submitted by the defendant in the appeal.

Holland & Knight

Danilo Romero Raad
Bettina Sojo

danilo.romeroraad@hkclaw.com
bettina.sojo@hkclaw.com

Carrera 7 # 71-21
Torre A, Piso 8
Bogotá, DC
Colombia

Tel: +57 1 745 5720
Fax: +57 1 541 5417
www.hkclaw.com

Denmark

Frederik André Bork, Olaf Koktvedgaard and Søren Zinck

Bruun & Hjejle

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Danish rules on cartel regulation are laid down in the Danish Competition Act (the Act), which entered into force in 1998. An English version of the Act is accessible through the website of the Danish Competition and Consumer Authority (DCCA) at <http://en.kfst.dk/Competition/Legislation>.

Section 6 of the Act contains a general prohibition against certain anticompetitive agreements.

Danish competition law is, to a large extent, similar to EU competition law. For instance, sections 6 and 8 of the Act largely correspond to article 101(1) and 101(3) of the Treaty on the Functioning of the European Union (TFEU). Moreover, the Danish rules are interpreted in accordance with case law from the European Commission as well as the European Court of Justice.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The DCCA is the authority investigating cartel matters and other competition law infringements and ensuring compliance with the competition rules in general. Thus the DCCA is essentially responsible for enforcing the Act.

The DCCA constitutes, together with the Danish Competition Council (the Council), an independent competition authority. Cartel cases are generally investigated and prepared by the DCCA and subsequently decided by the Council in the first instance.

Decisions by the Council may be appealed to the Danish Competition Appeal Tribunal (the Appeal Tribunal) and, subsequently, to the Danish courts.

Where the Council finds that an intentional or grossly negligent breach of competition law has been committed, the Council may decide to refer the case directly to the State Prosecutor for Serious Economic and International Crime (the State Prosecutor) for further investigation and prosecution. The Council may delegate this authority to either the chairman of the Council or, in specific cases, to the Director General of the DCCA.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

On 27 December 2016 the Danish Act on Actions for Damages for Infringements of Competition Law (the Damages Act), which implements the Damages Directive (Directive 2014/104/EU), entered into force. The act constitutes an 'over-implementation' as, in line with Danish legislative tradition, the Danish parliament has chosen to maintain consistency between Danish competition law and EU competition law, meaning that the rules apply to infringements of the Danish Competition Act as well as articles 101 and 102 TFEU.

An amendment to the Danish Competition Act entered into force on 1 January 2018. The amendment concerned the following topics: the abolition of the system for notification of agreements; a change in the Danish de minimis thresholds from being turnover-based to being market share-based; the addition of a 'stop-the-clock' rule, mandating the DCCA to suspend the deadline in merger cases; the addition of a rule permitting preliminary leniency applications; and a rule limiting the right to 'own access' (the right to get access to a file in cases mentioning an individual's or an undertaking's name) in the DCCA's cases.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

As noted above, Danish competition law is generally consistent with EU competition law. Accordingly, the substantive provisions of the Act largely correspond to the similar provisions of the TFEU.

Section 6 of the Act lays down a general prohibition against certain anticompetitive agreements and provides that such agreements are void unless covered by the exceptions in section 7 (de minimis rule for non-hard-core infringements) or the exemptions in section 8 of the Act (see below).

Section 6(1) of the Act provides that it is prohibited for undertakings, etc, to enter into agreements that directly or indirectly have as their object or effect the restriction of competition. The prohibition laid down in section 6(1) further applies to decisions made by associations of undertakings as well as concerted practices between undertakings (see section 6(3) of the Act).

The principle of *per se* illegality is not applied under Danish law. As is the case under EU law, certain anticompetitive agreements are considered hard-core infringements under Danish law (ie, price-fixing agreements, restrictions on production or sales, market and customer sharing and bid rigging). However, there are no specific provisions dealing with these types of agreements. Thus, all anticompetitive agreements are dealt with under the general prohibition set out in section 6(1) of the Act and are subject to a competitive effects test (section 8 of the Act).

Section 8(1) of the Act provides that the prohibition set out in section 6(1) does not apply if agreements, decisions or concerted practices between undertakings:

- contribute to improving the efficiency of the production or distribution of goods or services or to promoting technical or economic progress;
- provide consumers with a fair share of the resulting benefits;
- do not impose restrictions on the undertakings that are not necessary to attain these objectives; and
- do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no industry-specific infringements and no industry-specific defences or antitrust exemptions. The Act does not, however, apply to pay and working conditions or to agreements, decisions or concerted practices within the same undertaking or group of undertakings.

Under section 2(2) of the Act, the prohibition against anticompetitive agreements, including cartels, does not apply where an anticompetitive agreement is a direct or necessary consequence of public regulation. 'Public regulation' comprises, among others, legislation, ministerial orders, general budget rules, ratified conventions and EU regulations.

Section 2(2) ensures that the competition authorities do not overrule politically decided public regulations, and that companies are shielded from all the consequences of anticompetitive agreements required by public regulation. In this respect, section 2(2) is fairly similar to the state compulsion defence under EU competition law (see, for example, case C-280/08 P, *Deutsche Telekom*).

6 Application of the law

Does the law apply to individuals or corporations or both?

The substantive provisions of the Act apply to agreements between undertakings, decisions made by associations of undertakings and concerted practices between undertakings.

The Act applies to economic activity, whether carried out under private or public management. There are no requirements in terms of corporate form. The decisive criterion is whether or not the undertaking concerned carries out economic activity on a market.

The Act also applies to individuals who carry out economic activity or have a controlling interest in one or more undertakings. Furthermore, the Act applies to individuals practising a liberal profession, such as lawyers, accountants, doctors and dentists. Finally, members of the board, the management and employees of the relevant undertakings must adhere to the competition rules and may be held liable for competition law infringements, as criminal sanctions may be imposed on both undertakings and individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Act contains no provisions on extraterritoriality (except for section 29, which provides that the Act does not extend to the Faroe Islands and Greenland).

However, in general, it is assumed that the Act extends to conduct that has anticompetitive effects in Denmark. Consequently, a cartel between two undertakings situated outside Denmark may infringe the Danish competition rules.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The Act only applies to conduct having an anticompetitive effect in Denmark (the effects doctrine).

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

Cartel investigations are primarily carried out by the DCCA, but may also be carried out by the State Prosecutor if there is reasonable cause to suspect an infringement that will lead to a penalty.

The DCCA may initiate a cartel investigation on its own initiative, for example following an analysis of the competitive environment in a specific sector. Cartel investigations may also be initiated on the basis

of a leniency application, a complaint or a tip from a third party. In this regard, the DCCA has introduced a feature on its website making it possible for employees or others who may have knowledge of a cartel to inform the DCCA anonymously.

During the investigation, the DCCA will generally carry out a dawn raid on the premises of the relevant undertaking to secure evidence. Following the dawn raid, the DCCA will conduct a review of the secured material, which can be a lengthy procedure. Electronic material copied from the undertaking's IT system must be reviewed within 40 days after the dawn raid has been carried out.

The review may result in a decision by the DCCA:

- to close the case;
- to refer the case to the State Prosecutor (if the DCCA finds that an intentional or grossly negligent infringement of competition law has been committed); or
- to continue the investigation and present the case to the Council in order for the Council to render a decision (whereafter the DCCA may refer the case to the State Prosecutor).

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Under section 17 of the Act, the DCCA may demand all the information deemed necessary to carry out its tasks or to decide whether the provisions of the Act apply to a certain situation.

Furthermore, the DCCA is entitled to carry out dawn raids on the premises of an undertaking and make forensic copies of its IT system pursuant to section 18 of the Act. During a dawn raid, the DCCA is allowed to request employees to present the contents of their pockets and briefcases. The DCCA is also entitled to access company vehicles. However, the DCCA is not allowed to access private homes or private cars when conducting dawn raids under Danish law (as opposed to dawn raids carried out under EU law in accordance with Regulation 1/2003).

Before conducting a dawn raid, the DCCA is required to obtain a court order containing information on the subject matter and purpose of the inspection. The DCCA must stay within the limits of the court order when collecting and reviewing material.

If there is a confirmed suspicion of cartel activity, the case may be referred to the State Prosecutor, who, under the Danish rules on criminal procedure, is entitled to conduct searches (including searches of private homes) subject to court approval.

Furthermore, the State Prosecutor may, subject to a court order, among other things:

- conduct wiretapping;
- search the premises of individuals who are not suspected of participating in a cartel;
- conduct monitoring (including the filming of individuals at non-public locations and registration of individuals' locations based on mobile phones); and
- install 'sniffer programs' on computers.

The legal basis for these measures entered into force on 1 March 2013 and is thus relatively new.

It should be noted that the DCCA does not have the right to review an undertaking's correspondence with its external legal counsel concerning the undertaking's compliance with competition law. This corresponds to the EU rules on legal privilege. However, it has not yet been tested in case law whether the State Prosecutor will have access to such correspondence.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Denmark is part of the European Competition Network (ECN) and thereby participates in the cross-border cooperation between the European Commission and the national competition authorities of the other EU member states. The DCCA also participates in the informal cooperation of the European competition authorities.

On a Nordic level, the Danish competition authorities cooperate with Norway, Sweden, Finland, Iceland, Greenland and the Faroe Islands. An annual meeting is held, the purpose of which is to exchange legislative experiences and discuss cases and subjects of common interest.

Furthermore, Denmark has entered into a formal agreement with the national competition authorities in Sweden, Norway, Finland and Iceland on the exchange of confidential information.

Finally, Denmark is also active within the OECD (which has set up the Global Competition Network), the International Competition Network and WTO.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

In general, jurisdictions within the EU (and the ECN) interplay with the Danish competition authorities (see also question 11).

Moreover, under section 18a of the Act, the DCCA may, subject to reciprocity, disclose information covered by its duty of confidentiality to other competition authorities if such information is necessary to assist in the enforcement of the competition rules by these authorities, and if the DCCA thereby fulfils Denmark's bilateral and multilateral obligations.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Decisions on cartel infringements can be made by the Council based on investigations by the DCCA or directly by the courts in a criminal trial.

The Danish competition authorities do not have the power to impose administrative fines or criminal sanctions on undertakings or individuals.

If the case is referred to the State Prosecutor (either directly by the DCCA or following a Council decision), the undertakings involved or the responsible individuals may be formally charged with a competition law infringement, and the case will be brought before the courts.

Under section 23b of the Act, the Danish competition authorities or the State Prosecutor may offer undertakings a fine in lieu of prosecution by issuing a fixed penalty notice. (Fixed penalty notices issued by the Danish competition authorities are subject to approval by the State Prosecutor.) If the undertaking accepts the fine, there will be no further proceedings and the case may therefore be closed relatively quickly. If the fine is not accepted, the case will be brought before the courts.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The Act contains no provisions on the burden of proof or the level of proof required. Consequently, the general rules of Danish law apply as regards the burden of proof.

As a general rule, it is for the competition authorities to prove their case, including the existence of an anticompetitive agreement under section 6 of the Act. If, however, the authorities prove an anticompetitive agreement, it is for the parties to prove that the agreement meets the conditions of section 8 (similar to article 101(3) TFEU).

In civil proceedings, the competition authorities and the courts are generally free to assess evidence. No hierarchy or forms of evidence are set out in any statutory provisions. Accordingly, it is for the authorities and the courts to determine when the burden of proof has been lifted with the result that the burden of counter proof shifts to the undertaking.

In criminal proceedings, it is required that there is no reasonable doubt about the guilt of the defendant (the *in dubio pro reo* principle). For fines to be imposed, an infringement of the competition rules must be intentional or grossly negligent, while the requirement for imprisonment for a cartel agreement is that the breach committed is intentional and of a grave nature.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The Act contains no specific provision on the type or threshold of evidence needed to establish an infringement. Section 6(3) of the Act provides that section 6(1) applies to cases of concerted practices, thus establishing that a restriction of competition can be committed without proof of a specific agreement.

The DCCA must prove its case, but the DCCA and the courts are free to assess all the evidence. (See question 14 with regard to the necessary burden of proof.)

Case law from the European Court of Justice (ECJ) serves as guidance in relation to the inclusion of circumstantial evidence by the DCCA and the courts. In this regard, the ECJ has held that the existence of an anticompetitive infringement can 'be inferred from a number of coincidences and indicia that, taken together, can, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules' (case T-113/07, *Toshiba*).

16 Appeal process

What is the appeal process?

Decisions made by the Council may be appealed to the Appeal Tribunal. Decisions made by the Council may not be brought before any other administrative authority than the Appeal Tribunal and may not be brought before the courts until the Appeal Tribunal has made its decision.

An appeal must be lodged with the Appeal Tribunal within four weeks after a decision by the Council has been communicated to the party concerned. The Appeal Tribunal generally conducts a full and thorough review of the case.

Decisions made by the Appeal Tribunal can be challenged before the courts by infringing parties or any other party having a sufficient interest in the subject matter of a case. A strict eight-week time limit applies. If a decision made by the Appeal Tribunal has not been brought before the courts within eight weeks after the relevant party has been notified of the decision of the Council, the decision becomes final. The DCCA cannot challenge a decision by the Appeal Tribunal before the courts. The DCCA can, however, appeal a decision by a lower court to a higher court.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

In the case of intentional or grossly negligent breaches of competition law, criminal sanctions may be imposed on both undertakings and individuals.

In cartel cases, imprisonment may be imposed on individuals if their participation in a cartel has been intentional and if the breach has been of a grave nature, especially owing to the extent of the infringement or its potentially damaging effects. The maximum term of imprisonment is usually one and a half years but may be increased up to six years in case of aggravating circumstances.

Imprisonment, as well as an increase in the level of fines, was introduced on 1 March 2013. The new rules apply to both infringements committed after 1 March 2013 and to incidents commenced before 1 March 2013 and continuing after this date.

When meting out a penalty to be imposed, consideration must be given to the gravity of the infringement and its duration.

As regards legal persons, consideration must also be given to the legal person's turnover (see section 23(5) of the Act).

The gravity of the infringement will be defined as either less grave, grave or very grave. The indicative level of the fines for each category of gravity is specified below (before and after 1 March 2013, respectively):

Gravity	Examples	Previous indicative level	New indicative level	Indicative level of fines for individuals
Less grave	Exclusive purchase obligations lasting more than five years	Up to 400,000 kroner	Up to 4 million kroner	Minimum 50,000 kroner
Grave	Resale price maintenance, certain types of exchange of information, certain types of joint bids	400,000 to 15 million kroner	4 million to 20 million kroner	Minimum 100,000 kroner
Very grave	Coordination of prices, production, customers or bids; certain types of abuse of dominance	More than 15 million kroner	More than 20 million kroner	Minimum 200,000 kroner

As regards a legal person's turnover, it is stated in the preparatory works of the Act that fines should not exceed 10 per cent of the undertaking's worldwide turnover.

It should be noted that the courts are assigned considerable discretion when imposing penalties, and the courts have yet to impose the first imprisonment. Imprisonment is expected primarily to be imposed on members of the board and the management. In this respect, the State Prosecutor has unofficially stated that, in general, he or she will ask for unconditional imprisonment in cartel cases, including bid-rigging cases.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

There are no civil or administrative sanctions under Danish law.

However, as described in question 13, the Danish competition authorities may offer undertakings and individuals a fine in lieu of prosecution, subject to acceptance by the State Prosecutor.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

See question 17.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

As of 1 January 2016, it is possible for a contracting authority to exclude an operator from participation in a procurement procedure if the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements aimed at distorting competition, and if the contracting authority has stated in the contract notice that participation in such anticompetitive behaviour leads to exclusion. The Danish Act on Public Procurement (Act No. 1564 of 15 December 2015) is based on Directive No. 24 of 26 February 2014 of the European Parliament and of the Council on Public Procurement.

The contracting authority has the decision-making power. The decision is usually a discretionary sanction but under certain circumstances debarment is mandatory. The usual time period of debarment is two years from the date when the relevant anticompetitive behaviour ended. The economic operator has the right to take self-cleaning measures and demonstrate its reliability despite the existence of the said ground for exclusion. If the self-cleaning measures are considered sufficient, the economic operator cannot be excluded from the procurement procedure.

Any questions in this regard can be brought before the Danish Complaints Board for Public Procurement.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Civil and administrative penalties do not exist under Danish competition law.

The Danish competition authorities have the power to decide whether agreements are in breach of competition law and whether agreements must be reported to the State Prosecutor. The competition authorities may choose to make their own decision before reporting a case to the State Prosecutor or, alternatively, may report the case directly to the State Prosecutor for criminal investigations without making their own decision. If the authorities have a confirmed suspicion of an infringement, the case will be reported directly to the State Prosecutor.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

The rules on private damage claims are outlined in the Damages Act, supplemented by the general principles and practice concerning liability in tort.

The factors that need to be established in order for a plaintiff to be awarded damages are proof of fault, the existence and size of a loss, the causation between the fault and the loss and the foreseeability or adequacy of damages.

As regards liability in tort, it is a fundamental principle for the assessment of damages that the plaintiff's financial position before the occurrence of the damage must be restored. The damages should include lost profit and interest, but the level of damages must not be such as to enrich the injured party. Furthermore, the injured party is under a duty to mitigate his or her loss.

The Danish courts generally have a conservative approach to damage claims.

The Danish courts accept the passing-on defence in competition law cases. Thus, the defendant can argue that the plaintiff did not suffer any loss as any overcharge attributed to anticompetitive behaviour has been passed on to a subsequent purchaser. As a starting point, the burden of proof lies with the defendant. However, the burden of proof may shift during the case.

Indirect purchaser claims are permitted under Danish law; thus, indirect purchasers may claim damages.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions for follow-on damage claims are generally possible under Danish law. Class actions are regulated by the rules of the Danish Administration of Justice Act, and, as a general rule, a class action is subject to the same procedure as other Danish court cases.

Additionally, section 16 of the Damages Act states that where several persons have raised claims for damages due to infringements of the Act or articles 101 or 102 TFEU, the Consumer Ombudsman may be appointed as a representative for the class for the purpose of recovering such damages under a class action.

Case law concerning class actions in competition cases is scarce. However, the courts are currently processing a class action for damages against DONG, involving around 1,200 plaintiffs. The class action was initially brought in 2007, but it was put on hold pending a decision in the substantial competition case, which has been appealed to the Supreme Court. Further, in January 2016, a Danish district court accepted a class action for damages by Foreningen for Dankortsagen against NETS regarding credit card fees. The class action is pending before the Danish High Court, where a substantial decision on the card fees is expected in 2018.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Act provides for a leniency programme, which is by and large comparable to the leniency programme set out under EU law.

Thus, section 23a of the Act provides that anyone who acts in breach of section 6 of the Act or article 101 TFEU by entering into a cartel agreement will, upon application, be granted withdrawal of the charge that would otherwise have led to a fine or imprisonment for participating in the cartel, provided the applicant, as the first one, approached the authorities about the cartel, submitting information which the authorities were not in possession of at the time of the application.

The possibility of withdrawal of the charge is subject to certain conditions. First, withdrawal of the charge will be granted only if before having conducted an inspection or a search regarding the matter in question, the authorities are given specific grounds to initiate an inspection, conduct a search or inform the police of the matter in question, and if the authorities are enabled to establish an infringement in the form of a cartel after an inspection or search regarding the matter in question has been conducted (see section 23a(1) of the Act).

Furthermore, withdrawal will be granted only if the applicant cooperates with the authorities throughout the entire case, brings the participation in the cartel to an end no later than by the time of the application, and has not coerced any other party into participating in the cartel (see section 23a(2) of the Act).

If the requirements set out in section 23a(1) of the Act are not met (ie, if the leniency applicant is not the first one to apply for immunity) the leniency application will be treated as an application for a reduction of the penalty (see section 23a(3) of the Act). Thus, anyone acting in breach of section 6 of the Act or article 101 TFEU by entering into a cartel agreement will be granted a reduction of the fine that would otherwise have been imposed for participation in the cartel, provided the applicant submits information about the cartel that constitutes significant added value compared to the information already in the authorities' possession, and provided the requirements in section 23a(2) of the Act, as described above, are satisfied.

The amendment to the Act, which is described in question 3, introduced a rule permitting preliminary leniency applications (see section 23a(6) of the Act). The rule makes it possible for a cartel participant to 'reserve' its place in the queue while putting together a final leniency application.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

See question 24.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Pursuant to section 23a(5) of the Act, the applicant that goes in second (and is therefore unable to obtain full leniency, see question 24) will receive a 50 per cent reduction of the fine. The penalty reduction for the third cooperating party is 30 per cent, and, finally, the penalty reduction for subsequent applicants will be up to 20 per cent of the fine that would otherwise have been imposed on the party concerned for participating in the cartel.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

As such, there are no formal deadlines for the initiation or completion of a leniency application. However, it should be stressed that a leniency application must be submitted at a point in time when the authorities have not yet conducted an inspection or a search regarding the matter in question or when the submitted information constitutes significant added value to an ongoing investigation. Moreover, the applicant must bring the participation in the cartel to an end before submitting the application (see question 24).

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

See question 24.

To date, there have been very few leniency cases in Denmark and no ministerial orders or the like have been issued. Nonetheless, the competition authorities will expect full cooperation throughout the process, both by the first leniency applicant and by any subsequent cooperating parties.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Danish Act on Public Access to Documents in Public Files does not apply to cases and investigations carried out pursuant to the Act.

The Danish Public Administration Act applies to competition cases and may provide a right of access to documents for the parties, which in cartel cases will be the addressee of the competition authorities' decision. Furthermore, under certain circumstances, the DCCA may choose to provide a more extensive right of access to documents by applying a principle of 'extended openness'.

Generally, the practice of the DCCA is to keep the identity of leniency applicants confidential. This practice was confirmed by the Appeal Tribunal in a specific case from 2015. Furthermore, the DCCA is reluctant to publish information that may lead to the identification of the leniency applicants.

Confidentiality is, however, not guaranteed as the DCCA publishes a summary of any case involving a fine. Furthermore, the DCCA notifies the European Commission and national competition authorities in other EU member states when receiving applications for leniency.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Plea bargaining as such does not exist under Danish law. However, it is, to some extent, common for the DCCA and the State Prosecutor to enter into negotiations or talks with the undertakings involved regarding the level of the fine to be imposed.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Under section 23a(12) of the Act, a leniency application from an undertaking or an association will automatically cover current and former board members, senior managers and other employees, provided

Update and trends

In May 2017, the Council found that four companies on the market for roof felt and roof foil had entered into an agreement in violation of section 6 of the Act. The Council found that the companies had coordinated the content of a national industry-based standard and established a quality marking, ensuring that the standard was met. Lastly, the Council found that the parties had coordinated their behaviour towards competitors, by discrediting them through articles. On 13 September 2018, the Appeal Tribunal held that the Council's analysis of the economic and legal context had been insufficient to conclude with the required certainty that there was a restriction of competition by object. Consequently, the Appeal Tribunal decided to refer the case back to the Council for review and decision.

In July 2017, the Appeal Tribunal upheld the Council's decision, establishing that HMN Naturgas (HMN), Gastech-Energi, Kiertner and the energy industry association DEBRA – Energibranchen had coordinated prices on gas furnace maintenance subscription for end users in 2014. HMN offered its end customers gas furnace maintenance subscriptions through independent plumbers, called 'service partners'. Gastech-Energi and Kiertner were service partners, but did themselves offer gas furnace maintenance subscriptions to end users. The Appeal Tribunal considered (i) that HMN, Gastech-Energi and Kiertner agreed that the subscription fees for HMN's end users should not become too expensive, and (ii) that the parties were competitors, since both HMN, Gastech-Energi and Kiertner offered gas furnace maintenance subscriptions to end users. The Appeal Tribunal did not examine whether the agreement had had any negative consequences on the market concerned, since it found the agreement to be a restriction of competition by object. Moreover, the fact that the prices were actually reduced was not in itself sufficient to prove that the agreement did not restrict the competition, because the parties – according to the Appeal Tribunal – had not shown that prices would not have been reduced even further without the agreement. The case is pending before the Danish Maritime and Commercial High Court.

In April 2018, the Appeal Tribunal upheld the Council's decision that the Danish Camping Board and DK-CAMP violated the prohibition against anticompetitive agreements when they decided that camping

sites should require their guests to buy a Camping Key Europe card at a fixed price and that the Danish camping sites should only accept said camping cards as valid. The practice entailed a combined agreement on price and exclusion of competitors from the market and comprised almost 90 per cent of all Danish camping sites. According to the Appeal Tribunal, the practice had the object of restricting competition. The Council required the Danish Camping Board to terminate the restrictive practice and DK-CAMP to cease its participation in the practice. Finally, the Council decided to refer the case to the Danish State Prosecutor for Serious Economic and International Crime for criminal prosecution.

In June 2018, the Appeal Tribunal confirmed a decision by the Council that Mediacester Danmark A/S (MCD) and MPE Distribution ApS (MPE) violated the Danish competition rules in 2013 and 2014 by agreeing that MPE should not pursue MCD's customers. The two media agencies operated as competitors on the market for the purchase and sale of distribution of unaddressed mail to end customers (advertisers). The Council ordered the parties to refrain from entering into similar arrangements in the future and decided to refer the case to the Danish State Prosecutor for Serious Economic and International Crime for criminal prosecution.

In August 2018, the Danish Maritime and Commercial High Court decided that LKF Vejmarkering A/S (LKF) and Eurostar Danmark A/S (Eurostar) did not infringe section 6 of the Act by submitting a joint bid through a consortium in a tender for road marking in Denmark. The Council and the Appeal Tribunal had found otherwise in 2015 and 2016, respectively. The tender consisted of three contracts, which each covered a part of Denmark. The tender was organised in such a way that it was possible to submit a bid for just one of the contracts or for all three contracts together. The consortium parties were competitors in relation to two of the contracts, but not for all three contracts together. The consortium submitted a bid for all three contracts and won because its prices were overall the lowest. On 11 September 2018, the Council decided to seek permission to appeal the Danish Maritime and Commercial High Court's decision to the Supreme Court of Denmark.

An amendment to the Act entered into force on 1 January 2018. The amendment introduced various changes to the Act.

that each person satisfies the requirements set out in section 23a(2) (described in question 24).

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

A leniency application can be submitted to the DCCA or to the State Prosecutor.

There are no formal requirements as to the application itself; however, the DCCA has prepared a standard application. An application may be submitted to the DCCA in person, by letter or electronically through the website of the DCCA.

In practice, the DCCA will generally invite the applicant to a meeting in order to discuss the application.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

As discussed in questions 3 and 24, an amendment to the Danish Competition Act, introducing a rule on preliminary leniency applications, entered into force on 1 January 2018. There are currently no further anticipated reviews of the regime.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

Usually the defendant will receive a notice of concern (NOC) from the DCCA at the beginning of the case. The NOC will contain the DCCA's immediate opinion in regard to the claimed breach of the Competition Act. The opinion is non-binding for the DCCA.

As stated above in question 29, the Danish Public Administration Act applies to competition cases and provides a right of access to documents for the defendant. The right of access includes all registered documents in regard to the defendant, excluding internal working papers and confidential material, for example, competition-sensitive information.

If it is clear to the DCCA that the defendant is liable to punishment the case will be referred to the State Prosecutor who will initiate criminal proceedings. This information is not necessarily disclosed to the defendant. According to the general procedural rules in criminal cases, the defendant has the right to be informed of any criminal charges against oneself.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

As a general rule, counsel may represent both parties unless the representation will create a conflict of interest. If there is a conflict of interest – or an immediate risk that a conflict of interest will arise – a present or past employee should be advised to seek independent legal advice.

It should always be considered carefully whether there is a conflict of interest.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

It is possible for counsel to represent multiple corporate defendants unless there is a conflict of interest.

37 Payment of penalties and legal costs**May a corporation pay the legal penalties imposed on its employees and their legal costs?**

A corporation may pay the legal penalties imposed on its employees as well as their legal costs. However, such payments must be taxed as income for the relevant employees.

38 Taxes**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

Under Danish law, the general rule is that expenses incurred by an undertaking are tax-deductible if the expenses are considered a natural operating expense.

Generally, fines and other penalties are not considered a natural operating expense and will thus not be tax-deductible.

With regard to damages incurred as a consequence of a criminal offence, the issue of whether such an expense is considered a natural operating expense and thus tax-deductible depends on a specific assessment. However, the courts will generally be reluctant to accept any deduction if the undertaking concerned has acted with intent or gross negligence.

39 International double jeopardy**Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

In general, companies and individuals sanctioned in a criminal proceeding outside Denmark cannot be sanctioned for the same action in a subsequent Danish criminal proceeding (the *ne bis in idem* principle).

As regards private damage claims, it is a fundamental principle for the assessment of damages that the injured party's financial position must be the same as before the damage occurred. Consequently, any compensation received by the injured party in another jurisdiction will be taken into account in a subsequent Danish case.

40 Getting the fine down**What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

The optimal way in which to get the fine down is to apply for leniency. Furthermore, undertakings that contact the DCCA to settle the case by paying a fine in lieu of prosecution (as described in question 13) will generally be granted a reduction of the fine.

Additionally, section 82 of the Danish Criminal Code provides for a number of mitigating circumstances, the most relevant of which provides the basis for the leniency programme.

Finally, according to the preparatory works of the Act, the existence of a compliance programme at the time of the offence and the continuance of such a programme may constitute mitigating circumstances, which can affect the level of the fine, provided the undertaking does in fact seek to ensure compliance with the competition rules.

BRUUN & HJEJLE

Frederik André Bork
Olaf Koktvedgaard
Søren Zinck

fab@bruunhjejle.dk
oko@bruunhjejle.dk
szi@bruunhjejle.dk

Nørregade 21
1165 Copenhagen
Denmark

Tel: +45 33 34 50 00
Fax: +45 33 34 50 50
www.bruunhjejle.com

European Union

Anna Lyle-Smythe and Murray Reeve Slaughter and May

Hans-Jörg Niemeyer and Laura Stoicescu Hengeler Mueller

Jolling de Pree and Helen Gornall De Brauw Blackstone Westbroek

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Within the EU member states (as well as Iceland, Liechtenstein and Norway, by virtue of the 1992 EEA Agreement), both national and EU competition laws apply to cartels. As far as EU competition law is concerned, the relevant provision is article 101 of the Treaty on the Functioning of the European Union (TFEU). Council Regulation No. 1/2003 contains the implementing rules and procedural rules.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Cartel matters can be investigated by the European Commission (the Commission) or national competition authorities (NCAs), or by both. Regulation No. 1/2003 contains the implementing rules regarding enforcement procedures. The key provisions that relate to cartel proceedings are as follows:

- the principal enforcement agency in the EU is the Commission, with DG Competition being the service responsible for the enforcement of the competition rules;
- where an NCA within the EU uses domestic competition law to investigate a cartel, if that cartel affects trade between member states, it must also apply article 101 TFEU;
- there is close cooperation between the Commission and the NCAs of member states, including exchange of confidential information, within the framework of the European Competition Network (ECN) established between the Commission and the NCAs;
- the Commission has extensive powers of inspection, including the power to take statements, seal premises or business records, and ask for oral, on-the-spot explanations about particular documents or facts during an inspection;
- the Commission can impose substantial fines for breaches of the procedural rules (eg, for failure to provide information); and
- the Commission has the power to impose structural remedies (eg, divestments) and fines for breaches of article 101 TFEU.

The Commission has also adopted an implementing Regulation (Regulation No. 773/2004) further clarifying the proceedings under Regulation No. 1/2003. This lays down rules concerning the initiation of proceedings and the conduct of investigations by the Commission, as well as the handling of complaints and the hearing of the parties concerned.

In addition, the Commission has published various notices providing guidance for the application of article 101 TFEU. Notices have been adopted, inter alia, on cooperation within the ECN, on cooperation between the Commission and the courts of EU member states, on the handling of complaints and on the effect on trade concept contained in articles 101 and 102 TFEU.

National courts must apply, in addition to national antitrust rules, articles 101 and 102 TFEU. They may not adopt decisions that run counter to a Commission decision on the same subject matter. The

Commission can transmit opinions and statements as *amicus curiae* in proceedings before national courts that must apply articles 101 and 102 TFEU.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

There are no current proposals to change the overall legislative regime. However, in November 2014 a directive on actions for damages for violations of EU competition law was adopted (the Damages Directive). Member states were required to implement the Damages Directive by 27 December 2016; however, transposition by all member states was not completed until earlier this year. The Commission is currently assessing whether all national transposing rules implement the Directive completely and correctly.

The directive establishes, inter alia, common limitation periods for actions and a rebuttable presumption that cartels cause harm. It also clarifies the application of the 'passing-on' defence and the binding nature of national competition authority decisions (see question 22). In August 2015, the Commission adopted amendments to its Regulation No. 773/2004 and four related notices (Notices on Access to the File, Leniency, Settlements and Cooperation with National Courts) to reflect the provisions of the new directive on accessing and using information in the files of competition authorities for the purposes of follow-on damages litigation. In addition, the Commission is currently seeking input from stakeholders on draft guidelines for national courts on how to estimate the share of cartel overcharges to indirect purchasers and final consumers (the consultation is open until 4 October 2018). The guidelines are intended to give national courts, judges and other stakeholders in damages actions for infringements of articles 101 and 102 TFEU practical guidance on how to estimate the passing on of overcharges to persons at different levels of the supply chain. The guidelines are intended to supplement the Practical Guide on Quantifying Harm (which focuses on how to quantify the damage caused by anti-trust infringements), published in 2013.

In March 2017, the Commission published a draft directive to grant greater enforcement powers to NCAs. As stated above, NCAs and courts apply the EU competition rules within their jurisdictions on the basis of Regulation 1/2003. To ensure the consistent application of these rules, the European Commission and the 28 national competition authorities of the EU work together in the ECN. However, not all NCAs currently have the same investigative and enforcement powers. The draft directive aims to address this problem by requiring that NCAs be given powers such as the ability to inspect private homes and to summon people for interview, as well as ensuring that NCAs can impose more severe penalties for infringements. The proposals will also ensure that NCAs have greater operational independence when making enforcement decisions. A provisional political agreement on the directive was reached in May 2018 by the European Parliament and the Council, and the European Parliament's Economic and Monetary Affairs Committee approved the compromise text in July 2018. The next step is a plenary vote, due to take place in autumn 2018.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 101(1) TFEU provides that ‘all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market’ are prohibited. Article 101(1) TFEU provides a non-exhaustive list of prohibited practices, which includes agreements, decisions or concerted practices that: directly or indirectly fix purchase or selling prices or any other trading conditions (price fixing); limit or control production, markets, technical development or investment (eg, output restrictions); or share markets or sources of supply. Both horizontal and vertical restraints fall within article 101(1) TFEU. For horizontal agreements, specific guidance is given on the status of research and development (R&D) agreements, production agreements, joint purchasing agreements, commercialisation agreements and standardisation agreements. For vertical agreements specific guidance is given on single branding agreements, exclusive distribution agreements, exclusive customer allocation, selective distribution, franchising, exclusive supply, upfront access payments, category management agreements, tying and RPM.

Article 101(2) TFEU provides that agreements prohibited by article 101(1) TFEU shall be automatically void and unenforceable without there being a need for a prior finding by the Commission that the agreement breaches article 101 TFEU. Article 101 TFEU is also capable of enforcement before the national courts and NCAs in EU member states.

As a matter of practice, any agreement that fixes prices, limits output, shares markets, customers or sources of supply or involves other cartel behaviour such as bid rigging will almost inevitably be regarded as an agreement restricting competition within the meaning of article 101(1) TFEU. The Commission’s view is that these types of restriction are hard-core and may be presumed to have negative market effects (this approach was confirmed by the European Court of Justice (ECJ) in *Dole* (2015)).

According to article 1(2) of Regulation No. 1/2003, agreements that satisfy the conditions of article 101(3) TFEU are not prohibited, no prior decision to that effect being required. This requires that the efficiencies flowing from the agreement outweigh the anticompetitive effects. It is almost inconceivable that a hard-core cartel agreement could qualify for such an exemption. As regards vertical restraints, article 4 of Regulation No. 330/2010 (vertical agreements block exemption) provides a blacklist of agreements to which the block exemption will not apply (eg, where the object of the agreement is to impose a fixed or minimum resale price or an export ban). Horizontal cooperation agreements between competitors (such as information exchange, standardisation and R&D agreements) are assessed in line with the Commission’s 2010 Regulations and Guidelines.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no industry-specific offences or defences. There are, however, special rules governing the application of article 101 TFEU to the agricultural and transport sectors. The Insurance Block Exemption Regulation expired on 31 March 2017 with no replacement.

6 Application of the law

Does the law apply to individuals or corporations or both?

Article 101 TFEU applies only to undertakings, not to individual employees or officers of undertakings. The concept of ‘undertaking’ is defined broadly and can extend to any legal or natural person engaged in an economic or commercial activity (whether or not it is profit-making). It covers, for instance, limited companies, partnerships, trade associations, individuals operating as sole traders, state-owned corporations and non-profit-making bodies. National legislation within some member states may, however, provide for criminal sanctions (see, eg, the

UK chapter), administrative fines (see, eg, the Netherlands chapter) or other personal sanctions (see, eg, directors’ disqualification orders in the UK chapter) where individuals participate in infringements of article 101 TFEU.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Article 101 TFEU can apply to agreements, decisions and concerted practices concluded between undertakings located outside the EU but that have an effect on competition within the EU. This is wide enough to cover indirect sales provided the conduct may affect trade between member states and has as its object or effect the prevention, restriction or distortion of competition within the internal market. The Commission may choose not to take indirect sales into account if the fine based on direct sales alone is regarded as having a sufficient deterrent effect (*LCD*, 2010). When setting its fine the Commission is entitled to take into account sales of products in the EEA that include cartelised component products produced and sold outside the EEA (ECJ, *InnoLux* (2015)). As a consequence, manufacturing companies that produce and sell components outside Europe can still come under the Commission’s scrutiny if those components are then built into products sold in Europe. The EU courts have recognised that it is not necessary that companies involved in the alleged cartel activity have their seats inside the EU, that the restrictive agreements were entered into inside the EU, or that the alleged acts were committed or business conducted within the EU. In *Wood Pulp I* (1988), the ECJ found that the decisive factor in determining whether the EU competition rules apply is where the agreement, decision or concerted practice is implemented. Where parties established in third countries implement a cartel agreed outside the EU with respect to products sold directly into the EU, the cartel will be subject to investigation under article 101 TFEU. Overall, according to the ‘effects doctrine’, the application of competition rules pertaining to cartels is justified under public international law whenever it is foreseeable that the relevant anticompetitive agreement or conduct will have an immediate and substantial effect in the EU (see also Commission Notice of 27 April 2004 on the effect on trade concept contained in articles 101 and 102 TFEU, paragraph 100). Recent cases in which the Commission assumed jurisdiction over cartel members incorporated outside the EEA include *Automotive Wire Harnesses* (2013), *Power Cables* (2014), *Smart Card Chips* (2014), *Automotive Bearings* (2014), *Optical Disc Drives* (2015), *Alternators and Starters* (2016) and *Capacitors* (2018). In *Intel* (2017), the ECJ confirmed that the Commission has jurisdiction to apply EU competition law not only against conduct which is implemented in the EEA but also where it is ‘foreseeable’ that the conduct will have an ‘immediate and substantial effect’ in the EEA.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no such express exemption under EU law. However, on the basis of the effects doctrine (see question 7), conduct can only be caught under article 101 TFEU if it affects customers or other parties within the EU. Such conduct must be ‘foreseeable’ and have an ‘immediate and substantial effect’ in the EEA. In the absence of such effect, the conduct will not fall within the scope of article 101 TFEU.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

Investigations may be triggered as a result of one or more of the parties to an agreement or a concerted practice approaching the Commission (as a whistle-blower under the Commission’s leniency programme), a third party making a complaint, an NCA raising the matter with the Commission or the Commission launching an inquiry on its own initiative.

If complainants wish to make formal complaints, they are required to use form C. However, the Commission may dispense with a complainant’s obligation to provide all the information and documents required by form C where it considers that this information is unnecessary for the examination of the case. The form must be provided in

triplicate and, if possible, an electronic version should be sent to the Commission (see article 5 of Regulation No. 773/2004).

Once a case comes to its attention (which may be as a result of a leniency or immunity application – see questions 24 and 27), the next step for the Commission is to collect further information, either informally or using its formal powers of investigation (including dawn raids – see question 10) to decide whether to take action on the complaint. Following the initial fact-finding, if the Commission considers that there is evidence of an infringement of article 101 TFEU that should be pursued, it will decide to open formal proceedings.

The Commission may then make use of the formal settlement procedures (see question 30) or proceed to serve a formal statement of objections on the parties setting out the Commission's case. If the Commission issues a statement of objections, the parties are then allowed to examine the documents in the Commission's file (access to the file) and to respond to the statement of objections, in writing and at a hearing within the time limit set by the Commission (see article 27 of Regulation No. 1/2003 and article 10 et seq of Regulation No. 773/2004). In 2011, the Commission strengthened and expanded the role of the hearing officer to safeguard the parties' procedural rights and issued a notice on best practices in antitrust proceedings. The Commission further expanded on this Notice by publishing the Antitrust Manual of Procedures in March 2012, which is its internal working document intended to give practical guidance to staff on how to conduct an investigation applying articles 101 and 102 TFEU.

Before the Commission takes its final decision it must consult the Advisory Committee on Restrictive Practices and Dominant Positions, which consists of officials from each of the member states' competition authorities (see article 14 of Regulation No. 1/2003). The final decision is taken by the full College of Commissioners and then notified to the undertakings concerned.

It is difficult to generalise about the timing of cartel cases. However, from initial investigation to final disposition they usually take several years.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Commission's principal powers of investigation under Regulation No. 1/2003 are the power to require companies to provide information (article 18), and the power to conduct voluntary or mandatory on-the-spot investigations (dawn raids) on company premises (article 20) and to inspect employees' homes and cars, etc (article 21). It also has the power to take voluntary statements for the investigation from natural or legal persons under article 19.

Generally, the Commission has a wide discretion to collect any information that it considers necessary. The Commission may also request a member state's NCA to undertake any investigation or other fact-finding measure on its behalf (article 22). These powers are, however, subject to the general principles of proportionality and the rights of the defence. Certain documents will be protected by the principle of lawyer-client confidentiality (or legal professional privilege, LPP), although what this covers is limited and is ultimately for the courts to decide. In September 2010, the ECJ in *Akzo Nobel* confirmed its decision in *AM&S* (1982), which excluded the advice of in-house legal counsel from LPP. The ECJ clarified that, for the confidentiality of legal advice to be protected by LPP, such communication must emanate from independent EEA-qualified lawyers, and that the requirement of independence means the absence of any employment relationship. The adherence of many in-house lawyers to professional and ethical obligations was not sufficient to render them independent from their employers for this purpose. National rules may, however, continue to recognise LPP for in-house lawyers (see, eg, the UK and Netherlands chapters).

Information requests

Information requests ('article 18 requests' under Regulation No. 1/2003) are widely used by the Commission as a means of obtaining all necessary information from undertakings and associations of undertakings. A company that is the subject of an investigation can receive several such requests. Information requests may also be addressed to third parties, such as competitors and customers. These requests are addressed in writing to the companies under investigation and must set out their legal basis and purpose, as well as the penalties for supplying incorrect

or misleading information. The requests must also be adequately reasoned. The statement of reasons cannot be excessively brief, vague or generic, having regard in particular to the length of the questions asked (ECJ, *Heidelberg Cement* (2016)).

The Commission can either issue simple information requests or require undertakings and associations of undertakings to provide all necessary information by way of a formal decision. The addressees of a formal decision are obliged to supply the requested information. This is not the case for simple information requests. The Commission's choice whether to issue a simple information request or a formal decision needs to be proportionate (ECJ, *Schwenk Zement* (2014)). With respect to non-EU companies, the Commission is often able to exercise its jurisdiction by sending the information request to an EU subsidiary of the non-EU parent company or group. Otherwise, it sends out letters requesting information, to which the non-EU addressees usually respond.

Undertakings or associations of undertakings that supply incorrect or misleading information in reply to a simple information request or incorrect, misleading or incomplete information to a formal decision, or who do not supply information within the time limit set by a formal decision, are liable to fines that may amount to up to 1 per cent of their total annual turnover.

The EU courts have recognised a privilege against self-incrimination, albeit one limited in scope. In *Orkem* (1989), the ECJ held that undertakings are obliged to cooperate actively with the Commission's investigation. The court also observed, however, that the Commission must take account of the undertaking's rights of defence. Thus, the Commission may not compel an undertaking to provide it with answers that might involve an admission on its part of the existence of an infringement that it is incumbent on the Commission to prove. In this respect, the court distinguished between requests intended to secure purely factual information, on the one hand, and requests relating to the purpose of actions taken by the alleged cartel members on the other. Whereas the former type of questioning is generally permitted, the latter infringes the undertaking's rights of defence. The approach taken in *Orkem* was confirmed in *Mannesmannröhren-Werke* (Court of First Instance 2001, now the General Court (GC) after the entry into force of the Lisbon Treaty) and *Tokai Carbon* (GC 2004, ECJ 2006). The European courts have refused to acknowledge the existence of an absolute right to silence, as claimed by the applicants by virtue of article 6 of the European Convention on Human Rights. However, the GC held in *Tokai Carbon* (2004) that the Commission may not request undertakings to describe the object and the contents of meetings when it is clear that the Commission suspects that the object of the meetings was to restrict competition. The same applies to requests for protocols, working documents, preparatory notes and implementing projects relating to such meetings. On the other hand, in *Tokai Carbon* (2006), the ECJ clarified that undertakings subject to a Commission investigation must cooperate and may not evade requests for production of documents on the grounds that, by complying with the requests, they would be required to give evidence against themselves.

Dawn raids

Dawn raids may be conducted under two grounds: pursuant to a written authorisation only (article 20(3) of Regulation No. 1/2003) and pursuant to a formal Commission decision (article 20(4)). In an investigation made pursuant to a decision, the company must permit the investigation to proceed, and fines may be imposed for refusal to submit to the investigation. However, if the investigation is by request only, the company is not obliged to comply but is asked to submit to the investigation voluntarily.

When carrying out a surprise inspection visit (or dawn raid), Commission officials may:

- enter the premises, land and means of transport of undertakings or an association of undertakings;
- examine the books and other business records of the company (including computers, private devices used for professional purposes, external hard drives and cloud-computing services) falling within the scope of their investigation;
- take copies of books and records; and
- require on-the-spot oral explanations of facts or documents relating to the subject matter and purpose of the inspection.

The Commission may also seal any business premises and books or records for the time necessary for the investigation. The breach of a seal is considered a violation of the undertakings' obligation to cooperate and can lead to significant fines, with a fine of €38 million imposed on E.ON confirmed by the GC in 2010 and by the ECJ in 2012, and fines of €8 million imposed on Suez Environnement and Lyonnaise des Eaux in 2011. The Czech company EPH was also fined €2.5 million in 2012 for obstructing the Commission's inspection. The Commission can also – subject to obtaining a court warrant – inspect private premises, land and means of transportation, including the homes of directors, managers and other members of staff of the undertaking concerned, if there is reasonable suspicion that books and other records related to the business and to the subject matter of the inspection are located there. During the investigation procedures in *Marine Hose* (2009), the Commission carried out an on-the-spot investigation in a private home.

Commission officials have no power of forcible entry under Regulation No. 1/2003. They may, however, rely on the cooperation of member states' NCAs, who may use force to enter premises according to national procedural law. Forcible entry may require a court warrant under the applicable national law. In practice, officials will have obtained such a warrant before conducting the search. Under Regulation No. 1/2003, a national court called upon to issue such a warrant cannot call into question the legality of the Commission's decision or the necessity of the inspection. It may only assess whether the Commission decision is authentic and verify that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. To that end, it may ask the Commission for detailed explanations, in particular on the grounds the Commission has for suspecting infringement of article 101 TFEU, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. It cannot demand that it be provided with the information contained in the Commission's file.

The Commission team conducting a dawn raid usually consists of between five and 10 officials, of whom at least one is likely to be a technical expert who will aim to concentrate on electronically stored information. The Commission officials are normally accompanied by two or three officials from the relevant NCA assisting the Commission in its investigation.

As is the case for information requests, the undertaking concerned is only required to cooperate if the Commission has taken a formal decision. The Commission usually issues such a decision in the case of a dawn raid. The decision must specify the subject matter and the purpose of the inspection, so that the undertakings understand the scope of their duty to cooperate (ECJ, *Nexans* (2014)). Apart from relying on the cooperation of national authorities to gain forcible entry, the Commission may also impose periodic penalty payments if the undertaking does not submit to an inspection ordered by a Commission decision. These penalty payments may amount to up to 5 per cent of the average daily turnover in the preceding business year.

The Commission has the power to ask for on-the-spot oral explanations on facts or documents relating to the subject matter and purpose of an inspection from any representative or member of staff of a company and to record the answers. The company must cooperate actively and ensure that the most appropriate staff of sufficient seniority and knowledge of operations are available to deal with the enquiries. The Commission may also compel an undertaking to provide copies of pre-existing documents and factual replies.

As is the case for information requests, a company has certain fundamental rights of defence during a dawn raid, including:

- the right not to be subject to an unauthorised investigation;
- the right to legal advice;
- the right not to be required to produce legally privileged documents (limited to correspondence with EEA-qualified external counsel – see above); and
- the right not to be required to incriminate itself (see above).

In the *Deutsche Bahn* case (2015), the Commission had informed the officials conducting the dawn raid of another complaint against Deutsche Bahn, which was not the subject of the investigation at hand, and was not mentioned in the warrant. The ECJ ruled that the use of the documents relating to the suspected infringements of which the officials had been informed, but that were not mentioned in the warrant, violated the right of defence of the companies involved. The GC recently clarified the *Deutsche Bahn* case finding that the conduct of an unlawful dawn raid will only be relevant to questioning the validity of subsequent

inspection decisions, rather than prior decisions (including the decision which authorised the raid itself) (*Alcogroup and Alcodis* (2018)).

Power to take statements

In addition, the Commission has the power to take statements from any natural or legal person on a voluntary basis only (that is, such persons cannot be summoned to testify). This power is additional to the Commission's power to ask for on-the-spot oral explanations during a dawn raid.

Where the Commission takes statements or conducts interviews, the recent ECJ decision in *Intel* (2017) has clarified that there is no distinction between 'formal' and 'informal' interviews and has made clear that the Commission must record any interview it conducts for the purpose of collecting information relating to the subject matter of an investigation. The ECJ set a high bar to establish that the Commission's procedural breach provides sufficient basis for annulling the Commission's decision. A firm seeking to rely on non-disclosure must show that it did not have access to exculpatory evidence and that it could have used such evidence for its defence.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The EU has cooperation agreements (either multilateral or bilateral) with certain non-EU countries, notably the US, Canada, Japan, Switzerland, Brazil and South Korea. These agreements can help the Commission to obtain information and evidence located outside the EU. The Commission also has memoranda of understanding (MOUs) with China, Brazil, Russia, India, South Africa and, since 2018, Mexico that allow the relevant authorities to engage in discussions on competition legislation, share non-confidential information on legislation, enforcement, multilateral competition initiatives and advocacy, and engage in technical cooperation regarding competition legislation and enforcement. The MOUs also provide a mechanism for positive comity (allowing one authority to request that another engages in enforcement activity) and negative comity (to avoid conflicts if one authority's enforcement activity may affect the other in its enforcement).

The most significant of the cooperation agreements are the 1991 and 1998 EU-US agreements envisaging the exchange of information and establishing positive comity between the Commission and US anti-trust authorities. They provide for the Commission and US authorities to notify each other where their enforcement activities may affect the interests of the other, to assist each other in their enforcement activities and to cooperate regarding the investigation of anticompetitive activities in the territory of one party adversely affecting the interests of the other. As a result, there has been growing cooperation between the EU and the US in cartel matters (eg, in *Automotive Wire Harnesses* (2013) and *Automotive Bearings* (2014)).

These cooperation agreements do not allow the Commission to disclose confidential information received from companies in the course of its investigations. However, there are proposals under way for 'second generation' cooperation agreements to facilitate the exchange of company confidential information: the EU has signed such a 'second generation' agreement with Switzerland, and is in the process of negotiating a similar agreement with Japan. The Commission is a member of the International Competition Network (ICN), a network of competition agencies and a multilateral forum to address international cooperation and convergence.

Obviously, the Commission also cooperates extensively with the NCAs in member states. Regulation No. 1/2003 increased the scope of this cooperation within the framework of the ECN, which encompasses all member states' competition authorities as well as the Commission. The members of the ECN closely cooperate in the application of the EU competition rules. One authority may ask another for assistance by collecting information on its behalf. When an authority is assigned a case, it may decide to reallocate that case to another authority that is better placed to deal with it. The Commission may decide to take up a case, which will end the NCA's competence to apply article 101 TFEU (but not its equivalent national rules). Members of the ECN can also exchange information, including confidential information, for the purpose of applying article 101 TFEU or for parallel national proceedings under national competition law. Information so exchanged may only be

used as evidence to impose sanctions on natural persons when similar sanctions are present in the member state that transmitted the information, or where the information was collected respecting the same level of rights of defence as in the receiving state and where the sanction does not involve imprisonment. Case allocation and cooperation procedures are further detailed in the 2004 Commission Notice on cooperation within the Network of Competition Authorities. In particular, the Commission will be assigned a case if it has an impact in more than three member states. In March 2017, the Commission published a draft directive to empower the NCAs to be more effective enforcers of the EU competition rules. This includes enhanced cooperation between NCAs, including provisions compelling NCAs to enforce the fines imposed by another NCA against assets in its jurisdiction if the NCA imposing the fine certifies that there are insufficient assets in that member state. On 30 May 2018, the European Parliament and Council reached an agreement on the proposal, which was adopted by the Parliament's Committee on Economic and Monetary Affairs in July 2018. A plenary vote is due to take place in November 2018.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

It is increasingly the case that a cartel investigation in the US may lead to the Commission launching an investigation in the EU. This raises a particular problem, in that information provided to the EU authorities (for instance, in responses to information requests) may be discoverable in actions brought by third parties in the US and could increase exposure to civil damages (see question 32).

As regards the interplay between the EU and the NCAs in the member states, the work allocation between the different authorities is regulated within the framework of the ECN (see question 11). There is generally cooperation between the different authorities to decide which authority pursues a case. Once the Commission decides to initiate proceedings, the NCAs lose their competence to apply article 101 TFEU. However, there is no formal rule on avoiding double sanctions in the event that there are multiple investigations by several authorities. Nevertheless, the ECJ in its *Walt Wilhelm* judgment (1969) recognised a general requirement of natural justice that any previous punitive decision must be taken into account in determining any sanction that is to be imposed. By contrast, the Commission does not consider that fines imposed elsewhere (outside the EU), especially in the US, have any bearing on the fines to be imposed for infringing European competition rules. Nor does the possibility that undertakings may have been obliged to pay damages in civil actions have any relevance (*Lysine*, 2000). The GC confirmed this view (*Lysine*, 2003).

The cooperation between NCAs and the Commission does not always lead to perfectly harmonious outcomes: in April 2015 the German NCA pursued antitrust charges against Booking.com while the French, Italian and Swedish regulators settled the case. This has prompted a statement by the current Commissioner for Competition that the Commission should intervene earlier to avoid such divergent outcomes.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The Commission both investigates and adjudicates on cartel matters. At the end of an investigation by the officials of DG Competition, the final decision is taken by the College of Commissioners.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof lies with the Commission to establish the facts and assessments on which its infringement decision is based. However, if a party is claiming that the relevant agreement or concerted practice satisfies the conditions for an exemption under article 101(3) TFEU, the burden of proof lies with the party making that claim. The legislative framework does not provide for precise rules regarding the standard of

proof. Case law emphasises the presumption of innocence and clarifies that the Commission must produce 'sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place' (GC, *Danone* (2005)).

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes, direct evidence of a cartel is often difficult to find. It is therefore possible to prove the existence of a cartel on the basis of circumstantial evidence which, as a whole, provides 'sufficiently precise and consistent evidence' of the existence of a cartel. Furthermore, direct evidence of an agreement or a decision is not needed if there are grounds to show that there is a concerted practice, which amounts to a form of coordination between undertakings without having reached the stage where an agreement properly so called has been concluded, practical cooperation between them is knowingly substituted for the risk of competition (*ICI* (1972)). Parallel market conduct will often create suspicion that a concerted practice has occurred, although on its own this is not conclusive evidence of a concerted practice, unless there is no other possible explanation (*Åhlström* (1994)). See also question 14.

16 Appeal process

What is the appeal process?

Commission decisions can be appealed to the GC in Luxembourg. The GC has jurisdiction to review the legality of and reasons for Commission decisions and the procedural propriety of the decision, and to assess the appropriateness of the amount of the fines imposed. The GC may cancel, reduce or increase the fine. From the GC, appeals on points of law may be made to the ECJ in Luxembourg.

Companies do not necessarily have to pay their fine immediately if they lodge an appeal before the GC. However, in this case, they are required to provide a bank guarantee covering the full amount of the fine plus interest. Alternatively, the company may pay the fine into a ring-fenced account pending the outcome of the appeal. Typically, cartel cases before the GC last approximately two-and-a-half to three years and cases before the ECJ an additional one-and-a-half to two years. In January 2017, the GC ordered the EU to pay more than €50,000 in damages to Gascogne (along with fines to a number of other companies involved in a cartel in the industrial plastic bags sector) for the excessive length of proceedings before the General Court. The proceedings involving Gascogne lasted for more than five years and nine months (GC, *Gascogne Sack Deutschland and Gascogne* (2017)). The EU is appealing this decision, and in July 2018 Advocate General Wahl issued a non-binding opinion concluding that the Court of Justice should set aside the GC's judgment requiring the EU to pay compensation for material damage to Gascogne (the vast majority (approximately €47,000) of the damages were attributable to material damage, while further damages (€5,000) were attributable to non-material damage and remain payable). The Court of Justice will deliver a judgment over the coming months.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

EU law sanctions only undertakings and not individuals. National legislation within some member states may, however, provide for criminal or administrative sanctions where individuals participate in infringements of article 101 TFEU (see, for example, the UK and Netherlands chapters). For penalties on undertakings, see question 18.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The sanction available to the Commission is the imposition of fines on the undertakings or associations of the undertakings concerned. In general, the EU courts have confirmed that the Commission has wide discretion in setting the level of fines within the limits of Regulation No. 1/2003. The fines imposed can be up to 10 per cent of worldwide group turnover in the preceding business year where an undertaking or

association of undertakings has infringed article 101 TFEU. The ECJ has confirmed that fines may exceed the turnover in products concerned by the infringement, provided that they stay within the 10 per cent ceiling (*Pre-insulated Pipe Cartel Appeals* (2002)). Regulation No. 1/2003 states that these fines are not of a criminal nature. However, given the size of the potential fines, there are strong arguments as to why, pursuant to the European Convention on Human Rights (ECHR), the fines should be characterised as criminal or quasi-criminal (with the higher level of procedural protection this involves under article 6 of the ECHR).

The Commission imposes fines according to its Guidelines on the method of setting fines using a two-step method. In a first step, the basic amount of the fine is calculated taking into account the value of the undertaking's direct or indirect sale of goods or services concerned by the infringement within the EEA. For undertakings without EEA sales the Commission has used an alternative method taking into account sales outside the EEA to calculate the hypothetical turnover within the EEA. This happened, for example, in *Automotive Wire Harnesses* (2013), *Power Transformers* (2009), *Marine Hoses* (2009) and *Aluminium Fluoride* (2008). In a second step, the amount of the fine may be adjusted taking into account aggravating or mitigating circumstances. The basic amount of the fines may be increased by up to 100 per cent in the case of recidivism. A fine may also be increased for the purpose of deterrence. In *InnoLux* (2015), the ECJ confirmed that for a vertically integrated company the fine calculation may be based on non-EEA sales of cartelised components if they are built into a final product that is subsequently sold in the EEA as a 'direct EEA sale through transformed products'. In *AC Treuhand II* (2015) the ECJ confirmed that the Commission was entitled to fix the fine as a lump sum instead of using value of sales because AC Treuhand, a consultancy firm, did not have any sales in the markets concerned.

Under a draft directive published in 2018, member states will be obliged to establish non-criminal penalties that can be imposed at the domestic level for breaches of EU competition law, although whether these can be imposed by the NCA itself in its own proceedings or requires judicial action is a matter of discretion for member states. The proposals also require that the maximum fine available to NCAs must be at least 10 per cent of global turnover, which will represent a significant increase in some jurisdictions once implemented. Fines will also be able to be collected from the members of insolvent corporations provided the fines relate to the member's activities, for instance in respect of joint ventures. NCAs will also be empowered to impose structural and behavioural remedies, such as requiring the divesting of certain assets, which are not available in all member states at present.

The Commission also has the power to require the parties to terminate the infringement and may require them to undertake any action necessary to ensure their conduct in future is lawful. For this purpose, it has in some circumstances the power to impose structural remedies and to accept binding commitments. The Commission also has the power to take interim measures in relation to infringements of article 101 TFEU. Such measures are intended to preserve the position before the parties entered into the agreement in question. Performance of such orders can be compelled by means of periodic payments not exceeding 5 per cent of the average daily turnover in the preceding business year per day.

The Commission's policy on cartels has evolved substantially during the past 40 years. During the 1960s and 1970s, the Commission intervened only in a few major cases with relatively low fines being imposed. In the 1980s, the Commission began to impose much heavier fines in landmark cases such as *Polypropylene* (1986), where fines of nearly €60 million were imposed on 15 companies. Since the early 1990s, the Commission has pursued its policy of imposing heavy fines, and has also started to combat cartels in regulated sectors such as maritime transport. In recent years, the Commission has at various times reaffirmed its commitment to detecting and punishing hard-core cartels, increasing the number and intensity of its investigations and imposing record fines. Recent years have brought new record fines: the *Trucks* cartel (2016/2017) was fined a total of €3.81 billion, the largest fine ever imposed by the Commission in a single cartel investigation, including a fine of €1.01 billion on Daimler, €881 million on Scania, and €753 million on DAF, being to date the largest fines imposed on single companies for their involvement in cartel activity. In December 2017, Scania appealed the decision to the GC. In March 2018, the Commission fined eight Japanese manufacturers a total of €254 million for their

involvement in an alleged cartel concerning the supply of aluminium and tantalum capacitors.

It is very difficult to rebut the presumption of actual decisive influence by a parent company over a wholly owned subsidiary. The failure to comply with a parent company's instruction is not sufficient, as long as the failure to carry out instructions is not the norm (ECJ, *Evonik Degussa and Alzchem* (2016)). The ECJ has, in *DuPont and Dow* (2013), confirmed that, in addition to penalties for infringements by their wholly owned subsidiary companies, parent companies may also be held liable for the penalties imposed in respect of article 101 TFEU infringements committed by their full-function joint venture subsidiaries, provided that the Commission is able to establish that the parent company did, in fact, exercise 'decisive influence' over that joint venture company. More recently in *Power Cables* (2014), Goldman Sachs, the former 47 per cent financial investment shareholder of Prysmian, was fined €37 million jointly and severally with Prysmian. Liability was based on Goldman Sachs's decisive influence over Prysmian, which, the Commission found, was to all intents like that of a traditional industrial owner. In July 2018, following an appeal from Goldman Sachs, the GC affirmed the Commission's decision. The GC observed that the bank's voting rights (which fluctuated between 84 and 91 per cent) and other powers gave it decisive influence comparable to a sole owner and that it failed to show that its interest was intended solely as a pure financial investment (*Goldman Sachs Group* (2018)).

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The Commission's Guidelines on the method of setting fines, having the status of soft law, are only self-binding on the Commission, and do not have a binding effect on the General Court or on NCAs or national courts.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

The sanctions available under Regulation No. 1/2003 do not include the possibility of debarment from government procurement procedures for cartel infringements. However, an exclusion from the tendering process is possible under the rules on public procurement (article 57 of Directive 2014/24/EU). The public contracting authorities may, in a discretionary decision, exclude the undertaking where they have sufficiently plausible indications to conclude that the undertaking has entered into agreements with other undertakings aimed at distorting competition. They may further apply the catch-all element of grave professional misconduct. The time period for debarment due to anticompetitive conduct is subject to national law and fixed at a maximum of three years by Directive 2014/24/EU. It can be terminated earlier if measures taken by the undertaking sufficiently demonstrate its reliability.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Not applicable; see questions 17 and 18.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Third parties (and in certain circumstances, even parties involved in the infringement) who have suffered loss as a result of cartel behaviour

in breach of article 101 TFEU can sue for damages before the national courts.

The precise rules of standing, procedure and quantification of damages may, however, vary between EU member states. In November 2014 the Damages Directive was adopted. The directive is designed to ensure that victims of competition law infringements in Europe have access to effective mechanisms for obtaining compensation for the harm they have suffered. Victims should obtain full compensation for the actual loss suffered as well as for lost profits. The directive also allows for the use of passing on as a defence, and for Commission and NCA decisions to be binding on the national courts and to serve as evidence of an infringement. This further reinforces the requirement that Commission infringement decisions must be unambiguous (GC, *British Airways* (2015)). If an antitrust infringement is shown by the injured party the directive provides, with regard to the establishment of fault, a reversal of the burden of proof to the detriment of the infringer in terms of a rebuttable presumption that cartels cause harm. The directive also provides a common standard for limitation periods and the protection of leniency applicants. Member states were required to implement the Damages Directive in their national legal systems by 27 December 2016; however, transposition by all member states was not completed until earlier this year. The Commission is reviewing whether all national transposing rules implement the Directive completely and correctly. With the implementation of the Damages Directive now complete, it will be interesting to observe if there are any changes to the number of claims and quantum of the damages in follow-on damages cases.

In October 2018, the Commission finished consulting on draft guidelines for national courts on how to estimate the share of cartel overcharges passed on to indirect purchasers and final consumers. The draft guidelines aim to offer non-binding guidance to member states and parties on the applicable legal and economic tests to determine the level of overcharge that has been passed on to third parties. The Commission will review the responses to the consultation prior to finalising the guidelines.

A related development is that the ECJ recently held that there should be no national rule preventing third parties from seeking compensation from cartelists for loss allegedly suffered owing to the surcharge applied by non-cartelists who, independently and rationally, adapted to a price increase resulting from the cartel by increasing their own prices (*Kone* (2014)).

In relation to the jurisdiction of national courts over cartel damages claims, the ECJ held in May 2015 that cartel victims may sue for damages in the country where any one of the cartelists is domiciled and that the jurisdiction of the national court is not in principle affected by the claimant's withdrawal of its action against the sole participant domiciled in the member state in which the court is seised. The claimant also has the option to bring its action for damages in the jurisdiction where the cartel was concluded, where an agreement implying the existence of the cartel was concluded, or where the loss arose (the latter generally presumed to be the claimant's registered office). Furthermore, the ECJ found that jurisdiction clauses that derogate from the provisions of the Brussels I Regulation only encompass disputes relating to the payment of damages arising from an unlawful cartel if the claimant has consented to such derogation (*Cartel Damage Claims (CDC) Hydrogen Peroxide SA* (2015)).

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

While the Damages Directive does not include a requirement for member states to introduce collective redress mechanisms for damages suffered as a result of breaches of competition rules, in 2013 the Commission published a non-binding Recommendation setting out common principles regarding collective redress mechanisms. The Recommendation, which invited member states to implement appropriate measures by 26 July 2015, was intended to bring more coherence to the different systems of collective redress within the EU. From 22 May 2017 to 15 August 2017 the Commission conducted a consultation to assess the implementation of the Recommendation on the basis of practical experience and determine whether further measures to promote the principles set out in the Recommendation should be considered. Following this consultation, a report on the practical application

of the principles of the Recommendation was published. The report showed that the availability of collective redress mechanisms, as well as the implementation of safeguards against the potential abuse of such mechanisms, was still unevenly distributed across the EU. Therefore, in April 2018, the Commission proposed new legislation (Proposal for a Directive on Representative Actions for the Protection of Collective Interests of Consumers, and repealing Directive 2009/22/EC (the Injunctions Directive)), which, if implemented, will effectively introduce an EU-wide right of collective redress, allowing certain entities (see below) to seek redress (eg, compensation, replacement or repair) on behalf of consumers who have been harmed by an illegal commercial practice. It is, however, of note that the proposal focuses on consumer law, rather than antitrust breaches. Owing to a number of safeguards designed to prevent abuse of the procedure, the EU collective redress mechanism will be different from US style class actions: only qualified entities (eg, consumer organisations and independent public bodies) will be able to begin an action (not private law firms), and such entities will have strict obligations of transparency regarding the source of their funding. Accordingly, the proposal concludes that it is necessary to amend existing consumer protection Directives and repeal the existing Injunctions Directive. As a general rule, collective redress mechanisms should be based on the opt-in principle, according to which every represented party individually needs to join the action (in contrast to opt-out actions, which are possible without identifying the individual parties to the lawsuit).

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

To qualify for full immunity from fines (and, under the Damages Directive, to benefit from a softening of joint and several liability in any follow-on actions such that a successful applicant can generally only be liable to compensate their direct or indirect purchasers or providers) a party must be the first to inform the Commission of an undetected cartel, and must provide sufficient information for the Commission to carry out an inspection at the premises of the companies allegedly involved in the cartel. If the Commission has already begun an investigation into the suspected cartel, the informing party must provide sufficient information for the Commission to prove the alleged infringement. The informing party must also cooperate fully with the Commission on an ongoing basis throughout the investigation, offer up all evidence in its possession, and cease committing the infringement immediately. A party cannot, however, benefit from immunity if it was active in coercing other parties to participate in the cartel.

Companies that have recently benefited from full immunity include:

- Valeo in *Lighting Systems* (2017);
- Denso in *Thermal Systems* (2017);
- Johnson Controls in *Car Battery Recycling* (2017);
- Takata in *Occupant Safety Systems* (2017);
- Denso in *Spark Plugs* (2018);
- TRW (and Continental for one cartel) in *Braking Systems* (2018);
- Sanyo Electric and its parent Panasonic Corporation in *Electrolytic Capacitors* (2018); and
- MOL in *Maritime Car Carriers* (2018).

Any information and documents submitted by a party in the course of an application for immunity or leniency (see below) are treated with confidentiality by the Commission. The response to question 27 provides more information on the practicalities of approaching the Commission.

In March 2017, the Commission introduced an anonymous whistle-blower tool for individuals to alert the Commission anonymously about secret cartels and other antitrust violations. More recently (in April 2018), it announced a proposal for new legislation to guarantee a high level of protection for whistle-blowers by introducing new EU-wide standards. Under the proposal, all companies with more than 50 employees, or with an annual turnover of over €10 million, will be required to set up an internal procedure to manage whistle-blowers' reports.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Under the Leniency Notice (part III), favourable treatment is also available to companies that do not qualify for immunity but that provide evidence representing 'significant added value' to that already in the Commission's possession, and that immediately terminate their involvement in the cartel activity. Provided these conditions are met, the cooperating company may receive up to a 50 per cent reduction in the level of fine that would have been imposed had it not cooperated. The envisaged reductions are split into three bands:

- 30 to 50 per cent for the first company to provide significant added value;
- 20 to 30 per cent for the second company to provide significant added value; and
- zero to 20 per cent for any subsequent companies to provide significant added value.

The amount received within these bands depends upon the time at which they started to cooperate and the quality of evidence provided.

Companies that have recently benefited from a reduction of their fines include:

- Volvo/Renault, Daimler and Iveco (40 per cent, 30 per cent and 10 per cent respectively) in *Trucks* (2016);
- Sony, Panasonic and Sanyo (50 per cent, 20 per cent and 20 per cent respectively) in *Rechargeable Lithium-ion Batteries* (2016);
- Eco Bat and Recycle (50 per cent and 30 per cent respectively) in *Car Batteries Recycling* (2017);
- Bosch and NGK (28 per cent and 42 per cent, respectively) in *Spark Plugs* (2018); and
- Hitachi Chemical, Rubycon, Elna and NEC Tokin (35 per cent, 30 per cent, 15 per cent and 15 per cent respectively) in *Electrolytic Capacitors* (2018).

There is currently no 'immunity plus' or 'amnesty plus' option.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

See question 25.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

In practice, the decision on whether to apply for leniency if a violation is discovered internally requires an assessment of the risks, advantages and disadvantages. Factors include:

- risk of the authorities being on the trail already;
- the danger that another participant will get in first and 'slam the door';
- the jurisdictions in which liability to sanctions may arise;
- the exposure of individuals to criminal prosecution and imprisonment in other jurisdictions if they do not secure amnesty;
- the consequences in terms of civil liability, including punitive or triple damages in some jurisdictions; and
- the implications of a leniency application in terms of document disclosure requirements in other jurisdictions.

Where the Commission grants a marker, it will specify the time period in which the applicant undertaking must perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. If the undertaking complies within the time frame, the marker is deemed perfected at the time it was first granted. If the undertaking fails to supply the information and the deadline is not extended, the undertaking can still present an application for immunity, but its place in the queue is no longer protected.

There is no specific deadline for immunity or leniency applications; these are possible at any time in the Commission's investigation provided the criteria are met (see questions 24 and 25). However, applications cannot be made once settlement discussions have commenced.

Recent cases have shown that international cartels are highly likely to result in exposure to prosecution in multiple jurisdictions. If it is decided to apply for leniency, applications to the different regulators should therefore be made as quickly as possible and, where appropriate, simultaneously. If an undertaking wishes to benefit from full leniency at the EU level, it needs to tell the Commission as soon as it has gathered evidence of the cartel's existence sufficient for purposes of the Leniency Notice. Otherwise, it runs the risk that one of the other cartelists may blow the whistle first.

Within the ECN (see question 11), an application for leniency to a given authority is not considered as an application for leniency to any other authority and leniency programmes of the national competition authorities are autonomous in respect of other national programmes and the EU leniency programme (ECJ, *DHL* (2016)). When an undertaking decides to seek immunity, it is therefore in its interest to apply for leniency to all competition authorities that are competent to apply article 101 TFEU and that may potentially deal with the case under the work allocation rules within the ECN.

The ECN Model Leniency Programme, launched on 29 September 2006, is not binding on ECN members, but they are committed to it. It provides for summary applications to be made to NCAs where an applicant is seeking full immunity on the basis that it is the first to reveal a cartel and no inspections have yet taken place; that the Commission is 'particularly well placed' to deal with the case in accordance with the Notice on Cooperation Within the ECN; and that the NCA authority 'might be well placed' to act. Summary applications may be made orally and allow applicants to secure their place in the queue before NCAs. The NCAs will not decide on granting conditional immunity. NCAs are not required to assess a summary application submitted to them in the light of an application for immunity submitted to the Commission, or to contact the Commission where the summary application has a more limited material scope (ECJ, *DHL* (2016)). Changes have been proposed to ensure that applicants for immunity to an NCA can also request a place in the leniency queue and receive a marker at that time, even if it transpires that they are not eligible for immunity.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

To receive immunity, the Leniency Notice provides that the applicant must provide a corporate statement including a detailed description of the alleged cartel arrangement and explanations of the evidence provided, full details of the applicant and the other members of the cartel and information on which other competition authorities have been or will be approached, as well as all other evidence relating to the alleged cartel where no inspection has yet been conducted.

Only one undertaking can qualify for full immunity. To obtain full immunity a company must, in addition, cumulatively satisfy the following conditions:

- put an end to its involvement in the illegal activity immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the Commission's inspection;
- cooperate genuinely, fully, on a continued basis and expeditiously with the Commission – the company is expected to provide the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel; and
- not have taken steps to coerce other undertakings to participate or remain in the cartel.

The Leniency Notice explains that full cooperation also entails:

- providing the Commission promptly with all relevant information and evidence that comes into the undertaking's possession or is available to it;
- remaining at the Commission's disposal to respond to any request promptly;

- making current and, if possible, former employees and directors available for interview;
- not destroying, falsifying or concealing evidence of the cartel, or disclosing any information, except to other competition authorities; and
- unless otherwise agreed, not disclosing the fact or any content of the application before a statement of objections has been issued.

A company is not required to provide decisive evidence for a grant of full immunity, nor is the company automatically excluded for having acted as an instigator of, or for having played a determining role in, the cartel. Full immunity may also still be available after an investigation has been initiated.

A noteworthy case in 2005 concerned the Italian raw tobacco market. The immunity applicant, Deltafina, had been granted conditional immunity at the beginning of the procedure under the terms of the 2002 Leniency Notice. However, the final decision withheld such immunity owing to a breach by Deltafina of its cooperation obligations (confirmed by the GC in 2011): Deltafina had revealed to its main competitors that it had applied for leniency before the Commission could carry out dawn raids.

As far as the level of cooperation is concerned, any subsequent leniency applicants must satisfy the same conditions as the first. Only the quality of evidence differs insofar as the second (and subsequent) applicant has to provide evidence representing significant added value to that already in the Commission's possession.

However, there are proposals to ensure that directors, officers and employees of applicants in immunity (but not leniency) applications before NCAs also receive immunity from individual sanctions provided they cooperate with investigations, unless proceedings are already under way against individuals prior to their cooperation. This will mitigate the risks of non-compliance by persons working for applicants for fear of revealing their role in unlawful actions. However, this immunity is subject to a derogation allowing member states to opt for cooperation as a mitigating factor for individual sanctions imposed, rather than blanket immunity.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Information and documents communicated to the Commission under the Leniency Notice are treated with confidentiality. Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules relating to access to file. According to the Commission Notice on Access to the File (December 2005, as amended in August 2015), no access will be granted to internal documents of the Commission or of NCAs (including correspondence between the Commission and NCAs or between NCAs, and the internal documents received from such authorities), documents containing business secrets and other confidential information (which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking). The Commission's notes of meetings with leniency applicants are classified as internal documents. Where, however, the leniency applicant has agreed to the minutes, such minutes will be made accessible to third parties after deletion of any business secrets or other confidential information. Such agreed minutes constitute part of the Commission's evidence in the case.

The Leniency Notice further provides that any written statement made as regards the Commission in relation to the leniency application forms part of the Commission's file and may not, as such, be disclosed or used by the Commission for any other purpose than the enforcement of article 101 TFEU. The amendments made to the Leniency Notice in August 2015 following adoption of the Damages Directive add that the Commission will not transmit leniency corporate statements to national courts for use as evidence in support of actions for damages for breaches of EU antitrust law. The Commission also stresses that documents received in the context of the Leniency Notice will not be disclosed under Regulation No. 1049/2001 regarding public access to European Parliament, Council and Commission documents

(Transparency Regulation), as such a disclosure would undermine the protection of the purpose of inspections and investigations.

In practice, the Commission does not reveal the name of the whistle-blower as long as the investigations continue. In the *Stanley Adams* case (1985), the ECJ held that, where information is supplied on a voluntary basis and accompanied by a request for confidentiality to protect anonymity by an individual whistle-blower, if the Commission accepts such information, it is bound to comply with such a condition. Failure to do so meant that the Commission was liable to pay damages. Eventually, however, details of the cartel investigation and the applicant's wrongdoing may be made publicly available in the final Commission decision. The 2015 Guidance on the preparation of public versions of Commission Decisions explains the types of information that companies may request be redacted on the grounds that it contains business secrets or is confidential. The GC highlighted in *AGC Glass Europe* (2015) that the Commission should not be prevented from publishing, in its decision bringing the administrative procedure to an end, information relating to the description of an infringement that has been submitted to it as part of the leniency programme. The ECJ in *Evonik Degussa* (2017) also found that the Commission is not prevented from supplementing the extended cartel decision with information provided by a leniency applicant. The ECJ ruled that the fact that immunity is granted cannot protect a leniency applicant from civil damages claims. The only protection available to leniency applicants is protection concerning immunity from, or reduction in, the fine, in return for providing the Commission with evidence of the cartel, and the Commission's non-disclosure of documents and written statements that it has received in accordance with the Leniency Notice. As a result, the Commission is allowed to publish verbatim quotations of information included in the documents provided by a leniency applicant, provided that business secrets, professional secrecy and other confidential information is protected. It is for the hearing officer to take account of all the arguments related to general EU law principles raised by a leniency applicant to protect the information's confidentiality. However, verbatim quotations from the leniency statement itself may not be published under any circumstances. According to the Commission, summaries of parts of the leniency statement can be published.

Parties to international cartels need to bear in mind that written submissions to the Commission may be subject to US civil discovery rules in US proceedings regarding damages claims. In the interest of its leniency policy, the Commission has attempted to address these concerns by adjusting both the Leniency Notice and its overall practice as regards US civil proceedings (see question 32). In such cases, it may be advisable to make a paperless application to the Commission via external lawyers benefiting from legal privilege. The continuing conflict between public and private enforcement of competition law raises concerns over the future effectiveness of leniency programmes at national and European level. In its *Pfleiderer* ruling (2013), the ECJ held that the provisions of European law did not per se preclude private damages claimants from obtaining access to documents submitted to a national competition authority under a leniency programme. However, the ECJ left open the question of how to weigh conflicting concerns of obtaining compensation versus protecting leniency programmes.

Further, in the UK case *National Grid v ABB & Ors*, National Grid applied to the High Court seeking disclosure from the defendants of the Commission's confidential decision and some leniency materials from the defendants. In light of the *Pfleiderer* decision, National Grid argued that the national court had jurisdiction to order the disclosure of such documents and was no longer required to make a request to the Commission under article 15 of Regulation No. 1/2003.

The High Court concluded that the ruling of the ECJ clearly applies to the Commission leniency programme as well as to national leniency programmes, and that the Commission does not have exclusive jurisdiction to determine the disclosure of leniency materials submitted under its leniency programme. It is open for a national court to request the Commission to provide leniency materials, and there is nothing in Regulation No. 1/2003 precluding a national court from applying its national procedures for access to documents. Further, *Pfleiderer* expressly established that, in the absence of binding regulation under EU law on the subject, the question of access to leniency materials by the victim of a cartel is to be determined under national rules. The High Court also commented that if every application for disclosure of leniency materials had to be referred to the Commission, it would place a

significant burden on the Commission to carry out the balancing exercise required by *Pfleiderer* and would also give rise to significant delay.

The High Court held that other relevant considerations for the *Pfleiderer* balancing exercise included whether the information is available from other sources, the relevancy of leniency materials to the issues in context, and the evidential difficulties facing claimants seeking damages for an infringement of EU competition rules.

In November 2014 the Damages Directive was adopted (see also question 22). The directive provides that national courts must be able to order a defendant or third party to disclose evidence independently of whether such evidence is in the possession of a competition authority and regardless of the medium in which the information is stored. The directive provides, however, a specific exemption to this rule that affords absolute protection to leniency corporate statements and settlement submissions held by the Commission or an NCA. Under the directive, no national court can order the disclosure of such documents in a damages action, as their disclosure would pose a serious risk to the effectiveness of the leniency programme and settlement procedures. The directive was followed by, among others, amendments to the Notices on Access to the File and Leniency in August 2015. Access to the file will only be granted on the condition that the information thereby obtained is used for the purposes of judicial or administrative proceedings for the application of EU competition rules. In addition, the Commission will not send leniency corporate statements to national courts for use in actions for damages for breach of EU antitrust provisions (except for the sole purpose of confirming that they are ‘leniency statements’ or ‘settlement submissions’ as defined by the Damages Directive).

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The Commission does not have authority to enter into plea bargaining or similar arrangements. However, in 2008 the Commission introduced procedures for a simplified handling of cases in which the parties to a cartel and the Commission concur about the nature and scope of the illegal activity and the appropriate penalty. These rules on the conduct of settlement procedures aim at ensuring the continued effectiveness of the Commission’s long-term zero-tolerance policy by simplifying the administrative proceedings and reducing litigation in cartel cases, thereby freeing Commission resources to pursue more cases. The rules allow for settlements of cartel cases where the parties not only acknowledge their involvement in the cartel and their liability for it, but also agree to a faster and simplified procedure, as well as the imposition of lower fines on those who agree to the settlement procedure.

The Commission’s initiative is intended to complement the Leniency Notice (see questions 24 to 29) and the Fining Guidelines. The settlement procedure aims at simplifying the administrative proceedings and reducing litigation in cartel cases, thereby freeing Commission resources to pursue more cases.

Under the settlement procedure, the Commission neither negotiates nor bargains the use of evidence or the appropriate sanction. Instead, the parties are expected to acknowledge their participation in and liability for the cartel, and reach a common understanding with the Commission about the nature and scope of the illegal activity and the appropriate penalty. In return for such cooperation, the parties are rewarded with a 10 per cent reduction in fines (cumulative to any reduction received under the Leniency Notice) and a cap on the multiplier that may be applied to the fine for specific deterrence (to a multiple of two). Parties also benefit from a shorter public decision. Such cooperation differs from the voluntary production of evidence to trigger or advance the Commission’s investigation, which is already covered by the Leniency Notice. Parties have neither the right nor the duty to settle. Parties would be made aware of the Commission’s anticipated objections and be given an indication of the potential maximum fine they can expect. They would be informed about the evidence and allowed to state their views prior to any formal objections. If parties chose to introduce a settlement submission (which would include an acknowledgment of liability), the Commission’s statement of objections could be much shorter than the usual statements of objections

issued to face contradiction. The abbreviated statement of objections would endorse the contents of the parties’ settlement submission.

Since parties would have been heard effectively in anticipation of the ‘settled’ statement of objections, other procedural steps would be simplified. After confirmation by the parties, the Commission could, after consulting member states in the framework of the Advisory Committee, adopt an accelerated final decision. However, the Commission retains the possibility to depart from the parties’ settlement submission until the final decision, in which case the standard procedure would apply. Once parties choose to dispense with the settlement procedure, the Commission is not bound by its indications given during settlement discussions with regard to the levels of fines (GC, *Timab* (2015), confirmed by the ECJ (2017)).

The amendments to Regulation No. 773/2004 accommodate the settlement option within the existing framework. The changes amend provisions on issues such as the initiation of proceedings, access to the file and oral hearings and choice for a different sequence of procedural steps, advancing some before the adoption of the statement of objections.

The Settlement Notice sets out the specifics of the procedure. It provides guidance for the legal and business community and foresees that companies could anticipate the kind and extent of cooperation expected from them to settle and estimate the individual benefits of settling. The Settlement Notice also provides that settlement submissions may be given orally and will be given the same protections as those granted to leniency applications. Settlement decisions may be appealed to the General Court and, on points of law, to the Court of Justice.

The Commission has settled over 25 cases so far, and is using this procedure with increasing frequency: four out of seven cartel decisions reached in 2017 were full settlement cases.

A recent trend has been the use of ‘hybrid’ cases, in which one or more parties decides not to settle. For example, in *Trucks* (2016/2017), the Commission agreed a 10 per cent reduction in fines for those undertakings which agreed to settle, but pursued Scania under the ordinary procedure. *Trucks* was also notable as the procedure only shifted to a settlement procedure after issuing of a formal statement of objections pursuant to the ordinary procedure. In *Panalpina* (2016) the GC recalled that the efficiency gains arising from a settlement procedure are greater when all the parties concerned accept settlement. It confirmed that the Commission was entitled to choose not to apply the settlement procedure, particularly given the large number of parties involved (47) and the fact that many were not willing to cooperate on the basis of the Leniency Notice. In its *Icap* judgment of 2017 the GC warned against ‘hybrid’ settlements, where an early settlement with some parties risks infringing the presumption of innocence applying to non-settling parties. Following this criticism, the Commission now appears to be pursuing settlement and adversarial procedures in the same cases in parallel rather than sequentially (see, for example, recent (ongoing) forex and bioethanol investigations).

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Not applicable at the EU level, as the Commission cannot impose penalties on individuals. However, there may be implications for criminal proceedings against individuals that may arise under national legislation (see, eg, the United Kingdom chapter).

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

In general, the procedure applicable to cartel investigations is the standard one for all antitrust cases as provided for by Regulation No. 1/2003 (see questions 1, 3 and 10).

If an undertaking wishes to take advantage of the leniency programme, it should contact DG Competition, primarily through the following dedicated email address: comp-leniency@ec.europa.eu (assistance is given via the following dedicated telephone numbers: +32 2 298 4190 or +32 2 298 4191). Only persons empowered to

represent the enterprise for that purpose or intermediaries acting for the enterprise, such as legal advisers, should take such a step.

Application for immunity (Part II of the Leniency Notice)

Following initial contact, the Commission will immediately inform the applicant if immunity is no longer available for the infringement in question (in which case the applicant may still request that its application be considered for a reduction of fines, under Part III of the Notice). If immunity is still available, a company has two ways to comply with the requirements for full immunity. It may choose:

- to provide the Commission with all the evidence of the infringement available to it; or
- to initially present this evidence in hypothetical terms, in which case the company is further required to list the evidence it proposes to disclose at a later agreed date; this descriptive list should accurately reflect – to the extent feasible – the nature and content of the evidence; the applicant will be required to perfect its application by handing over all relevant evidence immediately after the Commission determines that the substantive criteria for immunity are met.

In either of the two scenarios, immunity applicants will be informed speedily about their situation and, if they meet the substantive criteria, conditional immunity will be granted to them in writing. If they subsequently comply with their obligation for complete and continuous cooperation, this conditional immunity will be confirmed in the final decision.

Application for reduction of a fine (Part III of the Leniency Notice)

Applicants wishing to benefit from a reduction in fine should provide the Commission with evidence of the cartel activity at issue. Following the necessary verification process by the Commission, they will be informed of whether the evidence submitted at the time of their application passed the ‘significant added value’ threshold, as well as of the specific band within which any reduction will be determined, at the latest on the day of adoption of a statement of objections. The specific amount to be imposed will be finalised in the Commission’s decision.

In practice, companies applying either for immunity or reduction of fines provide a written statement (sometimes referred to as the corporate statement) for the purposes of the leniency application, in which they give their own description of the cartel activity and assist the Commission in understanding any related evidence (internal notes, minutes of meetings, etc). Given the broad scope of US civil discovery rules, producing such documentary evidence may expose EU leniency applicants in the event of US civil litigation (in particular, regarding claims for treble damages), where US plaintiffs are keen to get hold of documents, statements and confessions provided to the Commission by companies. To avert the undermining of its leniency policy, the Commission protects leniency applications from disclosure in the following ways:

- asserting in the Leniency Notice that any written statement made as regards the Commission in relation to the leniency application forms part of the Commission’s file and may not, as such, be disclosed or used for any other purpose than the enforcement of article 101 TFEU (see, however, recent case law regarding disclosure in the context of private enforcement and also the position under the Damages Directive in question 29);
- intervening in pending US civil proceedings where discovery of leniency corporate statements is at stake by means of *amicus curiae* (the Commission has intervened in this way in a number of cases); and
- accepting oral corporate statements (paperless submissions).

In addition, it may be advisable for companies to restrict their statements and evidence to activities in the EU only, with a view to avoiding admission of misconduct with effects in the US or elsewhere.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

At the time of writing, there are no ongoing or proposed leniency or immunity policy reviews.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

See also questions 29 and 30.

The disclosure of information and evidence depends on whether the normal or the settlement procedure is followed (see questions 9 and 30).

In the normal procedure, the written statement of objections must contain all factual and legal aspects that the Commission intends to use in its decision, ie, clarification of the nature, area, duration and gravity of the infringement and the responsibility of each undertaking, but not the range of potential fines. The objections must be sufficiently clear to enable the undertakings concerned to properly identify the alleged conduct. The parties are then allowed to examine the documents in the Commission’s file (access to the file), but no access will be granted to internal documents of the Commission or of NCAs, documents containing business secrets and other confidential information, unless it is necessary to prove the infringement (article 27(1), (2) of Regulation No. 1/2003, articles 10(1) and 15(1), (2), (3) of Regulation No. 773/2004).

In the settlement procedure, parties are informed of the Commission’s anticipated objections and are given an indication of the potential maximum fine they can expect. They are given access to the evidence the Commission intends to base its findings upon (such as corporate statements by the other participants in the alleged conduct and historical documents) and are allowed to state their views prior to any formal objections. The Commission’s statement of objections may be much shorter than the document used in non-settlement proceedings. A subsequent access to the file is only granted if the statement of objections does not reflect the contents of the parties’ settlement submissions, as parties should have been sufficiently informed beforehand (article 15(1a) of Regulation No. 773/2004).

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

As individuals cannot be penalised for breach of the EU competition rules, this is not generally a concern at the EU level. However, the issue of separate representation may arise where, for instance, the employee may be subject to disciplinary measures pursuant to his or her contract of employment, or in the event of possible criminal proceedings under relevant national legislation (see, eg, the United Kingdom chapter).

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Conflicts of interest are governed by the relevant bar rules in each member state. Conflicts of interest arise fairly regularly between alleged parties to a cartel.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Penalties cannot be imposed on individual employees at the EU level.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

The tax consequences of fines or other penalties for competition law infringements are governed by national law. The Commission has the power under article 15(3) of Regulation No. 1/2003 to present written observations to national courts as *amicus curiae*. Notably, on 30 October 2012, the Commission published *amicus curiae* observations on a case then before the Belgian Constitutional Court that concerned the question of whether fines imposed by the Commission for competition law infringements are tax-deductible. The Commission was of the

opinion that allowing such penalties to be tax-deductible would diminish their deterrent effect, and would effectively mean that a part of the fine was borne by the relevant state. The Belgian Constitutional Court followed the Commission's opinion.

In respect of private damages awards, tax consequences are governed by national law.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

In principle, penalties imposed in other non-member state jurisdictions (regarding member state jurisdictions see question 12) are not taken into account by the Commission when determining sanctions for a cartel (reaffirmed by the ECJ in *InnoLux* (2015)). However, when it comes to including indirect sales for the purpose of calculating the amount of the fine, the Commission may take into account the fact that these sales have also been included in sanctions imposed in another jurisdiction. In *Automotive Wire Harnesses* (2013), the Commission is believed to have refrained from including the indirect sales of cars manufactured in Japan and exported into the EEA in its calculation, taking into consideration the fact that the Japanese FTC had already imposed sanctions with respect to these cars.

40 Getting the fine down

What is the optimal way in which to get the fine down?

Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The Commission's leniency programme has led to a significant change in the defence strategy of companies involved in cartel cases. Whereas in the past undertakings accused of being part of a secret cartel tended to present a joint defence based on denial and silence, today such an approach is rare given the advantages that can be obtained from cooperation with the Commission. The Commission has repeatedly emphasised its willingness to give companies the chance to get off the hook if they cooperate actively at the earliest possible opportunity. At the same time, it has made clear that companies that do not seize this chance must be aware of the responsibilities they will face. If the company decides to cooperate, it is therefore crucial to develop a cooperation strategy as early as possible tailored to the particular case and with the aim of providing the Commission with as much evidence as possible. The rules on the conduct of settlement procedures (introduced in 2008) allow the Commission to reward companies for their cooperation to attain procedural economies by means of a 10 per cent reduction in fines in addition to any reduction granted under the Leniency Notice.

BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY
URÍA MENÉNDEZ

Anna Lyle-Smythe
Murray Reeve
Hans-Jörg Niemeyer
Laura Stoicescu
Jolling de Pree
Helen Gornall

anna.lyle-smythe@slaughterandmay.com
murray.reeve@slaughterandmay.com
hans-joerg.niemeyer@hengeler.com
laura.stoicescu@hengeler.com
jolling.depree@debrauw.com
helen.gornall@debrauw.com

Square de Meeûs 40
1000 Brussels
Belgium

www.belex.com
www.bredinprat.fr
www.debrauw.com
www.hengeler.com
www.slaughterandmay.com
www.uria.com

Finland

Mikael Wahlbeck and Antti Järvinen

Hannes Snellman Attorneys Ltd

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation is set out in the Finnish Competition Act (948/2011) (the Competition Act). The Competition Act contains a prohibition against anticompetitive agreements and concerted practices, a prohibition against abuse of dominant position as well as provisions on merger control.

The current Competition Act entered into force on 1 November 2011 following a substantial review of the old law. The material provisions of the Competition Act are fully harmonised with articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Related legislation includes provisions on the functions and powers of the authorities, such as the Act on the Finnish Competition and Consumer Authority (661/2012), the Decree on the Finnish Competition and Consumer Authority (728/2012) and the Market Court Act (99/2013).

The Finnish Competition and Consumer Authority (FCCA) has also issued a set of guidelines relating to the application of the Competition Act, including guidelines on leniency and penalty payments.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The main institutions involved in cartel matters are:

- the FCCA, which is responsible for investigating competition restrictions;
- the Market Court, which may, for example, impose fines on undertakings upon the FCCA's proposal; and
- the Supreme Administrative Court (SAC), to which the decisions of the Market Court can be appealed.

The FCCA is an administrative authority that operates under the Ministry of Employment and the Economy. It was established at the beginning of 2013 by joining the operations of the Competition Authority and the Consumer Agency. The FCCA is headed by a Director General and it has four units dealing with competition matters. Unlike, for example, the European Commission, the FCCA does not itself have the authority to impose fines on undertakings for competition infringements but shall make a penalty payment proposal to the Market Court.

The Market Court is a special court for market law, competition law, public procurement and civil IPR cases in Finland. It has a dual role in competition restriction matters. On the one hand, it is the first instance ruling on the FCCA's penalty payment proposals, and on the other hand, it is the first instance of appeal for decisions made by the FCCA.

The SAC is the ultimate appellate body in competition cases. The SAC is the second and final instance of appeal for the FCCA's decisions and the first and final instance of appeal for the Market Court's decisions imposing fines.

In addition to the three main institutions, the regional state administrative agencies have powers to investigate competition

infringements in cooperation with the FCCA. In practice, however, it is almost exclusively the FCCA that bears responsibility for the investigation of suspected cartels.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The most recent overall review of Finnish competition law was conducted with the new Competition Act entering into force on 1 November 2011. The new Competition Act brought Finnish competition law even more into line with that of the EU and introduced some changes to, for example, the provisions concerning penalty payments. There have since been a few amendments to the act, but these have not affected cartel matters.

Following the entry into force of the EU Directive on Antitrust Damages Actions on 26 December 2014, the Ministry of Employment and the Economy set up a working group to prepare the directive's implementation into Finnish legislation. In June 2015 the working group proposed a new Act on Antitrust Damages Actions. The government bill was published in May 2016 and the final act came into effect on 26 December 2016.

A working group set up by the Ministry of Employment and the Economy has assessed the need to reform the Competition Act. A government bill of 24 May 2018 proposes that the FCCA is granted further powers, including the right to continue dawn raid inspections of electronic information at the FCCA's premises. The proposed amendments are expected to enter into force as soon as possible.

There have also been proposals for sector-specific competition rules concerning the producers of healthcare and social services, but so far these have not led to any new legislation.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The prohibition against anticompetitive agreements and concerted practices, section 5 of the Competition Act, corresponds to article 101(1) TFEU with the exception that it does not require that trade between the EU member states is affected. It prohibits all agreements and concerted practices between undertakings or associations of undertakings, which have as their object or effect the prevention, restriction or distortion of competition. Section 5 contains a list of practices which are in particular prohibited:

- directly or indirectly fixing purchase or selling prices or any other trading conditions;
- limiting or controlling production, markets, technical development or investment;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

As the list is not exhaustive, the FCCA and the courts have also found other practices, such as collective boycotts and exchange of sensitive information, to be in violation of section 5 of the Competition Act.

Competition restrictions prohibited by section 5 may be covered by the legal exemption in section 6 of the Competition Act, the criteria of which are similar to those of article 101(3) TFEU. In practice, however, hard-core restrictions are unlikely to qualify for an exemption.

If a competition restriction affects trade between member states, the FCCA and the Finnish courts apply article 101 TFEU directly.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The Competition Act is a general act that, as a main rule, covers all economic activities. However, by virtue of section 2 of the Competition Act, certain sectors are partly excluded from its scope of application: the act is not applicable to agreements or arrangements concerning the labour market or to arrangements by the agricultural sector if such arrangement fulfils the substantive requirements established in accordance with article 42 TFEU. There are no specific rules governing cartel behaviour in specific industries.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Competition Act applies to economic activity carried out by business undertakings. According to section 4 of the Competition Act, the term business undertaking comprises natural persons as well as private or public legal persons engaged in economic activity.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Competition Act is not applicable to competition restrictions outside Finland unless such restrictions are directed against Finnish customers. The Finnish government may nonetheless prescribe by decree that the act is extended to cover a competition restriction outside Finland if this is required by an agreement made with a foreign state, or if it is in the interests of Finland's foreign trade.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no specific exemption or defence. Regarding the applicability of the Competition Act to conduct taking place outside Finland, refer to question 7.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

If the FCCA suspects that an undertaking or an association of undertakings is engaged in conduct contrary to the Competition Act or EU competition law, it shall initiate the necessary proceedings to eliminate such conduct. Investigations into suspected competition restrictions can be commenced by the FCCA either on its own initiative, or following a complaint or a leniency application. Investigations of serious competition restrictions typically start with the FCCA's dawn raid at the undertakings' business premises.

Further along in the investigations, the FCCA normally requests written explanations and clarifications and may also conduct interviews. Having assessed all the obtained information, the FCCA generally either prepares a draft penalty payment proposal for the undertaking to comment on or closes the investigation without making any penalty payment proposal.

As the FCCA can merely make a penalty payment proposal, it is only after the Market Court proceedings that there is an appealable decision regarding the penalty payment. Other FCCA decisions can generally be appealed to the Market Court.

There are no legal time frames for the FCCA investigations apart from the statutory limitation periods.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The FCCA has extensive investigative powers that are largely similar to those of the Commission.

An undertaking or an association of business undertakings shall be obliged, at the request of the FCCA, to provide the authority with all the information and documents needed for the investigation of the content, aim and effect of a competition restriction. Such request may be supported by a conditional fine. Furthermore, submitting incorrect information to the authority such as the FCCA may cause criminal liability under the Finnish Penal Code.

The FCCA has the right to conduct inspections to supervise compliance with the Competition Act and is, at the request of the Commission, obliged to conduct an inspection as prescribed in EU competition law. After the 2011 reform of the Competition Act, the FCCA can now also carry out inspections outside business premises such as at private residences of directors with an authorisation of the Market Court. The Market Court does not grant an authorisation if it considers a search to be arbitrary or excessive.

The Competition Act does not expressly require the FCCA to present a written inspection decision when carrying out a dawn raid. It is nonetheless established practice that the FCCA issues a decision describing the scope and the aim of the inspection as well as the sanctions for opposing the inspection.

The FCCA officials must be allowed to enter any business premises, storage areas, land and vehicles in an undertaking's possession. Further, the officials performing the inspection shall have the right to examine all correspondence, financial accounts, computer files and other documents that may be relevant for ensuring compliance with Competition Act. The officials may also take copies of documents and seal business premises, books or records. When necessary, the police shall upon request provide official assistance in conducting the inspection.

The officials of the FCCA are also empowered to request oral explanations and conduct interviews on site as well as to record the interviews. The questions should be directly connected to the subject matter of the inspection. The officials of the FCCA are entitled to present only such questions that are of a factual nature (ie, necessary for identifying documents and understanding other facts). Further, the FCCA has a right to invite representatives of undertakings or persons who may, for a justified reason, be suspected of having acted in the implementation of a competition restriction, to appear before it. These interviews may also be recorded.

Undertakings' rights of defence, which pose certain limits on the FCCA's investigative powers, are set out in section 38 of the Competition Act. For example, an undertaking is not under an obligation to submit to the FCCA documents that contain confidential correspondence between an outside legal counsel and the client. Moreover, when an undertaking responds to the questions raised by the FCCA, it cannot be obliged to concede it has participated in a competition restriction.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The FCCA is a member of the European Competition Network (ECN), the main purpose of which is to secure an efficient and uniform application of EU competition rules throughout the EU.

The FCCA also actively cooperates for example with the Nordic competition authorities and partakes in the international cooperation conducted within the Organisation for Economic Co-operation and Development, the International Competition Network and the European Competition Authorities.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The main interplay for the FCCA is with other European competition authorities within the framework of the ECN. As members of the ECN assist each other in conducting investigations of competition law infringements, the FCCA has, for example, conducted investigations in Finland on behalf of other competition authorities, and has received similar assistance from other competition authorities.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The FCCA is responsible for investigating suspected competition infringements and adopting the infringement decisions to that effect. It has competence to, for example, order an undertaking to terminate conduct that violates competition rules, but cannot impose any fines.

Should the FCCA consider it necessary to impose a fine for anti-competitive conduct, it has to make a penalty payment proposal to the Market Court. The Market Court provides the undertaking to which the proposal relates with an opportunity to respond in writing or orally. The Market Court shall include a statement of reasons in its decision that indicates which facts and evidence have affected the decision and on which legal grounds it is based. The Market Court decision may be appealed to the SAC.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof to demonstrate a competition infringement lies with the FCCA. The FCCA must provide sufficient proof to establish that there has been an infringement. However, to the extent an undertaking wishes to benefit from an exemption under section 6 of the Competition Act (or article 101(3) TFEU), the burden of proof lies with the concerned undertaking.

There are no statutory provisions as to the level of proof required in competition restriction matters. On the contrary, the courts follow the principle of free consideration of evidence. The SAC has confirmed in its rulings that the European Convention on Human Rights and the EU Charter of Fundamental Rights are applicable in competition cases where penalty payments have been proposed. At the same time, however, the SAC case law shows that these principles are not applied to the same extent in competition matters as in criminal matters.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Finnish courts follow the principle of free consideration of evidence, and therefore circumstantial evidence can also be used to establish an infringement of competition rules.

16 Appeal process

What is the appeal process?

As the FCCA can merely make a penalty payment proposal, it is only after the Market Court proceedings that there is an appealable decision regarding the penalty payment. Most other FCCA decisions may be appealed to the Market Court. Therefore, a decision by the FCCA declaring an infringement of competition rules without any penalty payment proposal can generally be appealed. In the same manner, a decision finding that no infringement has occurred can be appealed by a third party if it has a direct impact on that party. Appeals shall normally be lodged within 30 days from receipt of the decision concerned.

A Market Court decision under the Competition Act is appealable to the SAC. Any person to whom the decision is addressed or whose right, obligation or interest is directly affected by the decision, as well

as the FCCA, has the right of appeal. An appeal shall be lodged within 30 days of notice of the Market Court decision.

In the SAC, proceedings are predominantly conducted in writing whereas oral hearings are usually limited in scope.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions for competition law infringements in Finland. The Ministry of Employment and the Economy and the FCCA have investigated the possibility of extending personal criminal liability to cartel infringements. However, such criminalisation depends on political decision-making and is not likely in the near future.

Submission of false evidence to the FCCA in the course of its investigations may result in criminal sanctions in accordance with the Finnish Penal Code. To date, however, this has not been applied in practice.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Upon the proposal of the FCCA, the Market Court may impose a penalty payment on undertakings that have violated competition rules unless the conduct is deemed minor or the imposition of fine otherwise unjustified with respect to safeguarding competition. In fixing the amount of fine, the gravity, extent and duration of the competition restriction shall be taken into account. Repeat offenders may be fined more heavily. The amount of the fine may be up to 10 per cent of the total turnover of the undertaking concerned in the last year of its cartel participation.

A fine cannot be imposed if the FCCA has not made a penalty payment proposal to the Market Court within five years from the occurrence of the competition restriction or, in the case of a continued infringement, from the date on which the restriction ended. The five-year limitation period is interrupted by certain FCCA investigatory measures. Moreover, there is an absolute limitation period according to which a fine cannot be imposed if the FCCA has not made a penalty payment proposal to the Market Court within 10 years of the applicable dates (date on which the restriction occurred, or on which it ended in case of a continued infringement).

The FCCA may also order an undertaking to cease the activities prohibited in the Competition Act (or article 101 TFEU), and support its order by imposing a conditional fine. A conditional fine can also be used to enforce an undertaking's obligation to provide information and documents as well as the obligation to contribute to the inspections conducted under the Competition Act. The enforcement of conditional fines rests with the Market Court.

By a decision, the FCCA may order that commitments offered by the parties shall be binding if the commitments are such that they eliminate the restrictive nature of the conduct. The FCCA may also take interim measures if the application or implementation of a competition restriction shall be prevented at once. Prior to issuing an interim order, the FCCA should provide the undertaking with an opportunity to be heard. However, this is not necessary if the FCCA considers that the urgency or another specific weighty reason demands otherwise.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

According to section 13 of the Competition Act, the amount of the penalty payment shall be based on an overall assessment, and in determining it, attention shall be paid to the nature and extent, the degree of gravity, and the duration of the infringement. The penalty payment shall not exceed 10 per cent of the turnover of an undertaking or association of undertakings concerned during the year in which the undertaking or association of undertakings were last involved in the infringement. In addition, the FCCA has issued guidelines on the assessment of the quantum of penalty payment and on the immunity

from and reduction of fines in cartel cases. The guidelines are not binding on the FCCA or the courts, but at least the FCCA is unlikely to deviate from them.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

According to section 81 of the Finnish Act on Public Procurement that entered into force on 1 January 2017, debarment from government procurement procedures is available as a discretionary sanction for cartel infringements. The decision on debarment is made by the contracting entity. The act does not provide for any set time period.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

As noted, criminal sanctions for cartel activities are not available under the Competition Act. Therefore, the sanctions that the FCCA and the Market Court can impose are administrative in nature. Civil law claims for liability for damage can be pursued simultaneously in respect of the same infringement. Such claims may also be made as stand-alone actions irrespective of any prior FCCA investigation or court decision.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Private damage claims are available under Finnish law. The Finnish Act on Antitrust Damages Actions came into effect on 26 December 2016. This act implemented the EU Directive on Antitrust Damages Actions and marked considerable changes to the previous regime.

All persons who have suffered harm caused by an infringement of competition law have a right to full compensation. This compensation shall cover actual loss and loss of profit, as well as payment of interest from the time the harm occurred until compensation is paid. The compensation shall not exceed the amount of the actual harm suffered – hence, only single recovery can be ordered.

According to the Finnish Act on Antitrust Damages Actions, compensation can be claimed by anyone who suffered damage, irrespective of whether they are direct or indirect purchasers (or sellers, as the case may be). In order to avoid overcompensation, compensation for actual loss at any level of the supply chain shall not exceed the harm suffered at that level. The act also contains rules concerning distribution of the burden of proof relating to passing on of the overcharge.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

The Finnish Act on Antitrust Damages Actions does not contain any provisions concerning class actions. The Finnish Act on Class Actions (444/2007) entered into force on 1 October 2007. The act may be applied between consumers and undertakings in matters within the competence of the Finnish Consumer Ombudsman. It is therefore not applicable to competition restriction cases.

Notwithstanding the above, a representative action has been held admissible under Finnish law by the Helsinki District Court in July 2013 in an interim decision. The District Court's finding would have been challengeable upon appeal of the final ruling but the case was settled by the parties in May 2014. Thus, there is no established case law on the question of whether, and under which conditions, representative actions on damages concerning competition infringements are considered admissible under Finnish law.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

A leniency programme was first implemented in Finland in May 2004. In accordance with section 14 of the Competition Act, the first undertaking to expose a cartel may benefit from immunity if the undertaking:

- produces information or evidence, on the grounds of which the FCCA may conduct a dawn raid; or
- following such a dawn raid, delivers information or evidence, on the grounds of which the FCCA can establish that section 5 of the Competition Act (or article 101 TFEU) has been violated.

Section 14 of the Competition Act applies only where competitors have agreed to fix purchase or selling prices or other trading conditions, to limit production or sales or to share markets, customers or sources of supply. Only one undertaking can obtain full immunity. This means that the undertaking must be first to provide the required information or evidence to the FCCA. An undertaking that has coerced others to participate in the infringement cannot benefit from full immunity but can still qualify for a reduction in fine. A leading role in the formation and sustenance of the cartel does not as such debar the undertaking from applying for full immunity.

An immunity applicant is expected to provide the FCCA with comprehensive and precise information on:

- the nature of the competition restriction;
- which companies have been involved;
- which product markets are concerned;
- which geographic areas are concerned;
- how long the competition restriction has been in force; and
- how the competition restriction has been implemented.

In addition, the immunity applicant must satisfy all the criteria set out in section 16 of the Competition Act whereby it must:

- immediately cease participation in the competition restriction unless the FCCA has advised otherwise;
- cooperate with the FCCA throughout the entire investigation;
- not destroy any relevant evidence prior to or after submitting the application; and
- refrain from disclosing to third parties the fact that it has made or intends to make a leniency application or the content of said application.

Once the undertaking seeking immunity has provided the FCCA with all the required information and documents in its possession, the FCCA shall inform the undertaking in writing whether it qualifies for conditional immunity. The FCCA shall issue a final written decision on the issue at the end of the procedure. This decision cannot be appealed.

The FCCA's guidelines contain further details on the FCCA's leniency programme.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Undertakings that are not first in to submit the required information and documents to the FCCA may receive a reduction in fine under section 15 of the Competition Act also after an immunity application has been made by another undertaking. To receive a reduction, an undertaking must provide the FCCA with information and evidence that is significant for establishing the competition restriction or its entire extent or nature before the FCCA has obtained the information from elsewhere. An undertaking applying for reduction in fine must fulfil the same conditions set out in section 16 of the Competition Act as an immunity applicant.

The reduction depends on the order in which the applicant submitted the required information and evidence to the FCCA. The fine shall be reduced by 30 to 50 per cent if the undertaking is the first one to submit significant information, by 20 to 30 per cent if the undertaking

Update and trends

Cartel enforcement in Finland has been focused on private enforcement actions. On 6 September 2017, the Finnish Supreme Court decided on the requests for leave to appeal in the damages cases related to the asphalt cartel previously ruled on by the Helsinki Court of Appeal on 20 October 2016. The Supreme Court granted a partial leave to appeal to Lemminkäinen and the city of Vantaa. In contrast, the applications for leave to appeal of most other parties were dismissed entirely. In December 2017, the Supreme Court made a request for a preliminary ruling to the ECJ related to the question of whether economic succession is applicable in competition law damages cases, and if so, under which circumstances.

The other most significant recent actions were based on a Market Court decision concerning a competition restriction in the raw wood market. Originally, there were over 1,500 separate but related private enforcement cases, with the aggregate principal amount of the claims totalling several hundred million euros. In February and November 2016, the Finnish Supreme Court issued precedential decisions setting out principles regarding statute of limitation. As a result of the said judgments, over 1,000 private plaintiffs withdrew their claims. The

remaining claims were heard in three separate court proceedings. The Helsinki District Court dismissed all claims, following which most claimants decided not to appeal or subsequently withdrew their appeals. The Helsinki Court of Appeal rejected the appeal of the largest claimant Metsähallitus in May 2018. Metsähallitus has requested a partial leave to appeal from the Supreme Court.

On the public enforcement side, there is one pending matter where the FCCA had proposed that the Market Court should impose a fine of €35 million on one participant in an alleged cartel concerning the Finnish power transmission line market. In March 2016, the Market Court rejected the proposal as time-barred. The FCCA has appealed the decision to the Supreme Administrative Court. In another matter that has received media attention, the FCCA had proposed that the Market Court should fine nine parties in total €38 million for their involvement in an alleged bus cartel. In its decision of 14 December 2017, the Market Court rejected considerable parts of the proposal and imposed fines amounting in total only to approximately €1 million. The decision has been appealed to the Supreme Administrative Court.

is second and by 20 per cent at most for other applicants fulfilling the criteria.

According to the FCCA's guidelines, the amount of the reduction depends on how significant the provided information and evidence has been for establishing the competition restriction. The FCCA may in its penalty payment proposal to the Market Court propose a reduction of fines concerning one or several cooperating undertakings. The Market Court is not bound by the proposal.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The Competition Act does not provide for an 'immunity plus' or 'amnesty plus' option. Applicants submitting significant information and evidence to the FCCA after the immunity applicant may be entitled to a reduction in the penalty payment as set out in section 15 of the Competition Act (see question 25).

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no set deadlines for making an application for immunity or leniency. As only the first undertaking to submit the required information and evidence is entitled to full immunity, timing is essential.

It is a normal practice that an undertaking first conducts a preliminary internal analysis to assess whether it is possible that it has engaged in a competition infringement which could qualify for immunity or leniency. Following this, an undertaking may contact the FCCA anonymously (typically through an external counsel) to ascertain whether immunity is still available. This contact does not affect the order of priority in case there are several applicants for immunity but the undertaking will only be told if another cartel participant has already applied for immunity. An application should be submitted as soon as possible following these steps.

A system similar to the Commission's marker procedure is operated by the FCCA. According to section 17 of the Competition Act, the FCCA may set a deadline for an applicant to provide the required information and evidence. As long as the applicant provides the information within the required time frame, the moment of application is deemed to be the point in time when the first application to the FCCA was submitted.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

An immunity applicant must provide all relevant information and evidence in its possession to enable the FCCA to conduct an inspection, or following an inspection, to enable the establishment of an infringement.

To receive a reduction in fine, subsequent cooperating parties must submit to the FCCA such information and evidence that is significant for establishing an infringement or its entire extent or nature before the authority has received the information from any other source. See questions 24 and 25 for further details.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Competition Act does not contain provisions on the issue of confidentiality in competition proceedings. Therefore, the Act on Openness of Government Activities (621/1999, as amended) applies. The act applies to documents in the possession of a public authority that have been either prepared by the authority or provided to the authority for the consideration of the matter. Official documents are public unless a specific legal exception applies. As a main rule, a party to the proceedings shall have access even to the contents of such a document which is not public, if it may influence the consideration of the matter. Such access may be denied only under certain conditions, for example, where it would be contrary to a very important public or private interest.

In a previous competition restriction case, one of the investigated companies requested disclosure of materials that its competitor had submitted to the FCCA pursuant to a leniency application. The FCCA refused to grant access. Upon appeal, the Administrative Court of Helsinki concluded that the requested materials were not public. The competitor of the leniency applicant was considered as a party to the proceedings. Access to the materials was nonetheless denied by the Administrative Court on the basis that such access would have been contrary to a very important public interest at the stage when the matter was still pending before the FCCA. The SAC upheld the decision.

Further, according to section 17 of the Competition Act, information and evidence provided to the FCCA in immunity or leniency application can only be used in handling of the public enforcement case by the FCCA, the Market Court or the SAC. According to the government bill, such information and evidence cannot therefore be used, for example, for private damages actions. The FCCA may share the documents with other members of the ECN.

The new Finnish Act on Antitrust Damages Actions that came into force in December 2016 contains rules on the use of leniency material in private enforcement proceedings. The said rules largely follow the EU Directive on Antitrust Damages Actions.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The Competition Act does not provide for any settlement procedure for cartel cases.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The Competition Act only applies to undertakings engaged in economic activity. Therefore, the treatment of current and former employees of a corporate defendant is not within the scope of the Competition Act.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

See questions 24 and 27.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are currently no major ongoing assessments or reviews of the immunity/leniency regime. In the government bill of 24 May 2018 concerning certain amendments to the Competition Act, it is proposed that the scope of utilising the short-form leniency application is somewhat widened.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

Upon request, the undertaking under investigation has the right to receive information, orally or in another appropriate manner, on the documents concerning the investigation and the phase of the proceedings insofar as it cannot harm investigations in the matter, unless otherwise provided in the Act on the Openness of Government Activities (621/1999, as amended) or EU laws.

The Act on Openness of Government Activities applies to documents in the possession of a public authority that have been either prepared by the authority or provided to the authority for the consideration of the matter. Official documents are public unless a specific legal exception applies. As a main rule, a party to the proceedings shall have access even to the contents of such a document which is not public, if it may influence the consideration of the matter. Such access may be denied only under certain conditions, for example, where it would be contrary to a very important public or private interest.

An undertaking has the right to be heard prior to the FCCA making a proposal for a penalty payment, or a decision stating a violation of sections 5 or 7, or articles 101 or 102 of the TFEU. The FCCA shall inform the undertaking in writing of the claims and grounds relating to the issues that have arisen during the investigation. The FCCA shall fix a reasonable time limit within which the undertaking may present its comments either orally or in writing.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

The FCCA's investigations of the suspected cartel infringements and the following Market Court and SAC proceedings are directed against undertakings only. An undertaking's employees are therefore out of the scope of the Competition Act. However, should an undertaking and its employee have diverging interests, it is advisable that they are represented by separate counsel.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

It is possible for a counsel to represent multiple corporate defendants. However, a conflict of interest between the defendants may in practice prevent such representation.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Penalties cannot be imposed on an undertaking's employees under the Competition Act. If there are legal costs associated with an employee as a result of his or her involvement in the FCCA's investigations, there is no prohibition under law for a corporation to pay them.

HANNES SNELLMAN

Mikael Wahlbeck
Antti Järvinen

mikael.wahlbeck@hannessnellman.com
antti.jarvinen@hannessnellman.com

Eteläesplanadi 20/PO Box 333
00130/00131 Helsinki
Finland

Tel: +358 9 228 841
Fax: +358 9 177 393
www.hannessnellman.com

38 Taxes**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

Under Finnish tax laws, fines are generally not tax-deductible. By contrast, recent tax authority praxis indicates that private damages are tax-deductible under certain circumstances.

39 International double jeopardy**Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

So far, there have not been any instances where the FCCA or Finnish courts would have taken into account penalties imposed in other jurisdictions. This is the case also concerning private damages claims. In such claims, Finnish courts would in any event have to apply the prohibition against unjust enrichment according to which damages shall not exceed the actual damage suffered by the claimant.

40 Getting the fine down**What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

An undertaking can take advantage of the immunity and leniency procedure as described in more detail in questions 24 to 28. The existence of a compliance programme does not, as such, affect the level of the fine. According to section 13 of the Competition Act, the amount of the penalty payment shall be based on an overall assessment and, in determining it, attention shall be paid to the nature and extent, the degree of gravity and the duration of the infringement.

France

Faustine Viala and David Kupka

Willkie Farr & Gallagher LLP

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant substantive legislation regarding the prohibition of anti-competitive practices, including cartels, is set out under articles L420-1 to L420-7 of the French Commercial Code (FCC) (see question 4). Cartels, more specifically, are covered by the prohibition of anticompetitive agreements set out under article L420-1 of the FCC. The French Competition Authority (FCA) is also competent to apply articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Procedural rules are set out under articles L450-1 to L450-8 of the FCC (investigation powers of the FCA and of the French Minister for the Economy) and articles L461-1 to L470-8 (proceedings before the FCA).

Specific legislation relating to private actions is set out under articles L481-1 to L483-11 of the FCC.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The main authority responsible for enforcing the prohibition of cartels is the FCA, an independent administrative authority created in 2009 to replace the former Competition Council. The FCA has powers of investigation, prosecution, and decision-making (including the power to impose sanctions, see questions 17 to 19).

The first two powers are exercised by the FCA's investigating service, composed of *rapporteurs*, under the direction of a *rapporteur général*.

The decision-making power is exercised by the *collège* of the FCA, composed of 17 members who do not participate in investigations. The FCA is headed by a President, appointed for five years, who is a member of the *collège*. Mr Bruno Lasserre has occupied this position from 2004 until 2016 (as President of the Competition Council until 2009, then as President of the FCA). Although he was reappointed in 2014, Mr Lasserre announced in September 2016 that he would be leaving the FCA as of October 2016. He was replaced as President by Mrs Isabelle de Silva, who has been a member of the *collège* since 2014.

The Minister for the Economy also has enforcement powers with respect to French competition rules (article L464-9 of the FCC), where the following conditions are met:

- the practices in question only affect local markets;
- they do not fall under articles 101 and 102 TFEU;
- the individual turnover in France of each undertaking does not exceed €50 million; and
- the combined turnover of all undertakings does not exceed €200 million.

Finally, French courts also have the power to enforce EU and French competition rules. The French Civil Code allows any entity or individual to bring civil actions before national courts if they have suffered damages from anticompetitive practices (see question 22).

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

Recently, there have been a few changes to the French regime regarding anticompetitive practices:

- the 'Macron' Law of 6 August 2015 strengthens the powers of the FCA within the ordinary investigation provided for in article L450-3 of the FCC (see question 10). This law also amended the settlement procedure in front of the FCA. Undertakings that do not contest the allegations of anticompetitive practices will now be proposed a settlement laying down minimum and maximum amounts of penalty (see question 30);
- the 'Hamon' Law of 17 March 2014 introduces a 'class action': consumers who consider themselves to be the victims of anticompetitive practices condemned as such by a final decision of a competition authority can be represented in court by a group action brought by a consumer association (see question 23); and
- Directive 2014/104/EU of 26 November 2014 provides for solutions allowing the victims of anticompetitive practices to be fully compensated. It also aims at increasing the effectiveness of leniency programmes. The transposition of this directive into national law took place on 9 March 2017 through Order No. 2017-303, supplemented by its implementing Decree No. 2017-35.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article L420-1 of the FCC prohibits concerted practices, agreements and alliances, express or tacit, which have as their object, or may have as their effect, the prevention, restriction or distortion of competition in a market.

This text does not provide for an exhaustive list of prohibited practices. There are no specific provisions dealing with group boycotts or bid rigging, which are however caught by the general prohibition set out in this text.

As is the case under EU law, French authorities applying competition rules traditionally consider that evidence of effect on competition is not necessary where the object of an agreement is to restrict competition: such 'by object' restrictions are 'per se' illegal. Cartels are the most obvious example of 'by object' anticompetitive practices.

In any event, it is not necessary to establish that the restriction of competition was knowingly planned and intended by the parties, as repeatedly stated by the FCA: 'the lack of anticompetitive intent of the parties to the agreement has no bearing on the qualification of such agreement.'

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

Article L420-4 of the FCC sets out two exemptions from cartel prohibition.

The first exemption covers practices implemented in application of a statute or regulation. For instance, in 2010, the French Court of Cassation (the highest court in the French civil judicial system – see question 16) held that the tariffs for the consultation and for the surgical acts of certain doctors were subject to price regulation in France, which excluded the application of article L420-1 of the FCC.

The second exemption concerns practices that the authors can prove: (i) have the effect of ensuring economic progress, including by creating or maintaining jobs; and (ii) reserve for users a fair share in the resulting profit, without giving the undertakings involved the opportunity to eliminate competition for a substantial part of the products in question. This mainly applies to the agricultural sector. Indeed, practices consisting in organising, for agricultural products or products of agricultural origin, under the same brand or trade name, production volumes and quality or even a commercial policy, including the setting of a common price, might be exempted if they are essential to achieve economic progress. For instance, in March 2012, the FCA fined endive growers and their professional organisation approximately €4 million for price fixing via exchanges of sensitive information. However, the Paris Court of Appeal ruled, in a judgment dated 15 May 2014, that the endive growers' organisation had not exceeded its legal mission consisting of price regulation regarding the regulatory specificities of the sector and regarding the Common Agricultural Policy.

6 Application of the law

Does the law apply to individuals or corporations or both?

French cartel law applies to any undertaking engaged in a production, distribution or service activity, regardless of its nature or legal form. This may apply to both natural and legal individuals, although in practice this mostly concerns corporations.

French law also provides for a criminal responsibility of natural individuals involved in anticompetitive practices such as cartels, under certain circumstances (article L420-6 of the FCC – see question 19). Criminal proceedings before criminal courts against individuals on the basis of this provision are separate from those brought before the FCA on the basis of article L420-1 of the FCC.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

French cartel rules apply as soon as such anticompetitive practice affects one or more markets located in France, in which case it will be assessed in the light of article L420-1 of the FCC. Anticompetitive practices committed directly or indirectly through the intermediary of a subsidiary located outside France are expressly included within the scope of the prohibition set out under article L420-1 of the FCC if they have anticompetitive effects in France.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The French law does not provide for an explicit exemption or defence for export cartels. We are not aware of any case law specific to export cartels. However, the Paris Court of Appeal ruled in a judgment dated 4 March 2008 that an export prohibition clause in a distribution agreement infringed competition law because it had an anticompetitive object.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The officers authorised to carry out investigations with respect to alleged anticompetitive practices are the agents of the FCA and of the General Direction of Competition, Consumption and Fraud Prevention (DGCCRF) (article L450-1 of the FCC).

Investigations by the FCA or the DGCCRF may be initiated on the basis of a complaint filed by an undertaking, or of their own initiative. The FCA may also start investigations on the basis of a leniency application (see question 26), while the DGCCRF may be seized by a referral from the FCA in cases where the latter deems itself incompetent.

Once the FCA is in charge of a case, an investigating agent (the *rapporteur*) is appointed to conduct the investigation under the supervision of the *rapporteur général*. The *rapporteur* will conduct further investigations in the context of one of the following: the ordinary investigation or the investigation under judicial control (see question 10).

There are no time limitations applicable to investigations by the FCA or DGCCRF.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Agents of the FCA and of the DGCCRF may conduct two types of investigation.

Ordinary investigations

The powers granted to FCA and DGCCRF agents in the context of ordinary investigations are governed by article L450-3 of the FCC.

Under this provision, agents have the power to:

- enter any premises, land or means of transport for professional use;
- request the communication of books, invoices and all other professional documents and obtain or copy by any means and on all media;
- gather convened on site or the information and justifications; and
- ask the authority to appoint an expert to carry out any contradictory expertise.

The 'Macron Law' of 2015 further allows agents to require the disclosure and obtain or take copies of business records 'of any kind, wherever they are, in order to facilitate the fulfilment of their mission'. On this occasion, they 'may require the necessary means to carry out their investigation'.

Investigations under judicial control

The powers granted to FCA and DGCCRF agents in the context of investigations under judicial control are governed by article L450-4 of the FCC.

First, the FCA or the Minister for the Economy must obtain judicial authorisation to conduct such heavy investigations, in the form of a court order.

If granted, FCA or DGCCRF agents may, accompanied by one or more police officers, visit all places, make searches, proceed to the seizure of documents and any data medium (dawn raids). They may also proceed with the sealing of all commercial buildings, documents and materials within the limits of the duration of the visit to the premises.

The visited person has the right to be assisted by external legal counsel, which must be specified in the court order, and may appeal such order up to 10 days after its notification. However, the exercise of such rights of assistance or appeal does not suspend the course of the investigations.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

At the EU level, the FCA is a member of the European Competition Network (ECN), which has led it to cooperate with the European

Commission (the Commission) and the National Competition Authorities (NCAs) of other member states.

The FCA is entitled to share with other NCAs information and documents that would already be in its possession, or to request such information and documents on behalf of foreign NCAs, to the extent that the latter would be bound by reciprocal obligation towards the FCA (article L462-9 of the FCC).

With respect to international matters, the FCA is notably active in:

- the International Competition Network: the FCA acted in 2015 as vice-chair of the steering committee, co-chair of the group working on pedagogy of competition and the liaison function with non-government representatives;
- the OECD Competition Committee; and
- the United Nations' Intergovernmental Group of Experts (IGE) on Competition Law and Policy, which meets annually in Geneva.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The FCA very actively cooperates with the Commission and other NCAs, in particular in the context of the ECN.

Regarding cooperation with NCAs of other member states, the FCA may request the communication of information or documents, as well as the performance of inspections or other fact-finding measures on their own territory with a view to establishing an infringement of article 101 or 102 of the TFEU (Regulation (EC) 1/2003, article 22, section 1).

Regulation (EC) 1/2003 also organises the cooperation between NCAs (including the FCA), which have the power to enforce article 101 of the TFEU on their territory, and the Commission. In particular, the FCA shall inform the Commission before starting formal investigation measures when acting under 101 TFEU and shall be relieved of its competence to apply this article in case the Commission initiates proceedings. The FCA also actively cooperates with the Commission in the context of the latter's investigations, by performing investigation measures and communicating any relevant information or document.

In 2017, the FCA provided assistance to investigations of anticompetitive practices by the Commission or NCAs of other member states (Greece, Luxembourg) in two instances, and requested assistance of NCAs (Germany, Italy, the Netherlands) in three instances. It submitted requests for documents collected by other NCAs in five instances, and received three requests for information, from German, Greek and Luxembourg NCAs.

A recent example of cooperation between EU competition authorities is the *Booking.com* case. In France, investigations were initiated by the FCA following complaints by hotel chains and unions with respect to certain contractual clauses imposed by the online booking platform Booking.com. These practices were also under scrutiny in Italy and Sweden, and the French, Swedish and Italian competition authorities worked closely together, as well as with the Commission, in order to obtain similar commitments in the three countries. In France, commitments were given by Booking.com in April 2015. The FCA is currently a member of a study group designed to measure the impact of these commitments, together with the Commission and nine other NCAs (Belgium, Czech Republic, Germany, Hungary, Ireland, Italy, the Netherlands, Sweden and the UK). In this context, the FCA indicated in July 2016 that harmonised questionnaires would be sent to hotels located in these 10 countries. On 9 February 2017, the FCA conducted an initial intermediary assessment of the commitments made by Booking.com and indicated that it will remain particularly vigilant to the state of competition in the sector. It has not ruled out the possibility of issuing an opinion on its own initiative if needed.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Adjudication powers with respect to cartels lie notably with the FCA (see below) and national courts (see question 24).

A first phase (investigation and prosecution phase) allows the FCA's agents to gather all the relevant information and documents necessary to determine the existence of a cartel, or, more generally, an anticompetitive practice (see question 10).

At the end of the investigation, the FCA may either issue a statement of objections (SO) or dismiss the case. An SO is issued when the FCA has sufficient evidence of the existence of facts that are likely to amount to anticompetitive practices. The parties and the government, which is associated to every proceeding by the FCA, have two months (that may be extended by one additional month) to submit their comments. The FCA then issues a report, to which the parties and the government may respond within two months.

The case is then discussed before a different body of the FCA, the *collège*, which has decision-making powers (decision phase). After a hearing with the parties, the FCA will issue its decision, which may:

- impose sanctions in cases where it finds that article L420-1 of the FCC has been infringed (see questions 19 to 21); or
- dismiss the case, when the facts are time-barred, the FCA is not competent, or the practices are not sufficiently supported in fact or it has not been proved that they constitute an anticompetitive practice (see question 16).

For some anticompetitive practices, the FCA's decision may also accept commitments, in which case no sanction will be imposed (see question 32). This procedure, however, does not apply to cartels.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

Before the FCA, the latter bears the burden of providing the evidence to support the existence of the facts and establish that they amount to an anticompetitive practice. When proceedings are initiated by filing a complaint, the plaintiff has the obligation to provide the FCA with the information and documents supporting its claim.

Before national courts, the party alleging a breach of competition rules in case of proceedings must provide the relevant evidence.

Conversely, the burden of proof lies with the defendant who seeks the benefit of a defence against a finding of infringement (eg, the benefit of an exemption).

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The FCA can establish an infringement by relying on the concept of the body of evidence. This consists in the FCA gathering 'precise, serious and consistent indicia' of the infringement. Such evidence is circumstantial and not direct evidence of the actual infringement. Thus, the existence of an infringement can be inferred from a number of pieces of circumstantial evidence that, taken together, may constitute sufficient proof of an infringement.

16 Appeal process

What is the appeal process?

A decision of the FCA may be appealed by the parties or the Minister for the Economy within one month of its issuance. The appeal must be lodged before the Paris Court of Appeal (article L464-8, section 1 of the FCC). It does not suspend the implementation of the decision in itself, unless a deferral of the implementation of the decision is ordered by the First President of the Court. The Court of Appeal has powers of full judicial review, and is thus competent to review the decision both in facts and in law. The infringing parties may thus discuss all the aspects of the FCA decision before the Court of Appeal.

A decision in the first instance issued by a national court relating to an anticompetitive practice (eg, follow-on damages) can be appealed within one month before the Court of Appeal of this court's jurisdiction.

Appeal decisions can afterwards be brought to the scrutiny of the French Court of Cassation, which may only review the judgment in law. The timeline for such appeal is:

- one month after a decision of the Paris Court of Appeal relating to cases previously adjudicated by the FCA (in application of article L464-8 of the FCC); or
- two months in other cases (in application of general civil rules of procedure).

Proceedings before appeal courts and the Court of Cassation usually take one to two years.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Under article L420-6 of the FCC, natural individuals may be subjected to criminal penalties amounting to fines of up to €75,000 and imprisonment for up to four years where they have 'fraudulently taken a personal and decisive action in the conception, organisation or implementation of the practices covered by article L420-1 ...[of the FCC].'

A court may jointly sentence the corporation to pay the fines ordered against its officers (article L470-1 of the FCC).

It appears from criminal courts' precedents that three elements must be established before criminal sanctions may be imposed: (i) there must be a personal role on the part of the accused in the conception, planning and implementation of the practice; (ii) the behaviour of the accused must have been decisive in the implementation of the practice; and (iii) the accused must have acted 'fraudulently' (ie, via intentionally misleading or bad faith actions).

This provision, however, is very rarely invoked, and even more rarely gives rise to actual sanctions. In particular, to the best knowledge of the authors, no individual has been imprisoned on the basis of this article.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Administrative sanctions

The FCA has the power to impose various administrative sanctions on undertakings that implement anticompetitive practices.

First, in order to respond to emergency situations, the FCA has the possibility to grant interim measures on the basis of article L464-1 of the FCC. The granting of such measures requires that the facts alleged appear likely to constitute a practice contrary to article L420-1 or L420-2 of the FCC (including a cartel) and are an immediate threat to the overall economy, the concerned sector, the interest of consumers or the plaintiff. Such measures are used to order undertakings to suspend the concerned practice or return to the previous state.

The FCA also has the power to impose heavy financial penalties, pursuant to article L464-2 of the FCC.

If the offender is a company, the maximum amount of the penalty is up to 10 per cent of worldwide turnover, and €3 million if the offender is not a company (eg, public institutions, associations). The FCA can further impose a periodic penalty of up to 5 per cent of the daily average turnover for every day of delay.

The European Court of Human Rights has deemed that, in light of the high amounts incurred for breach of competition law, such fines constitute 'criminal' sanctions within the meaning of the European Convention on Human Rights, thus triggering the application of this document to competition proceedings, and in particular, its article 6 on the right to a fair trial.

The turnover to be taken into account for the calculation of fines will be the highest amount achieved by the undertaking in any financial year during the period over which the practices have taken place.

The FCA imposed its highest fine in December 2015, punishing 20 companies for taking part in a cartel in the delivery services sector for a total amount of €672.3 million. In 2017, the highest fine for a cartel was in the floor covering sector and amounted to €302 million.

In setting the amount of cartel sanctions, the FCA is bound by its fining guidelines, published in 2011 and largely inspired by the Commission's guidelines on the method of setting fines (see question 21).

In addition to financial penalties, the FCA may issue injunctions forcing undertakings to change their behaviour, and order the publication of the decision or certain parts thereof in the press.

The Minister for the Economy may impose injunctions, or financial penalties not exceeding €150,000, or 5 per cent of the undertaking's latest turnover in France if this results in a lower amount. If the undertaking fails to comply with the injunction or pay the penalty, the Minister may refer the case to the FCA.

Civil sanctions

French law does not provide for any specific civil sanctions. However, the French Civil Code allows any entity or individual who has suffered damages from an anticompetitive practice to bring civil actions before national courts (see question 24).

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

On 16 May 2011, the FCA published its final guidelines for setting anti-trust fines.

The guidelines first define the basic amount of the penalty as a proportion of the sales value of the products or services to which the infringement relates. The basic amount is then adjusted to take into account the individual situation of the undertaking. Thus, repeated infringements or financial difficulties can respectively lead to an increase or a reduction. The amount can then be reduced to take into account leniency proceedings or a settlement.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not a sanction that may be imposed under French law.

However, under article 48 of Regulation No. 2015-899 of 23 July 2015 on public procurement, a public purchaser may exclude individuals from public procurement procedures when the purchaser has sufficient evidence that they have implemented coordination practices with a view to distorting competition.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Under French law, the same conduct can lead to both criminal and administrative sanctions, although such sanctions will not be imposed by the same court: criminal penalties are imposed by national courts (see question 19), while administrative sanctions are imposed by the FCA (see question 18).

Furthermore, any individual or entity who suffered a loss from an anticompetitive practice can bring a private damage claim. However, the purpose of this sanction is only to compensate a private damage (see question 22), whereas criminal and administrative sanctions protect public interests and have as main objectives punishment and deterrence.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Any individual or entity who suffered a personal loss from an anticompetitive practice can bring a private damage claim before national courts. Such action can be brought even if the FCA has not issued a decision regarding the anticompetitive practice in question.

Action of victims claiming compensation for damages caused by an anticompetitive practice are currently governed by the ordinary French rules of civil procedure and civil liability.

The plaintiff has to prove three elements: (i) a fault from the undertaking (ie, an infringement of competition rules); (ii) the damage suffered; and (iii) a causal link between the fault and the damage. French courts have always guaranteed the principle of full reparation of a damage. Punitive damages, however, are prohibited under French law. Apart from these principles, there are no specific rules governing the level of damages.

Plaintiffs may face numerous difficulties in proving the fault, damage and causal link. These difficulties increase if the plaintiff acts independently of any proceedings before a competition authority, since it is much more difficult to establish the existence of an anticompetitive practice. Proving the existence and quantifying the level of a damage can also be very complex, and may require the intervention of experts.

Directive 2014/104/EU of 26 November 2014, transposed into French law by Order No. 2017-303 and implementing Decree No. 2017-303 dated 9 March 2017, helps addressing these challenges. It reduces the evidentiary burden of the plaintiff by establishing: (i) an irrefutable presumption of the existence of an anticompetitive practice where such practice has been found by a final decision of a competition authority or appellate court; and (ii) a rebuttable presumption of a damage to the victims of a cartel. As a result, if a private action is brought after the intervention of such a decision, the person does not have to prove the infringement and thus the fault.

Regarding the assessment of damages, the directive states that the burden or standard of proof required for the quantification of harm must not render the exercise of the right to damages excessively difficult. Where it is established that a claimant suffered harm but it is excessively difficult precisely to quantify such harm on the basis of the evidence available, national courts must be empowered to make estimations (eg, by requesting an opinion from the NCA).

In practice, private enforcement case law is still limited but the transposition of Directive 2014/104/EU into French law could improve France's attractiveness within the EU in terms of follow-on actions. Indeed, France henceforth benefits from a legal framework that responds more effectively to private actions sought by antitrust infringement victims. For instance, in October 2017 the Paris Court of Appeal published a number of methodological documents to provide guidance in the assessment of private damages claims.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Since the Hamon Law of 17 March 2014, consumers that are the victims of anticompetitive practices condemned by a final decision of a competition authority can be represented in court by a consumer association (article L623-1(2^o) of the French Consumer Code).

This group action will allow a set of consumers placed in a similar situation to obtain, in the context of a single trial, compensation for damages resulting from anticompetitive practices within the meaning of EU or national law. Neither consumers acting alone nor professionals may engage in a group action.

Article L623-24 of the Consumer Code provides that group actions aiming to repair the damage caused by anticompetitive practices may only be undertaken by the consumer association 'on the basis of a judgment' of a competent court or authority issued against a professional, which establishes the facts in a final manner (ie, without any possible appeal or other recourse). The responsibility of the professional is then established *res juridica* (ie, no matter in this respect that the company has benefited from a reduction in the fine, or a leniency application).

The group action is subjected to a limitation period of five years from the date of the final decision establishing the infringement of competition rules.

The procedure is conducted in two phases.

In the first phase, the judge rules on the responsibility of the professional and defines the consumer group for which the responsibility of the professional is engaged and the connecting factors to the group. The judge also determines what damage could be repaired as well as

the period of time during which consumers may join the group (two to six months after completion of the disclosure requirements).

During the second phase, which is not contentious, consumers whose damage may be repaired as part of the group action decide, once informed of the judgment establishing the professional's responsibility, whether or not to join the action. They are then compensated under the terms of the judgment. Finally, the condemned undertaking will proceed to compensation for damage suffered by each consumer in the conditions and limitations set out in the judgment.

Articles L623-14 to L623-17 of the Consumer Code also set up a simplified group action procedure, gathering phases 1 and 2, where: (i) the identity and number of affected consumers are determined; and (ii) it is established that they have suffered identical damages.

Class actions still remain limited in number. A report published by the French Court of Auditors on 18 December 2017 highlighted that since October 2014, only nine class action cases had been brought before the courts. Most of these cases concerned financial and real estate matters. The first case was judged on 14 May 2018 by the Nanterre District Court, which dismissed the proceedings brought by the consumer association UFC-Que Choisir against Foncia, a property management company.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Undertakings may be exonerated from financial penalties where they have 'contributed to establishing the reality of a prohibited practice and to determining its authors by providing elements which the Authority or the administration were previously unaware of' (article L464-2 IV of the FCC).

The 'Procedural Notice on French Leniency Proceedings', published on 3 April 2015, defines the conditions and procedure that must be followed to obtain immunity from fines.

It lays down two cases in which the undertaking may obtain full immunity from fines (type 1 cases):

- type 1A cases: the FCA has no information on the alleged agreement. Conditional benefit of full immunity will be granted to the first company that provides information and evidence of the existence of a cartel, if such information and evidence allows the FCA to carry out investigations; and
- type 1B: the FCA already has information relating to the alleged cartel. Conditional benefit of full immunity will then be granted if the following three conditions are met:
 - the company is the first to provide sufficient evidence to allow the FCA to establish the existence of an infringement of article L420-1 of the FCC;
 - at the time of the application, the FCA did not have such sufficient evidence; and
 - no undertaking has received conditional full immunity from the type 1A case for the alleged cartel.

Undertakings that do not satisfy the requirements for full immunity can apply for partial immunity of fines if they nevertheless contribute to establishing the reality of a prohibited practice (type 2 cases) (see question 25).

In order to be eligible for type 1 or 2 proceedings, applicants should not have coerced any other member of the anticompetitive agreement, and must:

- fully cooperate with the FCA at every stage of the procedure;
- terminate their participation to the anticompetitive practice at the latest upon receipt of the notice granting leniency (except if otherwise requested by the FCA); and
- not inform the other parties to the anticompetitive practice of its leniency application.

Undertakings may also benefit from fine reductions in case they choose not to contest the existence of the alleged practices. This procedure is known as the 'negotiated settlement route' (see question 30).

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Undertakings may be granted reductions in fines (up to 50 per cent), even after the first immunity application, where they have 'contributed to establishing the reality of a prohibited practice and to determine its authors by providing elements which the FCA or the administration were previously unaware of'.

To qualify for such reduction, a company must provide the FCA with evidence of the existence of the alleged cartel that represents significant added value compared to the evidence already available to the FCA. In particular, the FCA considers that:

- contemporaneous written evidence of the alleged cartel has a greater value than evidence subsequently established;
- evidence relating directly to the facts in question has a higher value than indirectly related evidence; and
- indisputable evidence has a higher value than evidence that must be substantiated if challenged.

To determine the level of reduction of fines which a company may claim, the FCA will take into consideration: (i) the rank of the request; (ii) when it was presented; and (iii) the degree of significant value that the evidence provided by this company has brought.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Under French law there is a no 'immunity plus', or 'amnesty plus'. However, being the second or the third to cooperate with the FCA may have a significant impact on the reduction of the fine, since the Procedural Notice includes a predetermined range of fine reduction according to the rank: (i) between 25 per cent and 50 per cent for the first company providing significant added value to the investigation; (ii) between 15 per cent and 40 per cent for the second; and (iii) no more than 25 per cent for the third.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no deadlines for initiating or completing an application for immunity. However, the FCA takes into consideration the rank of each application (see question 26).

The Procedural Notice details the grant of a marker to applicants allowing them to know their rank and thus the amount of fine reduction they may be entitled to. If necessary, the *rapporteur général* gives the applicant a deadline allowing it to gather information and evidence relating to the alleged cartel that is required for the consideration of its application without causing it to lose its rank. If the company meets the deadline fixed by the *rapporteur*, the information and evidence provided will be deemed to have been disclosed at the date of receipt of the application.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

All leniency applicants must cooperate with the FCA in a true, complete, swift and lasting manner from their application date until the end of the investigation and adjudication procedure. Applicants must provide all and any element relating to the practice which already is, or would come to be, in their possession, be ready to answer any question by the FCA, make their current (and, to the extent possible, past) representatives and employees available for questioning by the FCA, refrain

from destroying, altering or dissimulating evidence, and refrain from disclosing the existence of their leniency application.

Additionally, in order to be eligible for type 1A proceedings (see question 24), applicants must at least provide:

- the name and address of the legal entity seeking total exemption (the applicant must indicate the specific entities covered by the request);
- the name and address of the other participants in the alleged cartel;
- a detailed description of the alleged cartel, which shall specify the nature and use of the products concerned, the territories over which the practices in question may produce effects, the nature of these practices, and an estimate of their implementation duration;
- information on any leniency application relating to the alleged agreement that it addressed or intends to address other competition authorities; and
- the documentary evidence or any other kind of information in their possession or available to it at the time of its application, which may, for instance, be the locations, dates and purpose of contacts or meetings between the participants in the alleged cartel.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Aware that companies may want their cooperation to be confidential, the FCA maintains, within the limits of its national and EU requirements, the confidentiality of the identity of the leniency applicant for the duration of the procedure and until sending the SO to the concerned parties. The level of confidentiality is the same for all cooperating parties.

With respect to actions for damages before national courts, disclosure to the plaintiff of certain documents detained by the FCA may be ordered, to the extent that is strictly necessary for this plaintiff to exercise its rights of defence. However, Directive 2014/104/EU of 2014 prohibits national courts from disclosing leniency statements, in order to preserve the attractiveness of leniency programmes.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Settlement procedure

Pursuant to article L464-2 III of the FCC, undertakings may benefit from fine reductions if they do not contest the existence of the alleged practices.

Since the Macron Law of 2015, the *rapporteur général* submits to the company a proposed settlement 'setting out the minimum and maximum amount of penalty'. If this proposal is accepted, the *rapporteur* refers it to the *collège* of the FCA, which will impose a penalty included in the range set out in the settlement.

Under the previous settlement regime, undertakings that did not contest allegations of anticompetitive practices were entitled to a reduction of a given percentage in the amount of the fine that would otherwise have been imposed. However, given the lack of visibility on such amount, it was difficult for undertakings to anticipate the final amount of fine that they would be imposed.

The current settlement regime allows undertakings to have more visibility on the fine that they incur, since the settlement offer lays down the precise range in which the final amount of the fine will be included.

To date, this new settlement procedure has been applied to cartel proceedings in three decisions of the FCA. In the last decision to date, relating to a cartel between companies active in the market of veterinary medicinal products, all companies requested to benefit from the settlement procedure and were fined a total of €16 million (Decision 18-D-15 of 26 July 2018). The new settlement procedure has also been implemented in the context of vertical agreements (eg, Decision

17-D-01 of 31 January 2017) and abuse of dominance (Decision 17-D-06 of 21 March 2017).

Settlement and leniency proceedings (and, thus, the fine reduction to which the undertaking is entitled) may be cumulated. For instance, in Decision 17-D-20 of 18 October 2017, pertaining to a cartel in the floor covering sector, all three condemned companies participated in the settlement procedure and the FCA cumulated leniency and settlement for two of them that were awarded partial leniency and thus benefited from a greater reduction in the fine than it would have been if only one of these proceedings had been applied.

Commitments procedure

Under article L464-2 I of the FCC, the FCA may accept from undertakings commitments that they will modify their behaviour in the future, and put an end to a practice that is being investigated by the FCA as a potential infringement of competition rules. If such commitments are accepted by the FCA, the latter will terminate the investigation and will not impose sanctions.

The Procedural Notice on Commitments published on 2 March 2009 provides general advice to undertakings on how to use the commitments mechanism.

This notice, however, explicitly states that this procedure cannot be applied to particularly serious agreements that have a particularly negative impact on the public economic order, such as cartels. Although commitments may be offered to the FCA in the context of a cartel as part of a settlement proceeding, in which case the FCA may take this into consideration when deciding the level of fine reduction that will be granted to the leniency applicant, this is distinct from the 'commitments procedure' described above, where no sanction is imposed at all.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Under article L462-6 section 2 of the FCC, the FCA may, where facts appear to justify the application of criminal proceedings, refer the case to the public prosecutor (*procureur général*) (see question 17). In this case, employees face criminal sanctions if they have fraudulently taken a 'personal and decisive' part in the design, organisation and implementation of practices referred to in article L420-1 of the FCC.

However, the FCA's Procedural Notice on leniency indicates that leniency constitutes a 'legitimate reason' for not referring a case to the Prosecutor. Indeed, individuals would be deterred from applying for leniency (and, thus, exposing cartels) if they were concerned that this might expose them to criminal sanctions.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Application for leniency must be addressed to the FCA's *rapporteur général* or, where applicable, the general director of the DGCCRF. The *rapporteur général* appoints a *rapporteur* to the case, and sets out a deadline by which the applicant must provide all elements of evidence in its possession, on the basis of which the *rapporteur* will prepare a report considering whether the conditions for leniency are met. This report is sent to the applicant and the government, following which a private hearing is held during which the applicant sets out its views. The FCA then sends a notice to the applicant: (i) granting conditional, full or partial immunity from fines; and stating the conditions under which such immunity is granted; or (ii) refusing to grant immunity. Finally, after the case has been examined by the *collège* of the FCA, the latter formally grants leniency as set out in the notice initially circulated to the applicant if it considers that the conditions set out in this notice have been fulfilled.

The FCA has appointed a leniency officer to liaise with undertakings. Potential applicants can freely and anonymously, by mail or orally, contact the FCA's leniency officer to obtain information about the leniency programme, before formally applying for leniency.

The leniency officer attends meetings between the leniency applicant and the *rapporteur*, provides technical support to the latter, and

cooperates with other competition authorities involved in multiple applications.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or anticipated assessments or review of the current immunity/leniency regime in France. The regime has already been modified recently, with the 2015 Procedural Notice on French Leniency Proceedings described above. However, in the context of the ongoing evaluation of the new settlement procedure, the FCA published draft guidelines on the settlement procedure in March 2018 and aims to publish the final version of the guidelines by the end of 2018.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The procedure before the FCA and national courts is contradictory, which implies that defendants should have access to the documents on which the FCA or the courts intend to base themselves to characterise the existence of a cartel, to the extent that would be necessary to guarantee their rights of defence.

Article L463-4 of the FCC provides that the FCA may refuse to grant the parties access to documents containing business secrets. If access to such documents is necessary to protect the rights of defence, the defendant shall have access to a non-confidential version.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Counsel may be allowed to represent employees under investigation in addition to the corporation that employs them, except in situations where this would lead to a conflict of interest (ie, when the interests of the employee and those of the corporation do not align, eg, in a case of 'whistle-blowing' where an employee would be denouncing its employer's practices).

A present or past employee should seek independent legal advice as soon as they become the individual object of a prosecution under article L420-6 of the FCC, or more generally when they are an interested party to the case with different interests from their corporation.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Counsel may represent several co-defendants in the same proceedings, unless this would give rise to a conflict of interest. For instance, counsel could not advise a candidate to leniency proceedings and other corporations that would allegedly be part of the cartel.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Article L470-1 of the FCC provides that a court may jointly sentence the corporation to pay the fines ordered against its officers.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Article 39, section 2 of the French General Tax Code provides that financial sanctions are not tax-deductible. In a ruling issued in 2004, the French Administrative Supreme Court held that this applied to fines imposed by the FCA for a breach of competition rules.

Private damages imposed by national courts, on the other hand, are tax-deductible.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

In application of the non bis in idem principle provided for under EU law, the FCA may not bring proceedings against, or impose a fine on, individuals for practices that have already been prosecuted or penalised, to the extent that: (i) the facts; (ii) the individual concerned; and (iii) the legal interest protected would strictly be the same.

This principle also applies to overlapping damage claims. However, in this case, it is unlikely that conditions (i) to (iii) above will be fulfilled since, if a claimant is seeking damages in various jurisdictions, the markets in question before each of these jurisdictions (and, hence, the practice condemned) are not likely to be identical.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The most efficient way to avoid or keep a fine down is to apply for leniency, or cooperate with the FCA in the context of settlement proceedings (or commitments, for practices other than cartels).

The existence of a compliance programme at the corporation level, either before or after commencement of the investigation, is not likely to influence the level of the fine, as per a communication from the FCA dated 2012 indicating that such programmes would not count as a 'mitigating circumstance' for the purpose of setting fines.

WILLKIE FARR & GALLAGHER_{LLP}

Faustine Viala
David Kupka

fviala@willkie.com
dkupka@willkie.com

21-23 rue de la Ville l'Evêque
75008
Paris
France

Tel: +33 1 5343 4500
Fax: +33 1 4006 9606
www.willkie.com

Germany

Thorsten Mäger and Florian von Schreiter

Hengeler Mueller

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Since 1958, the rules on cartels have been an essential part of the Act Against Restraints of Competition (GWB) in Germany.

The GWB was last amended in June 2017 (the ninth amendment to the GWB). The seventh amendment (2005) almost fully harmonised the German rules on cartels with those of the EU. The basic prohibition of cartels (section 1 GWB) covers the same anticompetitive conduct (horizontal and vertical restraints of competition) as its EU counterpart in article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Section 2 GWB contains an exemption to the prohibition on cartels that resembles article 101(3) TFEU. The ninth amendment provides for further alignment with EU law, as the standards for establishing liability for administrative fines on (several) companies of the same company group as well as universal legal and economic successors of such companies have effectively been harmonised.

Under EU Council Regulation No. 1/2003 on the implementation of articles 101 and 102 TFEU, these articles must be applied by the national competition authorities and the national courts adjudicating competition matters in addition to national law where the relevant conduct may affect trade between member states. In respect of cartels, the German and the EU rules differ merely insofar as the EU rules apply only to conduct that may affect trade between member states. In practice, it is no longer necessary to establish whether a cartel is cross-border (and is therefore subject to the EU rules) or only regional in scope (and thus subject only to national law).

As a result of the harmonisation of the rules on cartels, materially the same standards apply to cartels having an effect within Germany.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Investigation and enforcement of cartel matters primarily lies with the Federal Cartel Office (FCO), an independent federal authority with its seat in Bonn. The decisions of the FCO are rendered by independent Decision Divisions, which decide in bodies composed of a chair and two associate members and whose decisions must not be influenced by other officials (including the FCO's president). The state cartel offices have additional responsibilities, albeit of limited relevance in practice (see question 13). If a decision by which the FCO imposes administrative fines is challenged before the courts (ie, the Higher Regional Court of Düsseldorf), the power to prosecute is transferred to the competent Attorney General. Criminal prosecutors also have investigative powers if the cartel infringement relates to a criminal case as well, eg, in the case of bid rigging (see questions 10, 13 and 29). If a decision is not challenged in court, the FCO (its Decision Divisions) effectively serves as judge and jury.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The ninth amendment to the GWB came into force on 9 June 2017. It primarily served to implement the new European Cartel Damages Directive (Directive 2014/104/EU), but also contained certain additional changes. The law has, inter alia, established the following changes to the legal regime:

- privileged treatment of certain agreements between newspaper or magazine publishers that would otherwise fall under the ambit of section 1 GWB (section 30(2b) GWB);
- severely increased liability for administrative fines based on transposing the 'single economic entity' principle developed in European competition law; as part of this amendment:
 - a parent company with the ability to exercise control over subsidiaries within the corporate group can be held liable for competition law infringements committed by such subsidiaries (section 81(3a) GWB);
 - the universal legal successor of a corporation involved in an administrative cartel offence can be held liable for that offence in a broader manner than currently is the case (section 81(3b) GWB); and
 - the (mere) economic successor of a corporation involved in an administrative cartel offence can now be held liable for that offence, resulting in liability risks even for mere asset deals (section 81(3c) GWB); and
- several changes caused by the implementation of the European Cartel Damages Directive (Directive 2014/104/EU) that seek to strengthen and ensure private enforcement, including new rules for the litigation procedure such as a rebuttable presumption that a cartel caused damage (section 33a(2) GWB) and the obligation to disclose certain evidence (section 33g GWB), as well as specific substantive rules regarding, in particular, the passing-on defence (section 33c GWB) and certain rules on joint and several liability (section 33d GWB). Furthermore, the relevant statute of limitation has been changed significantly: limitation periods for cartel damages claims generally are triggered later than previously and have been considerably extended (section 33h GWB).

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The principal national rules on cartels are found in sections 1 and 2 GWB. These rules basically reproduce articles 101(1) and 101(3) TFEU on a national level.

Section 1 GWB prohibits all agreements between competing corporations, decisions by associations of corporations and concerted practices that have as their object or effect the prevention, restriction or distortion of competition. This provision covers a broad range of restrictive agreements and concerted practices (a collusive meeting of minds without reaching an agreement for lack of will to create mutual obligations). It includes agreements directly or indirectly fixing prices or other terms and conditions, bid rigging, group boycotts, agreements providing for the control of production or distribution, the allocation of quotas, territories or customers, and the exchange of market data.

Further, agreements providing for the establishment and operation of joint selling or purchasing organisations, or the creation of barriers to market entry are, in principle, covered by section 1 GWB. Vertical restraints of competition are also covered, such as exclusive dealing and exclusive supply agreements, distribution agreements containing territorial exclusivity and selective distribution agreements. On 12 July 2017, the FCO published a guidance note on the prohibition of vertical price fixing in the food retail sector, which may also serve as a blueprint for the FCO's enforcement practice and priorities in other industries. Section 21 GWB contains specific rules relating to boycotts.

Agreements restricting competition are prohibited by section 1 GWB only if they have an appreciable effect on competition. In respect of agreements (and concerted practices) that may affect trade between member states, the application of German law must not lead to the prohibition of agreements that are legal under article 101 TFEU, so the Commission's *de minimis* notice is likely to be applied in Germany although there is no legal obligation to do so. On 13 March 2007, the FCO issued a *de minimis* notice that was similar (but not identical) to the Commission's *de minimis* notice. The FCO's *de minimis* notice sets out in which cases the FCO would, in principle, not initiate proceedings. In contrast, the notice provides no binding interpretation of the appreciability criteria. Agreements concluded between corporations belonging to the same group of corporations are not subject to section 1 GWB.

Agreements (and concerted practices) that fall within the scope of section 1 GWB are exempted from the prohibition contained therein if they meet the requirements under section 2 GWB. Section 2 exempts cartels from section 1 under the same standards as provided by article 101(3) TFEU. The regulations for the application of article 101(3) TFEU, which substantiate the requirements for exemption (the Block Exemption Regulations), apply accordingly under section 2 GWB. With a few exceptions (see question 5), all specific exemptions from the prohibition on cartels were abolished. There is no system for notifying cartels for exemption by regulatory decision. As under EU rules, cartels are exempted from the prohibition by law if they meet the statutory requirements. Moreover, the distinction of restraints by object and by effect is known in Germany as well.

All agreements (and concerted practices) prohibited by section 1 and not exempted by section 2 GWB are null and void. The cartel authorities may impose administrative fines on individuals and corporations violating section 1 or impose other sanctions to bring the infringement to an end (see question 18).

According to EU Council Regulation No. 1/2003, the FCO is also required to apply article 101 TFEU where an agreement or concerted practice may affect trade between member states. The Regulation prescribes that the parallel application of national competition law, including sections 1 and 2 GWB, must not lead to the prohibition of agreements or concerted practices that do not restrict competition within the meaning of article 101(1) TFEU, that fulfil the conditions of article 101(3) or that are covered by the Block Exemption Regulations. The FCO forfeits the competence to apply article 101 TFEU in Germany when the Commission commences proceedings (article 11(6) of EU Council Regulation No. 1/2003). When applying article 101 TFEU, the FCO will apply the German procedural rules. Sanctions for violations of European law include all sanctions that may be imposed for a breach of German law.

Finally, bid rigging also constitutes a criminal offence and may be punished by imprisonment of up to five years or the imposition of a criminal fine pursuant to section 298 of the Criminal Code. Certain competition law infringements may also be prosecuted as fraud pursuant to section 263 of the Criminal Code, which is generally also punishable by up to five years' imprisonment or a criminal fine, with more severe sanctions in a 'particularly serious case' of fraud (see question 17).

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The GWB provides for specific rules for certain industries. According to section 28, the agricultural sector is partially exempted from the prohibition on cartels (section 1). Section 30(1) provides that the ban on resale price maintenance does not apply to the sale of newspapers and magazines. Pursuant to section 30(2a) (enacted in 2013), certain agreements between associations, newspaper and magazine wholesalers are exempted from the restrictions set forth in section 1. As mentioned above (see question 3), the ninth amendment of the GWB created even more leeway for newspaper and magazine publishers: according to section 30(2b) GWB, cooperation between such companies is exempt from section 1 GWB, to the extent it does not affect the editorial part of the involved companies' business and allows them to 'strengthen their economic basis for inter-media competition'. Finally, certain agreements by corporations in the field of public water supply are exempted from the prohibitions of section 1 according to sections 31, 31a and 31b GWB.

Further, there is a non-industry-specific exemption for cartels between competing small and medium-sized corporations. Under the specific circumstances set out in section 3 GWB, cartels among small and medium-sized corporations are held by law to meet the requirements for exemption under section 2 GWB. On 1 March 2007 the FCO issued an information leaflet on the possibilities to cooperate for small and medium-sized corporations. This leaflet provides some guidance regarding the application of section 3.

6 Application of the law

Does the law apply to individuals or corporations or both?

The prohibition set forth in section 1 GWB applies to private and public undertakings. The term 'undertaking' is construed broadly. It is generally agreed that all individuals, partnerships, corporations and cooperating parties engaged in business activities relating to the sale of goods or the performance of commercial services constitute undertakings. The legal form of operation is irrelevant. An intention to profit is not required. Professionals such as architects, lawyers, auditors and accountants, as well as scientific, artistic and athletic organisations, constitute undertakings to the extent they are engaged in business activities. Although the law applies to undertakings, individuals acting on behalf of the undertakings (directors, employees) can also be fined.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The GWB applies to all restraints of competition that have an effect within Germany (the effects doctrine) (section 185(2) GWB). Foreign corporations are, therefore, subject to the GWB to the extent they participate in restrictive agreements or concerted practices having effects on the German market. The GWB may be applied to foreign corporations even though they have never been directly active in the German market, let alone maintained a German subsidiary, branch or other business establishment. However, the German authorities cannot execute investigative measures outside Germany and must rely on administrative assistance from foreign authorities in this respect.

Section 1 GWB applies if horizontal or vertical restraints on competition are likely to affect the German market. Actual effects are not required.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no specific exemption. However, companies involved in export cartels may try to build a defence around the above-mentioned provision in section 185(2) GWB. If it can be demonstrated that an alleged export cartel is unlikely to affect Germany since it merely concerns other countries and repercussions on any German market can be

excluded (eg, owing to the fact that the cartel did not spill over onto price-setting in relation to German customers and allowed for re-imports to Germany), the application of section 185(2) GWB may effectively result in the inapplicability of the GWB and a lack of jurisdiction of the FCO. However, this would of course not preclude other competition authorities (in particular the European Commission) from taking over such a case.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

Investigations by the cartel authorities may be started for various reasons, for example, because of complaints by a third party, whistle-blowing by members of a cartel or their employees, reports in the media or because of cartel investigations in other jurisdictions concerning the same industry. Once a case has come to the attention of a cartel authority, it will normally collect further information, either informally or by using its formal powers of investigation, including searches and seizures and the collection of evidence by means of the testimony of witnesses and experts. If the cartel authority reaches the conclusion that there is evidence of an infringement of section 1 GWB, it will open formal proceedings. If it does so, it will usually inform the parties and (at a later point in time) serve a statement of objections on the parties. The parties are then allowed access to the file and may respond to the statement of objections, both in writing and orally.

The parties and individuals concerned must be afforded the opportunity to comment prior to a decision being taken.

They will, upon application, be summoned to a hearing. An investigation is completed by the issuance of a decision or the discontinuation of proceedings (the file may be closed without a formal decision).

There is no specific legal limitation on the time frame of an investigation. Rather, the time at the disposal of the cartel authorities depends on the specific circumstances of each individual case. The authorities need to implement certain procedural steps within a certain period in order to avoid the application of the statute of limitation for fines. In complex cases, cartel proceedings usually go on for several years, which may in the end also result in a decrease in administrative fines. In one ruling, the Higher Regional Court of Düsseldorf reduced the fines by 30 per cent owing to undue delay on the part of the authorities of 24 months.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The cartel authorities – and in criminal cases involving bid rigging, the criminal prosecutor – may in principle conduct any investigation and collect any evidence required to prove a violation of the antitrust laws.

The investigating authority is, upon issuance of a search warrant by a local court, in particular, entitled to visit and search the business premises, cars or private homes of employees (dawn raids) and seize letters and other means of communication (including emails), electronic and non-electronic databases, computer hardware, calculations, documents on travel expenses and diaries, and it may hear witnesses and experts. The FCO is entitled to copy hard drives and pursue electronic searches of those copies at the FCO premises following a dawn raid. Lawyers to corporations under investigation do not have a right to be present when such post-dawn raid searches of IT systems are conducted. Where a prior court order would cause a delay that could jeopardise the investigation, the cartel authorities may issue the warrants for searches and seizures by their own authority. Correspondence documents, such as posted letters, which are subject to the sanctity of the mail, are excluded from seizure by the cartel authority, but not by the criminal prosecutor in cases involving bid rigging. Attorney-client correspondence in the hands of the corporation is exempt from seizure only if it specifically concerns representation in the cartel proceedings at hand. The cartel authorities do not have the authority to carry out wiretapping.

The investigating authority may request a local court to administer the oath to a witness if it considers such an oath to be necessary to obtain evidence through testimony. Persons may refuse to answer questions if they have been accused of a violation of the antitrust laws,

or if the answer would expose them or their family to the risk of criminal prosecution or proceedings under the Administrative Offences Act. Further, a person or corporation has certain fundamental rights of defence during an investigation, including the right to legal advice. Professional secrecy for lawyers is guaranteed by law.

According to section 81b GWB, the concerned corporation is required to provide to the cartel authority the information necessary (including the submission of documents) to determine the amount of the fine, if the imposition of a fine appears as a possible outcome of an investigation. This rule does not apply to persons acting for the corporation, to the extent providing the information or documents would expose these persons to prosecution based on criminal or administrative offences.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

In Germany, two formal bilateral cooperation agreements are in force. The first agreement on cooperation between cartel authorities was concluded in 1976 between Germany and the United States. The agreement provides for an exchange of information between the FCO and the US Department of Justice and Federal Trade Commission including documents, memoranda, judicial pleadings and other documents with regard to restrictive trade practices having effects on trade in the other authority's jurisdiction. This cooperation extends to statements of civil servants of one cartel authority as witnesses in proceedings of the other cartel authority and to sending requests for information of one cartel authority to corporations established within the other's jurisdiction. The cartel authorities will also consult each other in proceedings relating to the same cartel activity having effects in both jurisdictions. It should be noted that the national laws on business secrets will prevail.

In 1984, Germany concluded a second cooperation agreement with France. This agreement provides for cooperation between the cartel authorities of both countries with regard to giving notice of the commencement of proceedings to the other cartel authority, the provision of information on restrictive practices and consultations if an investigation might impair the interests of the other country or if proceedings relate to the same cartel activity. The national cartel authority may refuse to provide information if the provision of such information would be contrary to the national laws on business secrets or the vital interests of the country.

In addition to the cooperation agreements, the European Convention on the Service Abroad of Documents Relating to Administrative Matters of 1977 provides for mutual assistance concerning the service of administrative letters in foreign jurisdictions (the contracting parties are Austria, Belgium, France, Germany, Italy, Luxembourg and Spain). In practice, however, these agreements are not very important.

Of great practical importance, by contrast, is the close cooperation between the FCO and the European Commission. Under EU Council Regulation No. 1/2003, the European Commission and all the competition authorities of the EU member states apply the community competition rules in close cooperation and within the framework of the European Competition Network (ECN). This includes, in particular, the (informal) exchange of information, mutual consultation, coordination of investigations, inspections on behalf of another competition authority and discussing the proposed course of action. When investigating a case under article 101 TFEU, the FCO is required to liaise with the European Commission and the competition authorities in other member states within the ECN. Within this network, the case will be allocated to a competition authority that is best placed to investigate the case. If the European Commission initiates proceedings in the same matter, the FCO loses its competence to apply article 101 TFEU to that case.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

As a matter of principle, if certain cartels are investigated in other jurisdictions this may trigger similar investigations in Germany, provided that the cartel is active or has effects in Germany as well. In that regard, cross-border investigations may often stem from cooperation among European competition authorities, in particular the close cooperation facilitated by the ECN (see also question 11). As investigations by national cartel authorities frequently concern the effects of a cartel within different jurisdictions and markets, the problem of double jeopardy (*ne bis in idem*) will generally not arise (see also question 37).

With regard to parallel investigations by the German cartel authorities and the European Commission, the FCO can no longer investigate a case if the Commission has initiated its own investigations in that case (see questions 4 and 11). Under EU Council Regulation No. 1/2003, the FCO may no longer prohibit or sanction behaviour pursuant to German law if such behaviour is permissible under article 101 TFEU (see question 4).

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The FCO bears primary responsibility for the administration and enforcement of the GWB. The cartel offices of the German federal states have only limited responsibilities. In general, the FCO deals with all cartel matters extending beyond the territory of a single state of the Federal Republic of Germany.

The cartel authorities (the FCO and state cartel offices) investigate and adjudicate cartel matters at an administrative level. They have discretion as to whether to open an investigation, commence proceedings, issue orders or impose fines. To the extent the cartel involves criminal aspects (bid rigging) the cartel authorities must refer these aspects to the criminal prosecutor. Furthermore, the cartel matter is also referred to the criminal prosecutor (Attorney General) once a fining decision of the FCO is challenged in court (see question 2).

Private parties may institute separate proceedings in court against corporations that violate section 1 GWB (or article 101 TFEU) if they can demonstrate that they are affected by the breach of law (see question 22). The same applies in respect of violations of orders issued by the cartel authorities (section 33 GWB).

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In proceedings under the Administrative Offences Act (ie, all proceedings that are conducted to impose fines) the burden of proof lies with the cartel authorities as a matter of principle. The same holds true in criminal proceedings. Pursuant to section 261 of the Code of Criminal Procedure, applicable both in criminal and administrative proceedings, the level of proof is that of free judicial conviction. The judge is barred from finding the defendant guilty of a criminal or administrative offence if he or she has reasonable doubts as to the meeting of the statutory requirements (*in dubio pro reo*).

In other proceedings (such as proceedings conducted to impose behavioural or structural measures), the burden of proof for a violation of section 1 GWB is on the cartel authority or the party alleging the infringement, while the corporation must prove that the requirements of an exception to the prohibition under section 2 GWB are met.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes. In line with the practice of the European Commission and the Court of Justice of the European Union (ECJ), circumstantial evidence can be sufficient if the above-mentioned requirements regarding the burden of proof (see question 14) can be met despite the absence

of direct evidence of an infringement. The *in dubio pro reo* principle would generally call for a particularly close scrutiny of the pieces of circumstantial evidence in question and a particularly well-founded reasoning in a written decision as to why these pieces are suitable to deduce the existence of anticompetitive conduct. However, it is not excluded that the FCO may rely on such reasoning and that such reasoning would also hold in court, if, based on the number and nature of coincidences and *indicia*, there is no plausible alternative explanation other than the companies concerned being involved in an infringement of the competition rules.

16 Appeal process

What is the appeal process?

With one exception relating to health insurance, the infringing parties may appeal decisions of the cartel authorities to the competent Higher Regional Court. Jurisdiction over appeals against decisions of the FCO lies with the Higher Regional Court of Düsseldorf. Rulings of the Higher Regional Court may in turn be appealed to the Federal Court of Justice. In administrative proceedings an appeal to the Federal Court of Justice is only admissible if the Higher Regional Court grants leave to appeal. The refusal to grant leave to appeal may be challenged by way of limited appeal. In any event both the FCO and the infringing parties may challenge the Higher Regional Court of Düsseldorf's decision.

Appeals against fines are to be filed within two weeks after the decision has been notified. In all other cases the appeal may be filed within one month after notification. The duration of appeals to the Higher Regional Court varies; it depends in particular on the number of witnesses that the court wishes to hear. The duration of cartel appeal proceedings before the Federal Court of Justice is likely to range between 12 and 18 months.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Bid rigging is a criminal offence pursuant to section 298 of the Criminal Code. Apart from specific criminal rules concerning bid rigging, there are no criminal sanctions for cartel activities in Germany. Furthermore, cartels concerning single tender actions have in the past been successfully tried as fraud pursuant to section 263 of the Criminal Code. Both of these offences are punishable by up to five years of imprisonment or a criminal fine. In case of fraud, the sentence may be even more severe (ie, six months to 10 years of imprisonment), if the court finds the prosecuted individuals guilty of having committed a 'particularly serious case' of fraud. This is the case, for example, if the fraud has been committed in a 'commercial' manner, which is to say that the cartel induced fraud is based on repeated conduct aiming to secure a recurring source of income. Within this framework, the sentences actually imposed by the courts vary so that no meaningful indication regarding the overall sentence duration or a comparison between recent and older cases can be provided. In any case, there are no criminal sanctions against the corporations involved. Only the responsible individuals would be the subject of criminal sanctions within the aforementioned framework (as German law still does not provide for the possibility to hold corporations liable under criminal law).

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Anticompetitive contractual provisions prohibited by section 1 GWB and not exempted by section 2 GWB are null and void.

The cartel authorities may impose administrative fines for violations of section 1 GWB against individuals and corporations. The minimum fine is €5, the maximum fine is €1 million or, in excess of that, up to 10 per cent of the total turnover generated by the corporation and its affiliated corporations (aggregate group turnover) in the business year preceding the decision of the cartel authority. Notably, however, the 10 per cent maximum only pertains to corporations; the fines against individuals must not exceed the amount of €1 million and will be based on the individuals' income. The cartel authorities may also issue orders requiring an infringement of section 1 GWB (or article 101 TFEU) to

be brought to an end. Since 2013, section 32(2) GWB explicitly states that all necessary and proportionate measures, both behavioural and structural, may be imposed. A structural measure, however, can only be imposed if no equally effective behavioural measure is available, or if the available behavioural measures would interfere to a greater degree with the corporation's interests than the available structural measures. The cartel authorities may also decide to make binding on a corporation the commitments that the corporation offered to bring an infringement to an end. However, the cartel authority may be reluctant to accept commitments where it deems fines appropriate.

Fines are levied very frequently and have, considering all fines levied by the FCO, mostly been in the hundreds of millions range in recent years. In 2014, the FCO even levied fines in the aggregate of more than €1 billion (with more recent years seeing a smaller total amount, ie, €208 million in 2015; €124.5 million in 2016; and €60 million in 2017).

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The FCO has revised its guidelines for the setting of fines in cartel proceedings on 25 June 2013. The revision was necessary as the Federal Court of Justice held in a judgment in February 2013 that the 10 per cent turnover threshold (see question 18) is, in fact, an upper limit, rather than a cap. According to the revised guidelines, fines are essentially calculated as follows.

The scope for setting a fine in a specific case is determined with due consideration of the potential for gain and for harm on the one hand and the total turnover of the corporation on the other. The FCO assumes a gain and harm potential of 10 per cent of the corporation's turnover achieved from the infringement during the infringement period. The relevant turnover achieved from the infringement is the domestic (ie, German) turnover achieved by the corporation from the sale of the products or services relating to the infringement and within the duration of the violation. In cases in which the infringement lasted less than 12 months, the FCO bases its calculation on a period of 12 months irrespective of the actual duration of the infringement.

Subsequently, a multiplication factor is applied to the established gain and harm potential to account for the size of the respective corporation. A factor of 2:3 is applied to corporations with an annual turnover of less than €100 million; a factor of 3:4 is applied to corporations with a turnover between €100 million and up to €1 billion; a factor of 4:5 is applied to corporations with a turnover between €1 billion and €10 billion; a factor of 5:6 is applied to corporations with a turnover of €10 billion up to €100 billion; and a factor greater than six is applied to corporations with a turnover of more than €100 billion. The FCO also considers aggravating and mitigating factors, in particular the scope of the markets affected by the infringement, the involved company's position on these markets, the economic relevance of the markets, or the role that the company had in the cartel (ringleader or follower).

Furthermore, the FCO reserves the right to skim off the economic benefit either in the fining proceedings or in separate proceedings (section 32 GWB, section 34 GWB).

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not available as a sanction to be imposed directly by the cartel authorities. Based on public procurement rules, however, cartel infringements will regularly render a bidding corporation devoid of its eligibility to participate in the procurement procedure. Following an amendment of the law introduced in 2016, cartel infringements are now specifically addressed by section 124(1) No. 4 GWB and are considered sufficient reason to debar a corporation from procurement measures. Effectively, this was also the case previously, but the new provision that serves to transpose an EU directive is far more clear-cut regarding cartel infringements. The debarment decision will then be made by the public entity

responsible for the procurement decision. As of July 2017, the FCO is in charge of keeping a central competition register in which several types of criminal and administrative offences, including competition law infringements, are entered. This serves to provide public entities issuing a tender with the possibility to gain comprehensive insight as to the involvement of potential bidders in these types of violations of the law in every German federal state. In the case of a contract value of at least €30,000, public entities issuing a tender are even legally obliged to check the competition register prior to awarding the contract. This new system serves to harmonise the heterogeneous registers on which tender processes previously had to rely (with several German federal states keeping registers of their own and significant variations as to the number of infringements covered by the different registers).

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Criminal, civil and administrative sanctions can be pursued in parallel in respect of the same conduct. As a matter of practical feasibility, however, public prosecutors will often stay their investigations until the FCO has issued a decision of its own.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Third parties that can demonstrate that they are affected by a violation of the prohibition on cartels under German or EU law may institute private suits to obtain injunctive relief or to recover damages. Claims are limited to the actual level of damages and necessary legal expenses. Standing to claim for damages is not limited to the immediate customers (or competitors) of a cartel participant. Other market participants further downstream of the customers of the cartel participants may also successfully claim for damages suffered from the cartel behaviour. With respect to these indirect purchasers, the passing-on defence is permissible under German law, as is now expressly stipulated by section 33c GWB (and had, in principle, also been acknowledged before based on a ruling of the Federal Court of Justice). If an indirect purchaser claims compensation of damages, section 33c(2) GWB now presumes that price increases have been passed on to such indirect purchaser, unless there is evidence to the contrary (in which case, however, the defendant would also undermine the passing-on defence).

It should be noted that definitive decisions of cartel authorities (German courts) – including those in other member states of the EU – on cartel violations may be introduced into civil proceedings as proof of the actual infringement (section 33b GWB). These decisions are binding on the court ruling on the damages claim (ie, the existence of an infringement as such cannot be challenged as part of the litigation).

Private damages actions have become increasingly frequent in recent years. In part, this is due to the activity of professional plaintiffs (see question 23). The claims made can reach into the hundreds of millions of euros and may easily exceed the fines imposed by the authorities. Furthermore, many cases are settled outside court, the parties often concluding non-disclosure agreements. Information on the damages ultimately recovered by a (potential) plaintiff therefore usually does not become public. Owing to that fact, it is currently still hard to identify a certain trend in terms of the amount of damages paid.

German law only provides for single, not double or triple damages.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are not possible. Despite much discussion about class actions in recent years, these rules were not revised by the ninth amendment to the GWB (see question 3). However, professional plaintiffs may

'acquire' damages claims against cartel offenders from those affected by the cartel and litigate these claims in court. Furthermore, several plaintiffs with similar claims may jointly sue in accordance with section 59 et seq of the Code of Civil Procedure.

According to section 34a(1) GWB, certain associations (including, since 2013, consumer protection associations) are entitled to demand that benefits derived from cartel behaviour be surrendered to the federal government; this mirrors the skim-off right of the FCO (see question 19).

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The FCO's leniency programme provides that under certain circumstances immunity can be obtained. The FCO will grant immunity from a fine if a cartel participant is the first participant in a cartel to contact the FCO before the FCO has sufficient evidence to obtain a search warrant and by providing the FCO with verbal or written information and, where available, evidence that enables the FCO to obtain a search warrant. Further, the applicant must not have been the only ringleader of the cartel or coerced others to participate in the cartel and must cooperate fully and on a continuous basis with the FCO. Where the FCO was or is in a position to obtain a search warrant, immunity can still be obtained if the applicant is the first to contact the FCO before it has sufficient evidence to prove the offence and provides the FCO with verbal or written information and, where available, evidence which enables the FCO to prove the offence. Further, the applicant must not have been the only ringleader of the cartel or caused others to participate in the cartel. Moreover, the applicant is required to cooperate fully and on a continuous basis with the FCO, provided, however, that no cartel participant has been granted immunity before the FCO was in a position to obtain its search warrant.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Where immunity is no longer available, the FCO can reduce the fine by up to 50 per cent if the applicant provides the FCO with verbal or written information and, where available, evidence that makes a significant contribution to proving the offence and cooperates fully and on a continuous basis with the FCO. The amount of the reduction shall be based on (i) the value of the contributions to uncovering the illegal agreement and (ii) the sequence of the applications.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The leniency programme gives preferential treatment to the first party to cooperate. There are no specific provisions for the second cooperating party (or subsequent cooperating parties). Rather, the fine may be reduced by up to 50 per cent for any cartel participant that provides substantial evidence of the cartel offence (irrespective of that cartel participant's 'rank' in the leniency programme). In that regard, the specific reduction will depend not only on the order of the applications for leniency but also (and essentially) on the value of the evidence provided. Accordingly, there have been cases in which the FCO has granted a higher reduction to, for example, 'number 3' rather than 'number 2' since 'number 3' provided evidence of higher value. The FCO's leniency guidelines do not provide an 'immunity plus' or 'amnesty plus' option.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

A corporation that wishes to take advantage of the leniency programme should approach the FCO as early as possible to secure the possibility of non-imposition or reduction of fines. There are no strict deadlines for applying for leniency or immunity. The FCO usually grants a time period of eight weeks for perfecting a marker.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The FCO expects the applicant cooperating under its leniency programme to provide verbal or written information and, when available, evidence. All leniency applicants are expected to cooperate fully and on a continuous basis.

If the applicant is first in and contacts the FCO before it has sufficient evidence to obtain a search warrant, the information or evidence provided by the applicant merely has to be sufficient to enable the FCO to obtain a search warrant. If, by contrast, the applicant is first in but contacts the FCO when it is already in a position to obtain a search warrant, the information or evidence provided by the applicant has to enable the FCO to prove the offence. Cartel participants who are not eligible for immunity, but seek a reduction of their fine, need to provide information or evidence making a significant contribution to proving the offence (see questions 24 and 25).

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Regarding confidentiality, there is no distinction between the immunity applicant and subsequent cooperating parties. In its leniency programme, the FCO states that it will protect the identity of any leniency applicant and its business secrets until it serves a statement of objections on a cartel participant. Also, it should be noted that during the administrative proceedings, the defence has access to the file (usually following the statement of objections) and the FCO will not delete any information from documents in its file with regard to this procedural right of the defence. Even though information on the identity of a leniency applicant may be provided to the FCO on an anonymous basis, it may happen that the contents of oral or written statements made by the leniency applicant give a hint as to its identity. In addition, the FCO in its decision against the other members of an illegal cartel may have to rely on the testimony of a leniency applicant and so may have to reveal the identity of the cooperating party. Also, the non-imposition or reduction in the amount of a fine relative to the fines imposed on competitors may indicate that a corporation has cooperated with the FCO. Finally, in the press release following the issuance of the decision, the FCO will disclose a certain minimum amount of information pursuant to section 53(5) GWB (ie, information about the facts underlying the case, the type and duration of the infringement, the companies involved, the products or services affected as well as the advice that private parties may seek redress and that the FCO's definitive decision will be binding on the court in this case). In addition to that, the FCO will usually also disclose the identity of the party that has been granted full immunity. Notably, this pertains only to a situation where the proceedings have been concluded by a formal decision of the FCO. During the proceedings, the FCO is keen to avoid sensitive information becoming public and, in this regard, will adhere to the aforementioned rules.

Further, the FCO will decline applications of third parties to access the file as far as legally possible. This would, in particular, apply to applications by customers or other potentially injured parties that may apply for access to the file pursuant to section 406(e) of the Code of Criminal Procedure. Such applications must be declined insofar as

there are prevailing interests of the accused. The FCO has taken the position that access needs to be granted to documents seized or taken during a dawn raid, whereas access to the file with respect to the content of leniency applications (and annexes thereto) infringes EU competition law and must be denied. The local court of Bonn did not share this view and requested that the ECJ give a ruling thereon according to article 267 TFEU. In 2011 the ECJ ruled (Case C-360/09 – *Pfleiderer*) that it is for the national courts, on the basis of their national laws, to determine the conditions under which such access must be permitted or refused by weighing both interests protected by EU law. The local court of Bonn has decided that the FCO is entitled to refuse disclosure of leniency statements. In view of these decisions an initial legislative proposal to explicitly limit the access to documents regarding leniency applications (section 81b of the draft eighth amendment to the GWB) was dropped in the legislative proceedings. While the ninth amendment to the GWB contains certain facilitations of access to the FCO's file for claimants in cartel damages litigation, there still is a provision allowing to deny access to leniency statements (section 33g(4) GWB).

It should be noted that in cases of bid rigging and fraud, the proceedings against natural persons can be taken over by the criminal prosecutor, who may initiate proceedings even against a cooperating person.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The FCO is not obliged to initiate proceedings against a cartel participant, but rather has discretion in that respect. Furthermore, the FCO increasingly conducts settlement-type procedures and briefly outlined this process in an information leaflet published on 1 February 2016. As part of such procedure, cartel participants are usually asked to confirm the facts as perceived by the FCO. In return, the administrative decision imposing the fine will usually only include very basic reasons, thus also providing less factual background for potential follow-on damage claims based on such order. Moreover, the FCO usually reduces the fine by 10 per cent (see question 32). The settlement – which formally is a short version of a regular decision – may be challenged by the fined party (eg, with regard to the amount of the fine); the right to judicial review cannot be waived. If a corporation challenges a decision after a settlement, the FCO would usually withdraw the decision and issue a new decision without granting the above-mentioned reduction of the fine. In practice, however, corporations that have reached a settlement with the authority should rarely have an interest in doing so.

In case of investigations involving a public prosecutor, a plea bargain may be reached. Following a decision by the Federal Constitutional Court, however, such bargain is subject to certain strict requirements.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

It is for the immunity or leniency applicant to decide which legal entities and which (current and former) employees are covered by the application. Usually, a corporate defendant will also extend its application to all (current and former) employees involved. In such case, the employees will equally benefit from any immunity or reduction of fines granted (provided the employee immediately and unreservedly cooperates in the corporation's contribution to uncovering the cartel).

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Corporations wishing to take advantage of the leniency programme should contact the Special Unit for Combating Cartels (SKK) or, in case the FCO is already investigating into the matter, the competent Decision Division within the FCO through a person authorised to

Update and trends

The digital economy continues to be a major focus area where the FCO considers itself a frontrunner. Following previous scrutiny of best-price clauses in the hotel booking portal business, the FCO declared narrow best-price clauses to be anticompetitive as well. These clauses permit hotels to offer their rooms more cheaply on other hotel booking portals but still prescribe that the prices that they display on their own websites may not be lower than on the hotel booking platform. Furthermore, the FCO is spearheading enforcement practice with regard to big data issues, as its administrative proceeding against Facebook continues. The proceeding is based on the notion that Facebook might abuse a dominant market position by amassing large amounts of user data in violation of data protection laws. Also noteworthy is the confirmation of the FCO's decision regarding Asics by the Higher Regional Court of Düsseldorf. The FCO found the general prohibition of the use of price comparison engines imposed by Asics on the retailers in its selective distribution system to fall foul of competition law. It remains to be seen how the results of the European Commission's e-commerce sector inquiry as well as the ECJ's decision regarding selective distribution and online platforms (Case C-230/16 – *Coty*) will affect the FCO's enforcement practice.

represent the corporation. For practical purposes this should be pursued by a lawyer on behalf of the corporation. The first contact can then be made on a no-name or 'hypothetical' basis, which gives the corporation the opportunity to discuss important issues, such as confidentiality, before revealing its identity.

It is possible to discuss with the FCO the elements of cooperation (see question 28) with regard to a non-imposition or reduction of a fine (eg, the evidence the party can provide, how to obtain further evidence, the behaviour of that party at cartel meetings in the future so as not to reveal that it is cooperating). To secure the highest possible reduction of fines under the leniency programme, the corporation or, preferably, its counsel should contact the head of the SKK or the head of the competent Decision Division of the FCO as early as possible to set the marker (see question 27). This could be done over the telephone (in German or English).

If the FCO does not close the file with regard to the cooperating party pursuant to its leniency programme, the FCO will first issue a statement of objections on which the cooperating party may comment and the party will – in all likelihood – declare that it does not contest the FCO's findings. The FCO will then issue a non-contested decision in which it expressly states that the cooperating party does not contest the facts on which the decision is based. The reasons given in the decision will usually be limited to what is required by law as a minimum. In practice, the cooperating party may discuss the likely fine with the FCO and the reduction (in terms of a percentage) will be granted in view of its cooperation. In that regard, application for leniency and reaching a settlement with the authority usually go hand in hand, resulting in the FCO providing a 'discount' of up to 10 per cent if the corporation in question is not being granted immunity anyway (see question 30).

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No, there are not.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

As a general rule, the FCO will disclose information relating to its proceedings only scarcely – also to the defendant. The defendant will usually just be made aware of the fact that the FCO has opened formal proceedings and, later on, the defendant will be confronted with the FCO's statement of objections issued after the authority has, in its own view, sufficiently investigated the case (see also question 8). In the meantime, the defendant will usually receive no information at all and only be able to draw conclusions as to the status of the investigation

based on specific requests for information by the FCO. This 'information scarcity' is hardly outweighed by the right of access to file. The FCO can legally deny access to its file to the defendant as long as the cartel proceedings are ongoing. Only the defence counsel in such proceedings will be allowed access to the file (section 147 of the Code of Criminal Procedure). However, even the defence counsel will usually not gain unfettered access to the file before the FCO has issued a statement of objections to the defendant (see also question 29). Before that, the FCO will grant only limited access to the file, if any. Such limited access would usually be granted to information that directly concerns the defendant (eg, minutes of oral hearings of the defendant itself). By contrast, minutes of oral hearings of other cartel participants would not be disclosed so as to not jeopardise the investigation.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

It is generally accepted that counsel can represent a corporation under investigation as well as one employee or manager of the corporation who was involved in the alleged breach of section 1 GWB. Counsel may, however, not represent two or more individuals in the same proceedings. Generally, different members of the same law firm can represent different individuals and the corporation they belong to, respectively. A present or past employee may seek independent legal advice, in particular concerning whether the corporation should pay these legal costs, penalties, or both.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

No, and the FCO takes the view that this also applies to affiliated corporations. Generally, different members of one single law firm may, however, be able to each represent one corporate defendant.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes, provided this does not concern future infringements.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

For practical purposes, it has to be assumed that fines and other penalties are not tax-deductible. Under German law, fines and other penalties can be tax-deductible to the extent the fines or penalties do not merely sanction the unlawful behaviour committed but recoup economic advantages gained by the unlawful behaviour. However, according to recent decisions of tax courts, fines imposed by the European Commission and the FCO do not contain such element of recoupment (unless the FCO opts to include such element and expressly states this in its fining decision). These decisions have drawn criticism in legal literature. Hence, the discussion on this topic is ongoing.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Neither the sentencing criteria set forth in section 81(4) and (4a) GWB and section 17(3) of the Administrative Offences Act nor the FCO's guidelines for the setting of fines in cartel administrative offence proceedings (see question 19) make explicit reference to penalties imposed in other jurisdictions. The fact that a corporation or an individual may have already been punished or fined in another jurisdiction does not prevent the German cartel authorities from conducting an investigation and levying fines. In calculating the amount of the fine, cartel authorities will not necessarily take into account a fine already imposed in another jurisdiction. However, as the setting of the fine is at the discretion of the authorities, they are not barred from taking this into consideration.

Similarly, overlapping liability for damages in other jurisdictions is not taken into account in private damage claims.

BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY
URÍA MENÉNDEZ

Thorsten Mäger
Florian von Schreitter

thorsten.maeger@hengeler.com
florian.vonschreitter@hengeler.com

Square de Meeûs 40
1000 Brussels
Belgium

www.belex.com
www.bredinprat.fr
www.debrauw.com
www.hengeler.com
www.slaughterandmay.com
www.uria.com

40 Getting the fine down

What is the optimal way in which to get the fine down?

Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The prospect of success of a leniency approach should be analysed as soon as possible. Corporations that do not take advantage of the leniency programme should at least think about resolving the issue based on a settlement approach (see question 30). The existence of a compliance programme may only (and at full discretion of the FCO) affect the level of the fine if it is introduced subsequent to the cartel infringement being uncovered. By contrast, pre-existing compliance programmes are usually not considered a mitigating factor when determining the fine, as the authority takes the view that the infringement then proves the inefficiency of the compliance programme. It remains to be seen if the FCO will change its view in this regard, as a recent decision by the Federal Court of Justice suggests that compliance programmes should have a mitigating effect more broadly (ie, irrespective of the time of their implementation).

Greece

Marina Stavropoulou*

DRAS-IS

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Free competition in the Greek market is protected by Law 3959/2011, 'Protection of Free Competition' (the Competition Act), which abolished the previous Law 703/77, introduced when Greece was about to become a member of the EEC. Specifically, Law 703/1977 was abolished instead of being amended one more time because the legislator of Law 3959/2011 declared the intention to avoid the risk of conflicting rules and oversights and to produce a coherent statute that is easier to understand and to implement.

The new Competition Act adopted the central structure of the former one, keeping intact, with only minor grammatical and technical changes, its core substantive law provisions; namely, article 1 on restrictive agreements, and article 2 on the abuse of a dominant position (closely drafted in line with articles 101 and 102 of the Treaty on the Functioning of the European Union respectively (TFEU)). The amendments regarding concentrations are also mostly technical in nature, whereby the respective provisions, as well as all the subsequent ones, have undergone extensive renumbering. The new Competition Act introduced, however, other significant amendments concerning, *inter alia*, the organisation and operation of the Hellenic Competition Commission (HCC), the prioritisation of cases, the administrative and criminal penalties for violations, as well as several procedural rules. The amendments served the following objectives:

- the harmonisation of Greek legislation with European standards and the modernisation of the operations of the HCC;
- the strengthening of the deterrent effect of sanctions;
- the empowerment of the authority to intervene in whole sectors of the economy;
- the institutional strengthening of the HCC; and
- the enhancement of the effectiveness of its actions.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The HCC is the authority responsible for the enforcement of the Competition Act, as well as articles 101 and 102 TFEU. Pursuant to Law 2296/95, the HCC is an independent administrative authority with procedural and decision-making autonomy. Pursuant to Law 2837/2000, the HCC also enjoys financial autonomy. The HCC performs all the enforcement actions of a designated national competition authority (NCA) to apply national and EU competition rules, in accordance with Regulation (EC) 1/2003 (see article 5). It also has consultative powers in the area of identifying and removing regulatory barriers to competition. In particular, the HCC has broad enforcement powers in the area of collusive practices and cartels, abuses of dominance and merger control. In this context, the HCC may:

- take decisions finding an infringement of article 1 of the Competition Act and article 101 TFEU (collusive agreements and/or concerted practices between undertakings that have as their object or effect the restriction of competition) and impose administrative fines;

- take decisions finding an infringement of article 2 of the Competition Act and article 102 TFEU (abuse of dominance) and impose administrative fines;
- take interim measures in case of suspected infringement of articles 1, 2 and 11 of the Competition Act, as well as of articles 101 and 102 TFEU;
- review prior notifications of envisaged mergers and acquisitions (merger control of concentrations), in accordance with articles 5 to 9 of the Competition Act, and impose pertinent measures and sanctions;
- launch investigations and conduct dawn raids for the enforcement of antitrust and merger control rules;
- deliver opinions on competition issues on its own initiative or upon request of the Minister of Development and Competitiveness or of any other competent minister, in accordance with article 23 of the Competition Act; and
- conduct sector inquiries, in accordance with article 40 of the Competition Act.

The HCC cooperates closely with the European Commission and the national competition authorities in all EU member states in order to enforce EU competition rules, primarily in the context of the Regulation (EC) 1/2003. Furthermore, it cooperates closely with other competition authorities in its capacity as a member of the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN).

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

No changes have been made to Law 3959/2011 (Competition Act) in 2016. However, based on specific enabling provisions of the Competition Act, the HCC continued its secondary legislation and soft-law initiatives. To date, there have been no significant legal challenges to the use of investigative measures used by the HCC. To the contrary, all relevant decisions of the Athens Court of Appeals that have been issued so far, acknowledged the wide discretion of the HCC in conducting dawn raids.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

According to the Competition Act, all agreements and concerted practices between undertakings and all decisions by associations of undertakings that have as their object or effect the prevention, restriction or distortion of competition shall be prohibited, and in particular those that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, distribution, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent trading transactions, especially the unjustified refusal to sell, buy or otherwise trade, thereby hindering the functioning of competition; and

- make the conclusion of contracts subject to acceptance, by the other parties, of supplementary obligations which, by their nature or according to commercial use, have no connection with the subject of such contracts.

The Competition Act does not define the term 'cartel'. However, the term 'prohibited agreements and concerted practices' is used and article 1 of the Competition Act includes specific practices that are considered as anticompetitive agreements between undertakings. Article 1 essentially refers to the same practices prohibited under article 101 TFEU. While the Competition Act does not distinguish between hard-core cartels and other types of cartels, the HCC's decisions are in line with the relevant EU case law on this matter. Moreover, the published guidelines on the method of setting fines provide that horizontal price-fixing, market sharing and output limitation agreements are considered as the most serious infringements of competition law. The participation in agreements such as price fixing or market sharing has been treated by the HCC as per se illegal.

Participation in a hard-core cartel is both an administrative and criminal offence according to Greek law (article 35 of the Competition Act). However, it must be noted that under the Competition Act the proceedings within the Greek enforcement system are of an administrative nature only. The HCC does not have the power to impose criminal sanctions, while the latter lies within the competences of the criminal courts.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no any industry-specific defences or antitrust exemptions from the Competition Act. The latter applies equally to government-sanctioned activity or regulated conduct.

6 Application of the law

Does the law apply to individuals or corporations or both?

Article 1 of the Competition Act and article 101(1) TFEU prohibitions apply to agreements, decisions and concerted practices between undertakings. The term 'undertaking' applies to any entity that performs an economic activity irrespective of its legal status and the way the said entity is being financed. It is settled case law that undertakings include both natural and legal persons. The same approach has been adopted by the HCC regarding the application of merger control.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Article 1 prohibitions are applicable only where the relevant agreement, decision or practice has as its object or effect the elimination, restriction or distortion of competition within the Hellenic Republic. In addition, under article 14, the HCC cooperates with the European Commission and the competition authorities of the other EU member states for the application of EU competition law, pursuant to the relevant provisions of the Competition Act and of Regulation (EC) 1/2003.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

According to article 44, Law 3959/2011 shall apply to all restrictions of competition that affect or might affect Greece, even if these are owing to agreements between undertakings, decisions by associations of undertakings, concerted practices between undertakings or associations of undertakings or concentrations of undertakings implemented or taken outside Greece or to undertakings or associations of undertakings that have no establishment in Greece. The same shall apply with regard to abuse of a dominant position manifesting in Greece.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The HCC has extensive investigative powers (that mirror the European Commission's investigative powers in all key aspects). In particular, according to article 38 and 39 of the Competition Act, the HCC has the power to conduct inspections of business premises, non-business premises, as well as the homes of directors, managers, and other members of staff of the undertakings and associations of undertakings concerned, under the conditions set by law and to request information from an undertaking and/or association of undertakings or natural person in the context of an investigation. A court warrant is not a prerequisite in order to conduct an inspection of business premises, but it must be obtained if the undertaking subject to the investigation refuses to accept the investigation. Similarly, in all inspections of non-business premises, a judge or public prosecutor should be present. According to article 39 of the Competition Act, the HCC has the power to take sworn or unsworn testimonies, as appropriate, by any representative or member of staff of any undertaking or association of undertakings. The HCC also has the power to conduct interviews or ask questions during inspections of business and/or non-business premises. In addition, the HCC may address compulsory requests for information also to public or other authorities. Public authorities and legal persons governed by public law have a duty of information. In the event of refusal, obstruction or delay in providing the information requested, the HCC may file an official report so that disciplinary action can be taken against civil servants or employees of public-law legal entities for the above infringements, which are a disciplinary offence.

All cases regarding the application of articles 1 and 2 of the Competition Act are assigned to a Commissioner (rapporteur) when the investigation is mature. There is no time limit regarding the period between the initiation of proceedings and the assignment of the case to a rapporteur.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

In order to establish the existence of an infringement, the HCC conducts a series of investigatory measures, such as:

- inspections of business premises, non-business premises and means of transport of undertakings or associations of undertakings concerned (dawn raids);
- inspections of private premises, including the homes of directors, managers, and other members of staff of the undertakings and associations of undertakings concerned, under the conditions set by law;
- requests for information addressed to undertakings directly or indirectly involved and to market operators;
- examination of books and other records, irrespective of the means on which they are stored, and making of copies, in any form, of extracts of such books or records; and
- testimonies and explanations on the facts or documents relating to the subject-matter and the purpose of the investigation from representatives or members of the staff of the undertaking or the association of undertakings involved.

Upon conclusion of the investigation, a statement of objections (SO) is drafted and submitted to the HCC's Competition Commission to decide whether the alleged infringement has been substantiated or not. The decision of the Competition Commission is issued within 30 days from the last session in which the examination of the case was concluded.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The HCC, as the NCA, is responsible for cooperation:

- with the competition authorities of the European Commission and for providing its designated bodies with the necessary assistance to undertake the controls provided for under EU law; and
- with the competition authorities of other countries.

If an undertaking that has its seat or exercises its activity in Greece refuses to allow the inspection provided for under EU law, the Competition Commission and its empowered body, acting ex officio or following a relevant request from the bodies designated by the European Commission, shall ensure overall proper conduct of the investigation, in particular by providing necessary assistance, implementing in this instance the provisions of article 38 of Law 3959/2011.

Therefore, the HCC, according to national legislation, cooperates closely with the European Commission and the national competition authorities in all EU member states in order to enforce the EU competition rules, primarily in the context of Regulation (EC) 1/2003. Furthermore, it cooperates closely with other competition authorities (ie, mutual legal assistance treaties, MOUs, cooperation agreements, etc), in its capacity as a member of the OECD and the ICN.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The HCC has often cited, in its reasoning, relevant decisions of the European Commission and other national competition authorities. Apart from this aspect, there is no significant interplay with other jurisdictions.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Investigations in cartel cases may be launched:

- after the HCC's ex officio initiation of proceedings;
- following a complaint filed with the HCC; or
- upon a leniency application.

There are no particular legal requirements for lodging a complaint against a cartel. Unlike the proceedings before the European Commission, complainants are not required to demonstrate a legitimate interest for lodging the complaint.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

Each party shall bear the burden of proof of their claims during proceedings before the HCC for the purposes of articles 1 and 2 of the Competition Act.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

To comply with the burden of proving an infringement the HCC can rely on both direct and indirect evidence. Consequently the assessment of an infringement can be based on circumstantial evidence if an overall pattern of guilt emerges and in the absence of any other reasonable hypothesis that could be predicated on that evidence.

16 Appeal process

What is the appeal process?

According to article 30, paragraph 1 of the Competition Act, the decisions of the HCC are subject to an appeal before the Athens Administrative Court of Appeals within a time limit of 60 days following notification of the HCC's decision. In addition (article 32, Competition Act), an appeal before the Council State against the decision of the Athens Administrative Court of Appeal can be filed within 60 days following the issuance of the decision of the Athens Administrative Court of Appeal.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The participation in a cartel is both an administrative and a criminal offence. Specifically, when the HCC finds that the provisions of article 1 (ie, cartel activity) have been infringed, it shall report the infringement to the competent prosecution authority within no more than 10 days of issuing its decision. According to article 44, any person who executes an agreement, takes a decision or applies a concerted practice in breach of article 1 or article 101 TFEU shall be punished by a fine between €15,000 and €150,000. If the act referred to in the first sentence pertains to undertakings that are in actual or potential competition with each other, a term of imprisonment of at least two years and a fine of between €100,000 and €1 million shall be handed down.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

According to the Competition Act, the HCC can impose procedural sanctions and fines on undertakings, associations of undertakings or persons who obstruct or hamper, in any manner, investigations carried out under the provisions of this article (dawn raids). The HCC can also impose procedural sanctions and fines on undertakings, associations of undertakings or persons who refuse to submit to relevant inspections, produce books, records and other documents requested and provide copies or extracts of them. The legislation also provides for penal sanctions imposed by national courts.

The administrative fine imposed for infringement of article 1 of the Competition Act and article 101 TFEU (collusive agreements and/or concerted practices between undertakings) and article 2 and article 102 TFEU (abuse of dominance) may be up to 10 per cent of the total turnover of the undertaking for the financial year in which the infringement ceased or, if it continues until issuing of the decision, the year preceding the issuing of the decision. In the case of a group of companies, calculation of the fine shall take account of the total turnover of the group. In determining the level of the fine, account must be taken of the gravity, duration and geographical scope of the infringement; the duration and nature of participation in the infringement by the undertaking concerned and also its economic benefit derived therefrom.

According to article 25 of the Competition Act the persons obliged to comply with the provisions of the Competition Act and articles 101 and 102 TFEU are:

- in the case of individual undertakings, the owners;
- in the case of civil and commercial companies and joint ventures, their managers and all the general partners; and
- in the specific case of public limited companies, the members of the board of directors and those persons responsible for implementing the relevant decisions.

Regarding decisions of collective bodies of the undertaking taken by majority, only those voting in favour shall be liable. The HCC may also impose on the above natural persons, following their hearing, a separate fine from €200,000 to €2 million, where they demonstrably participated in preparatory acts, the organisation or implementation of the unlawful behaviour of the undertaking.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The HCC has published guidelines on the method of setting fines (available only in Greek at www.epant.gr/img/x2/categories/ctg253_3_1193315361.pdf). In general terms, determining the level of the fine, account must be taken of the gravity, duration and geographical scope of the infringement, the duration and nature of participation in the infringement by the undertaking concerned, and also its economic benefit derived therefrom. Where it is possible to calculate the level of economic benefit to the undertaking from the infringement, the fine shall be no less than that.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

The Competition Act does not provide for debarment from public procurement procedures for cartel infringements.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Criminal, civil and administrative sanctions can be pursued in parallel in respect of the same conduct. As a matter of legal certainty, however, public prosecutors will often stay their investigations until the HCC has issued a decision of its own.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Private damages claims are not mentioned specifically under the Competition Act. It must be noted though that any person affected by infringements of article 1 may file a lawsuit before the civil courts. However, according to the Directive 2014/104/EU on Antitrust Damages Actions, following US practice, from 27 December 2016, third parties (and in certain circumstances, even parties involved in the infringement) that have suffered loss as a result of cartel behaviour can sue for damages before the national courts. According to this directive, which will be transposed in national legislation by the end of 2017, national courts can order companies to disclose evidence when victims claim compensation, while a final decision of HCC finding an infringement will automatically constitute proof of the infringement. Furthermore, if an infringement has caused a price increase and it has been passed on along the distribution chain, those who suffered harm at the end (consumers) can claim compensation. The directive clarifies that victims are entitled to full compensation for the harm suffered, which covers compensation for actual loss and for loss of profit, plus payment of interest from the time the harm occurred until compensation is paid. Any participant in an infringement will be responsible towards the victims for the whole harm caused by the infringement (joint and several liability), with the possibility of obtaining a contribution from other infringers for their share of responsibility. However, to safeguard the effectiveness of leniency programmes, this will not apply to infringers who obtained immunity from fines in return for their voluntary cooperation with a competition authority during an investigation; these immunity recipients will normally be obliged to compensate only their (direct and indirect) customers.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are not provided in the Competition Act, but can be filed before civil courts.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Undertakings that assist in the investigation of infringements of competition rules (other than the rule on abuse of a dominant position) by giving information or evidence about the existence and operation

of a cartel of which they were members, may ask to be granted immunity from a fine and/or a reduction of the fine. Leniency programmes implemented by the European Commission and the national competition authorities play a crucial role in the enforcement against cartels, as they offer incentives to cartel members to file a complaint and put an end to such illegal behaviour, thereby strengthening efforts at detection, rendering and prevention of cartels.

In particular, according to the leniency programme first introduced in 2005 and revised in 2011, the HCC will grant immunity from fines that would have otherwise been imposed on a company disclosing its participation in an alleged cartel only if that company:

- is the first to submit information and evidence that in the HCC's view will enable it to either launch a targeted investigation with regard to the alleged violation of article 1 of the Competition Act (and article 101 TFEU), or find an infringement of article 1 of the Competition Act (and article 101 TFEU);
- cooperates genuinely, fully, continuously and expeditiously from the time it submits its application throughout the HCC's administrative procedure;
- stopped its involvement in the alleged cartel immediately following the submission of its application or evidence;
- has not induced other companies to participate in the alleged cartel; and
- has treated its application for leniency as confidential until the issuance of the SO by the Directorate General.

The decisive conditions for immunity or reduction in fines are the timing of the application, the degree to which the leniency application entails or enhances the HCC's capability to establish proof of the infringement, the significance and completeness of the evidence and/or information submitted by the participant, which must, in any case, have additional probative value in relation to the evidence already in the HCC's possession.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

As mentioned above both full and partial leniency are provided by the leniency programme. In order to qualify for a reduction of fine, an undertaking which is not the first to submit information, it must provide the HCC with evidence that has an added value with respect to the evidence already possessed by the HCC. Also, it has to stop its involvement in the alleged cartel at the latest time it makes its leniency application.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

For the second undertaking to meet the aforementioned criterion, a reduction of 20 per cent to 30 per cent is applied. Finally, for the subsequent undertakings that meet aforementioned criterion, a reduction of up to 20 per cent is granted.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no deadlines for initiating or completing an application for immunity or partial leniency. Under the revised leniency programme regime, the applicant may request a 'marker', which protects the applicant's place in the queue for a given period of time. According to the leniency programme, the undertaking (or the natural person) wishing to benefit from the 'marker' system has to submit to the HCC a minimum set of information and may withhold its priority, provided that it submits the evidentiary material required within the deadline set by the HCC. The set of information required to obtain a 'marker' includes the identification of the alleged cartel members, the affected geographic

and product markets, and the cartel's duration, nature and operation, as well as potential leniency applications submitted to other NCAs.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

See questions 22 to 26.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

In the context of the general obligation of the officials of the Directorate General (DG) and the members of the HCC to treat in a confidential way any material gathered during the examination of any case the agency is required to keep the identity of the beneficiary confidential. The Competition Act also provides that any information gathered in the context of the examination of any case, may be used only in relation to the particular case for which the information has been gathered. If the officials of the DG infringe the above provisions, they may be imprisoned for at least three months, in accordance with article 252 of the Penal Code, and pay a sanction of at least €1,000, but not exceeding €10,000. They may also be disciplinarily prosecuted for breaching their obligation of confidentiality. If, on the other hand, the provisions of article 41 of the Competition Act are infringed by the President or the members of the HCC, they may be punished pursuant to article 252 of the Penal Code, as well as with a pecuniary sanction of at €1,500, but not exceeding €15,000, and by the same decision they are disqualified from their position as a member of the HCC.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

In May 2016, the HCC adopted a new settlement procedure concerning cases where undertakings or associations of undertakings make a clear and unequivocal acknowledgement of participation and liability in relation to their participation in horizontal agreements (cartels) and the subsequent breach of competition law. As a result, they can obtain a reduction of the imposed fine by 15 per cent, provided that certain conditions are fulfilled. The reduction of the fine amounting to 15 per cent due to settlement will be deducted from the fine that a company would normally have to pay according to the provisions of the current HCC's guidelines on fines.

The new settlement procedure, which is essentially modelled after the EU-equivalent procedure, aims at simplifying and speeding up the handling of pending cases. It would allow the HCC to achieve efficiencies through a streamlined administrative process, resulting in the increased expeditious adoption of infringement decisions regarding article 1 of the Competition Act and/or article 101 TFEU. In addition, the settlement procedure provides scope for a reduction in the number of appeals against the HCC's decisions before the administrative courts. In turn, this would allow a better allocation of resources, in order to deal with more cases, thereby increasing the deterrence effect of the HCC's enforcement action, while simultaneously increasing citizens' awareness in the effective and timely punishment of undertakings infringing competition law.

Settlement discussions may commence on the parties' initiative at any stage of the investigation. However, procedural efficiencies are less likely to accrue if a statement of objections has been already addressed to the parties concerned. In any case, the deadline for the filing of a request for settlement is 35 days before the hearing. The HCC will not bargain about evidence or its objections or the finding of an infringement. However, each business will also be heard effectively in the

framework of the settlement procedure and parties will therefore have the opportunity to influence the HCC's objections through argument. The HCC issues a simplified decision accepting the settlement.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

There is no express provision in either the Competition Act or in the leniency programme regarding how current or former employees will be treated in the event immunity or leniency is granted to a corporate defendant.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

According to the leniency programme, the undertaking must cooperate fully, actively and on a continuous basis throughout the procedure and expeditiously provide all information and evidence that is available to it, or comes into its possession at a later stage, relating to the suspected infringement. In particular, it remains at the DG's and at the HCC's discretion to answer swiftly any question or request that may contribute to the establishment of the facts concerned. Furthermore, the undertaking must end its involvement in the suspected infringement no later than the time at which it submits evidence and must not have urged other undertakings to participate in the infringement. Moreover, the undertaking must keep confidential in relation to any third party the fact that it has submitted a leniency application until the conclusion of the SO for the case by the DG. Finally, the undertaking must not have participated in the past in a prohibited collusive practice for which a decision by a NCA or the European Commission has been issued.

An undertaking wishing to apply for immunity from fines should contact the Head of the Directorate of Legal Services of the DG, who immediately informs the Director General of the HCC. Should the Directorate of Legal Services, in collaboration with the competent operational directorate, deem that the requirements set out in paragraphs 1 to 3 are not met, it so reports to the Director General. In this case, the President of the HCC, upon proposal of the Director General, immediately informs the undertaking that immunity from fines is not possible for the suspected infringement.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or anticipated assessments or reviews of the immunity/leniency regime at present, since the HCC amended it in 2011.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

Assessment of the confidential nature of information requires balancing the requirements for due exercise of the right of defence against the need to safeguard the confidentiality of certain information, as well as any legal interests prohibiting their disclosure. Efficient and consistent application of national and EU rules on competition requires that the disclosure of evidence does not unjustifiably restrict the efficient enforcement of competition law by competition authorities. Moreover, the qualification of information as confidential does not prevent the HCC from disclosing and using information necessary to prove an infringement of articles 1 and 2 of the Competition Act or articles 101 and 102 TFEU. Where business secrets and confidential information are necessary to prove an infringement or for the purpose of applying competition rules in general, the HCC must assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

There is no explicit provision prohibiting counsel from representing multiple corporate defendants. However, this should be evaluated from the outset whether a conflict of interests could arise, whereby independent legal advice must be sought.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

There is no explicit provision prohibiting counsel from representing multiple corporate defendants. However, this should be evaluated from the outset whether a conflict of interests could arise, whereby independent legal advice must be sought.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

There is no provision in the Competition Act prohibiting the payment by a corporation of the legal penalties and legal costs imposed on its employees.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

There are no tax deductions regarding fines or private damages.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

As in many EU jurisdictions (eg, Cyprus and Germany), there are no explicit rules preventing international double jeopardy for cartel enforcement. However, the HCC may take into account fines and other sanctions imposed by the European Commission or other national competition authorities of the European Competition Network before deciding on the level of the administrative fine.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

As noted in question 18, guidelines on the method of setting fines apply by taking into account the gravity, duration and geographical scope of the infringement, the duration and nature of participation in the infringement by the undertaking concerned, and also its economic benefit. However, undertakings are encouraged to cooperate with the HCC and these actions may lead to a reduction of the fine.

* This chapter is accurate as of November 2017.



Marina Stavropoulou

marina@dras-is.com

62 Charilaou Trikoupi Street
Kifisia
145 62
Greece

Tel: +30 210 808 6721
Mob: +30 694 422 2111
www.dras-is.com

Hong Kong

Natalie Yeung

Slaughter and May

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Section 6 of the Competition Ordinance 2012 (Cap 619 of the Laws of Hong Kong) (the Ordinance) prohibits cartel conduct in Hong Kong. The substantive provisions came into effect on 14 December 2015.

The Competition Commission (the Commission) and the Communications Authority (CA) issued six guidelines under the Ordinance on 27 July 2015 (the Guidelines). The Guidelines provide guidance on how the Commission and the CA intend to interpret and apply the provisions of the Ordinance. In addition, the Commission published two policy documents on enforcement and leniency, as well as other guidance (including on the investigation powers of the Commission and legal professional privilege).

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Ordinance established two bodies for enforcement roles:

- the Competition Commission, whose role is to investigate and prosecute suspected offenders; and
- the Competition Tribunal (the Tribunal), comprising judges of the Hong Kong Court of First Instance (CFI).

The Commission has a full range of powers to investigate suspected cartels, including powers to require production of documents and information, to require individuals to attend interviews before the Commission and, if armed with a court warrant, to enter and search premises.

On 27 April 2018, five of the current Commission members received a two-year renewal of their appointments, and nine new members were appointed to the Commission as eight members stepped down. The chairperson of the Commission, Ms Anna Wu, was reappointed for another two years from 1 May 2018. The Commission now has 15 members as of 1 May 2018.

There were also a number of changes in the Executive staff of the Commission in 2017. First, Mr Brent Snyder was appointed as Chief Executive Officer in summer 2017. Mr Snyder was the former Deputy Assistant Attorney General of the US Department of Justice (Head of criminal enforcement function). Second, Mr Jindrich Kloub was appointed as Executive Director (Operations) of the Commission in October 2017. Mr Kloub was an official at the Directorate-General for Competition (DG Competition) of the European Commission from 2006 until 2017. Third, Mr Steven Parker was appointed as Executive Director (Legal Services) of the Commission in July 2017. Before his appointment to the Commission, Mr Parker was the Chief Litigation Counsel of the Hong Kong Monetary Authority.

The Tribunal acts as the adjudicative body for applications by the Commission on alleged infringements of the competition rules and private actions in respect of such infringements.

Mr Justice Godfrey Lam and Madam Justice Queeny Au-Yeung were reappointed for three-year terms as the president and deputy

president respectively of the Tribunal with effect from 1 August 2016. Every judge of the CFI is also, by virtue of his or her appointment as such, a member of the Tribunal.

While the Commission is the principal competition authority responsible for enforcing the Ordinance, the CA has concurrent jurisdiction with the Commission in respect of undertakings licensed in the telecommunications and broadcasting sectors.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

There are currently no proposed changes to the regime. A review of the Ordinance is due to be carried out by the government towards the end of 2018, three years after the Ordinance came into effect.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Section 6 of the Ordinance states that an undertaking must not:

- make or give effect to an agreement;
- engage in a concerted practice; or
- as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong (the First Conduct Rule).

Section 2 of the Ordinance defines serious anticompetitive conduct as any conduct that consists of price fixing, market sharing, output restriction and bid rigging. Such conduct shall be subject to stricter enforcement action (for example, the *de minimis* exclusion in paragraph 5 of Schedule 1 to the Ordinance is not available for serious anticompetitive conduct).

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

At present, there are no industry-specific infringements under the Ordinance in respect of antitrust conduct. On 8 August 2017, the Commission issued a Block Exemption Order in respect of vessel sharing agreements (a type of agreement between operators of liner shipping services on certain operational arrangements, such as slot sharing) in the liner shipping industry, excluding such agreements from the application of the First Conduct Rule by virtue of the efficiencies brought about by them. The exemption is subject to certain conditions and will continue in force until 8 August 2022.

There is no specific defence or exemption for government-sanctioned activity or regulated conduct, as such. However, there are two exclusions in paragraphs 2 and 3 of Schedule 1 to the Ordinance that may be relevant in this context, namely that the conduct rules do not apply if:

- the relevant conduct is required by a ‘legal requirement’, which is defined as a requirement imposed by or under any enactment in force in Hong Kong or imposed by any national law applying in Hong Kong (paragraph 2 of Schedule 1 to the Ordinance); or
- the undertaking has been entrusted by the government with the operation of services of a general economic interest in so far as the conduct rule would obstruct the performance, in law or in fact, of the particular tasks assigned to it (which is modelled on article 106(2) of the Treaty on the Functioning of the European Union).

The Guidelines indicate that these exclusions will be narrowly construed by the Commission.

6 Application of the law

Does the law apply to individuals or corporations or both?

The law applies to both individuals and corporations. The First Conduct Rule applies to ‘undertakings’. An undertaking is defined under section 2 of the Ordinance as ‘any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity’, and includes a natural person engaged in economic activity.

Individuals may also be liable for infringements of the First Conduct Rule. In particular, Part 6 of the Ordinance envisages that a ‘person’ (the definition of which appears to cover natural persons) who was ‘involved’ in the contravention of the First Conduct Rule (eg, by being knowingly concerned in or party to the contravention, or by aiding, abetting, counselling or procuring any other person to contravene the rule) may also be subject to a pecuniary penalty or other order imposed by the Tribunal. The Tribunal may also make a disqualification order against an individual, which prohibits that person for a period not exceeding five years from: being a director of a company; being a liquidator or provisional liquidator of a company; being a receiver or manager of a company’s property; or in any way, whether directly or indirectly, being concerned or taking part in the promotion, formation or management of a company.

On 6 September 2018, the Commission brought its first case against individuals allegedly involved in a contravention of the Ordinance. The case was brought against three construction companies and two individuals. The Commission is seeking fines against the alleged cartel’s participants, as well as a director disqualification order for one of the individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Section 8 of the Ordinance states that the First Conduct Rule applies if the agreement, concerted practice or decision has the object or effect of preventing, restricting or distorting competition in Hong Kong, even if:

- the agreement or decision is made or given effect to outside Hong Kong;
- the concerted practice is engaged in outside Hong Kong;
- any party to the agreement or concerted practice is outside Hong Kong; or
- any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no specific exemption or defence in the Ordinance for conduct that only affects customers or other parties outside the jurisdiction. However, the First Conduct Rule applies only if the agreement, concerted practice or decision has the object or effect of preventing, restricting or distorting competition in Hong Kong.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

Section 39 of the Ordinance states that the Commission may commence a cartel investigation:

- of its own volition;
- where it has received a complaint;
- where the court or the Tribunal has referred any conduct to it; or
- where the government has referred any conduct to it.

Section 40 of the Ordinance requires the Commission to issue guidelines on the procedures it will follow both in deciding whether to conduct an investigation and in conducting the investigation itself. The Commission’s Guideline on Investigations as published on 27 July 2015 refers to a two-phase investigation process composed of:

- an initial assessment phase during which the Commission (relying solely on public information or information provided on a voluntary basis) considers whether it is reasonable to conduct an investigation and whether there is sufficient evidence for it to establish a reasonable cause to suspect that a contravention of the competition rules has occurred; and
- if the Commission has reasonable cause to suspect a contravention of the competition rules, an investigation phase during which the Commission may use its compulsory document and information-gathering powers.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Under Divisions II and III of Part 3 of the Ordinance, the Commission is granted a full range of investigative powers, including powers to require production of documents and information that it reasonably believes to be relevant to the investigation, to require individuals to attend interviews before the Commission and, if armed with a court warrant granted by a judge of the CFI, to enter and search premises (ie, conduct a dawn raid) and use reasonable force for gaining entry, to take possession of documents or computers found on the premises that are reasonably believed to contain relevant information for establishing a contravention of a competition rule. As mentioned above, the Commission issued a guideline on 27 July 2015 on the procedures it will follow when conducting an investigation.

In conducting its investigations, the Commission has continued to use its compulsory evidence-gathering powers under the Ordinance to request documents and information from companies and enter and search premises. In general, the Commission reports that businesses under investigation have shown a high degree of compliance with the Commission’s evidence-gathering requests. Since the Ordinance came into effect in December 2015, the Commission has carried out a number of dawn raids across different investigations already.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The Ordinance does not contain express provisions on cooperation with regulatory authorities in other jurisdictions. However, the Commission has shown willingness to cooperate with other authorities – both within Hong Kong and in other jurisdictions – by signing memoranda of understanding as well as engaging in informal dialogue and sharing experiences on cases. As required by section 161 of the Ordinance, the Commission and the CA signed a memorandum of understanding on how the two bodies will cooperate and pursue enforcement actions, which envisages that they will, where necessary, exchange information (including confidential information) with a view to adopting a harmonised approach under the Ordinance.

The Commission has a secondment programme with certain overseas agencies, including the UK CMA. In December 2016, the Commission signed a memorandum of understanding with the Competition Bureau of Canada with the purpose of enhancing cooperation, coordination and information sharing between the two agencies. In the spirit of such cooperation, Andrea McAuley from the Competition Bureau of Canada joined the Commission in February 2017 for a six-month secondment as part of an exchange programme under the memorandum of understanding.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The Commission has indicated that it will look to other jurisdictions for precedents, especially in the early days of enforcement. For example, the March 2018 judgment of the Tribunal in the *Nutanix* case (see question 34 for details), in relation to document disclosure, considered practice in the UK, Australia and the EU, in response to arguments raised by one of the respondents. However, at the same time, the courts of Hong Kong have indicated that decisions of the courts of other jurisdictions cannot be transplanted to Hong Kong without a careful examination of the social and legal context in which they were made. It remains to be seen how influential foreign law will be on the decisions of the Tribunal.

Furthermore, given the proximity of Hong Kong to China, we would expect the Ordinance to apply to Chinese companies in a significant way, but it is not yet clear to what extent the Commission will coordinate with the relevant Chinese competition authorities. There has been some high-level dialogue and communication between the Commission and the Chinese competition authorities since the Ordinance came into effect.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The Tribunal acts as the adjudicative body for applications by the Commission on alleged infringements of the First Conduct Rule and private actions in respect of such infringements. It is therefore the Tribunal that determines whether an infringement of the Ordinance has occurred.

Section 92 of the Ordinance allows the Commission to initiate enforcement action, if it considers it appropriate to do so, and apply to the Tribunal for a pecuniary penalty to be imposed on any person that it has reasonable cause to believe has infringed the First Conduct Rule or been involved in such an infringement.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof is on the Commission. We expect the level of proof will be the normal civil standard (balance of probabilities).

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The First Conduct Rule applies to concerted practices, which the Commission has defined in its Guideline on the First Conduct Rule as 'a form of cooperation, falling short of an agreement, where undertakings knowingly substitute practical cooperation for the risks of competition'. The Guideline further provides that the Commission is likely to conclude that there exists a concerted practice with the object of harming competition (and thus an infringement of the First Conduct Rule) where competitively sensitive information, such as an undertaking's planned prices or planned pricing strategy, is exchanged between competitors in circumstances where:

- the information is given with the expectation or intention that the recipient will act on the information when determining its conduct in the market; and
- the recipient does act or intends to act on the information.

Without a legitimate business reason for an information exchange of this kind, the Commission is likely to infer from the information exchange that the party providing the relevant information had the requisite expectation or intention to influence a competitor's conduct in the market. Similarly, in the absence of a legitimate business reason for taking receipt of the information exchanged or other evidence showing that the recipient did not act or intend to act on the information when determining its conduct in the market, the Commission is likely to infer

that the recipient undertaking acted on or intended to act on the information exchanged.

In January 2016, the Hong Kong High Court handed down a judgment quashing a 2013 decision of the CA, which was made under the competition provisions in the Broadcasting Ordinance (see *Television Broadcasts Limited v Communications Authority and The Chief Executive in Council*, HCAL 176/2013). In upholding the CA's competition law analysis, Mr Justice Godfrey Lam (also the president of the Tribunal) clarified a number of legal principles, which are also relevant to future cases decided under the Ordinance. This included the principle that, in evaluating the evidence, the CA is entitled to draw 'sufficiently compelling' inferences from the relevant circumstantial evidence considered in its entirety.

In May 2018, the Hong Kong High Court handed down a judgment ordering an alleged antitrust contravention from an ongoing legal action to be transferred to the Tribunal (see *Taching Petroleum Company, Limited v Meyer Aluminium Limited*, HCA 1929/2017). Taching argued that Meyer had not provided any evidence of direct collusion, but relied only on circumstantial evidence. In the judgment, Madam Justice Queeny Au-Yeung accepted that parallel conduct cannot by itself be equated with concerted practice, but it may, depending on the circumstances, be evidence of such practice.

16 Appeal process

What is the appeal process?

Certain decisions made by the Commission may be reviewable by the Tribunal (section 84 of the Ordinance). This includes decisions or rescission of decisions by the Commission as to whether certain conduct is exempt from application of the First Conduct Rule (eg, block exemption order or an individual exemption decision), as well as decisions varying or releasing commitments relating to any competition rule. A person specified in section 85 of the Ordinance may apply to the Tribunal for leave to review a reviewable determination. Section 85 provides that an application for review may be made:

- in the case of a decision relating to the variation of a commitment or the release of a person from a commitment, by the person who made the commitment; or
- in the case of a decision relating to the termination of a leniency agreement, by a party to the agreement.

A person who does not fall into one of these categories may also apply to the Tribunal for a review of a reviewable determination if the Tribunal is satisfied that the person has a sufficient interest in the reviewable determination.

Appeals can be made as of right to the Court of Appeal against any decisions, determinations or orders by the Tribunal, including a decision as to the amount of any compensatory sanction or pecuniary penalty (section 154 of the Ordinance).

In respect of appeals against an interlocutory decision, determination or order by the Tribunal, leave of the Court of Appeal or the Tribunal will be required, unless any rules of the Tribunal specify that an appeal lies as of right against such decisions or orders (section 155 of the Ordinance).

Section 158 of the Ordinance envisages that the chief judge may make Tribunal rules to regulate and prescribe the practice and procedure (and any incidental matters) to be followed by the Tribunal. These rules were brought into full effect on 14 December 2015.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions in Hong Kong in respect of cartel infringements.

However, providing false or misleading information or obstruction of the Commission's investigations, such as failure to comply with a Commission requirement or destruction of evidence, may expose individuals or businesses to criminal sanctions under the Ordinance (sections 51–55 of the Ordinance).

Criminal offences may also be committed by a person who causes their employee to suffer certain conduct or damage (eg, discriminates against the employee or terminates the employment contract) because

the employee had assisted the Commission in its investigation or proceedings (section 173 of the Ordinance).

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Ordinance gives the Tribunal the power to apply a full range of civil remedies for an infringement of the First Conduct Rule, including (among others):

- a declaration that a person has contravened a competition rule;
- financial penalties of up to 10 per cent of Hong Kong turnover of the relevant undertaking for a maximum of three years of infringement (at present, it is unclear whether this extends to group turnover);
- disgorgement orders (ie, to pay back the illegal profits made from the infringement);
- injunctions; and
- disqualification orders against directors.

A full list of orders that may be made by the Tribunal is set out in Schedule 3 to the Ordinance.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

There are no formal sentencing guidelines yet. The Commission is reported to be working on a set of guidelines relating to the calculation of pecuniary penalties which the Commission will recommend to the Tribunal.

Section 93(2) of the Ordinance sets out certain factors to which the Tribunal must have regard in determining the amount of the pecuniary penalty. These are:

- the nature and extent of the conduct that constitutes the contravention;
- the loss or damage, if any, caused by the conduct;
- the circumstance in which the conduct took place; and
- whether the person has previously been found by the Tribunal to have contravened the Ordinance.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

There is no such reference in the Ordinance.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Not applicable, as there are no criminal sanctions in Hong Kong for cartel activity.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Follow-on private actions for damages are provided for by the Ordinance. A person who has suffered loss or damage as a result of any act that has been determined to be a contravention of a conduct rule has a right of action under the Ordinance (subject to appeal periods during which such follow-on actions may not be brought). It remains to be seen how the Tribunal will deal with pass on and double recovery issues.

Private enforcement actions may be brought before the Tribunal based on:

- a determination by the Tribunal, the CFI or the higher courts that a conduct rule has been infringed; or
- an admission of an infringement in a commitment offered to the Commission (sections 110 and 111 of the Ordinance).

At present, stand-alone private enforcement actions are not permitted. This does not prevent a party from arguing in a private legal action that a conduct rule has been infringed (eg, as a defence), as long as the alleged infringement is not the basis for a cause of action (see, for example, the *Taching Petroleum Company, Limited v Meyer Aluminium Limited* case, HCA 1929/2017, referred to in question 15).

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

At present, there is no class action procedure for competition claims or more generally in Hong Kong.

On 28 May 2012, the Law Reform Commission published a report proposing that a mechanism for class actions should be adopted in Hong Kong, with a view to expanding access to judicial relief. The report recommends that class actions be introduced on an incremental basis and initially be permitted only in relation to consumer cases, though the expectation is that class actions will eventually apply to all claims. The Hong Kong Department of Justice has since set up a cross-sector working group chaired by the Solicitor General in order to consider the proposals of the Law Reform Commission. As at the end of December 2017, the working group had held 20 meetings and its sub-committee had held 26 meetings to study the proposals in detail. However, at the time of writing, there is no concrete time frame for implementation.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Part IV of the Ordinance allows the Commission to make an agreement, on terms it considers appropriate, that it will not bring or continue proceedings for a pecuniary penalty in exchange for a person's cooperation in an investigation or in proceedings. While a leniency agreement is in force, the Commission must not bring or continue proceedings for a pecuniary penalty in breach of that leniency agreement, notwithstanding certain circumstances in which the Commission may terminate a leniency agreement.

Under the Commission's Leniency Policy for Undertakings Engaged in Cartel Conduct (the Leniency Policy), published pursuant to section 80 of the Ordinance, the key elements of the programme are as follows:

- leniency is available only in respect of cartel conduct contravening the First Conduct Rule;
- only an undertaking (the definition of which is described in question 6) may apply for leniency under the policy;
- leniency is available only for the first undertaking that reports the cartel conduct to the Commission and meets all the requirements for leniency;
- if the undertaking meets the conditions for leniency, the Commission will enter into an agreement with the undertaking not to take proceedings against it for a pecuniary penalty in exchange for cooperation in the investigation of the cartel conduct;
- leniency ordinarily extends to any current officer or employee of the undertaking cooperating with the Commission, as well as any former officer or employee and any current or former agents of the undertaking specifically named in the leniency agreement; and
- the undertaking receiving leniency will, to the satisfaction of the Commission, agree to and sign a statement of agreed facts admitting to its participation in the cartel on the basis of which the Tribunal may be asked jointly by the Commission and the applicant under rule 39 of the Competition Tribunal Rules (Cap 619D) (CTR) to make an order under section 94 of the Ordinance declaring that

the applicant has contravened the First Conduct Rule by engaging in the cartel.

Under the Commission's Leniency Policy, leniency is available only for the first cartel member who reports the cartel conduct to the Commission and meets all the requirements for receiving leniency. There is therefore a strong incentive for a cartel member to be the first undertaking to apply for leniency and the Commission uses a marker system to establish a queue in order of the date and time the Commission is contacted with respect to the cartel conduct for which leniency is sought.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The Leniency Policy applies only to the first undertaking reporting the cartel. However, it explicitly states that this does not preclude the Commission from entering into a leniency agreement with an undertaking with respect to an alleged contravention of a conduct rule which is not covered by the Leniency Policy. As such, the Commission may exercise its discretion with subsequent cooperating parties. In particular, the Leniency Policy states that the Commission will consider a lower level of enforcement action, including recommending to the Tribunal a reduced pecuniary penalty or the making of an appropriate order under Schedule 3 to the Ordinance. When seeking a pecuniary penalty or other order in relation to cartel conduct, the Commission may consider making joint submissions to the Tribunal with the cooperating undertaking.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Neither the Ordinance nor the Leniency Policy currently envisages a specific option addressing these issues, other than as set out in question 25.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Neither the Ordinance, nor the Leniency Policy, envisages a specific deadline for applying for immunity. However, the Commission uses a marker system to establish a queue in order of the date and time the Commission is contacted with respect to the cartel conduct for which leniency is sought.

A potential applicant for leniency, or their legal representative, may contact the Commission to ascertain if a marker is available for particular cartel conduct. Such enquiries may be made on an anonymous basis, although a marker will not be granted on the basis of anonymous enquiries. To obtain a marker and thereby preserve the undertaking's place in the queue, a caller must provide sufficient information to identify the conduct for which leniency is sought in order to enable the Commission to assess the applicant's place in the queue in relation to that specific cartel. This includes, at a minimum, providing the Commission with the identity of the undertaking applying for the marker, information on the nature of the cartel (such as the products and services involved), the main participants in the cartel conduct and the caller's contact details. The Commission is willing to grant the marker on the basis of an oral discussion.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

If a leniency applicant with the marker is invited by the Commission to apply for leniency, it will be asked to provide a detailed description of

the cartel, the entities involved, the role of the applicant, a timeline of the conduct and evidence in respect of the cartel conduct (a 'proffer'). The Commission will invite the undertaking to submit its application by completing its proffer within a specified period, ordinarily within 30 calendar days. A proffer may be made orally or in writing. Should the undertaking fail to complete its proffer within this time frame, or any extension to it as might be agreed by the Commission, the undertaking's marker will automatically lapse. In that circumstance the next undertaking in the marker queue will be invited by the Commission to make an application for leniency.

Undertakings in the marker queue who are not invited to apply for leniency will be informed that they are not currently eligible to apply for leniency under the Leniency Policy. Such undertakings may, however, consider cooperating with the Commission as mentioned in question 25.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information provided to the Commission and section 126 of the Ordinance lists the exceptions to this obligation where the Commission may disclose confidential information with lawful authority, such as where the disclosure is: in accordance with an order of the Tribunal or any other court or in accordance with a law; or in connection with judicial proceedings arising under the Ordinance. Further detail regarding the confidentiality of information and documents obtained in a Commission investigation is contained in the Commission's Guideline on Investigations. This states, among other things, that in deciding whether to disclose confidential information, the Commission will consider and have regard to the extent to which the disclosure is necessary for the purpose sought to be achieved and where the Commission may be required to produce confidential information in accordance with a court order, law or legal requirement, the Commission will endeavour to notify and consult the person who provided the confidential information prior to making such a disclosure.

Specifically, in the context of a leniency application and as set out in the Leniency Policy, the Commission will use its best endeavours to protect as appropriate:

- any confidential information provided to the Commission by a leniency applicant for the purpose of making a leniency application or pursuant to a leniency agreement; and
- the Commission's records of the leniency application process, including the leniency agreement (collectively, leniency material).

It is the Commission's stated policy not to release leniency material (whether or not it is confidential information under section 123 of the Ordinance) and to firmly resist, on public interest or other applicable grounds, requests for leniency material, including the fact that leniency has been sought or is being sought, where such requests are made. In March 2018, the Tribunal handed down a judgment in the *Nutanix* case (*Competition Commission v Nutanix and others*, CTEA 1/2017) in relation to document disclosure in the case of an unsuccessful leniency applicant, ruling that leniency documents in these circumstances are covered by informer privilege and without prejudice privilege and need not be disclosed. In the case of successful leniency applications, on which the Tribunal did not need to rule as no leniency was granted in this case, the Commission's position was that there is a need to withhold from disclosure without prejudice communications pursuant to which the application is made, such as the application statement or proffer. The Commission raised no objection to the production of any pre-existing documents that were provided during the course of the leniency process.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The Commission has the discretion to accept a party's commitment to take, or refrain from taking, any action that the Commission considers appropriate to address its concerns about a possible infringement of the First Conduct Rule (pursuant to section 60 of the Ordinance). If the Commission accepts the commitment, it may not commence or continue an investigation or bring proceedings in the Tribunal, in relation to any alleged contravention, if such an investigation or proceedings relate to matters addressed by the commitment. Any admission contained in the commitment can form the basis of a follow-on action (see question 22). The Commission's Guideline on Investigations states that the Commission may accept commitments under section 60 of the Ordinance at any stage.

Further, in relation to cartel activity, the Commission has the discretion to issue an 'infringement notice' instead of bringing proceedings in the Tribunal, provided the undertaking makes a commitment to comply with the requirements of the notice. These requirements may include:

- refraining from specified conduct, or to take any specified action that the Commission considers appropriate; and
- admitting to an infringement of the conduct rule.

The original intention was to allow the Commission to impose a financial penalty with the infringement notice; however, this was subsequently removed from the Ordinance as a result of feedback from small and medium enterprises that this could potentially be an unreasonable burden on them.

Even where parties wish to resolve the Commission's concerns, there may be cases where the Commission considers these can only be addressed satisfactorily by an order made by the Tribunal. Subject to the Tribunal's determination, a consent order may provide for a declaration that a person has contravened a competition rule, the imposition of a pecuniary penalty, a director disqualification order or any other order that may be made by the Tribunal under the Ordinance.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Section 80 of the Ordinance provides that leniency can be granted to an individual (as well as to corporations or partnerships) in return for that individual's cooperation with the Commission's investigation or proceedings under the Ordinance.

In particular, leniency granted to a corporate defendant will also cover any director, manager, company secretary (or governing body of the undertaking), employee or agent.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

In relation to an immunity applicant, the template Leniency Agreement (set out in the Commission's Leniency Policy) sets out certain conditions with which the leniency applicant must comply. These include an obligation to maintain continuous and complete cooperation with the Commission throughout the investigation and any ensuing proceedings, and to ensure full and truthful disclosure to the Commission. The Commission is likely to ask for compliance with similar conditions in relation to subsequent cooperating parties. Failure to comply with the conditions imposed by the Commission could jeopardise immunity, in the case of immunity applicants, and the benefits of cooperation (eg, reduced recommended fines, immunity for individuals), in the case of subsequent cooperating parties. The Commission encourages parties who are subject to an investigation to engage with the Commission early and often to ensure a productive dialogue is established and maintained.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

The Commission is currently undertaking a review of the Leniency Policy, with a view to introducing possible changes before the end of 2018.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

According to the Commission's Guideline on Investigations, prior to commencing proceedings in the Tribunal, in circumstances where a Warning Notice has not already been issued, the Commission will usually contact relevant parties to advise them of its concerns and to provide the parties with an opportunity to address those concerns.

If proceedings are commenced in the Tribunal, the Commission must make its case in a notice of application, which is published by the registrar of the Tribunal and states, among other things: the nature of the application; the determination to which the application relates; the particulars of the relief sought; and the grounds for the application. The Commission will issue a press release as soon as practicable after commencing proceedings. For example: the first case was brought before the Tribunal on 23 March 2017, with a Commission press release issued on the same day (available at www.compcomm.hk/en/media/press/files/20170323_Competition_Commission_takes_bid_rigging_case_to_Competition_Tribunal_e.pdf); the second case was brought before the Tribunal on 14 August 2017, with a Commission press release issued on the same day (available at www.compcomm.hk/en/media/press/files/20170814_Competition_Commission_takes_market_shari.pdf); and the third case was brought before the Tribunal on 6 September 2018, with a Commission press release being released on the same day (https://www.compcomm.hk/en/media/press/files/Competition_Commission_takes_renovation_cartel_case_to_Competition_Tribunal_EnglishPR.pdf).

In terms of further discovery, the Competition Tribunal Rules (at rule 24) provide that a party may apply to the Tribunal for an order for discovery and production of a document relating to the proceedings from a person for inspection. The application may be determined by the Tribunal with or without a hearing. The Tribunal may make or refuse to make an order for discovery and production of a document having regard to all the circumstances of the case, including: the need to secure the furtherance of the purposes of the Ordinance as a whole; whether the information contained in the document sought to be discovered or produced is confidential; the balance between the interests of the parties and other persons; and the extent to which the document sought to be discovered or produced is necessary for the fair disposal of the proceedings.

In March 2018, the Tribunal handed down a judgment in the *Nutanix* case in relation to document disclosure. One respondent in the case, SiS International Limited, had asked the Tribunal to order the Commission to disclose certain documents claimed by the Commission to be protected under privilege or public interest immunity. The documents over which the Commission claimed privilege or public interest immunity included:

- without prejudice correspondence and records of without prejudice communication between the Commission and respondents in relation to the Commission's Leniency Policy. These contained correspondence and records of communications with leniency applicants;
- affirmations (together with exhibits), and drafts thereof, for the purpose of applying for search warrants;
- the complainant's original complaint form submitted to the Commission;
- correspondence, reports, and other documents passing between the Commission and its solicitors for the purpose of the case;
- all without prejudice correspondence and records of without prejudice communications between the Commission and any respondent where an agreement had not been reached; and
- all confidential internal reports, minutes and correspondence relating to the Commission's investigation and the proceedings.

Update and trends

There are currently three cases before the Tribunal. Details of the cases are set out below, but we can see with each case that the Commission is developing its practice and broadening the scope of its powers under the Ordinance (eg, in bringing proceedings against individuals).

On 23 March 2017, the Commission commenced proceedings in the Tribunal against five information technology companies for alleged bid rigging in a tender for the supply and installation of a new server (*Competition Commission v Nutanix and others*, CTEA 1/2017). The Commission is seeking pecuniary penalties and a declaration that each party has contravened the First Conduct Rule of the Ordinance. This is the first case to be brought by the Commission to the Tribunal. The Tribunal has handed down three decisions to date in relation to this case: in April 2017 on the treatment of confidential information; in October 2017 on self-incrimination; and in March 2018 on document disclosure. The substantive trial began in June 2018. In early July 2018 the court was adjourned until 17 September 2018, when the closing arguments were heard.

On 14 August 2017, the Commission brought its second case before the Tribunal and commenced proceedings against 10 construction and engineering companies for alleged market sharing and price fixing practices (*Competition Commission v W Hing Construction Company Limited and others*, CTEA 2/2017). As in the earlier case, the Commission is seeking pecuniary penalties and a declaration that each

party has contravened the First Conduct Rule of the Ordinance. The substantive hearing for this case is scheduled to take place towards the end of 2018.

The third case was brought before the Tribunal on 6 September 2018, against three companies and two individuals for alleged price fixing and customer allocation in the market for public housing renovations (*Competition Commission v Kam Kwong Engineering Company Limited and others*, CTEA1/2018). This is the first case to be brought by the Commission against individuals for an alleged contravention of the Ordinance.

The Commission has indicated that it has a number of advanced investigations in the pipeline that could be brought before the Tribunal in the near future. Most of the complaints received by the Commission continue to be in relation to the First Conduct Rule, and most of those relate to alleged cartel conduct. This continues to be an area of focus for the Commission.

The Commission is currently undertaking a review of the Leniency Policy, with a view to introducing possible changes before the end of 2018. The Commission is reported to be working on a separate set of guidelines relating to the calculation of pecuniary penalties which the Commission recommends to the Tribunal. It is expected that these guidelines will set out some of the factors the Commission will take into consideration when making such recommendations.

The Commission opposed disclosure on various grounds including public interest immunity, without prejudice privilege, and lack of relevance. The Tribunal ruled partly in favour of SiS and held, among other things, that:

- leniency documents are covered by informer privilege and without prejudice privilege;
- the original complaint form would ordinarily be protected by informer privilege, but was not in this case because the identity of the complainant was known to the parties; and
- internal documents relating to the Commission's investigation need to be judged by context. It is likely that two narrower types of documents (ie, reports to and minutes of the Commission concerning the results of the investigation and the enforcement steps to be taken, and certain internal communications and notes relating to the execution of the search warrants showing the methods, procedures and tactics of the Commission) could in principle be covered by public interest immunity, but immunity would have to be justified in each case.

The Commission was ordered to produce a list of relevant documents, along with its claims for public interest immunity or privilege in respect of those documents.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

In the absence of a conflict of interest, there is no absolute legal restriction preventing a law firm from representing both employees and the undertaking under investigation, provided that this is compatible with the law firm's own professional conduct obligations. In practice, however, it is possible that the undertaking may wish to distance itself from the conduct of individual employees and to argue that the employee was acting without authority.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Again, there is no legal restriction on counsel representing more than one member of the alleged cartel provided this is compatible with counsel's own professional conduct obligations. In practice, depending on the circumstances, single representation of multiple corporate defendants may not be advisable where conflicts of interest may be anticipated.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Section 168 of the Ordinance prohibits a corporation from indemnifying its officers, employees or agents against liability for paying:

- a pecuniary penalty imposed under the Ordinance; or
- costs incurred in defending an action in which the person is convicted of contempt, convicted of an offence under the Ordinance or ordered to pay a pecuniary penalty.

However, according to section 170, section 168 does not prohibit a corporation from providing funds to an officer, employee or agent to meet expenditure incurred or to be incurred in defending proceedings for a pecuniary penalty if it is done on the following terms:

- the funds are to be repaid in the event of the person being ordered by the Tribunal to pay the pecuniary penalty; and
- they are to be repaid no later than the date when the decision of the Tribunal becomes final (this means either the decision is not appealed against or when the appeal is finally disposed of).

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Not yet applicable in the absence of any fines (and the Ordinance is silent on this issue).

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Not yet applicable.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The Commission may be willing to take into account steps taken by the undertaking to conduct a detailed internal audit throughout its businesses and to cooperate with the Commission in its investigation. The Commission's enforcement policy notes that it will take into consideration (in assessing the appropriate enforcement response)

the compliance efforts of persons under investigation where they can demonstrate they have made a genuine effort to comply with the Ordinance. However, the Ordinance and the Guidelines are silent on whether the existence of a compliance programme affects the level of the fine. As part of its review of the Leniency Policy, the Commission may consider whether to credit compliance programmes in determining the level of recommended fine.

As soon as the undertaking becomes aware of possible participation in cartel activity, it should conduct an immediate and thorough internal investigation to establish the full extent of its participation in the cartel and of its exposure. This should involve the collection of all relevant documents and, to the extent possible, the gathering of witness statements from all employees with first-hand knowledge of the cartel's operation. This should place the undertaking in a position to fully assess its exposure, not only in the Hong Kong but in all jurisdictions in which the cartel is operating.

SLAUGHTER AND MAY

Natalie Yeung

natalie.yeung@slaughterandmay.com

47th Floor, Jardine House
One Connaught Place
Central
Hong Kong

Tel: +852 2521 0551
Fax: +852 2845 2125
www.slaughterandmay.com

India

Suchitra Chitale

Chitale & Chitale Partners

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation is the Competition Act 2002, as amended (the Competition Act).

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Competition Commission of India (CCI), established under the provisions of the Competition Act, is the regulatory body and is responsible for investigating and adjudicating matters under the Competition Act, including on matters relating to cartels.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The government notified section 3 of the Competition Act, which prohibits anticompetitive agreements (including cartels) and other related provisions of the Competition Act vide a notification dated 15 May 2009, thereby making the CCI functional with effect from 20 May 2009. As of now, there are no proposals for change in the regime.

Section 53A of the Competition Act relating to the Competition Appellate Tribunal (the CompAT) has been amended (in the Finance Act 2017) to provide for the National Company Law Appellate Tribunal (NCLAT), established under provisions of the Companies Act 2013 to be the appellate authority for the purposes of the Competition Act. The amending section of the Finance Act 2017 came into force with effect from 26 May 2017 and all appeals, applications or proceedings pending before the CompAT were transferred to the NCLAT.

Prior to enforcement of section 3 of the Competition Act, the Monopolies and Restrictive Trade Practices Act 1969 (the MRTP Act) was the applicable legislation with regard to restrictive trade practices, including cartels, and the Monopolies and Restrictive Trade Practices Commission (the MRTP Commission) was the appropriate authority. The Competition (Amendment) Ordinance 2009 (the Ordinance) was promulgated by the president on 14 October 2009, amending section 66 of the Competition Act, which provided for the MRTP Commission to exercise jurisdiction under the provisions of the MRTP Act for a period of two years in respect of cases or proceedings filed before the commencement of the Competition Act. With effect from the promulgation of the Ordinance, all cases pending before the MRTP Commission were transferred to the CompAT with immediate effect. The Ordinance was subsequently passed by the Parliament of India as the Competition (Amendment) Act 2009.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The Competition Act is the substantive legislation on cartels in India. Under the Competition Act, the following agreements or arrangements

between enterprises, persons or associations involved in the same or similar trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods or provision of any services are presumed to have an adverse effect on competition in the relevant market and would therefore be considered anticompetitive agreements, unless proven otherwise:

- those that directly or indirectly determine purchase or sale prices;
- those that limit or control production, supply, markets, technical development, investment or provision of services;
- those that share the market or source of production or provision of services by way of allocation of geographical area of market, type of goods or services, number of customers in the market, or any other similar way; and
- those that directly or indirectly result in bid rigging or collusive bidding.

The Competition Act also defines certain vertical agreements as illegal. Any agreement between enterprises or persons at different stages or levels of the production chain, including tie-in arrangements, exclusive supply or distribution agreements, or resale price maintenance, having or likely to have an appreciable adverse effect on competition in India will be anticompetitive agreements and will be dealt with in accordance with the provisions of the Competition Act.

The substantive test is appreciable adverse effect on competition in the relevant market in India. There is a presumption under the Competition Act that horizontal cartels have an appreciable adverse effect on competition in India.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no industry-specific offences and defences provided for under the Competition Act. However, the CCI is required to have due regard to factors such as the creation of barriers to new entrants in the market, driving existing competitors out of the market and the accrual of benefits to consumers while determining whether an agreement has an appreciable adverse effect on competition. Further, the Competition Act excludes joint ventures if such joint ventures result in an increase of efficiency in production, supply, distribution, storage, acquisition or control of goods or provisions of services. The Competition Act exempts any reasonable restrictions or conditions imposed for protecting intellectual property rights and the right of a person to export goods to the extent the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export. Also, sovereign functions of the government including all activities carried on by the departments of the central government dealing with atomic energy, currency, defence and space do not fall within the purview of the definition of enterprise and are therefore exempt. In addition to the above exemptions, the central government is vested with the power to exempt any practice or agreement in accordance with any obligation assumed under any treaty, agreement or convention between India and any other country, or exempt any enterprise that performs a sovereign function

on behalf of the government or any class of enterprise in the interest of security of the nation or public interest.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Competition Act applies to individuals and other persons, including companies, partnership firms, corporations established under central or state legislation, cooperative societies, and also to associations of individuals and other type of persons.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Competition Act empowers the CCI to inquire into and pass appropriate orders on anticompetitive agreements entered into outside India or where a party to such agreement is outside India. However, there has to be a territorial nexus. Thus, such an anticompetitive agreement should have or be likely to have an appreciable adverse effect on competition within India.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Yes, the Competition Act carves out an exception with regard to reasonable restrictions or conditions imposed for protecting the right of a person to export goods to the extent the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The CCI can inquire into an alleged contravention of the provisions of the Competition Act by a cartel either on its own motion, on receipt of information from any person, consumer, or trade or other association, or by recommendation made by the central or state government or a statutory authority. Information from any person, consumer, or trade or other association is required to be accompanied by the prescribed fees. The Competition Commission of India (General) Regulations 2009 (the General Regulations) provide that the reference or information given to the CCI should specify the name, address, contact details, manner of service of notice or other documents, etc, and should be signed by an authorised person. The CCI will hold its first ordinary meeting within 15 days of the date of placement of the matter, and form an opinion on the existence of a prima facie case within a maximum period of 60 days. The CCI may call for a preliminary conference to form a prima facie opinion, and may also invite the complainant and such other person as is necessary for the preliminary conference.

Where the CCI is of the opinion that no prima facie case exists, it can close the matter and pass orders regarding closure. If the CCI concludes that a prima facie case exists, it may direct the Director General (DG) to investigate the matter and furnish a report to the CCI by the specified date.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

In discharging its functions, the CCI is guided by the principles of natural justice. It has the power to regulate its own procedure. While discharging its functions, the CCI has the powers of a civil court in relation to matters such as summoning and enforcing the attendance of any person, discovery and production of documents, receiving evidence on affidavit, and issuing commissions for examination of witnesses and documents requisitioning any public record or document. The CCI also has the power to call experts from the fields of economics, commerce, accountancy, international trade, etc, to assist in the conduct of the inquiry. The CCI has the power to direct a person to produce books or other documents that may be in the custody or control of such person,

or to provide any information that may be in the possession of a person in relation to the trade carried on by such person.

The DG has all the powers that are conferred on the CCI and can determine the manner in which evidence may be adduced. The DG can admit evidence adduced as material evidence, admit on-the-record documents, admit entries in accounts books, admit the opinion of experts, etc.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Under the Competition Act, the CCI is empowered to enter into a memorandum or arrangement with agencies of foreign countries for the discharge of its duties or performance of its functions. Such memorandum or arrangement can be entered into by the CCI only with the prior approval of the central government. The CCI has cooperation arrangements in place with competition regulators of other jurisdictions.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Agencies of foreign jurisdictions with which CCI has entered into a memorandum or arrangement may cooperate with the CCI in investigation of cross-border cases.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The investigation report of the DG is placed before the CCI. The CCI may forward a copy of the report to the parties concerned. If the DG has concluded in its report that there is no contravention of the provisions of the Competition Act by the cartel, the CCI may invite objections, recommendations or suggestions from the informants being the central or state government or the statutory authority, or from the parties concerned. If, after considering the objections or suggestions received, the CCI agrees with the findings of the DG, it may close the investigation. If, after considering the objections, recommendations and suggestions, the CCI is of the opinion that further inquiries are called for, it may direct such inquiries into the matter by the DG or by an officer or expert of the CCI, or itself proceed with further inquiries in accordance with the provisions of the Competition Act.

Under the General Regulations, the parties are not entitled to produce additional evidence, either oral or documentary, that was previously in the possession or knowledge of the party but was not produced before the DG during the investigation. The CCI may require any of the parties or any other person to produce such documents or other material objects as evidence as it may consider necessary. The CCI, after considering the pleadings and evidence, examining witnesses, etc, may pass such appropriate orders as it deems fit. In cases where the CCI has passed interim orders temporarily restraining any party, it is required to hear the party as soon as possible. The CCI also has the power to combine any number of persons or enterprises, jointly and severally, as parties in the same proceedings.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The provisions under the Competition Act relating to anticompetitive agreements do not specify the party on whom the burden of proof rests. As such, in normal cases the burden would lie on the complainant. However, horizontal cartels that directly or indirectly determine purchase or sale prices or limit or control production, supply, markets, technical development, investment or provision of services or shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or

number of customers in the market or any other similar way or directly or indirectly result in bid rigging or collusive bidding, are presumed to have an appreciable adverse effect on competition.

Even though the Competition Act does not specify the level of proof required, the general legal principles regarding level of proof are followed.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes, the CCI considers it appropriate to infer the existence of an agreement on the basis of circumstantial evidence where direct evidence of the existence of an agreement is not present.

16 Appeal process

What is the appeal process?

Appeals from the CCI lie with the NCLAT. The NCLAT, inter alia, has jurisdiction under the Competition Act to hear and dispose of appeals against the directions issued, decisions made or orders passed by the CCI, inter alia:

- on the existence or non-existence of a prima facie case;
- on closure of the case by the CCI based on the report of the DG;
- on any sanction of the CCI after concluding the existence of a cartel in contravention of the provisions of the Competition Act;
- on orders passed by the CCI in matters taking place outside India but having an effect on competition in India;
- on any interim orders;
- on matters relating to a penalty imposed by the CCI for non-compliance with directions issued by it or by the DG, or for making false statements, omitting to furnish any material information or furnishing false information; or
- on a matter of the imposition of a lesser penalty by the CCI.

The NCLAT is guided by the principles of natural justice and has the power to regulate its own procedure. It has the same powers as those vested in a civil court for the purposes of discharging its function. The NCLAT may execute its order or may send it to a civil court having local jurisdiction for execution.

The form and fee for appeal is prescribed under the Competition Appellate Tribunal (Form and fee for filing an appeal and fee for filing compensation applications) Rules 2009. The amount of fee prescribed for appeals with respect to the imposition of a penalty by the CCI is 1,000 rupees for every 100,000 rupees of penalty imposed, subject to a maximum fee of 300,000 rupees. The amount of fee payable in respect of any other appeal against a direction, decision or order of the CCI is 10,000 rupees.

Appeals must be filed within 60 days from the date on which a copy of the direction, decision or order made by the CCI is received. The NCLAT may condone a delay in filing an appeal if it is satisfied that there was sufficient cause for it not being filed within the 60-day period. Appeals from the NCLAT lie with the Supreme Court of India within 60 days from the date of communication of the decision or order.

Every appeal, together with an affidavit in support and a certified copy of the impugned order, is required to be submitted to the registrar of the NCLAT who, after verification, will register such an appeal. Registered appeals are put forward to the NCLAT for hearing with a notice to the appellant. After the hearing, the NCLAT may either admit the appeal or dismiss it summarily. On acceptance of an appeal, the NCLAT may direct a notice to be issued to concerned parties.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The sanctions imposed under the Competition Act are civil in nature, and the proceedings are civil proceedings. The Competition Act does not prescribe any criminal sanctions for violations of its provisions and thus no imprisonment is provided for under the Competition Act for cartel conduct. The Competition Act prescribes imprisonment only in cases of the contravention of orders of the CCI, the furnishing of false evidence or documents, or the non-furnishing of details, etc.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

If, after an inquiry, the CCI concludes that a cartel is in contravention of the provisions of the Competition Act, it may pass such orders or issue such directions as it may deem fit, including for discontinuance of the cartel agreement, a bar on re-entering into such agreements or for modification of the cartel agreement. In addition, the CCI may also impose a penalty upon each producer, seller, distributor, trader or service provider involved in such cartel of up to three times the profit for each year of the duration of such agreement or 10 per cent of the turnover for each year of its duration, whichever is higher. The CCI also has the power to impose lesser penalties on cartel members in accordance with the regulations framed thereunder.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The penalty is calculated by the CCI on a case-by-case basis depending upon the facts and circumstances of each case. The Competition Act requires the CCI to follow the principles of natural justice. The General Regulations require the CCI to order imposition of a penalty only after a show cause notice has been issued and reasonable opportunity to represent the case has been given to the person against whom such penalty is to be levied. The Competition Act and the regulations are binding on the CCI. The Supreme Court of India has held that the penalty cannot be imposed on the 'total turnover' and had to be restricted to the 'relevant turnover' (ie, the turnover in respect of the quantum of supplies made of the product for which the cartel was formed, and not the total turnover).

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

The Competition Act does not provide for debarment from government procurement procedures as a sanction for contravention. However, the CCI has the power to pass any order as it may deem fit in the interest of justice. Qualifying conditions for tender process may also make restrictions in this regard.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

The sanctions are civil in nature, and the CCI has been granted powers to pass any or all orders and directions as it may deem fit in the interests of justice.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

The NCLAT has the power to adjudicate compensation claims that may arise from the findings of the CCI or the orders of the NCLAT or for any loss or damage shown to have been suffered by any person due to non-compliance with the orders of the CCI or of the NCLAT by such cartels or their members. The Competition Act does not provide for the level of damages. The eligibility and quantum of damage is to be determined by the NCLAT.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Yes, class actions are possible. Upon obtaining the permission of the NCLAT, a person may make an application on behalf of all the persons who have suffered damage. On grant of such permission, the NCLAT is required to issue a notice by personal service or public advertisement, and interested persons may apply to join as parties. No abandonment, withdrawal of such application or any agreement or compromise is allowed except with the specific approval of the NCLAT. An order passed by the NCLAT will be binding on all persons concerned.

Cooperating parties**24 Immunity**

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Competition Act provides the CCI with the power to impose lesser penalties. If a member of a cartel or an individual who has been involved in the cartel on behalf of a cartel member is the first to make a vital disclosure by submitting evidence of a cartel, enabling the CCI to form a prima facie opinion regarding the existence of a cartel or is first to make a vital disclosure by submitting evidence that establishes the contravention of the provisions of Competition Act by a cartel in a matter under investigation and the CCI, or the DG did not, at the time of application, have sufficient evidence to establish such a contravention, the CCI may impose a lesser penalty on such member and the individual. The Competition Commission (Lesser Penalty) Regulations 2009 as amended (the Lesser Penalty Regulations), which were notified by the government on 13 August 2009, contain guidelines for imposing full or partial leniency. An applicant making first disclosures is eligible for full leniency (ie, up to 100 per cent) provided that disclosures are made prior to the CCI having gathered sufficient evidence to enable it to form a prima facie opinion or the evidence disclosed helps CCI or the DG to establish a contravention of section 3 of the Competition Act. Prior to the amendments to the Lesser Penalty Regulations made by the CCI (Gazette Notification on 8 August 2017), only members of a cartel and not its employees or officers could apply to the CCI for a lesser penalty.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Partial leniency may be granted to members who have not been granted full leniency but make a disclosure to establish a contravention of the provisions of the Competition Act. Such disclosures are required to have significant added value with respect to the evidence already in the possession of the CCI, that is the additional evidence enhances the ability of the CCI or the DG to establish the existence of a cartel. For the second applicant and third and subsequent applicants in priority status, the Lesser Penalty Regulations prescribe a reduction of up to 50 per cent and 30 per cent respectively of the penalty that may be levied.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Partial leniency may be granted to members who have not been granted full leniency but make a disclosure to establish a contravention of the provisions of the Competition Act. Such disclosure is required to have significant added value with respect to the evidence already in the possession of the CCI. For the applicant marked as second in the priority status, the Lesser Penalty Regulations prescribe a reduction of up to 50 per cent of the full penalty leviable and third and subsequent applicants may be given up to 30 per cent reduction of the full penalty.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

A lesser penalty can only be imposed by the CCI in cases where the report of investigation by the DG has not been received before such disclosure is made and the disclosures have sufficient evidence to enable the CCI to form a prima facie opinion or enable the CCI or the DG to establish a contravention of section 3 of the Competition Act. Thus, the application for leniency should be made accordingly. The benefit of a reduction in the penalty up to or equal to 100 per cent will only be considered if no other applicant has been granted such benefit by the CCI. Markers are available subject to filing a detailed application within 15 days from the date of communication in this regard by the CCI.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

Benefit of a reduction in the penalty up to or equal to 100 per cent may be granted by the CCI only where a member of a cartel is the first to make a vital disclosure by submitting evidence of a cartel, enabling the CCI to form a prima facie opinion or the applicant is the first to make a vital disclosure by submitting such evidence which establishes the contravention of section 3 of the Competition Act. Also, the CCI and the DG should not have sufficient evidence to form such a prima facie opinion or sufficient evidence to establish such a contravention. The applicant seeking leniency is required to:

- cease further participation in the cartel unless otherwise directed by the CCI;
- provide vital disclosure in respect of the contravention;
- provide all relevant information, documents and evidence that may contribute to the establishment of a cartel or as may be required by the CCI without concealing, destroying, manipulating or removing the relevant documents in any manner; and
- cooperate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings.

The CCI may subject the applicant to further restrictions or conditions after considering the facts and circumstances of the case. If the CCI has reason to believe that the applicant has not complied with the condition on which the lesser penalty was imposed, it may levy the penalty that the person would otherwise be subject to under the Competition Act. The Lesser Penalty Regulations further provide that the discretion of the CCI with regard to a reduction in the fine is to be exercised having due regard to the stage at which the applicant comes forward with the disclosure; the evidence already in possession of the CCI; the quality of the information provided by the applicant; and the entire facts and circumstances of the case. Applicants subsequent to the first are required to disclose evidence that has significant added value, that is such evidence should enhance the ability of the CCI or the DG to establish the existence of a cartel.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The CCI will treat as confidential the identity of and the information submitted by an applicant, whether such applicant is first or subsequent. However, there are exceptions under which the CCI may disclose the identity of the applicant or the information submitted by the applicant, such as when the disclosure is required under law or the applicant has agreed to such disclosure in writing, or the disclosure is a public disclosure. The DG may also seek waiver of confidentiality for evidentiary information or documents from the applicant, without compromising its identity, so as to counter the contentions of other cartel members.

Update and trends

The CCI passed an order on 19 April 2018, imposing a penalty on leading Indian zinc-carbon dry cell battery manufacturers Eveready Industries India Limited (Eveready), Indo National Limited (Nippo), Panasonic Energy India Company Limited (Panasonic) and Association of Indian Dry Cell Manufacturers (AIDCM) for cartelisation by fixing prices of zinc-carbon dry cell batteries in India.

The CCI initiated a suo moto investigation against these battery manufacturers based on the disclosure made by Panasonic in May 2016 under the Lesser Penalty Regulations. During the investigation, the Director General carried out simultaneous search and seizure operations at the premises of Eveready, Nippo and Panasonic on 23 August 2016, and seized incriminating material such as handwritten notes, emails and various other documents. Subsequently, Eveready and Nippo filed applications under the Lesser Penalty Regulations in August 2016 and September 2016, respectively.

The CCI, in its order, observed that the three battery manufacturers, facilitated by AIDCM, had indulged in anticompetitive conduct relating to price coordination, limiting production, supply and market allocation that were in contravention of the provisions of section 3(3)(a), 3(3)(b) and 3(3)(c) read with section 3(1) of the Competition Act. It was further observed that the conduct was carried out from 2008, prior to 20 May 2009, the date on which section 3 of the Competition Act was enforced, and up to 23 August 2016 – the date of search and seizure operations by the Director General – and therefore the CCI would have jurisdiction.

While calculating the leviable penalty, the CCI took into consideration all relevant factors, including the duration of the cartel, industry conditions, etc, and decided to levy a penalty on the three battery manufacturers at the rate of 1.25 times of their profit for each financial year from 2009/10 to 2016/17. Additionally, considering all of the facts and circumstances of the case, the penalty for individual officers of the three manufacturers was calculated at the rate of 10 per cent of the average of their income for preceding three years. Pursuant to the Lesser Penalty Regulation, the CCI granted Panasonic and its officers a 100 per cent reduction, hence no penalty was levied on Panasonic. Eveready was penalised after a reduction of 30 per cent and Nippo was penalised after a reduction of 20 per cent under the Lesser Penalty Regulations. Also, a nominal penalty was imposed on ADIMC and its officers were penalised at the rate of 10 per cent of the average of their income for preceding three years.

Another case involving Panasonic was decided by the CCI under the Lesser Penalty Regulations on 30 August 2018. The CCI held

Panasonic and Geep Industries (India) Private Limited (Geep) liable for colluding to fix prices of zinc-carbon dry cell batteries in contravention of the provisions of section 3(3)(a) read with section 3(1) of the Competition Act.

This case was initiated by the CCI suo motu, pursuant to receiving an application under the Lesser Penalty Regulations, dated 7 September 2016, and subsequent submissions, dated 22 September 2016, from Panasonic Corporation, Japan (Panasonic Japan) filed on behalf of itself and the enterprises controlled by it (ie, Panasonic and its respective directors, officers and employees).

The CCI, while observing that it had concluded in its earlier order, dated 19 April 2018, that Panasonic was involved in a primary cartel with other manufacturers of zinc-carbon dry cell batteries, namely Eveready and Nippo, came to the opinion that Panasonic had prior knowledge about the time of price increases of such zinc-carbon dry cell batteries by its involvement in the primary cartel, and Panasonic used this prior knowledge as leverage to negotiate and increase the basic price of the batteries that were being supplied by it to Geep. Further, Panasonic and Geep, in accordance with the prices of the primary cartel, used to agree on the market price of the batteries being sold by them, so as to maintain price parity in the market. Additionally, after considering the evidence – an anticompetitive clause in the written agreement entered into between Panasonic and Geep for supply of batteries and email communications between their key managerial personnel – the CCI was of the opinion that a bilateral ancillary cartel existed between Panasonic and Geep in the market of institutional sales of dry cell batteries in India.

Based on the above, the CCI was of the opinion that Panasonic and Geep had indulged in an anticompetitive conduct of price coordination in contravention of section 3(3) of the Competition Act. It was also observed by the CCI that such conduct continued from 1 October 2010, when Panasonic and Geep entered into a written agreement, until 30 April 2016, when the last supplies were made by Panasonic to Geep.

The CCI calculated a penalty at the rate of 1.5 times of the profits of Panasonic for each year from mid 2010/11 to April 2016/17. However, Panasonic and its officials were granted a 100 per cent reduction of the penalty under the Lesser Penalty Regulations, hence no penalty was imposed on Panasonic and its officials. A penalty was imposed on Geep at the rate of 4 per cent of the turnover for each year from mid 2010/11 to April 2016/17. Individual officials of Geep were penalised at the rate of 10 per cent of the average of their income for the preceding three years.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Subject to the provisions of the Competition Act and the Lesser Penalty Regulations, the CCI has the authority to grant full and partial leniency resulting in a reduction of the fine. The Competition Act does not make provision for any plea bargain, settlement or other binding resolution with the party to resolve liability and penalty.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Where leniency is granted to a corporate defendant, the same treatment would also be extended to its employees who are named in the application made by the corporate defendant or who have individually applied for leniency and who cooperate. The Lesser Penalty Regulations make provision for employees and officers of a member of a cartel to apply for leniency for themselves even where the corporate defendant, being a member of the cartel, fails to do so.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The practical way is to cooperate with the DG and CCI during the investigation and adjudication procedure, and to furnish the required information.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

Currently, there is no ongoing or proposed leniency and immunity policy assessment or reviews. The CCI amended the Lesser Penalty Regulations (Notification dated 22 August 2017) permitting individuals who were involved in a cartel on behalf of an enterprise to seek leniency for themselves. Previously, only enterprises could apply for leniency. The amendment also seeks to remove the restriction of three markers for reduction of penalty. Now the third or subsequent applicant may be granted a penalty reduction of up to or equal to 30 per cent.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

During the investigation process, as a matter of practice, the DG shares the order passed by the CCI framing a prima facie opinion on the matter and ordering investigation by the DG. The DG does not disclose the

information collected during the investigation or obtained from third parties to the defendants or the information provided by one defendant to the other prior to obtaining their replies. Such information is used by the DG to challenge a defendant later during the investigation process. The CCI may share a copy of the DG's final report with the defendants.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

If there is no conflict of interest between the employees and the corporation, counsel may represent both. If there is a conflict of interest, present or past employees may be advised to seek independent legal advice.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Yes, counsel may represent multiple corporate defendants if there is no conflict of interest. There is nothing in the Competition Act prohibiting this.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

There is no specific provision in the Competition Act barring companies (corporations) from paying the legal costs or penalties imposed on their employees.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Penalties or damages are not tax-deductible.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

There are no provisions for international double jeopardy under the Competition Act, and the CCI may impose a penalty for the conduct of the concerned party having appreciable adverse effects on competition in India, whether or not any penalty has been imposed in other jurisdictions. Further, the Competition Act does not have any provision restricting the amount of penalty that may be levied by the CCI on the profit or turnover derived in or out of India, neither has it any provision for taking into account overlapping liability for damages in other jurisdictions. The Supreme Court of India recently held that in the case of an enterprise engaged in multi-product business the penalty should be imposed on the relevant turnover instead of overall turnover of the enterprise.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The only way provided under the Competition Act to get the fine down is by way of disclosure of vital information. However, this is also subject to other conditions prescribed in the Competition Act and the Lesser Penalty Regulations.



Suchitra Chitale

suchitra@chitales.com

B-111 Neeti Bagh
New Delhi 110 049
India

Tel: +91 11 4164 2965
Fax: +91 11 4164 2964
www.chitales.com

Indonesia

Asep Ridwan, Farid Fauzi Nasution, Albert Boy Situmorang and Anastasia PR Daniyati

Assegaf Hamzah & Partners

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (the Indonesian Competition Law or ICL) is the primary law regulating business competition in Indonesia. Chapters 3 and 4 of the ICL regulate restrictive agreements and restrictive activities set out provisions on prohibiting cartel conducts, be it in relation to price, production or market. In addition, provisions on restrictive agreements or activities may also be located in other laws and regulations, such as article 382-bis of the Indonesian Criminal Code prohibiting unfair competition and article 1,365 of the Indonesian Civil Code, which prohibits any person from committing an unlawful act causing damage to another party.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

There is only one authority responsible for the enforcement of the ICL, namely Komisi Pengawas Persaingan Usaha (KPPU or the Indonesian Competition Commission), established in 2000. KPPU may initiate investigations and examinations as well as issue decisions and impose administrative sanctions against all violations of the ICL. For the purpose of the investigation, KPPU has the power to summon undertakings, witnesses or experts to obtain, examine and evaluate documents or other instruments of evidence. KPPU has no authority to investigate criminal sanctions, since criminal investigations are dealt with by the national police and public prosecutor. Further, criminal sanctions are decided by the court and are beyond KPPU's authority.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The process of amending the ICL is still ongoing, although no definite deadline has been set for the introduction and adoption of the amended law. The Indonesian parliament, the initiator of the amendment, has approved the draft amendments to the ICL. Currently, the government of Indonesia has released its version on list of inventory issues (LII) regarding the draft amendments to the ICL, which propose significant changes to the latest draft amendments to the ICL circulated by the House of Representative earlier in mid-2017. The most notable expansion in the KPPU's investigative authority is the authority to request assistance from the national police to force undertakings or individuals to appear before KPPU. The authority to conduct search and or seizure, also with assistance from the national police, was initially introduced in the amendment, but was later removed.

An interim order was introduced as well. KPPU may order a temporary halt of agreement or activity that may have anticompetitive effects. The order can only be issued during a hearing at KPPU. In terms of administrative sanctions, KPPU is authorised to impose a potentially

much higher fine (ie, up to 30 per cent of sales value generated during the alleged period of violation). KPPU may also recommend that the related authority revoke the business licence of the offending undertaking. The authority to order debarment has also been granted to KPPU.

The draft amendments place a general rule on leniency where KPPU can grant immunity from fines or reduce fines for an undertaking that confesses or reports its activity allegedly violating provisions of the ICL. Extraterritorial application of the ICL is firmly specified. Extraterritoriality is already applied by KPPU using the effects doctrine to foreign undertakings in some instances and in merger control. The Supreme Court has upheld KPPU's view in some cases. This new definition will affirm KPPU's power over foreign undertakings. Another feature is that an undertaking must pay 10 per cent of its total fine as one of the requirements to appeal against a KPPU decision.

Please note that this information is based on the latest publicly available document and subject to change following the process of amendment.

Another update is that the Constitutional Court has recently issued its decision on the request of judicial review on the current ICL. The petitioner, among other things, challenged KPPU's investigative authority, whether it is administrative or criminal in nature. The court holds that the phrase 'investigation' under the ICL shall be interpreted as certain action to collect evidence for the examination and not be construed as investigation under the criminal justice system.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The prohibition of cartels under the ICL covers horizontal restricted agreements or cartels in the forms of prohibition of price fixing, production arrangements, market allocation, group boycotts, bid rigging, and other arrangements, conspiracy or concerted practices that may restrict competition on the market or may cause harm to consumers. The cartel substantive test is covered in Chapters 3 and 4 of the ICL taking the 'per se illegal' or 'rule of reason' approach in each article. The first approach refers to provisions that do not include the phrase 'which may result in the occurrence of monopoly or unfair business practices'. In this approach, KPPU does not necessarily have to analyse the effect of an agreement on the market as it is considered sufficient to only establish the existence of the prohibited agreement, which is similar to the application of the 'per se illegality' rule as applied in other jurisdictions. This approach applies for price fixing and boycotts. On the other hand, the provisions comprising the above-mentioned phrase adopt the second approach, rule of reason. Here, the provisions qualify the agreement as violating the ICL only after KPPU has conducted an in-depth assessment resulting that such agreement has an adverse impact on the market or on the competition. This latter assessment applies to market allocation, bid rigging and other arrangements, conspiracy or concerted practices.

KPPU has so far issued the following guidelines relating to cartel assessment:

Commission Regulation	Approach
Commission Regulation No. 2/2010 on Bid Rigging	Rule of reason
Commission Regulation No. 4/2010 on Restrictions on Output and Marketing	Rule of reason
Commission Regulation No. 4/2011 on Price Fixing	Per se illegal

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There is no industry-specific infringement or defence or exemption or immunity applicable under the current ICL, except for small businesses and certain forms of cooperatives. These exceptions or exemptions can be found in article 50 of the ICL, which includes agreements or activities:

- (i) intended to implement any applicable laws and regulations;
- (ii) related to intellectual property rights;
- (iii) related to the application of technical standards of goods or services that do not inhibit or impede competition;
- (iv) a research cooperation agreement intended to improve the standard of life of the society at large;
- (v) related to exports of goods or services that do not disrupt domestic supply;
- (vi) made by and between small business undertakings; and
- (vii) made by and between cooperatives aimed specifically to serving their members.

It is important to note, however, the ground-breaking precedent on the *Garlic* case (2013) in its relation to the application of point (i) above, in which case KPPU decided that the government, the Minister of Trade and the Directorate General of International Trade of the Ministry of Trade had violated article 24 on conspiracy to impede the production and market of garlic, regardless of the fact that they acted within their statutory power and did not engage in business or commercial activities. In the *Garlic* case, the Ministry of Trade used its discretion to ease up the importation licence and quota requirements for the 19 reported undertakings to import garlic to Indonesia after the garlic scarcity caused a significant increase in price at end-consumer level. Despite the fact that the scarcity was the result of the previous government's policy on agriculture and that the price sharply decreased after the discretion applied by the Ministry of Trade, KPPU was of the opinion that the severe scarcity and the ever-increasing price of garlic constituted a conspiracy in which the Minister of Trade and the Directorate General were involved.

Similarly to the *Garlic* case, in the *Chicken* case, KPPU decided that 12 breeders had conducted a cartel because they attended and signed a document of meeting with the Directorate General of Animal Husbandry and Animal Health of the Ministry of Agriculture of Republic of Indonesia that was considered by KPPU as an agreement to jointly exterminate their day-old chicks thus causing an increase in chicken prices on the market. Despite the fact that the joint extermination was instructed along with a threat of sanctions from the government, KPPU believed that the extermination was done independently by each breeder without making any agreement.

The precedent in the *Garlic* and the *Chicken* cases serves as indication that KPPU will not apply point (i) above as an absolute exception or exemption. Thus it is advisable for undertakings to maintain awareness even if they are running their business based on the government's and the public's interests.

6 Application of the law

Does the law apply to individuals or corporations or both?

The nature of the law applies to individuals as well as to corporations. The ICL refers to an undertaking as any individual or business enterprise, whether incorporated or otherwise, that is established and domiciled or conducts activities within the territory of the Republic of Indonesia, whether individually or jointly through an agreement, in the form of various operations in the economic sector.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The ICL will generally apply to conduct occurring outside Indonesia if one or more of the defendants is established and has domicile in Indonesia or directly or indirectly engages in business activities in Indonesia. If either condition is met, KPPU may pursue the case when it considers that its action to enforce the ICL would be effective, for example, by enforcing its decision against local subsidiaries or affiliates of the foreign companies.

Further on this issue, there has been a KPPU precedent applying the extraterritorial doctrine in its investigation over violation of the ICL. This doctrine was raised in KPPU Decision No. 7/2007 regarding the cross-ownership of Temasek and other cases. Referring to the same case decision, KPPU further stated that according to the national and international law, the competition law may be enforced extraterritorially as long as the requirements in effect doctrine, implementation doctrine, or the single economic entity doctrine are satisfied.

Although not from cartel precedents, it is worth noting the implementation of this doctrine by KPPU in its merger opinions derived from Government Regulation No. 57 of 2010 on the Mergers, Consolidations and Acquisitions of Shares that May Result in Monopoly or Unfair Business Competition Practices and Commission Regulation No. 2 of 2013 on the Guidelines of Mergers, Consolidations and Acquisition. The merger control legislation clearly stipulates that KPPU has jurisdiction to control any merger affecting competitive conditions in the Indonesian (domestic) market by always taking into account the effectiveness of such enforcement. To date there have been numerous foreign mergers notified to KPPU, including *Nokia Corporation/Alcatel Lucent*, *Foxconn Technology/Sharp Corporation*, and *Airbus Prosky SAS/Navtech Inc.* Those transactions took place outside Indonesian jurisdiction, yet since they affected the domestic market, KPPU used its powers to assess the transactions.

Although the precedents and the underlying regulations do not relate to a cartel case, KPPU's position on the extraterritorial application of the ICL is worth noting as the most likely approach taken by KPPU in any investigation of violation of the law in general. The draft amendment of the ICL as described above will affirm extraterritorial application in the enforcement of the ICL.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The tendency of KPPU is only to have concerns over the Indonesian market. Therefore, the geographical market covered by KPPU will not go beyond Indonesian jurisdiction.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

An investigation by KPPU can be triggered on its own initiative or by a complaint filed by undertakings, consumers, other entities or by other government agencies. KPPU will open a formal investigation if it concludes that there are reasonable findings to believe that a violation has occurred. There is, however, neither minimum nor maximum time set forth for the investigation process. This means that KPPU may conduct the investigation process as long as it deems necessary to gather sufficient evidence and information for the investigated case.

Once the evidence and information is deemed to fulfil the requirements, KPPU will proceed to the formal examination process consisting of two phases: preliminary examination, which will last for a maximum 30 working days, and further examination, which will last for 60 working days and can be extended for a maximum of 30 working days. After the examination is completed, KPPU must make its decision within 30 working days.

After a decision to start an examination is made, KPPU will generally summon the defendants to present before a hearing in which the KPPU investigatory team or the plaintiffs will present the case or indictment. Afterwards, KPPU will give the defendants an opportunity to prepare and submit their response to the allegation. During the

further examination, both the KPPU investigator or plaintiffs and the defendants will be given an opportunity to present their witnesses and submit evidence. Since April 2010, hearings in KPPU have been open to the public.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Among its powers, KPPU has the authority to receive complaints, summon parties and witnesses, make conclusions from investigations and hearings, request statements or clarification from related government institutions, determine and stipulate the existence of losses on undertakings or society, and impose administrative sanctions. The investigative powers are set out in broad wording such as 'conduct research', 'conduct investigations', 'obtain, examine and/or evaluate' letters, documents or others instruments of evidence.

Currently, KPPU has no power to conduct searches and seizures, dawn raids or other commanding investigative powers. These, nevertheless, may be amended once the new draft law has been passed by Parliament and signed by the President. The current draft amendment seemingly grants authority to KPPU to request assistance from the national police to conduct a search and or seizure of letters, documents or other evidence unwillingly withheld by undertakings. In addition, with assistance from the national police, KPPU is also authorised to force undertakings, witnesses, experts and or individuals who are considered as having knowledge of the violation, to appear before KPPU. The national police will immediately follow up such request of assistance. It is, however, still unclear of how this scheme will be applied.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

There are cooperation agreements in place between KPPU and other competition agencies from other jurisdictions. The latest memorandum of understanding (MoU) was signed at the end of August 2018 between the Competition & Consumer Commission of Singapore (CCCS) and KPPU. Based on the signed MoU, the CCCS and KPPU will cooperate on competition enforcement and policy. Besides that, KPPU have the common MoU with the JFTC (Japan Fair Trade Commission) cooperation, while the KFTC-KPPU Cooperation Arrangement is the foundation of Korean Fair Trade Commission and KPPU cooperation. However, inter-agency cooperation is not limited to those two agreements, as sporadic cooperation with other competition authorities also takes place on an ad hoc basis.

The illustration of the extent of the cooperation would be the KPPU's stance towards the allegation report from its counterpart in Australia, the Australian Competition and Consumer Commission, on a possible currencies exchange rate cartel by some Singapore banks. KPPU has affirmed that it will analyse the report further.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

To date, KPPU has not conducted any multi-jurisdictional investigations, although there have been cases investigated by KPPU that involved undertakings domiciled in neighbouring countries.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Proceedings for alleged violations of the ICL, such as cartels, are heard and determined by a panel that consists of at least three commissioners of KPPU. There is no difference between adjudication of cartel violations and that of other violations (eg, abuse of dominant position). After KPPU has issued its decision, the defendant may appeal before

a competent district court. In the case of criminal investigation into a cartel, the case will be heard and decided by a three-judge panel in proceedings before the district court following a criminal investigation by the police and the public prosecutor. Under the ICL, it is the public prosecutor, and not KPPU, that will bring such a criminal case to the competent court. To date there has been no precedent on criminal investigation and there is no sign of the police beginning criminal investigations under the current ICL.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In principle, the burden of proof rests on the party claiming a breach of the ICL, which is KPPU if the case is initiated by KPPU or if it is initiated by a complaint from third party without seeking any damages. On the other hand, it rests on the plaintiffs if the complainants do seek compensatory damages.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

In several cartel cases, undertakings were found guilty based on circumstantial evidence in proceedings brought by KPPU. In the *Skutik* case, KPPU established cartel infringement by proving communication and economic evidence. Although there is controversy on the use of circumstantial evidence, the recent Supreme Court decision in the *Tyre* case affirms the validity of using such circumstantial evidence.

16 Appeal process

What is the appeal process?

The defendants may file an appeal against the KPPU's decision to the district court within 14 working days after they have become aware of or been notified about the decision. The district court has 30 working days to decide on the appeal. The district court may request KPPU to carry out additional proceedings if it considers it necessary.

Both KPPU and the defendants may appeal against a district court decision to the Supreme Court. Under the ICL, the Supreme Court has 30 days to make a decision. In the case of a criminal investigation, the defendants may appeal to the High Court and subsequently to the Supreme Court. No criminal investigation of a cartel case has been concluded to date.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The ICL provides criminal sanctions for certain conditions, the enforcement of which is beyond KPPU's powers. Criminal sanctions are regulated in article 48 of the ICL. In either case a criminal investigation may be initiated and the undertaking or individual may face criminal sanctions in the form of fines and imprisonment. Depending on the gravity of the offence, criminal penalties vary from a 1 billion rupiah to 100 billion rupiah fine or imprisonment ranging from three to six months. Additional sanctions may also be imposed in the form of revocation of business licences, prohibition of liable individuals from assuming the positions of director or commissioner for as long as up to five years, and injunction orders.

There has been a final and binding case that ordered the defendants to pay damages to the reporting undertaking due to use of the competitor's confidential information for the benefit of the defendant at the expense of the reporting undertaking, but the damages have not yet been paid. KPPU could actually bring this disobedience toward the final and binding KPPU decision to the national police to be further processed for the criminal aspect. As KPPU has not yet executed any such legal action there has been no precedent on the implementation of the criminal sanction to date.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Where KPPU concludes that a violation has occurred it has the power to:

- annul the agreements or cancel any provisions of an agreement that would violate the ICL;
- impose pecuniary penalties in the amount of a minimum of 1 billion rupiah to a maximum of 25 billion rupiah; and
- award compensatory damages incurred by companies or individuals as a result of anticompetitive conduct.

In rare cases, KPPU may also order the defendants to lower the prices of their products or refrain from or commit to performing certain activities or practices. For example, in one cartel case that involved two producers of anti-hypertension medicines, KPPU ordered the defendants to lower the selling prices of their products by 65 per cent and 60 per cent respectively and to reduce the marketing costs of the products by 60 per cent. Subsequently, the Supreme Court has upheld the decision of the district court that overturned the KPPU's decision on this case.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Yes. KPPU has issued a guideline that lays down the criteria applicable in determining the level or calculation of the fine. According to the guideline, there are two steps in determining the amount of the fine: the first is to determine the basic amount of the fine, and the second is to make an adjustment to the basic amount by increasing or reducing the basic amount as set forth in the first step.

In determining the basic amount, KPPU will use the sales or purchase value of the goods or services of the defendants in the market concerned. In general, the sales value will be calculated on the basis of the total sales in the year before the violation was committed. Nevertheless, in a bid-rigging case, the determination of sales value will not be based on the calculation of the sales of the year prior to the year the violation was committed but based on the price of the bid winner.

To determine the proportion of sales that would be considered as the basic amount of the fine, KPPU will take into account the nature and duration of the violation. To determine whether the proportion of the sales considered in the case should be at the highest or lowest level of the scale, KPPU will consider certain factors as follows:

- size of the company;
- type of violation;
- combined market shares of the defendants;
- geographical scope of the violation; and
- whether the anticompetitive agreement has been effectively executed or implemented.

Regarding the basic amount of fine, in the *Liquefied Petroleum Gas* cartel case (2014), KPPU determined the basic imposed fines by multiplying the total sales of alleged period with the excessive profit though KPPU did not explain how the excessive profit was derived.

It is worth noting that, as acknowledged in the *Container* cartel (2013) decision, if the imposed fines are less than 1 billion rupiah, KPPU shall weigh in the turnover of the undertakings and also the fairness aspect and the ability to pay from the social and economic perspectives.

There will be an additional portion to the basic amount of the fine if KPPU finds that the defendant is a recidivist or does not cooperate during the investigation, or is the initiator or the leader of the cartel. The final amount of fines imposed on an undertaking in any circumstances may not exceed 25 billion rupiah or 10 per cent of the total turnover of the current year of the examination. However, it is worth noting that the most recent draft amendment proposes the maximum pecuniary penalty to be 500 billion rupiah. Under current legislation, if the undertaking's 10 per cent turnover exceeds 25 billion rupiah, the end fines shall be 25 billion rupiah. The *Tyre* cartel case (2014) replicating such approach of which KPPU was of opinion that each undertaking's 10 per cent turnover way exceeding 25 billion rupiah thus each undertaking was fined 25 billion rupiah.

The way KPPU applies a fine reduction or addition can be clearly seen in the *Container* cartel case, in which KPPU reduced the original fine of 12 reported undertakings by 10 per cent because of their cooperation. On the contrary, the fine for one of the reported undertakings from the same case was increased by 20 per cent. KPPU applied the fines calculation on the *Liquefied Petroleum Gas* cartel case, of which denial of the involvement caused 10 of 18 reported parties' fines to be increased by 20 per cent yet their cooperation and good deed caused a 10 per cent reduction of fines. From the same case, one reported party's fine was increased: by 20 per cent for not attending the hearing, by 10 per cent for not providing any document, and by 20 per cent owing to denial of the violation. The six reported parties in the *Liquefied Petroleum Gas* cartel case had their fines reduced by 10 per cent owing to their cooperativeness and good behaviour and by another 80 per cent for admitting the violation. Both precedents emphasise the importance of full cooperation with KPPU during the investigation process, since it will certainly affect the final outcome.

Nevertheless, it is important to note that in the *Tyre* cartel case, KPPU disregarded any reduction or additional factors of the fine since it was already sufficient for KPPU to determine the 25 billion rupiah fine for each undertaking merely because the 10 per cent total turnover of each undertaking exceeded 25 billion rupiah.

This guideline, however, is not binding on the court in handling the appeal process.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Bid-rigging sanctions are not automatically followed by imposing debarment from any tender (eg, KPPU Decision No. 18/L/2014 regarding procurement of high density polyethylene floating fish nets in Pokja Area 7 of Government Procurement Service Unit of Riau Islands (2012) and KPPU Decision No. 19/L/2014 regarding procurement of revitalisation work of a youth centre in West Nusa Tenggara (2011)). Yet in some cases, a one- to two-year debarment, be it from tenders held by a single government institution in a certain area only or from those held by any government institution across Indonesia, can also be found. The most recent precedent is the prohibition of several undertakings in the construction service from participating in any government procurement for two years owing to their horizontal bid rigging in the procurement of construction work of the Regent Building in South Labuhanbatu Regency, North Sumatra (2015), which breached article 22 of the ICL on bid rigging.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Criminal sanctions can be pursued in respect of the same conduct if the defendants do not comply with the final and binding decision (ie, do not refrain from the anticompetitive behaviour even though the decision has been final and binding) or if the defendant committed obstruction of justice during the investigation or examination. There is no precedent to date with regard to the enforcement of criminal investigation or sanctions.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Under current legislation, private damage claims are possible under proceedings before KPPU. Parties may file a complaint to KPPU and seek damages. However, in such cases, the onus is on the plaintiffs to provide sufficient evidence of the offence and not on KPPU. In *EMI* (2007), KPPU ordered PT EMI Indonesia and EMI Music South East

Update and trends

Based on the number of decisions issued by KPPU, it could be observed that the enforcement of the ICL since 2017 has been decelerating. Contributing factors to this circumstance include the selection of the KPPU Commissioners for the office term of 2018–2023, which was delayed for almost a year, and the proposed amendment of the ICL that has been ongoing for over two years. Among the high-level cartel cases that were decided by KPPU in the past five years, the Indonesian Supreme Court (the Supreme Court) has ultimately decided two cases: KPPU Decision No. 3 of 2015 (the *Garlic* case) and KPPU Decision No. 2 of 2016 (the *Chicken* case).

In 2013, KPPU found 19 garlic importers were colluding to restrict the supply of imported garlic into the market. KPPU also invoked the Minister of Trade and the Directorate General of International Trade as part of the reported parties as they were considered to have facilitated the 19 importers by issuing their import permits. KPPU imposed fines ranging from 11 million to 921 million rupiah on the importers. The North Jakarta District Court overruled the KPPU decision owing to the improper use of indirect evidence and misinterpretation of the definition of ‘other parties’. However, the Supreme Court eventually reversed the North Jakarta District Court decision and upheld the KPPU decision in 2018. It is worth noting that KPPU interpreted the definition of other parties in the *Garlic* case as not only undertakings, but also government institutions. Given such, KPPU considered the Minister of Trade and the Directorate General of International Trade to be violating article 24 of the ICL. Such consideration also became the basis of the Supreme Court in upholding the KPPU decision where the Supreme Court consistently considered that the definition of other parties could also refer to government institutions, and that KPPU has properly applied the indirect evidence in the *Garlic* case.

In 2016, the Indonesian Constitutional Court (the Constitutional Court) issued a decision on the judicial review of the ICL, which can be considered as a development to the ICL itself. In its decision, the Constitutional Court concluded that the definition of other parties in article 22 (Bid rigging), article 23 (Collusion for obtaining competitors’ confidential information) and article 24 (Sabotage) shall always refer to parties related to other undertakings. This definition has raised concerns as to whether government institutions can be considered as ‘parties related to other undertakings’ as well. Notwithstanding such unclarity, there is now a precedent, based on the Supreme Court decision on the *Garlic* case, that government institutions can also be exposed to the risks of violation to article 24 of the ICL, which may potentially affect how KPPU will enforce the ICL in the future.

It is also worth noting that KPPU, in 2016, imposed fines ranging from 1 billion to 25 billion rupiah on 11 poultry companies for violating article 11 of the ICL. The 11 companies were allegedly agreeing to conduct early culling of 6 million parent stocks of day old chicks, resulting in a decrease of the parent stock supplies, which ultimately resulted in the price increases of the final stocks. In their defences, the poultry companies stated that the early culling was conducted based on the instruction from the government that found an oversupply of parent stocks in the market. Accordingly, the West Jakarta District Court and the Supreme Court dismissed the KPPU decision on the *Chicken* case on the basis that the government’s instruction could not be regarded as an agreement between the companies. Instead, it should be regarded as an instruction that came with penalties for every failure to comply, and therefore was legally binding on the companies. This Supreme Court decision may also potentially affect KPPU in adjudicating similar cases in the future.

Asia (EMI) to pay 3.8 billion rupiah to PT Aquarius Musikindo for its losses caused by a cartel conducted by EMI.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are not regulated under the current ICL. Theoretically, however, any party, in a civil proceeding, can submit a class action petition to the relevant first-instance or district court by using the KPPU decision as one of the legal bases for seeking damages.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being ‘first in’ to cooperate?

There is no immunity programme under the current ICL. However, the draft amendment to the ICL is providing option for leniency application. Nevertheless, it is important to note, in the *Minahasa Road Tender* case (2014), KPPU clearly adopted the leniency programme in light of the Fine Imposition Guideline by mirroring a similar act performed by the Federal Trade Commission and Japan Fair Trade Commission giving incentives for whistle-blowers in the form of total cancellation of the fine or fine reduction. KPPU in this case reduced the fine an additional 50 per cent for PT Ericko Grant Dinarto as the reported party for being the whistle-blower in addition to the 10 per cent fine reduction for cooperativeness during the examination. The 10 per cent fine reduction was also applied to the other three undertakings as reported parties in this case.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

As explained in question 24, there is no formal leniency programme under the current ICL. However, KPPU has used its discretion to provide a similar programme that under current precedent is applicable only to the first going in.

26 Going in second

What is the significance of being the second cooperating party? Is there an ‘immunity plus’ or ‘amnesty plus’ option?

Not applicable.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Not applicable under the current ICL. The leniency procedure will be further defined with a KPPU regulation under the draft amendment to the ICL.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

Not applicable under the current ICL. The leniency procedure will be further defined with a KPPU regulation under the draft amendment to the ICL.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Under the ICL, the identity of a person who makes a report on an alleged violation of the ICL shall be kept confidential by KPPU. The current KPPU Regulation on Case Handling Procedure has extended this rule by granting a witness the right to request KPPU to keep his or her identity undisclosed. However, if the relevant person intended to file a loss report, then his or her identity shall be disclosed.

With regard to the information disclosed to KPPU, under the ICL it is required to maintain confidentiality of information obtained from undertakings that are considered as 'company's confidential information'. In certain cases, KPPU has extended the definition of this term to also include trade secrets. Furthermore, the KPPU Regulation on Case Handling Procedure has stipulated that, on request, KPPU may declare and treat particular documents that fall within certain criteria as confidential and will not be disclose them during examination.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Not applicable.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Not applicable.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Not applicable.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

As previously mentioned, there has been a proposal on the application of a leniency programme for the ICL amendment.

Defending a case**34 Disclosure**

What information or evidence is disclosed to a defendant by the enforcement authorities?

According to the KPPU Guidelines on Case Handling, the Commission Council of an ongoing case shall provide the opportunity for each defendant listed in the Violation Allegation Report to view and obtain a copy of all submitted or acquired dossier of the case (information and evidence, including affidavits and minutes of investigations and examinations, during the investigation and examination phases). This process will be conducted in a separate session for each defendant. The defendant shall be liable on its own means of obtaining the copy, some of the most accepted means are by scanning or taking pictures of each piece of evidence. However, the Commission Council shall exempt the dossier disclosure of the case submitted by the defendant that is considered confidential. The defendant may submit such confidentiality status of the dossier to the Commission Council and the Commission Council shall further determine whether they shall grant such proposal.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Yes, counsel may represent employees as well as the corporation under investigation so long as there is no conflict of interest for such representation. When it becomes obvious that there would be a different interest between the employee and the company, it is advisable to seek independent legal advice.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Yes, counsel may represent multiple corporate defendants so long as there is no conflict of interest in such representation. But this may lead KPPU to suspicions about the anticompetitive practice under investigation (ie, that as the defendants can actually coordinate their litigation during the investigation or examination, it is very possible that they might have coordinated their anticompetitive practice in the past). Thus, when they do not belong to the same group, it is advisable to have separate counsel.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

There is no provision under the ICL that prohibits a company from paying the legal costs of and penalties imposed on its employees.

ASSEGAF HAMZAH & PARTNERS

Asep Ridwan
Farid Fauzi Nasution
Albert Boy Situmorang
Anastasia PR Daniyati

asep.ridwan@ahp.id
farid.nasution@ahp.id
albert.situmorang@ahp.id
anastasia.pritahayu@ahp.id

Capital Place, Level 36 & 37
Jalan Jenderal Gatot Subroto Kav. 18
Jakarta 12710
Indonesia

Tel: +62 21 2555 7800
Fax: +62 21 2555 7899
www.ahp.co.id

38 Taxes**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

The ICL is silent on whether pecuniary penalties or private damages awards are tax-deductible and so is the draft amendment to the ICL.

39 International double jeopardy**Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

There has been no precedent to date on this issue. However, prior to conducting any international investigation or any investigation that includes foreign undertakings as a part of the investigation, KPPU shall calculate the effectiveness of such investigation. It is also important to note that KPPU is more concerned about the impact on Indonesia's market (eg, whether or not such alleged agreements have an adverse effect on the market). Thus the application of international double jeopardy would depend heavily on the KPPU's policy at the time the investigation took place and the specific case and its possible impact on the Indonesian market.

40 Getting the fine down**What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

The total amount of fines may be lower than the basic level if the defendant:

- stops the violation immediately after KPPU has opened an investigation;
- proves that the violation has been unintentionally committed or made under pressure;
- proves that the involvement is minimal;
- acts cooperatively during the investigation or examination;
- argues that the conduct is to implement the applicable laws and regulations or is based on approval from the competent government authorities; and
- makes a clear statement of his or her willingness to change his or her future practice so as to comply with the ICL.

Italy

Rino Caiazzo and Francesca Costantini
Caiazzo Donnini Pappalardo & Associati

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

On 10 October 1990, Parliament adopted Act No. 287, the Competition and Fair Trading Act (the Act) (as amended by Act No. 57 of 4 March 2001 and by Act No. 248 of 4 August 2006, which established rules on market liberalisation and regulation).

Before 1990, Italy did not have full antitrust legislation, although anticompetitive conduct was sometimes punished under provisions of the Civil Code. The Act meets the requirements of article 41 of the Italian Constitution, which protects and guarantees the right of free enterprise and brings Italy's legislation into line with EU law. The main purposes of the Act are to foster and protect market conditions that allow economic entities equal opportunities to compete and gain access to the market, and to protect consumers by encouraging lower prices and improving the quality of products through the operation of market forces.

Moreover, on 14 January 2017 Italian Legislative Decree No. 3/2017 implementing Directive 2014/104/EU on antitrust damages actions was adopted. As explained later, the decree has introduced several relevant rules, both of a substantial and of a procedural nature.

The borderline between the scope of EU legislation and national legislation is clear and precisely determined as to concentrations, but is less clear with regard to agreements impeding competition and alleged abuses of a dominant position. EU law applies wherever effective competition in the Common Market, or a substantial part of it, is significantly affected. In recent years, the European Union has tended to concentrate its efforts on cases of greater relevance to the EU, leaving the authorities of individual member states to deal with cases of mainly national concern. Furthermore, under article 1 of the Act, as amended by Decree No. 3/2017, the Competition Authority may simultaneously apply provisions of the Act and TFEU with reference to the same case.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The authority designated to investigate cartel matters is the National Competition Authority (the Competition Authority), which is an independent technical body. The Competition Authority is responsible for enforcing the Act, and hence for controlling agreements that impede competition, abuses of dominant position and concentrations. It is also empowered to enforce the legislative provisions on misleading and comparative advertising, and on the abuse of economic dependence (in the latter case, if the abuse is relevant in respect of the protection of competition and the market).

The Competition Authority has jurisdiction to apply competition rules in almost all fields of the market, with some exceptions.

As provided by article 20(4) of the Act, in relation to matters (including cartels) concerning insurance companies, the Competition Authority, before adopting a decision, is required to request the opinion of the Institution for the Supervision of Insurances. The opinion, however, is not mandatory.

In the electronic communications market, the Competition Authority applies competition rules, but it is required to request the opinion of the Electronic Communications Regulator, AGCOM, with regard to proceedings involving companies operating in such market. Again, this opinion is not mandatory.

The Competition Authority is an independent organisation with the status of a public agency, and is required to submit reports to Parliament and the government. It is a collegiate body currently composed of three members appointed jointly by the chairpersons of the Senate and the Chamber of Deputies, who make decisions by majority vote.

The Competition Authority has a directorate general for competition, which is responsible for handling competition cases. The Secretary General of the Competition Authority is appointed by the Minister of Industry acting on a proposal by the chairperson of the Competition Authority, and is responsible for overseeing the organisation and operations of the staff and of the offices.

The Competition Authority's decisions can be appealed before the administrative courts (of first and second instance).

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

On 14 January 2017 Italian Legislative Decree No. 3/2017 implementing Directive 2014/104/EU on antitrust damages actions was finally adopted. The decree has affected national legislation, both substantively and procedurally.

Having regard to cartel regulation, changes have been introduced, *inter alia*, with reference to:

- Limitation rules: pursuant to previous regulation the limitation period (in order to take an action for the compensation of damages caused by a cartel) was five years starting from the time of knowledge of the damage. Following the implementation of the directive the limitation period is five years after having knowledge of the infringement, starting from the termination of the same.
- Quantification of harm: pursuant to the decree there is a presumption that cartel infringement causes harm. This principle was not recognised in previous legislation.
- Passing on: the decree introduced a rebuttable presumption of the passing on of damages produced by a cartel for indirect purchasers on the recurrence of three conditions (see question 22). Pursuant to previous legislation – article 2697 of the Civil Code – an indirect purchaser should demonstrate damage and a causal link between the damage and the alleged conduct.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 2 of the Act prohibits all agreements between undertakings, decisions by associations of undertakings or concerted practices (even if taken in compliance with statutory regulations) that may have as their object or effect the prevention, restriction or distortion of competition within the national market, and in particular those that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;

- limit or control production, markets, technical development or investment to the detriment of consumers;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The Authority has applied a per se rule in condemning cartels, stating that when agreements between undertakings even only potentially reduce competition substantially within the national market or in a substantial part of it, they are prohibited (article 2 of the Act). The actual restrictive effects of the conduct are taken into account when determining the fine to be imposed on the undertakings. Intention of the restrictive competitive effects is not required for a finding of a liability, as the case law has specified that just the intention of the conduct is required in this respect.

Vertical agreements may also be prohibited under article 2. The Authority, however, has often applied a rule of reason when investigating distribution agreements and other kinds of vertical arrangements. Moreover, the adoption of EC Regulation No. 2790/99, establishing the new block exemption regulation concerning vertical agreements (now replaced by Regulation No. 330/2010), also caused the Authority to definitively abandon a formal assessment of vertical restraints under article 2 of the Act, and to focus instead mainly on the market power of the undertakings concerned. In this regard, in case No. I/487, *Sagit Contratti Vendita e Distribuzione del Gelato*, of 31 October 2001, relating to the notification of a distribution agreement pursuant to article 13 of the Act (which states that the companies entering into an agreement may notify it to the Authority), the Authority took the economic approach as set forth in articles 2 and 3 of Regulation No. 2790/99. In particular, the Authority established that, because the market-share of the undertakings concerned was above the 30 per cent threshold, it was necessary to assess whether the vertical agreement at issue constituted a breach of article 2 of the Act.

This is consistent with article 29 of Council Regulation No. 1/2003 (referred to by recital 14 of Regulation No. 330/2010), which states that, where the vertical agreements to which the exemption provided for in article 2 applies have effects incompatible with the conditions laid down in article 101(3) of the Treaty on the Functioning of the European Union (TFEU) in the territory of a member state or in a part thereof, the competent authority of that member state may withdraw the benefits of application of such Regulation. The Authority established that it was also necessary to assess the opportunity to withdraw the block exemption benefit concerning the aforementioned vertical restraints owing to the existence of a large number of exclusive relationships in the same market.

Following the modernisation of EC competition law pursuant to Council Regulation No. 1/2003, the enforcement of article 101(3) TFEU provisions on cartels has been decentralised so that it is now applied by national competition authorities and national courts. Accordingly, the Authority has to assess the existence of harm to trade among member states before examining the case under article 101(1) TFEU and allowing for an exemption under article 101(3) TFEU. This new task is likely to boost either horizontal cooperation between the Authority and other national competition authorities or vertical cooperation between the Authority and the Commission. Since the new rules came into force, the Authority has opened most investigations on cartels under article 101 TFEU rather than article 2 of the Act.

In Decision No. 15604, dated 14 June 2006, the Authority concluded that gas companies operating in the supply market for jet fuel had entered into a horizontal agreement on pricing and distribution that violated article 101 TFEU. The following fines were imposed: ENI, €117 million; Esso, €66.6 million; Kuwait, €46.8 million; Shell, €53.3 million; Shell IAV, €3.1 million; Tamoil, €19.6 million; and Total, €8.8 million.

In Decision No. 16404, dated 25 January 2007, the Authority concluded that companies operating in the supply market for marine paints had entered into a horizontal agreement for the purpose of defining the conditions for participation in tenders for the supply of paints to ship owners and shipyards. According to the Authority, the parties had

exchanged confidential information on prices (minimum and average ones), the percentage of rebates to apply and, finally, had agreed on market partitioning. The following fines were imposed: BOAT, €1.08 million; IP, €1.08 million; Hempel, €324,000; Sigma, €756,000; and Jotun, €1.13 million.

In Decision No. 16835, dated 17 May 2007, the Authority concluded that company groups operating in the market for chipboard panels had entered into a horizontal agreement for the purpose of partitioning the market. According to the Authority, the companies had coordinated their commercial strategies and, in particular, fixed prices, price increases and other contractual terms to be applied to customers, as well as a list of customers to which price increases should not apply. The agreement also concerned import-export policies and the fixing of product characteristics. The following fines were imposed: Sacic Legno, €2.52 million; Sit, €3.02 million; Sia, €5.54 million; Sama, €7.06 million; Gruppo Frati, €6.96 million; Fantoni, €3.28 million; Saib, €1.76 million; and Xilopan, €529,200.

On 22 November 2007, the Authority concluded that Acea and Suez had entered into a horizontal agreement by coordinating their commercial strategies and by exchanging information on their participation to public tenders; the two companies participated in public bids for water services by setting up an ATI (temporary group of companies) even though they had all the requirements to participate in the bid on their own. The Authority deemed that this behaviour had the purpose of limiting competition in the bids and, therefore, partitioning the market. The following fines were imposed: Acea, €8.3 million; and Suez, €3 million (case No. I/670).

On 26 February 2009 (case No. I/694), the Authority concluded that 26 companies operating in the market of the production of pasta (representing almost 90 per cent of the whole Italian market) had entered into a horizontal agreement to agree an increase of pasta prices to be applied to distributors. The agreement took place between October 2006 and March 2008 by means of an exchange of information during meetings organised by the trade union of the companies involved. The Authority ascertained that prices applied by the companies to distributors had increased by more than 50 per cent, which had been passed on by distributors to consumers (the retail price, in fact, increased by 36 per cent). By coordinating their conduct, both smaller companies (affected by higher production costs) and bigger companies were able, notwithstanding the increase of their prices, to freeze their market share as the distributors (before the general increase) were obliged to accept the new conditions. The Authority, when fixing the penalties, also took into consideration the relevant increase of the price of raw materials and the general worsening of the companies' performance in recent years. The overall amount of the penalties imposed was equal to €12.5 million.

In January 2010 (case I716), the Authority concluded proceedings initiated against the National Psychologists' Register by accepting the commitments offered by the parties.

The Authority had ascertained that the psychologists enrolled in the Register had entered into a horizontal agreement to fix their minimum tariffs. The Psychologists' Deontological Code provided that the tariffs should be fixed by taking into account the importance and dignity of the profession and by referring to the parameters fixed by the Code to calculate the right tariff amount. It was also provided that the violation of the Code's provisions should result in disciplinary sanctions.

The Authority assessed that such provisions affected competition on the market, as the tariffs should be freely fixed between the parties at the beginning of the professional relationship.

The National Psychologists' Register offered commitments to the Authority that consisted of amending the Code by repealing those deontological provisions pertaining to the minimum tariffs and to the importance and dignity of the profession. The Authority accepted the commitments and did not impose any fine.

On 15 June 2011 (Decision No. 22521), the Authority concluded that 22 company groups operating in the market of overland forwarding had entered into a horizontal agreement for the purpose of partitioning the market. The Authority ascertained that the companies and their trade association had fixed increases in price by means of an unceasing exchange of information. During meetings at the trade association, companies had informed each other of their costs and had agreed increases in price to be applied to consumers. Once such increases had been fixed, the association circulated application memoranda, so that those companies that did not participate in the meetings could also act

in accordance with the agreed conditions. As a result of such concerted practice, companies could increase their prices, being confident that their competitors would adopt the same increases. The Authority ascertained that the alleged conduct had completely altered market conditions so that a price increase of 50 per cent had occurred. The Authority found that all the main operators in the market had continuously participated in the agreement between 2002 and 2007, and imposed penalties in the amount of €76 million. Schenkel, which claimed for admission to the leniency programme, did not incur any penalty, as it had spontaneously informed the Authority of the secret cartel, while Agility and DHL obtained a reduction in the fine of 50 per cent and 49 per cent, respectively. Finally, Alpi Padana and Spedipra did not incur any penalty owing to the operation of the statute of limitations.

On 16 March 2012 (Decision No. 23338), the Authority sanctioned 15 shipping agents and two trade associations for a secret cartel that lasted five years (from February 2004 to December 2009). The Authority ascertained that the companies had fixed the prices for agency services (ie, preparation and issue of documents, such as bills of lading for exported goods and 'delivery orders' for imported goods), known as 'fixed duties', in violation of article 101 TFEU. According to the Authority, a complex agreement was carried out. On the one hand, during several meetings of the Port Committee, the companies had coordinated the price of fixed duties and (from 2008) the loyalty discount to be applied to forwarding agents. On the other hand, trade associations had reflected companies' decisions into the agreements entered into between 2004 and 2007 by means of memoranda that recommended that all the associates be compliant with the agreements.

The Authority ascertained that the cartels raised anticompetitive effects into the whole market of maritime transport. In fact, even if the concerted activity was carried out by companies operating in the Port of Genoa, many documents acquired during the investigation revealed that the concerted prices were also applied for transactions taking place in other Mediterranean ports, such as Gioia Tauro and La Spezia, and in the Italian port system in general. The total amount of the sanctions was equal to €4 million. Two companies received a reduction of the fine as a result of their cooperation during the proceedings. Many companies had also offered commitments, which the Authority rejected.

In Decision No. 24405 (case 1743), dated 11 June 2013, the Authority concluded that four companies operating in the market for maritime passengers' transportation had entered into a concerted practice to raise the 2011 summer season prices by up to 65 per cent on specific routes (Civitavecchia-Olbia, Genova-Olbia, Genova-Porto Torres). The Authority ascertained the conduct by taking into account the parties' parallel behaviours, concluding that concentration was the only plausible explanation for higher prices and dismissing the alleged justifications of the parties (such as increasing petrol costs and companies' financial losses). The following fines were imposed: Moby, €5,462,310; GNV, €2,370,795; SNAV, €231,765; and Marinvest, €42,575.

On 30 May 2013 (Decisions No. 24377, 24378, 24379; cases 1749, 1750, 1753), the Authority ascertained that three notary's councils in the Milan, Bari and Verona districts had repealed recent provisions for the liberalisation of tariffs by reintroducing uniform tariffs for notaries' deeds, under threat of disciplinary sanctions to the associated notaries.

In Decision No. 24823 (case 1760) dated 27 February 2014, the Authority imposed a total fine of over €180 million on the pharmaceutical companies Roche and Novartis for an alleged cartel in relation to the treatment of eyesight diseases.

The collusion concerned two pharmaceutical products: Avastin, intended for cancer treatment, and Lucentis, used for the treatment of eyesight diseases.

Although registered only for the treatment of certain forms of cancer, in certain countries (including Italy), Avastin has also been used 'off-label' (ie, used for a purpose other than that for which the product has been authorised for sale) to treat common eyesight diseases. The incentive for off-label use of Avastin resulted from the circumstance that the cost of an Avastin treatment was far lower of a Lucentis-based treatment (€81 versus €900).

Avastin and Lucentis were based on two different active substances developed by the same US company, Genentech, which then licensed Avastin to Roche and Lucentis to Novartis. Genentech was subsequently acquired by Roche. This resulted in a situation where both companies had an interest in the sale of Lucentis, Novartis by earning sales revenue and Roche by earning licence fees.

According to the Authority, since 2011 Roche and Novartis had engaged in a 'complex collusive strategy' to create obstacles to the off-label use of Avastin and to push demand towards Lucentis, by alleging that the off-label use of Avastin could be dangerous to patients. The Authority considered this conduct to further limit competition that had developed between the products. Moreover, as Roche did not require an 'on-label' registration of Avastin for ophthalmic use, only Lucentis was reimbursed by the Italian healthcare system: as a consequence, the Authority found that the damages of the cartel (in terms of health-care expense in excess) amount to several hundreds of million euros per year.

In light of the seriousness of the infringement, the Authority imposed fines on Roche and Novartis of €90.5 million and €92 million respectively.

The decision represents a very significant hardening of the Authority's fining policy. The Authority, adhering to the Commission Guidelines on the calculation of fines, applied a basic amount set at 25-30 per cent of the value of sales of the goods concerned (in the past the Authority used to limit itself to 5-10 per cent). Moreover, contrary to the Authority's normal practice in this case fines were imposed on parent companies.

In Decision No. 25422 (case 1779) dated 21 April 2015, the Authority accepted the commitments offered by Priceline Group's companies Booking.com BV and Booking.com (Italy) and closed, with respect to these companies, the investigation opened on 7 May 2014.

In more detail, the Authority opened an article 101 TFEU investigation against two online travel agencies, Expedia and Booking.com. The investigation referred to some clauses inserted in the agreements concluded by Expedia and Booking.com with their hotel partners which prevented the latter from offering on their own websites or through competing platforms and other channels better rates and conditions than those advertised on the Expedia and Booking.com sites (MFN clauses).

The Authority pointed out some monitoring tools adopted by Expedia and Booking.com that were thought to strengthen compliance with such clauses, for example, the use of price comparator sites, such as Kayak and Trivago, owned by the two companies. Moreover, monitoring was also strengthened by some contractual provisions which in case of non-compliance empowered Expedia and Booking.com to lower the ranking of the non-compliant hotels that are published on their sites.

Pursuant to the Authority such a strategy was likely to produce restrictive effects on the Italian market of online travel agencies.

During the investigation, Booking.com submitted commitments consisting of a significant reduction of the scope of the MFN clauses. The revised MFN clauses will only apply to prices and other conditions publicly offered by the hotels through their own direct online sales channels, leaving them free to set prices and conditions on other competing platforms and on their direct offline channels, as well as in the context of their loyalty programmes. The commitments apply, starting from 1 July 2015, to all bookings made by consumers with regard to hotels located in Italy and will have a duration of five years. The Italian Competition Authority concluded that such commitments are suitable to address the competition concerns related to Booking.com's behaviour.

In its turn Expedia informed the Authority that starting from 1 August 2015 it had modified its MFN clauses, similarly to Booking.com (the revised MFN clauses just apply to prices and other conditions publicly offered by the hotels through their own direct online sales channels, leaving them free to set prices and conditions on other competing platforms and on their direct offline channels). Having regard to the above policy change, the Authority, by Decision No. 25940, dated 23 March 2016, closed the proceedings against Expedia.

By Decision No. 25966 (case 1790), dated 19 April 2016, the Authority imposed fines for a total amount of €66 million on Sky Italy, RTI-Mediaset, Infront Italy and the Serie A National Football League (the Football League) for the 'allocation agreements' between Sky and Mediaset on the television rights to the 2015-2018 seasons.

In June 2014 when the Football League auctioned the broadcasting rights relating to Serie A's next three seasons, it divided the offer into five packages. At the end of the procedure, Sky should have been entitled to matches contained in packages A and B on satellite platforms and digital terrestrial, respectively, for which it submitted the best bids, while Mediaset - offering the best bid for package D - should have been entitled to broadcast the remaining games on all platforms.

After the bidding process, however, the final allocation structure was different as the League decided to assign: only the satellite package A to Sky; the digital terrestrial package B to Mediaset (despite the fact that its offer was nearly €150 million lower than the Sky offer); and the package D to RTI, which in turn transferred this package on to Sky.

Following the investigations, the Authority found that the rights' allocation resulted from a concerted agreement between the competitors, promoted by the Football League.

The Authority considered the agreement to constitute a violation of article 101 TFEU, restrictive by 'object' and thus very serious, aiming at conditioning and altering the outcome of the competitive bid, while also foreclosing potential new entrants in the relevant market.

Mediaset was fined of a sanction equal to €51 million, while Sky, which initially took position against the other parties' initiatives and then kept a cooperative attitude in relation to the Authority, a sanction of €4 million.

By Decision No. 26705, dated 25 July 2017 (case I793), the Authority fined 11 cement manufacturers, a cement distributor and a trade association more than €184 million for fixing prices and exchanging sensitive information. The Authority found that for five years between 2011 and 2016, the main cement manufacturers (representing 85 per cent of the Italian cement market), their trade association (AITEC) and a cement distributor (TSC) had actively colluded with one another in violation of article 101 TFEU by coordinating price increases and then monitoring the respective market shares for compliance. The evidence gathered during the proceedings revealed that all the operators had concerted simultaneous price rises to be communicated to customers in advance and had also verified the actual implementation of the concerted prices by each competitor. Key to facilitating this anticompetitive behaviour was the involvement of the trade association, AITEC, which had allowed its members to discuss prices during the course of its meetings and had also circulated monthly statistics on cement production to help the companies monitoring their respective market shares. Finally, the Authority determined that a cement distributor, TSC, had facilitated the implementation of the infringement by circulating new price lists among the cement manufacturers.

By Decision No. 27102, dated 28 March 2018, the Authority closed the investigation opened against Telecom Italia and Fastweb for alleged violation of article 101 TFEU regarding their joint fibre optic cooperative venture, also involving the incorporation of a jointly controlled company named Flash Fiber. Flash Fiber aims to build fibre optic networks using FTTH architecture in Italy's 29 largest cities already covered by FTTC by 2020. Pursuant to the original project, use of the networks would have been granted by the company to Telecom and Fastweb on an exclusive basis. According to the Authority the cooperation agreement, while being promoted to the purpose of enabling a more efficient development of innovative technological infrastructure (in line with the objectives set forth by the 'Italian Ultrabroadband Strategy' government plan), could potentially prevent, restrict or falsify competition on the national wholesale markets for access to fixed networks, retail broadband and ultra-wide band telecommunications services.

In more detail, the Authority has examined whether the joint venture would have been capable of restricting competition in breach of article 101 TFEU by way of coordination of the parent companies' strategies with regard to their strategic commercial decisions on two Italian markets: (i) the market for fixed broadband wholesale access, and (ii) the market for broadband and ultrafast-broadband retail telecommunication services. Telecom, in fact, is dominant in the first market, with a market share equal to 96 per cent, while Telecom and Fastweb are the first operators in the second market, with a market share of 40 per cent and 27 per cent respectively. Moreover, both the operators are vertically integrated. According to the Authority the joint venture, resulting in exclusive cooperation for a long time, between the first two vertically integrated operators on the market, could have determined their coordination and, therefore, the reduction of static and dynamic competition on the market. In fact, both operators would have been forced to exclusively use the services provided by the joint venture for the provision of their offers on the retail markets and had also undertaken not to enter into cooperation agreements with competitors of the joint venture. On the other hand, the transaction could result in the wholesale input foreclosure to the detriment of Telecom and Fastweb competitors. Moreover on the market for broadband and ultrafast-broadband retail telecommunication services, the joint venture could have encouraged the coordination of the retail prices of the parties. In

June 2017 both Telecom and Fastweb presented six commitments to the Authority, which, as a result of the market test phase, has accepted the same. The commitments include the implementation of the FTTH network within a precise timetable (30 per cent by 2017; 70 per cent by 2018; 85 per cent by 2019; 95 per cent by 2020); the removal of the preemptive right on the network capacity of Flash Fiber; the introduction of autonomous offers of VULA and NGA bitstream services by Telecom and Fastweb on non-discriminatory terms; backdating of the closing date of Flash Fiber to 2035; modification of co-investment agreements; and measures to prevent the exchange of commercially sensitive information between the parties through Flash Fiber.

According to the Authority, such commitments are necessary to overcome the competitive concerns and will favour the development of infrastructural competition in the markets of fixed network telecommunications.

Finally, the Act does not contain criminal law provisions.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no block exemptions under the law. However, when certain conditions are met, the Authority may authorise agreements or categories of agreements that restrict competition for a limited period of time (article 4 of the Act). To qualify for this exemption, the companies concerned must show that the agreements improve conditions of supply in the market, that the limitations on competition are absolutely necessary to obtain these positive effects and that the improved conditions of supply deliver a substantial benefit to consumers (eg, by reducing prices or providing goods or services that would not otherwise be available). However, the exemption may not involve the authorisation of restrictions that are not strictly necessary for the aforementioned purposes, nor may it allow competition to be eliminated in a substantial part of the market.

In addition, pursuant to paragraph 2 of article 4, the Authority may subsequently, after giving notice, revoke the exemption when the party concerned abuses it or when any of the conditions on which the exemption was based are no longer met.

On 1 July 1996, the Authority published an application form to encourage the voluntary submission of negative clearance notifications and exemption applications.

Special rules are provided for banking, insurance, broadcasting and publishing.

With specific regard to regulated markets, case law has specified that a regulated conduct is exempted from the compliance to competition law principles only if the need to comply with regulation rules does not leave to the company any margin of autonomy, not even with reference to the modalities of fulfilment.

6 Application of the law

Does the law apply to individuals or corporations or both?

Anticompetitive agreements include concerted practices and resolutions adopted by associations of undertakings and consortia. Furthermore, the law applies not only to corporations, but also to any entrepreneur, including individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Article 2 of the Act prohibits agreements between undertakings that have as their object or effect the appreciable prevention, restriction or distortion of competition within the national market or a substantial part of it. It is the effects of the conduct on the Italian market and not where it occurs that places it under the jurisdiction of the Act. Therefore, even if the conduct occurred abroad, but produced anticompetitive effects in the Italian market, it is punishable under article 2.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The Act applies to conduct that has as its object or effect the restriction of competition within the national market or a substantial part of it. Therefore, if conduct does not affect the Italian market or customers, the same conduct will be analysed under the jurisdiction of the Commission or the competition authority of another EU member state.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

An investigation may be initiated by the Authority itself, or by a written declaration or notice brought to the Authority's attention by a party, which may be:

- a company that claims to have been damaged by the alleged anti-competitive behaviour;
- a consumer or consumers' association; or
- a public authority (such as the competent ministry) in areas of business in which the development of trade, the evolution of prices or other circumstances suggest that competition may be impeded, restricted or distorted.

The declaration or notice must be signed. The investigation cannot be initiated on the basis of an anonymous allegation.

However, an investigation may also be initiated by companies whose practices may be subject to inquiry where they notify the Authority that either a concentration or an agreement (either vertical or horizontal) has occurred.

While the pre-merger (or concentration) notification is mandatory, the notification of an agreement is voluntary. In this respect it is worth noting that, pursuant to article 13 of the Act and article 3 of DPR No. 217 of 30 April 1998 (containing the procedural rules), companies that enter into an agreement may notify the Authority. In such case, the Authority shall open a formal investigation within 120 days of the notification being received. Otherwise, the Authority may not start any further investigation of the agreement unless the notification was inaccurate or incomplete.

Under the EU modernisation rules (Regulation No. 1/2003, article 3), whenever the Authority applies the national antitrust rules, it will be required to apply article 101(1) and (3) TFEU at the same time if there is harm to trade among member states.

Pursuant to article 12 of the Act, after assessing the data in its possession and the information brought to its attention by the public authorities or by any other interested party, including bodies representing consumers, the Authority conducts an investigation to ascertain whether there is any infringement of the prohibitions provided in articles 2 and 3.

Pursuant to article 14 of the Act, the Authority notifies the undertakings and entities concerned that an investigation is starting.

Article 14-bis of the Act (added by Legislative Decree No. 223 of 4 July 2006 as amended by Act No. 248 of 4 August 2006) provides that, where the conduct allegedly in breach of the Act is likely to produce a relevant and irreparable damage to competition, the Authority (after having checked, by a summary investigation, the existence of the violation) may adopt interim measures.

The owners or legal representatives of the undertakings or entities may make representations in person or through an attorney within the deadline set at the time of notification, and may file submissions and briefs at any stage during the course of the investigation. Article 14-ter of the Act provides that within three months from the opening of a procedure, the companies under investigation may also offer commitments to the Authority to correct the anticompetitive conduct. After an evaluation of the suitability of the commitments, also based on an open market test, the Authority may make the commitments binding and close the proceedings without an adjudication of the alleged violations. If the companies do not honour the commitments, the Authority may levy administrative fines of up to 10 per cent of the companies' turnover. The Authority may reopen the proceedings if there is a change in a factual element in the case, the companies engage in behaviour contrary to the commitments made or the Authority's decision is found to be based on

incomplete, inexact or misleading information. The rules applicable to this procedure are set forth in the Notice adopted by the Authority by the decision of 12 October 2006.

Once the investigation is closed, the Authority notifies the interested parties by means of a statement of objections of the results. The interested parties shall be notified at least 30 days before the conclusion of the case. The interested parties may submit their briefs until five days before the final hearing before the Authority.

An investigation concerning a possible cartel is normally completed within 240 days of the start of the investigation.

Decisions of the Authority are taken by a majority of votes of the panel.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Authority may at any stage during the investigation:

- request undertakings, entities and individuals to supply any information in their possession and make available any relevant documents;
- call witnesses to give oral testimony before the authority;
- conduct inspections of the undertaking's books and records and make copies of them, availing itself of the cooperation of other government agencies where necessary;
- produce expert reports and economic and statistical analyses; and
- consult experts on any matter relevant to the investigation.

Searches and seizures ordered by the Authority may be carried out through an investigative body, the Guardia di Finanza, and do not need to be authorised by a judge or magistrate.

Any information or data regarding the undertakings under investigation is wholly confidential and may not be divulged, even to other government departments. The Authority may fine anyone who refuses or fails to provide the information or exhibit the documents referred to in subsection 2 without justification. The fine can be up to €25,822, which is increased up to €51,645 in the event that inaccurate information or documents are submitted, in addition to any other penalties provided by current legislation.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The Authority is a member of the International Competition Network (ICN) and the European Competition Network (ECN).

The ICN is a competition authority forum that is open, on a voluntary basis, to all national and multinational competition authorities entrusted with the enforcement of competition law. The ICN is the only international body devoted exclusively to competition law enforcement. The main purposes of the ICN are to provide antitrust authorities with a specialised, yet informal, venue for maintaining regular contact and addressing practical competition issues, and to improve worldwide cooperation. By enhancing convergence and cooperation, the ICN aims to promote more efficient, effective antitrust enforcement worldwide.

However, the ICN does not exercise any rulemaking function and will only issue recommendations on best practices. It will be left to the individual antitrust agencies to decide whether and how to implement the recommendations through unilateral, bilateral or multilateral arrangements, as appropriate.

The ECN is regulated by specific EC rules and is the common organisation that facilitates the application of European antitrust provisions at national level, as well as the cooperation among the antitrust authorities of the member states and the European Commission.

Moreover, it should be noted that, following the increasing development of internet commerce and services, and the subsequent delocalisation of the supply of goods and services, coordination between member states is becoming more and more frequent. For example, the investigations against Booking.com and Expedia (please see question 4) have been conducted by the Italian Authority in collaboration with the National Competition Authorities of France and Sweden, with the coordination of the European Commission, and the commitments

offered by Booking.com have been evaluated and accepted by all the three authorities.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

As specified above, the Authority is a member of the ICN. The ICN facilitates procedural and substantive convergence in antitrust enforcement. In particular, it promotes cooperation between different national authorities by the exchange of information and coordination of investigations to eliminate unnecessary and duplicative procedural burdens. The ECN facilitates the application of European antitrust provisions at national level as well as cooperation among the antitrust authorities of EU member states and the European Commission.

Moreover, the Authority is a member of the various advisory committees set up by the Director-General for Competition of the European Commission to receive the non-binding opinions of the antitrust authorities of different member states with regard to draft decisions on EU cases relating to agreements, abuses of dominant position and concentrations.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Antitrust matters, including cartels, are adjudicated before the Authority. However, private actions to obtain the annulment of anti-competitive contracts or the award of damages are adjudicated before the ordinary judicial courts (explained below).

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof rests with the Authority. With reference to private actions for the compensation of damage before the ordinary judicial courts, Decree No. 3/2017 (article 7) recognises that final and conclusive decisions of the Authority (ie, not further subject to appeal), or the judgments issued pursuant to their judicial review before the administrative courts, will have binding effect for antitrust damages before national judges. The binding effect is limited to the factual analysis of the infringement of competition law, it does not cover the existence or amount of harm nor the causal link, whose evidence rests with the plaintiff. Moreover, the decree has introduced the presumption that cartel infringements cause harm, whereas the defendant could still rebut this presumption. The claimant is nonetheless required to prove the causal link between the infringement (the illegal behaviour) and the damage suffered individually as well as the quantification of this damage.

Pursuant to the well-established case law of the Authority and administrative courts, 'smoking gun' evidence (such as confessions or cartel's written evidence) is not required, since direct proofs are very rarely found for this kind of infringement. The presence of serious, precise and coherent clues of the existence of the cartel is necessary to prove the illegal behaviour.

For example, regarding cartels in the form of a concerted practice, the courts have considered the existence of a parallel behaviour among the undertakings as sufficient evidence, provided that contact among the undertakings is proved (eg, the participation of undertakings at meetings where sensitive information was exchanged ('external factors') and that the parallel conduct is not alternatively justifiable from a rationale viewpoint ('internal factors')).

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Administrative courts' case law has ascertained that a cartel may be established by using circumstantial evidence without direct evidence of the actual agreement. Indeed, it has been clarified that the recurrence of a cartel or concerted practice may be inferred by a certain number of coincidences and clues that, if considered as a whole, can constitute

evidence of a violation, also taking into account that direct proof of the infringement is often difficult to find, especially in the case of secret cartels.

16 Appeal process

What is the appeal process?

According to article 33 of the Act, appeals against administrative decisions of the Authority fall within the exclusive jurisdiction of Tar Lazio (the administrative court).

An appeal was initially essentially limited to a review of the legality of the decision on the basis of specific grounds, such as lack of jurisdiction, infringement of law and abuse of power. The latter may, however, involve a review of the reasoning and completeness of the motivation for the decision being challenged. The court may also verify the correctness of the factual grounds upon which the decision is based. In this respect article 7 of Decree No. 3/2017 now specifies that in the judicial review of Authority decisions, the administrative courts shall have the power to fully verify the facts and technical profiles (of non-controversial nature) on which such decision is based.

It should also be noted that, as a general principle of administrative law, the outcome of this review may only be an annulment of the decision and not a different decision, except for the quantification of the fines, which may be reassessed.

Moreover, the judgments of the administrative court of first instance may be challenged before the Consiglio di Stato (the highest court, charged with the judicial review of administrative actions). However, there is no stay of execution pending this appeal, as judgments of the administrative court of first instance are immediately enforceable. Nonetheless, the Consiglio di Stato may decide, under article 111 of Legislative Decree No. 104/2010, to grant this suspension should serious and irreparable damages result from the execution of the judgment on the appealing parties.

Pursuant to article 2 of Law Decree No. 1/2012 (which entered into force on 22 September 2012), private actions involving annulment proceedings, claims for damages and petitions for emergency measures to be adopted in respect of infringements of the provisions of the Act and of article 101 TFEU must be filed before the Companies' Tribunals (a specialised division of the court of first instance having territorial jurisdiction). It should be noted that article 18 of Decree No. 3/2017 has provided that courts designated to hear antitrust private claims are now concentrated in the Companies' Tribunals of Milan, Rome and Naples (and related Court of Appeals for the appeal phase), each with its own large defined territorial competence.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions for cartel activity provided for in the antitrust legislation. However, article 501 of the Criminal Code provides that whoever, in the exercise of his or her business, either through speculative practices or otherwise, hides, interrupts the supply of or buys raw materials or primary goods or foodstuffs so as to noticeably alter the prices of these and to cause them to become scarce, shall be sentenced to imprisonment (from six months to three years) and shall be fined up to €25,822.

It follows that if a cartel is involved in the above-mentioned activities, some criminal issues may arise.

Criminal sanctions are also provided in the event of boycotts. Individuals involved in boycotts may be sentenced to up to three years in prison (article 507 of the Criminal Code).

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Act provides for administrative sanctions. Pursuant to article 15 of the Act as modified by article 11 of Act No. 57 of 5 March 2001, if the investigation provided for in article 14 reveals infringements of the Act, the Authority shall set a deadline within which the undertakings and entities concerned must remedy such infringements. In the most serious cases it may decide, depending on the gravity and duration of

the infringement, to impose a fine of no more than 10 per cent of the turnover of each undertaking or entity for the previous financial year. Time limits shall be laid down within which the undertaking must pay the fine.

In the case of non-compliance with restraining orders, the Authority shall impose a fine of no higher than 10 per cent of the turnover or, in cases where the penalty has already been imposed, a fine of no less than double the penalty already imposed, with a ceiling of 10 per cent of the turnover. It shall also set a time limit for payment of the fine. In cases of repeated non-compliance, the Authority may decide to order the undertaking to suspend activities for up to 30 days.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Sentencing criteria are provided for in article 15 of the Act. When determining the fines, the Authority shall take into account the duration and seriousness of the violation, and may impose fines of up to a maximum of 10 per cent of the turnover realised by the interested company during the year preceding the beginning of the investigation. Furthermore, the following criteria for the setting of administrative fines are provided for by article 11 of Act No. 689 of 24 November 1981:

- the seriousness of the violation;
- actions carried out by the fined party to eliminate or reduce the effects of the violation;
- the fined party's previous behaviour; and
- the economic conditions of the fined party.

The Authority also makes reference to the Commission Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003.

On 22 October 2014, the Authority adopted new Guidelines on methods of setting fines aimed at defining, even on the basis of guidelines and recommendations of the administrative judge, a specific calculation method of the penalties associated with infringement of competition rules.

The purpose of the Antitrust Authority's decision was to make its deterrent policy more effective, by rendering its decision-making process more transparent and predictable.

In the Guidelines, the Authority first of all specifies that the basic amount of the fine shall be established by multiplying a percentage (up to 30 per cent) of the sales of goods and services related to the infringement for the duration of the same. It also establishes a minimum percentage, normally not less than 15 per cent of the value of sales, for the most harmful restrictions of competition (ie, for secret price-fixing cartels, market sharing and output-limitation horizontal agreements). Criteria for assessment of the gravity of the offence include the following elements: competitive conditions in the relevant market (for example, the level of concentration and the existence of barriers to entry); prejudice against innovation; the actual implementation of the infringement; and the degree of the actual economic impact.

The Authority also provides for the possibility of adjusting the basic amount of the fine with an additional penalty, the size of which would range between 15 per cent and 25 per cent of the value of sales, regardless of the duration of the infringement and of its effective implementation (entry fee).

The Authority establishes specific mitigating and aggravating circumstances, for example further reduction of up to 50 per cent of the basic amount of the fine may be applied if during the investigation the undertaking provides information and documentation that is deemed to be crucial to the identification of other infringements (other than the infringement in the current proceeding) and may be legitimate grounds for conditional immunity from penalties, in accordance with the leniency programme (the Amnesty Plus programme). Moreover, the Authority may increase the penalty by up to 50 per cent if, during the last financial year prior to the issue of the infringement decision, the undertaking concerned recorded a particularly high global turnover compared to the value of sales related to the infringement or if it belongs to a group of significant economic size. Case law has identified the recidivism and the fact of being the promoting party of the cartel

as specific aggravating circumstances, while the filing of remedies and cooperation by the company during the proceedings shall be considered as mitigating factors. See also below the immunity rules under the leniency programme.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

No, but the Authority may decide to order the undertaking to suspend its general activities for up to 30 days.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

There are no criminal sanctions for violations of antitrust law in Italy, only administrative and civil sanctions. The Competition Authority pursues the 'public enforcement' of competition law in the public interest and applies administrative sanctions. Private parties, on the other hand, are entitled to the 'private enforcement' of competition law. Depending on the actual circumstances of the case, they may bring a claim in court and be awarded damages that are in fact civil sanctions.

Thus, administrative sanctions and civil sanctions may indeed be pursued in respect of the same conduct, although by different subjects and on different legal bases.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Pursuant to Decree No. 3/2017 any person who believes he or she has been damaged by a cartel may bring a suit against the companies involved in the alleged anticompetitive conduct.

Victims of a cartel must, as a minimum, receive full compensation of the real value of the loss suffered. The entitlement to full compensation therefore extends not only to the actual loss due to anticompetitive conduct, but also to the loss of profit resulting from any reduction in sales, and encompasses a right to interest.

This principle also applies to indirect purchasers (ie, purchasers who had no direct dealings with the infringer, but who nonetheless may have suffered considerable harm because an illegal overcharge was passed on to them in the distribution chain). In order to facilitate the burden of proof of the claimant, Decree No. 3/2017 recognises a presumption of passing on, providing that:

- compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer;
- as a general rule, indirect purchasers have to prove the passing on of the overcharge to substantiate their claims;
- there is a rebuttable presumption of passing on with the recurrence of three conditions (ie, when the claimant proves the infringement, this infringement resulted in an overcharge for the direct purchaser and the purchased products or services were the object of the infringement); and
- the passing on of defence is admitted whereas the burden of proof of the passing on of the damages remains with the defendants.

In addition, damage to reputation has been considered relevant. Punitive damages are not awarded.

Before the adoption of Decree No. 3/2017, in Italy there was no definitive certainty on the admissibility of passing on. The right of a party to compensation for harm caused by a cartel, irrespective of whether it is a direct or indirect purchaser from the infringer, was recognised by the decision of the Court of Appeal of Rome in case No. 1337/2008, *International Broker v La Raffineria di Roma e altre*.

In addition, the admissibility of the passing on defence was recognised by the Court of Milan in Decision No. 7970/2016, *Swiss International Airlines v SEA* and in the *Juventus FC SpA* case (*Indaba Incentiva Company srl v Juventus FC SpA*, Court of Appeal of Turin, 6 July 2000). More specifically, the claimant, Indaba Incentiva Company, was in the market of tourism services and sporting events and brought proceedings against Juventus FC SpA, claiming that it had committed an abuse of dominant position in the supply of tickets for a football match. The claimant was co-participating in the anticompetitive practice and was victim at the same time. For these reasons, according to the court, a party who co-participated in transferring prices is not able to claim damages.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

On 23 July 2009, Parliament passed a law instituting class actions (Law No. 99/09, which amended the new article 140-bis in the Consumers' Code originally contained in Law No. 244/2007, which never entered into force). Article 140-bis of the Consumers' Code provides that each consumer may take action before the civil courts against companies to apply for the payment of damages and the restitution of the amounts due as a result, inter alia, of anticompetitive behaviour. The court first decides the admissibility of the request (although it can suspend its decision if a proceeding concerning the same issue is pending before the Authority), and then determines whether the infringement occurred and the amount due or the criteria to be taken into consideration to determine such amount.

The new provisions came into force in January 2010 and apply to anticompetitive conduct occurring after 15 August 2009.

Only one class action has been initiated for an antitrust violation since the class action provisions entered into force. It was initiated by an association of consumers claiming damages for the unfair raising of prices for the transportation of maritime passengers a few months after the opening of the antitrust proceedings for the concerned cartel. The Genoa Court admitted the claim, and more than 7,000 consumers have already adhered to the action. However, the case is of a 'follow on' type and meanwhile the administrative courts have definitively quashed the Authority's decision. Thus, the action is unlikely to proceed.

The Parliament is examining proposals for a material change of the current class action rules in order to make the procedure more viable and effective for the plaintiffs.

It should be noted that provisions set forth in Decree No. 3/2017 also apply to claims brought by means of class actions.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Paragraph 2-bis of article 15 (added by Legislative Decree No. 223/2006 as amended by Act No. 248 of 4 August 2006) provides that in certain cases the fine can be cancelled or reduced. On the basis of such rule of law, the Italian Antitrust Authority adopted an Immunity and Leniency Programme on 15 February 2007 (Decision No. 16,472) following a public consultation. The Immunity and Leniency Programme applies to secret cartels only. The first company to spontaneously inform the Authority of a secret cartel (whistle-blowers) will be awarded full immunity from fines if they submit decisive evidence on the cartel that the Authority does not possess. Companies will have to withdraw immediately from the cartel and cooperate with the Authority throughout the proceedings. The request must be submitted to the Authority in writing or orally. If a company does not have all the evidence readily available, it may still lodge the request and ask for a term by which it will provide full evidence (marker). If the Authority turns down the request for immunity or leniency, companies may withdraw the documentation supporting their application. In order to be admitted to the leniency, further conditions shall be met: the company shall terminate the anticompetitive conduct after having presented the petition for the leniency; during the proceedings, the company shall cooperate with the Authority in a

continuing and effective way; and the company shall not inform anybody of its intention to apply for the leniency.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Parties that cooperate after the immunity application – those who are not first in – may be awarded a reduction in their fine of up to 50 per cent if they offer qualified evidence. Companies will have to withdraw immediately from the cartel and cooperate with the Authority throughout the proceedings. Rules on procedure are the same as those applicable to the parties who are the first in to cooperate.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Companies going in second may be awarded a reduction in their fine of up to 50 per cent if they offer qualified evidence.

If a second-in company offers information on a different, previously unknown offence in which it is involved, it may benefit from full immunity in the latter case, but not in the one in which it is second in. There are no specific differences between going in second versus third, but the promptness of the cooperation carried out by the company is taken into account by the Authority when determining the level of reduction of the fine.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

If a company has sufficient evidence to request immunity, the best time to approach the authorities is as soon as possible and even before the Authority initiates the proceedings. No deadlines exist, but upon the request of a company seeking immunity (a marker), the Authority may fix a deadline within which such a company shall submit all the evidence requested thereto. If the company does not comply with such a term, the evidence provided shall be evaluated by the Authority in the context of a reduction of the sanction.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

Pursuant to article 7 of the Immunity and Leniency Programme (updated on 31 July 2013 by Decision No. 24560), companies applying for full leniency as well as those applying for a fine reduction must satisfy some specific cooperation duties to be admitted to the programme. In particular, an undertaking must cease its behaviour upon leaving the cartel, unless the Authority requests or permits the company not to do so in order to keep the investigations secret, and must fully and continually cooperate with the Authority for the entire duration of the proceedings. For the company, such cooperation involves, inter alia:

- the duty to immediately provide all the relevant information and evidences;
- the obligation to remain at the Authority's disposal, to immediately answer any request, to act to permit the Authority to hear its employees and to secure information and documents before employees' dismissal or discharge;
- a prohibition to cancel, modify or hide relevant information or documents; and
- a prohibition to inform anyone (except other antitrust authorities or external legal experts under a duty of confidentiality) of its intention to file a leniency application as well as of the existence or the object of a filed application until the investigation is notified to the parties, unless the Authority permits it.

Update and trends

By Decision No. 27015 dated 7 February 2018 the Authority opened an investigation into a price collusion agreement allegedly put in place by the major telecommunication operators Tim, Vodafone, Wind Tre and Fastweb.

Such proceedings follow the entry into force of Decree-Law No. 148/2017, which laid down the obligation for the telecommunication operators to bill their customers on a monthly basis (instead of once every four weeks). The Telecommunication Authority released Guidelines about the compliance of operators with the new system.

In January and February 2018, Tim, Vodafone, Fastweb and Wind Tre (in order to be compliant with the new rules) sent a letter to their customers informing them about the new monthly billing system. Further, they specified that the yearly expense would be divided into 12 instead of 13 invoices and therefore it would result in an increase in the monthly cost for customers.

The fact that the letters sent by the operators were similarly drafted and that all of them referred to the concept of annual costs

and to the reduction of the number of invoices (though these issues were not considered in the Telecommunication Authority Guidelines), were seen by the Authority as evidence of an anticompetitive conduct. According to the Authority, in fact, the parties agreed to coordinate their economic strategy in order to preserve the increase in tariffs determined by the initial change in invoicing frequency (from one month to four weeks) and at the same time to prevent any price competition among them.

The Authority identified the relevant product markets in the retail market for the provision of telecommunication mobile services and the retail market for the provision of telecommunication fixed services. By the decision taken on 21 March 2018 the Authority resolved to adopt certain precautionary measures ordering the operators to suspend the implementation of the agreement and to define their own services' offer independently from their competitors. The proceedings are expected to end by 31 March 2019.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Applicants (and subsequent cooperating parties) may request the Authority to keep certain documents or sections thereof confidential, provided that such a request is well grounded (the document contains trade secrets, commercial strategies, personal information, etc). The Authority will assess whether the request is grounded and whether it needs to show the documents or sections thereof to prove the cartel. The Authority will inform the interested party of its conclusions on the confidentiality request. If the request is upheld, the Authority will keep the documents confidential and shall not disclose them to the parties involved in the proceedings or to third parties.

Access (by the parties involved in the proceedings) to the confession provided is postponed until the Authority notifies the parties of the statement of objections.

Access (by the parties involved in the proceedings) to documentation provided may be postponed until the Authority notifies the parties of the statement of objections.

By Decision No. 21,092 of 6 May 2010, the Authority also specified that third parties, even if granted access to the proceedings, cannot have access to the confession and to the related documents.

If the Authority decides to turn down the immunity or leniency application, applicants may withdraw the documentation provided to support their application.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

No. The Authority can only accept commitments (see above).

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Not applicable.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

An applicant for leniency must file a request with the Authority. Such request may be submitted by the corporate defendant as well as the company's counsel. In addition, the Authority has made available a

specific telephone and fax number to facilitate communications by interested parties.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

Defendants have right of access to any documents produced or permanently retained by the Authority in the course of the proceedings, with the exception of those documents containing personal, commercial, industrial and financial information of a confidential nature relating to the individuals or to the undertakings involved in the proceedings. Nonetheless, if the charges are based on such documents, they must be disclosed to defendants, at least with regard to the portions containing evidence of the infringement or essential information for the defence of the undertaking concerned.

It is also provided that the Authority may defer access to the documents requested until it has been ascertained that they are relevant for the purposes of acquiring evidence of infringements, in any case, not beyond the date of notification of the statement of objections (while the confession provided pursuant to a leniency request must be postponed until the Authority notifies the parties of the statement of objections).

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

There are no personal sanctions against employees; therefore, the issue of conflict of interest does not arise.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Pursuant to the general principles of the professional code of ethics, counsel may not represent parties where there may be a conflict of interest. In other cases, no specific rule is provided.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Not applicable.

38 Taxes**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

The issue is controversial.

In this respect the Provincial Tax Court of Milan has recently admitted the chance for companies to deduct antitrust fines as business expenses for tax purposes (Decision No. 136/32/02).

The Tax Court stated that since an anticompetitive practice is likely to increase a company's revenues, there is a 'causal link' between such an unlawful practice and its taxable income. Consequently, according to the Court, the amount of a fine imposed for such an unlawful practice is sufficiently linked to the business activity of the company to be deductible for tax purposes. In this respect the Italian Supreme Court in its decision of 21 January 2009, held that business expenses are deductible provided they are 'functionally linked' to an activity that is potentially able to generate income. According to the Tax Court, the concept of an 'activity that is potentially able to generate income' should be construed to include unlawful activities.

However, the position taken by the Tax Court is in contradiction with the most recent case law of the Italian Supreme Court. For instance, by Decision No. 5050/2010, the Italian Supreme Court stated that antitrust penalties are not deductible for tax purposes since an administrative penalty imposed by the Authority is the punitive consequence of a violation of a rule prohibiting certain business practices. A sanction that punishes the exercise of an unlawful activity cannot be considered as a productive activity and, therefore, is not a business expense that can be deducted from the company's income.

39 International double jeopardy**Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

Fines imposed in other jurisdictions are not taken into consideration. Within the jurisdiction, the rule of *ne bis in idem* applies; thus, a company cannot be fined twice for the same illegal conduct (irrespective of the identity of the damaged parties).

Regarding private damage claims, indirect purchasers (ie, purchasers who had no direct dealings with the infringer) are also entitled to claim damages, but the damages cannot be duplicated. In this respect, pursuant to article 13 of Decree No. 3/2017, to avoid actions for damages by claimants from different levels in the supply chain from leading to multiple liability or to an absence of liability of the infringer, in assessing whether the burden of proof is satisfied, Italian courts are able to take due account of actions for damages (also in other EU member states) that are related to the same infringement of competition law, but that are brought by claimants from other levels in the supply chain and of the decisions taken with reference to such actions.

40 Getting the fine down**What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

The optimal way to get the fine down is to act quickly. A corporation that is a member of a cartel or party to a prohibited horizontal agreement should cease the behaviour and by adhering to a compliance programme inform the Authority as soon as possible. The amount of the fine may also be proportionate to the duration of the conduct, thus it must be ceased immediately if a case is started by the Authority. The Authority is more inclined to be lenient with companies or undertakings that have taken concrete steps to limit the effects of their illegal practice.

The Authority is particularly strict in cases where the companies acted through associations representing the industry in question. It is therefore recommended that active steps to leave the association or at least to signal a refusal to adopt the association's illegitimate practices be taken.



Caiazzo Donnini Pappalardo & Associati
CDP STUDIO LEGALE

Rino Caiazzo
Francesca Costantini

rino.caiazzo@cdplex.it
francesca.costantini@cdplex.it

Via Ludovisi 35
00187 Rome
Italy

Tel: +39 06 4522401
Fax: +39 06 45224044
www.cdplex.it

Japan

Eriko Watanabe and Koki Yanagisawa

Nagashima Ohno & Tsunematsu

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law), as amended from time to time, is the legislation that prohibits cartels. In addition to the prohibition under the Antimonopoly Law of Japan, collusion in a public bid is subject to penalty under the Criminal Code. The Law Concerning Exclusion and Prevention of Public Bid Rigging and Actions against Involved Officers provide the measures that the Fair Trade Commission of Japan (JFTC) may take against the activities of government officers involved in public bid rigging.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The JFTC is the sole enforcement agency established by the Antimonopoly Law. In contrast to the United States, there is no enforcement agency in Japan that shares the power and responsibility to enforce the Antimonopoly Law with the JFTC, while the Public Prosecutors' Office is in charge of criminal procedures after the JFTC files an accusation.

The JFTC is the investigator and prosecutor with regard to offences under the Antimonopoly Law. The JFTC consists of a chair and four commissioners. The General-Secretariat, headed by the secretary-general, is attached to the JFTC for the operation of its business, and consists of the Secretariat, the Investigation Bureau and the Economic Affairs Bureau (including the Trade Practices Department). In general, the Investigation Bureau is in charge of investigations and issuance of orders under the Antimonopoly Law.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

No fundamental legislative amendment to the substantive law under the Antimonopoly Law or changes in the JFTC's enforcement thereunder with regard to cartels have been made since 2011, unlike those made in recent years to strengthen the power of the JFTC.

Having said that, amendment to the Antimonopoly Law abolishing the JFTC's administrative proceedings became effective as of 1 April 2015. Under the current Antimonopoly Law, JFTC orders are directly subject to review by judicial courts, without going through administrative proceedings, under the applicable administrative procedure laws. More specifically, a defendant company may file a complaint directly with the Tokyo District Court to quash such JFTC orders. Complaints to quash the JFTC orders will be examined by a panel of three or five court judges. The substantial evidence rule which is applicable to actions for quashing JFTC decisions before the Tokyo High Court and in which the court is bound by the JFTC's findings was abolished. Namely, the Tokyo District Court is not bound by the JFTC's findings of fact and a defendant company may submit evidence to the judicial court proceedings without such restrictions as imposed by the substantial evidence

rule. A JFTC order will be quashed if the judicial court finds that the order is contrary to the laws. See question 16 regarding the current system with regard to the appeal process of JFTC orders.

Furthermore, the commitment procedure, the system to resolve alleged violations of Antimonopoly Law voluntarily by consent of a defendant company, will be introduced pursuant to the amendment to the Antimonopoly Law included in the Act to Amend the Trans-Pacific Partnership Agreement Related Laws, which will become effective as of the date when the Trans-Pacific Partnership agreement will come into force in Japan. Under the commitment procedure, an entrepreneur that receives a notice from the JFTC regarding alleged violation of the Antimonopoly Law may devise a plan to take necessary measures to cease such an alleged violation and file a petition for approval of such plan with the JFTC, and if such plan is approved, the JFTC determines not to render a cease-and-desist order and administrative surcharge payment order against the petitioner. However, such commitment procedure will not apply to cartel conducts.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Under the Antimonopoly Law, an agreement or understanding among competitors to eliminate or restrict competition among them that substantially restrains competition in a particular field of trade is prohibited as an unreasonable restraint of trade (article 3, latter part). While the Antimonopoly Law does not explicitly limit the scope of conduct in violation of the Antimonopoly Law as an unreasonable restraint of trade to that among competitors, the Tokyo High Court, in a 9 March 1953 decision, held that only restrictions among competitors constitute an unreasonable restraint of trade. Unreasonable restraint of trade by a trade association is also prohibited under article 8, paragraph 1, item 1 of the Antimonopoly Law.

Cartels and bid rigging are typical examples of an unreasonable restraint of trade prohibited under the Antimonopoly Law. Agreements that cover topics such as price fixing, production limitation, and market and customer allocation are typical examples of cartels. Note that joint activities, collaboration or alliance among competitors that have pro-competitive effects (and therefore should be subject to the rule of reason analysis) are also reviewed under the latter part of article 3 of the Antimonopoly Law.

While the latter part of article 3 of the Antimonopoly Law prohibits only conduct that substantially restrains competition in the relevant market, the JFTC seems to have enforced the Antimonopoly Law as though the law prescribes that such cartels are illegal per se, and the JFTC has not accepted the arguments of defendant companies.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There is no industry-specific conduct that constitutes an unreasonable restraint of trade (cartels) under the Antimonopoly Law.

Certain activities by small businesses, such as cooperatives qualified under the applicable laws, are exempted from the application of the Antimonopoly Law under article 24. Certain other joint activities among competitors are exempted from the application of the Antimonopoly Law by the provisions of other individual business laws over particular industries (such as the Road Traffic Act, the Maritime Traffic Act, the Insurances Act and the Air Aviation Act). In the foreign trade area, certain export cartels that meet the requirements provided in the Export and Import Act are also permitted to some extent.

The JFTC made public its understanding that unless the Antimonopoly Law or individual laws contain a relevant provision for exemption from the Antimonopoly Law, the Antimonopoly Law may be applied to any form of conduct that meets the conditions that would establish it as a violation of the Antimonopoly Law, even if it arose as a result of an approval, a recommendation, an instruction or administrative guidance by government agencies.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Antimonopoly Law applies to the conduct of 'entrepreneurs', which includes both corporations and individuals. The trade association is also subject to the prohibition under the Antimonopoly Law.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Antimonopoly Law contains no provision expressly setting forth the JFTC's jurisdiction. However, the JFTC considers that it has jurisdiction over conduct that has an effect on the Japanese market, irrespective of where such activities are carried out. Therefore, the JFTC may have jurisdiction over cartel cases involving the Japanese market. With regard to the procedures to be followed under the Antimonopoly Law, the JFTC may use the public service for its inquiries or orders to defendant corporations outside Japan that do not have a presence in Japan. The provisions therefore indicate that the JFTC has jurisdiction over the conduct of such corporations outside Japan that have no presence (eg, a subsidiary, business office or agent) in Japan.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The application of the Antimonopoly Law is exempted for an export cartel among exporters filed with the relevant ministries under the Export and Import Transaction Law, if it does not involve unfair trade practices.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

When the JFTC discovers an alleged violation of the Antimonopoly Law in the form of an unreasonable restraint of trade by any means (such as through a complaint by a third party, information from an employee of the suspected corporation or an application under the leniency programme), the JFTC first conducts a feasibility study for the investigation, and then determines whether it will conduct an investigation and, if it determines to investigate, whether to conduct either an administrative investigation or compulsory measures for criminal offences under the Antimonopoly Law.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Compulsory investigation for criminal offences

The JFTC may inspect, search and seize materials in accordance with a warrant issued by a court judge under the Antimonopoly Law as part of the compulsory investigation of criminal offences.

The JFTC has made public that it will initiate a criminal investigation under the Antimonopoly Law where there is a considerable reason to suspect a malicious and material violation of the Antimonopoly Law,

including cases involving price fixing, restriction of supply, market division and bid rigging, or where there is an entrepreneur or industry that is repeatedly violating the Antimonopoly Law or an entrepreneur that is not complying with a cease-and-desist order and it is difficult to correct such conduct using the JFTC's administrative measures under the Antimonopoly Law. Where, as the result of the investigation, the JFTC is convinced that a criminal offence has taken place, it will file a criminal accusation with the Public Prosecutors' Office.

Administrative investigation by the JFTC

The JFTC may, on a compulsory basis, if necessary, during the conduct of an investigation of a case:

- order persons involved in a case or any other relevant person to appear at a designated time and place to testify or to produce documentary evidence;
- order experts to appear and give expert testimony;
- order persons to submit account books, documents or other material, and retain these materials (ie, production orders); and
- enter any place of business of persons involved in a case and any other necessary place to inspect the conditions of business operation and property, account books, documents and other material (ie, dawn raid).

The JFTC may also conduct investigations on a voluntary basis.

The JFTC usually conducts a dawn raid (a compulsory investigation) in a cartel or bid-rigging case. Having said that, a dawn raid requires the consent and presence of the manager of a corporation, who may approve the JFTC's entry onto the premises on behalf of the corporation, with regard to entry onto the premises of the suspected company for the dawn raid. The presence of a lawyer, including in-house counsel, is not a legal requirement to lawfully or validly conduct the dawn raid.

The JFTC removes originals of documents and materials held at the offices of companies during a dawn raid, either by an order or a request to which the investigated corporation responds on a voluntary basis. Note that the Rules on Administrative Investigations provide that persons who are ordered to submit materials are entitled to make photocopies of such materials, unless doing so would impede the investigation.

It is usual for the JFTC to question employees with regard to the subject matter of the investigation at the same time as the dawn raids (either at the site or the JFTC's office) and, in addition, after the completion of a review of materials and collection of information from other persons, to request such persons to respond to questions. The questioning is usually conducted by the JFTC on a voluntary basis with the consent of an individual to be questioned.

Further, the JFTC usually issues a report order requesting certain information, such as the types of product and the sales thereof, and a production order requesting the production of documents during the process of the administrative investigation, although it sometimes also requests that information, documents or both be submitted on a voluntary basis.

The Antimonopoly Law provides the criminal penalties (ie, imprisonment for up to one year or a fine of up to ¥3 million) for any individual that refuses, obstructs or evades inspection as provided in the Antimonopoly Law. Corporation can also be subject to a fine of up to ¥3 million.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Yes. The legal basis of the cooperation is as follows.

In 1999, Japan and the US signed an Agreement Concerning Co-operation on Anticompetitive Activities, providing for coordination and cooperation with respect to antitrust enforcement activities. Under the Agreement, the competition authorities of each country are mutually bound to give notification of enforcement activities that may affect the other's interests.

Japan also entered into similar agreements with the European Commission in 2003 and Canada in 2005.

Moreover, Japan signed economic partnership agreements with various countries, such as Chile, Malaysia, Mexico, the Philippines, Singapore and Thailand.

The JFTC has concluded memoranda on cooperation with competition authorities such as the Philippines (August 2013), Vietnam (August 2013), Brazil (April 2014) and Korea (July 2014).

The JFTC may exchange information with other competition authorities to some extent. See question 12.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Although the JFTC seems to have made no public announcement with regard to the scope and degree of the information actually exchanged pursuant to the above agreements with other competition authorities for particular cases involving cartels, there have been cases in which the competition authorities have apparently coordinated their investigations of conduct on a global basis.

The Antimonopoly Law stipulates that the JFTC may provide information to foreign competition authorities, excluding cases where 'proper enforcement' of the Antimonopoly Law 'may be disturbed or when interests of the country may be violated', although it is also stipulated that the JFTC must confirm that the confidentiality of information is firmly secured in foreign countries receiving information from the JFTC to the same degree as confidentiality is secured in Japan, and that measures must be taken to ensure that such information will not be used in criminal procedures overseas.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

If the JFTC, as a result of a compulsory investigation for criminal offences, determines that the alleged conduct constitutes a cartel in violation of the Antimonopoly Law and that criminal sanctions are appropriate, it files a criminal accusation with the Public Prosecutors' Office, and criminal sanctions under the Antimonopoly Law will be imposed on the corporation and individuals through the criminal procedures under the applicable laws in the same manner as for other criminal cases.

If the JFTC conducts an administrative investigation and issues a cease-and-desist order or a payment order for the administrative surcharge, or both, a defendant corporation that has an objection against such administrative orders may file a complaint, within six months after the service of the order, with the Tokyo District Court to quash such JFTC order, and the Tokyo District Court decisions over complaints to quash JFTC orders can be appealed to the Tokyo High Court and then to the Supreme Court. It is an issue whether the JFTC, having issued an order, has standing (ie, to file an action to quash its own order). In judicial proceedings to quash JFTC orders, the JFTC or a plaintiff must prove that the alleged facts are 'highly probable'.

Prior to the amendment to the Antimonopoly Law which became effective as of 1 April 2015, complaints to quash JFTC orders were examined through administrative proceedings presided by the administrative judges appointed and authorised by the chairperson and commissioners of the JFTC and the decisions rendered through the administrative proceedings can be appealed to the Tokyo High Court and then to the Supreme Court. JFTC orders, the relevant advance notice of which was rendered prior to 1 April 2015, shall still be subject to the administrative proceedings of JFTC pursuant to the Antimonopoly Law before the amendment.

Complaints to quash JFTC orders are examined by a panel of three or five court judges.

Under the proceedings before the aforementioned 2015 amendment, the Antimonopoly Law adopted the 'substantial evidence rule' in which the judicial court is bound by the JFTC's findings of fact made through the administrative proceedings as long as they are supported by substantial evidence and a defendant company may not submit new evidence to the judicial court proceedings in principle. Since the substantial evidence rule was abolished by the amendment, the judicial court shall not be bound by the JFTC's findings of fact and a defendant company may submit evidence to the judicial court proceedings.

An appeal against a judgment rendered by the Tokyo High Court to the Supreme Court can be accepted if certain requirements set forth in the Civil Procedure Law are fulfilled.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In a criminal case, the criminal procedures for a cartel are same as those for other crimes, and the burden of proof lies with the public prosecutors, who must prove the fact that constitutes the violation of the Antimonopoly Law without reasonable doubt. On the other hand, in appellate judicial proceedings (for challenging JFTC decisions), or civil proceedings involving claims for injunctions or damages, or both, a relatively relaxed standard of proof will apply. In these proceedings, the party with the burden of proof must prove that the alleged facts are 'highly probable'.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes. Indirect or circumstantial evidence is considered to be sufficient to prove the cartel.

16 Appeal process

What is the appeal process?

See question 13.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

For an unreasonable restraint of trade, the Antimonopoly Law stipulates criminal penalties including a fine of up to ¥500 million for a corporation; and servitude (labour in a prison) for up to five years, a fine of up to ¥5 million, or both for an individual (such as an employee in charge of a cartel).

Although criminal penalties have been continuously imposed from the 1990s, ever since the price-fixing case involving the petroleum business in 1984, the number of criminal cases has been small. In February 2016, the JFTC filed a criminal accusation on bid rigging concerning the construction to restore roads after the East Earthquake. In March 2018, the JFTC filed a criminal accusation on bid rigging among Japanese major construction companies concerning the construction of a maglev railway between Tokyo and Nagoya.

The JFTC made public its reasons for filing an accusation in the given case, which included the effects of the given cartel on the national economy and knowledge of the participants to the bid rigging and to the violation of the Antimonopoly Law. To our knowledge, the judicial court, regarding individuals, has decided on suspended sentences where decisions involved imprisonment. We do not have statistics for sentences regarding criminal cases involving cartel cases.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Administrative sanctions – JFTC enforcement

If a violation of the Antimonopoly Law is supported by evidence, the JFTC may order the entrepreneur that committed the violation to cease and desist from such act and to take any other measures necessary to eliminate such act. The statutory limitation for the JFTC to issue cease-and-desist orders is five years after the conduct ceased. The cease-and-desist order is effective upon the service thereof to its recipient, and such recipient must comply with its terms, even if the recipient initiates administrative proceedings, unless the enforcement of such order is specifically suspended by a decision of the court or the JFTC.

The JFTC is required to order payment of an administrative surcharge by entrepreneurs found to have participated in an unreasonable restraint of trade that directly affects prices or that consequently

affects prices by curtailing the volume of supply (price fixing or cartels on supply, market share or customers that affect prices).

The amount of the administrative surcharge is calculated as the following percentage of the sales of the products or services that are subject to the cartels for the period of the cartel concerned up to three years from the date such conduct ceased.

The rate of administrative surcharge under the Antimonopoly Law is as follows:

Principal

- Manufacturers, etc: 10 per cent;
- retailers: 3 per cent; and
- wholesalers: 2 per cent.

Small and medium-sized corporations

- Manufacturers, etc: 4 per cent;
- retailers: 1.2 per cent; and
- wholesalers: 1 per cent.

An administrative surcharge at a rate of 150 per cent of the respective rate set out above is imposed on those entrepreneurs, in general, that have repeated conduct in violation of the Antimonopoly Law and that have been subject to an administrative surcharge payment order within the past 10 years. On the other hand, the administrative surcharge rate shall be decreased by 20 per cent in certain circumstances (such as withdrawal from the cartel at an early stage).

An adjustment will be made through the system that, if both an administrative surcharge and criminal fines are imposed on the same entrepreneur based on the same conduct, the amount of administrative surcharge shall be calculated by deducting 50 per cent of the amount of the criminal fine.

Under the Antimonopoly Law, the administrative surcharge rates is increased by 50 per cent if a corporation planned conduct that constitutes an unreasonable restraint of trade in violation of the Antimonopoly Law; requested another corporation to act in violation of the Antimonopoly Law; or prevented other corporations from ceasing such conduct. Further, if the corporation that played a leading role in the conduct constituting an unreasonable restraint of trade is a corporation that has repeatedly acted in violation of the Antimonopoly Law within the past 10 years, the amended Antimonopoly Law provides that the administrative surcharge be calculated at a rate double that of the applicable surcharge.

The number of defendant companies to which the JFTC has imposed administrative surcharge orders was 128 in the 2014 fiscal year, 31 in the 2015 fiscal year, 32 in the 2016 fiscal year and 32 in the 2017 fiscal year. The total amount of administrative surcharge paid in each year was approximately ¥17 billion, ¥8.5 billion, ¥9.1 billion and ¥1.9 billion respectively.

Private actions – private enforcement

Although private enforcement of the Antimonopoly Law through civil damage suits by private plaintiffs is not as common in Japan as it is in the United States, a party (such as a competitor or a customer) that suffers damage from a cartel is entitled to undertake civil action for recovery of damages based on the provisions of strict liability under article 25 of the Antimonopoly Law or on the more general tort law provisions of the Civil Code. The Antimonopoly Law enables a plaintiff to claim compensation more easily. That is, if a suit for indemnification of damages or a counterclaim under the provisions of article 25 (strict liability) has been filed, the court is required, without delay, to request the opinion of the JFTC regarding the amount of damages caused by such violations.

Note that a legally interested person such as a plaintiff may review and reproduce the case records of administrative proceedings by the JFTC and those of the judicial court proceedings where the validity of JFTC's orders are challenged by entrepreneurs. Further, the JFTC made a public announcement in 1991 that it will provide plaintiffs with access to certain investigation records that the JFTC collects during its investigation through a request by the court if a damage suit is filed in the court, except for certain information such as trade secrets and privacy information. Through these procedures, documents protected by attorney-client privilege in other jurisdictions may be produced during judicial review in Japan.

Civil actions for an injunction under article 26 of the Antimonopoly Law are not available for the unreasonable restraint of trade.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

No sentencing guidelines are publicly available for Antimonopoly Law violations or for other crimes. The criminal penalties (servitude and fines) seem to be determined based on the scale or effects, the time period and maliciousness of the conduct in violation of the Antimonopoly Law, similar to other criminal cases involving the violation of economic illegal conduct.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Each government agency seems to have its own rules and such rules are not, to our knowledge, publicly available. However, based on our experience, the business of many corporations subject to investigation by the JFTC on the suspension of a cartel, or to which the JFTC's orders were rendered, was suspended, and such corporations were restricted from participating in bids presided over by the government agencies. The time period for the suspension seems to differ for the government agencies.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

When the JFTC finds an alleged violation of the Antimonopoly Law to be an unreasonable restraint of trade by any means (eg, a complaint by a third party, information from an employee of the suspected corporation or application under the leniency programme, or both), the JFTC first conducts a feasibility study for the investigation, and then determines whether to conduct either an administrative investigation or compulsory measures for criminal offences under the Antimonopoly Law. Both an administrative surcharge and criminal penalties can be imposed on the same entrepreneur based on the same conduct. If both the administrative surcharge and criminal fines are imposed on the same entrepreneur based on the same conduct, the amount of the administrative surcharge shall be calculated by deducting 50 per cent of the amount of the criminal fine. The JFTC made a public announcement that it will not file a criminal accusation against the corporation and an officer or employee of the 'first in' who is cooperative. Because the JFTC has exclusive rights to file a criminal accusation with regard to the violation of the Antimonopoly Law and the Public Prosecutors' Office is highly likely to respect such decision by the JFTC, in practice the 'first-in' corporation and the officer or employee thereof are exempt from the criminal sanctions with regard to the violation of the Antimonopoly Law.

Having said that, civil actions may be brought by a plaintiff to the court regardless of whether an administrative surcharge or a criminal penalty (or both) is imposed.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Private damage claims are available, although no triple damages are available in Japan. Namely, a party (eg, a customer) who suffers damage from a cartel is entitled to undertake civil action for recovery of damages based on provisions of strict liability under article 25 of the Antimonopoly Law or on the more general tort law provisions of the Civil Code. The Antimonopoly Law enables a plaintiff to claim compensation more easily. That is, if a suit for indemnification of damages or a counterclaim under the provisions of article 25 (ie, strict liability) has been filed, the court may, without delay, request the opinion of

the JFTC regarding the amount of damages caused by such violations. Note that no compensation for punitive damages or triple damages is allowed. An indirect purchaser may file an action. However, the damages to be compensated under the applicable laws require, in civil proceedings, as in any civil tort cases, that the plaintiff alleging the defendant's violation of the Antimonopoly Law bears the burden of proof to demonstrate:

- the illegality of the defendant's conduct;
- damages;
- the causal relationship between the damages and the violation; and
- the negligence or wilfulness of the violator, the conclusion of which depends on whether the plaintiff may prove the causal relationship between the damages and the violation, if the plaintiff argues that indirect sales is within the scope of the damages.

In a suit for indemnification of damages or a counterclaim under the provisions of article 25, the Antimonopoly Law does not allow the defendant to deny its negligence or wilfulness for the violation of the Antimonopoly Law.

See question 18 for further information about private damage claims.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

No class action is available with regard to violations of the Antimonopoly Law. Each plaintiff must file its complaint individually.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

An immunity (ie, a leniency) programme is provided under the Antimonopoly Law.

If an entrepreneur committing an unreasonable restraint of trade voluntarily and independently reports the existence of a cartel and provides related materials to the JFTC, and ceases such violation before the initiation of an investigation, immunity from or a reduction in the administrative surcharge payment shall be applied to such entrepreneurs as follows:

- first applicant filed before the initiation of an investigation – total immunity;
- second applicant filed before the initiation of an investigation – 50 per cent deducted;
- third applicant filed before the initiation of an investigation – 30 per cent deducted; and
- any applicant filed after the initiation of an investigation – 30 per cent deducted.

The number of leniency applicants shall be up to five: up to five applicants before a dawn raid, and up to three applicants after the JFTC conducts a dawn raid if there are fewer than five before the dawn raid. A 30 per cent discount will be made for the third to the fifth applicants. A joint application for leniency may be made by multiple corporations within the same business group.

The corporation first in is totally exempt from the administrative surcharge. The JFTC made a public announcement that it will not file a criminal accusation against the first-in corporation, officer or employee thereof to cooperate. Because the JFTC has the exclusive right to file a criminal accusation with regard to the violation of the Antimonopoly Law, and the Public Prosecutors' Office is highly likely to respect such a decision by the JFTC, in practice this means that the first-in corporation and the officer or employee thereof is exempted from criminal sanctions. The suspension of transactions, which is customarily ordered by the relevant public offices (such as the ministries and local government authorities) with which the suspected corporation has business may be shortened. Having said that, the corporation cannot be discharged of civil liability.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Leniency is available for subsequent parties after the first to report, as follows:

- second applicant filed before the initiation of an investigation – 50 per cent deducted;
- third applicant filed before the initiation of an investigation – 30 per cent deducted; and
- any applicant filed after the initiation of an investigation – 30 per cent deducted.

The number of leniency applicants shall be up to five: up to five applicants before a dawn raid, and up to three applicants after the JFTC conducts a dawn raid if there are fewer than five before the dawn raid. A 30 per cent discount will be made for the third to the fifth applicants. A joint application for leniency may be made by multiple corporations within the same business group.

No immunity from the criminal accusation is available for the second and subsequent applicants.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The administrative surcharge is reduced by 50 per cent. While there is no 'amnesty plus' under the Antimonopoly Law, the 'second in' may be exempted from or have the administrative surcharge reduced by 100 per cent if it applies as first in for leniency for another cartel case. There is no exemption from criminal and civil liability for the second in.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

No deadline is provided under the Antimonopoly Law with regard to an application (ie, marker) with Form 1. However, the Antimonopoly Law limits the number of the applicants who may enjoy the immunity or decrease in the amount of administrative surcharges; the applicant must file as soon as possible before another applicant files an application.

With regard to the submission of detailed information and admission of conduct in violation of the Antimonopoly Law (Form 2) and evidence, the JFTC sets the deadline, usually two weeks. All or at least a substantial part of the information must be submitted to the JFTC in order for leniency to be granted.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

Full cooperation is required for the JFTC to grant the leniency (ie, all of the relevant information must be disclosed and all of the evidence available to the applicant must be produced for the JFTC). If the JFTC requires statements, oral statements by individuals are permitted. The level of cooperation is the same for all applicants (eg, the first and subsequent applicants). However, if the information or evidence is inconsistent, the JFTC will further investigate the case before granting leniency to applicants.

Cooperation with the JFTC regarding its investigation, other than those for leniency, has no legal effects.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

While the Antimonopoly Law provides the confidential obligation under the Antimonopoly Law for the JFTC officials in general, there are no specific provisions with regard to the confidentiality for leniency applicants under the Antimonopoly Law.

The JFTC made a public announcement that the JFTC shall disclose the names of the applicants to which administrative surcharge is exempted or reduced and the exemption or reduced ratio thereof under the leniency program if the JFTC issues an administrative surcharge payment order for the case involving such an applicant on or after 1 June 2016. Before 31 May 2016, only when the applicants so desired the JFTC would make such information public so that the applicants may request to shorten the period for the suspension of the transactions with the relevant ministries and local governments.

The JFTC requests the applicants to keep the application and contact with the JFTC therefor in strict confidentiality, so that the JFTC may successfully investigate the case.

The JFTC allows applications with an oral explanation in certain circumstances, while an application must be filed in written form (see question 32). However, it can be difficult to go through the entire process of the leniency application with no written materials.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

In June 2018, the amendment to the Criminal Procedure Law introduced the plea bargaining system for certain types of crimes including violation of the Antimonopoly Law. The system allows for a public prosecutor to enter into a plea bargaining agreement with a suspect or a defendant (an individual or corporate entity) to drop or reduce criminal charges or agree to predetermined punishment if such suspect or defendant provides certain evidence or testimony in relation to certain types of crimes, including cartels and bid riggings, of other individuals or corporate entities. Defence lawyers are required to be involved in negotiations on the terms of a plea bargaining agreement and the defence lawyers' consent to the terms of agreement must be obtained.

Apart from the foregoing, no plea bargains, settlements or other binding resolutions between the JFTC or the Public Prosecutors' Office and defendant companies are permitted. Note that the amendment to the Antimonopoly Law included in the Act to Amend the Trans-Pacific Partnership Agreement Related Laws will introduce the commitment procedure in which an entrepreneur that received a notice from the JFTC regarding alleged violation of the Antimonopoly Law may devise a plan to take necessary measures to cease such an alleged violation and file a petition for approval of such plan with the JFTC, and if such plan is approved, the JFTC determines not to render a cease-and-desist order and administrative surcharge payment order against the petitioner; however, such commitment procedure will not apply to cartel conducts.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The administrative surcharge that is exempted or reduced is imposed on an entrepreneur, mainly a corporate defendant. While individuals who are first in line may be exempted from a criminal accusation, there is no such treatment for later applicants. The Antimonopoly Law does not distinguish between former employees and current employees; however, the JFTC will usually investigate the current employees of defendant corporations.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The Leniency Rules make anonymous prior consultation available. A corporation contacting the JFTC for leniency will be informed of the expected order (marker) of the leniency application if it reports to the JFTC in order to apply for the leniency programme. The leniency applicant is required to file the relevant form with the JFTC by facsimile to prevent the JFTC from receiving more than one written report at the same time. The products or services that are subject to the violation, and the types of conduct in violation of the Antimonopoly Law, are required to be set forth in the form. The JFTC will inform the applicant of the priority of the first party (marker) and the deadline for submission of evidence and materials. The applicant will be required to submit the evidence and materials before the designated deadline using another form. If the JFTC so determines, certain parts of the material may be provided to the JFTC orally. Before an investigation begins, the JFTC will give priority to the corporation that submitted its initial report to request its application for the leniency programme by fax earlier than other entrepreneurs.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No ongoing policy discussions are publicly available with regard to the leniency programme.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The JFTC has a policy whereby it will provide plaintiffs with access to certain investigation records which the JFTC collects during its investigation, upon the request by a court if a damage suit is filed in the court, except for certain information such as trade secrets and private information.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Yes. Unless there is a conflict of interest or differences in the defence strategy, the lawyer who represents the corporation may represent the employee during the process of investigation by the JFTC. However, in practice, if the individual's conduct becomes subject to a criminal sanction, an independent lawyer should represent such individual.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Yes, legally speaking, unless a conflict of interest exists. However, after the leniency programme was introduced by the 2006 Amendment, it seems that multiple representation of suspected companies should be avoided.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes. However, the payment of legal fees and expenses to defend such employee may trigger the liability of the management of the corporation under the shareholders' derivative suits, unless such payment is for the purpose and effect of mitigating the company's liability. A company may not bear the criminal penalties on behalf of individual officers or employees.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

No. Neither criminal fines nor administrative surcharges are tax-deductible. Income tax is not imposed on the compensation awarded to plaintiff due to the conduct in violation of the Antimonopoly Law.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

To our knowledge, there are no formal rules that are publicly available. However, we are under the impression that the JFTC is concentrating on activities that affect the Japanese market or customers. It is not clear whether the JFTC would enforce the Antimonopoly Law with regard to indirect sales as distinct from direct sales.

In private damage suits before the Japanese judicial courts, the amount of damage may be reduced by the court if the defendant proves that the overlapping damage has already been recovered by the same claimant through the proceedings in other jurisdictions.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The JFTC has no discretion to reduce administrative surcharges unless otherwise explicitly provided under the Antimonopoly Law (as the leniency programme). Therefore, to reduce the amount of the administrative surcharge, the suspected corporation must cease the cartel conduct as soon as it is found and produce evidence to show that the corporation ceased such conduct before the investigation, and, if possible, file an application for the leniency programme as the first in.

NAGASHIMA OHNO & TSUNEMATSU

Eriko Watanabe
Koki Yanagisawa

eriko_watanabe@noandt.com
koki_yanagisawa@noandt.com

JP Tower, 2-7-2, Marunouchi
Chiyoda-ku
Tokyo 100-7036
Japan

Tel: +81 3 6889 7000
Fax: +81 3 6889 8000
www.noandt.com

Kenya

Anne Kiunuhe and Njeri Wagacha

Anjarwalla & Khanna

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Kenya

The relevant legislation in relation to cartels is:

- the Competition Act 2010 (CA) enacted by the Kenyan parliament;
- the East African Community Competition Act 2006, enacted by the East African Community (EAC); and
- the Common Market for Eastern and Southern Africa (COMESA), under the provisions of the COMESA Competition Commission (CCC) Regulations (the COMESA Regulations).

The EAC comprises six partner states including Kenya. COMESA comprises 19 member states including Kenya. The majority of EAC partner states are also members of COMESA.

COMESA

In mid-2016, the CCC issued Draft Guidelines on the Application of Article 16 of the COMESA Competition Regulations to Restrictive Business Practices (the Draft RBP Guidelines). In April 2016, the Competition Authority of Kenya (CAK) and the CCC signed a cooperation framework agreement, which specifies that, among other things, the CAK and CCC will share information in respect of investigations that concern the other regulator's jurisdiction.

The EAC

We understand that the EAC competition regime is in force and the EAC Competition Authority has commenced some nominal operations but has not started receiving or processing applications in respect of mergers, restrictive trade practices (RTPs) or cartels.

For the purposes of this chapter, we have focused only on the CA and, where relevant, the COMESA Regulations.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Kenya

Cartel investigations are conducted by the CAK, which then takes on the role of prosecuting cases of alleged infringement and imposing pecuniary penalties and awards of damages in cases where the parties agree to settle.

Any person who is aggrieved by the CAK's decision following an investigation may appeal to the Competition Tribunal and thereafter may file a second appeal to the High Court. We understand that the Competition Tribunal has started receiving appeal applications.

Where cartel infringement is brought before a criminal court, the prosecution is conducted by the Office of the Director of Public Prosecutions whereby a public prosecutor handles the court process.

COMESA

For cartel investigations in the COMESA region (including Kenyan entities), the CCC has investigative powers (in addition, the CAK would have parallel jurisdiction). The CCC can also request the authorities

of member states to undertake investigations on its behalf. However, where an undertaking fails to comply with the CCC's decision, the CCC may request the assistance of the competition regulator in the member state where an undertaking is located to enforce its decision. In Kenya, therefore, the CCC would rely on the CAK to enforce its decision in relation to a cartel.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

Kenya

The CA was amended in December 2016 to, among other things, give the CAK greater information-gathering powers by providing that every person, undertaking, trade association or body is obliged to provide information requested by the CAK in relation to an investigation or possible investigation. The amended CA also allows the CAK to impose a financial penalty of up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question where any of the undertakings is found to be in breach of the provisions of the CA on restrictive trade practices. This is in addition to the then existing sanctions of a fine of 10 million Kenya shillings and/or imprisonment of up to five years.

In March 2018, the CAK published various draft rules and guidelines for stakeholder review and comments. The draft rules and guidelines which (if adopted) have an impact on cartels include:

- the Competition (General) Rules, 2018 (the Draft Competition Rules);
- the Block Exemption Guidelines; and
- the Search and Seizure Guidelines.

The Draft Competition Rules set out the process of conducting of investigations into RTP, the criteria for determination of exemptions, settlement in respect of RTPs and consumer infringements; and determination of penalties and remedies. The Draft Competition Rules also propose the introduction of forms for lodging complaints. The Block Exemption Guidelines propose the introduction of a block exemptions regime in Kenya allowing for the exemption from competition assessment of a category of agreements, decisions and practices by or between undertakings from application of prohibitions under section 21 and 22 of the CA. However, the Block Exemption Guidelines propose covering only certain franchise agreements, stadia branding rights, media content generation and one-off sporting and promotional events. The Search and Seizure Guidelines set out the procedure for conducting dawn raids for the purposes of ensuring they are conducted in a transparent and consistent manner.

As the draft rules and guidelines have not yet been passed and are subject to change, we have not considered them in this chapter.

COMESA

The CCC is still developing its regime on restrictive business practices. Detailed draft guidelines on restrictive trade practices have been proposed but not yet formally adopted.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Kenya

Section 21 of the CA and the Consolidated Guidelines on the Substantive Assessment of Restrictive Trade Practices under the CA (RTP Guidelines) contain the substantive law on cartels in Kenya. Section 21 prohibits RTPs, being agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings that have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya.

RTPs can be among parties either in a horizontal or vertical relationship. Types of agreements listed in the CA that would apply to cartels include:

- directly or indirectly fixing purchase or selling prices or any other trading conditions;
- dividing markets by allocating customers, suppliers, areas or specific types of goods or services;
- collusive tendering; or
- otherwise preventing, distorting or restricting competition.

The RTP Guidelines expand on RTPs to include information-sharing between competitors (save where the information is for technical, safety or education purposes) to also constitute a horizontal restriction.

Certain practices by trade associations and their members constitute horizontal restrictions. These include the unjustifiable exclusion of a competitor, potential competitor from a trade association, or trade association, sharing pricing information or making pricing recommendations to its members. The members of trade associations are jointly liable for the decisions of the associations. However, the CAK may, in some circumstances, require evidence of actual knowledge of and participation in a prohibited activity before inferring that an individual member was in agreement with other members to engage in the prohibited activity.

The RTP Guidelines provide for a hard-core restriction on cartels and therefore these are per se illegal. Whereas in some instances RTPs may apply for exemption, no exemption and no analysis as to the object or effect of a cartel may be adduced and their mere existence is a breach of the CA.

COMESA

Article 16 of the COMESA Regulations prohibits any agreement between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between member states and have as their object or effect the prevention, restriction or distortion of competition within COMESA. Specifically, article 19 makes it an offence for undertakings engaged in rival or potentially rival activities to engage in:

- agreements that fix prices, hinder or prevent the sale or supply or purchase of goods or services, limit or restrict the terms and conditions of sale or supply or purchase between persons, limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services;
- collusive tendering and bid rigging;
- market or customer allocation agreements;
- allocation by quota as to sales and production;
- collective action to enforce arrangements;
- concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier; or
- collective denials of access to an arrangement or association which is crucial to competition.

The Draft RBP Guidelines provide that cartel conduct constitutes a restrictive business practice by object and is difficult to justify on the basis of efficiency. Therefore, cartel conduct is presumed by the CCC to have anticompetitive effects that outweigh any procompetitive effects.

The COMESA Regulations and the Draft RBP Guidelines are silent on the issue of knowledge and intention and their impact on a finding of liability.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

Kenya

There are no industry-specific infringements, defences or exemptions under the CA and no defence or exemption for government-sanctioned activity or regulated conduct.

In general, however, any person, undertaking or association may apply to the CAK for an exemption from the provisions dealing with RTPs and the CAK may, upon considering the application, grant an exemption to the agreement or practice. Trade associations and professional associations are also required to apply to the CAK for an exemption if their association rules have provisions that would prevent, distort or lessen competition.

The CAK may grant an exemption if it is satisfied that there are 'exceptional and compelling reasons of public policy', and in granting the exemption, the CA requires the CAK to take into account whether the practice would be likely to result in or contribute to:

- maintaining or promoting exports;
- improving or preventing decline in the production or distribution of goods or the provision of services;
- promoting technical or economic progress or stability in any industry; or
- obtaining a benefit for the public which outweighs or would outweigh the lessening competition that would result from the agreement, decision or concerted practices.

The RTP Guidelines in addition provide that the following categories of conduct may be entitled to an exemption:

- certain intellectual property arrangements; and
- certain professional or trade association agreements.

COMESA

There are no sector-specific offences, block exemptions or exemptions for government-sanctioned activity under the COMESA Regulations. However, any person, undertaking or association may apply to the CCC for an exemption from the provisions dealing with RTPs and the CCC may deem the restrictions to be inapplicable to such agreement if:

- the parties can prove that the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit and that does not:
 - impose restrictions that are not indispensable to the attainment of this objective; or
 - afford such undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question; or
- the CCC determines that there are public benefits that outweigh the anticompetitive effect.

6 Application of the law

Does the law apply to individuals or corporations or both?

Kenya

The law applies to both individuals and corporations. Section 5 of the CA provides that the CA applies to all persons including the government, state corporations and local authorities insofar as they engage in trade. A person is defined to include a body corporate.

COMESA

Article 3 of the COMESA Regulations provides that the COMESA Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the common market. A person is defined under article 1 to include both a natural or legal person.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Kenya

Yes. The regime applies to conduct that takes place outside the jurisdiction if it has an effect in Kenya. Section 6 of the CA applies to conduct by either:

- a citizen or person resident in Kenya;
- a body incorporated or carrying out business in Kenya;
- any person in relation to the supply or acquisition of goods and services by that person in to or within Kenya; or
- any acquisition of shares or other assets outside Kenya resulting in a change of control of a business or an asset of a business in Kenya.

However, the above provisions need to be read in conjunction with section 21 of the CA, which states that the RTP must have the object or effect of distorting, lessening or preventing competition 'in Kenya'. Therefore, conduct taking place outside Kenya, for example, indirect sales into Kenya, may be captured by the CA's provisions on RTPs if the conduct is aimed at, or has the effect of distorting, lessening or preventing competition in the country.

COMESA

Yes, the regime applies to conduct that takes place outside the jurisdiction if it has an effect in the COMESA region. Article 3(2) of the COMESA Regulations provides that the regime is only applicable to conduct that has an appreciable effect on trade between member states and that restricts competition in the common market. Therefore, conduct whose effects are outside the common market is not within the jurisdiction of the CCC.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Kenya

Yes, there will be a defence available if the conduct does not have as its object or effect the distorting, lessening or preventing of competition in Kenya. However, if the conduct taking place outside Kenya affects parties in Kenya, it will be regulated by the CAK.

COMESA

Yes, there will be a defence available if the conduct does not have an appreciable effect in the COMESA region. However, if the conduct affects trade within member states, it will be regulated by the CCC.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

Kenya

Investigation

Under section 31 of the CA, the CAK, can carry out an investigation either on its own initiative or upon receipt of information or a complaint. The CAK may request that the company or person under investigation produces records, documents and any other information that the CAK may request, or appears before the CAK to give evidence or produce a document. It may also enter and search premises and seize any data or anything that has a bearing on the investigation.

Proposed decision

The CAK will then write to the entity or person, advise it of its proposed decision and offer it the opportunity to make representations to the CAK either orally or in writing.

Final decision

After considering the representations made, the CAK will then make a final decision.

Settlement

The CAK may at any time during or after an investigation enter into an agreement of settlement with the entity or person concerned.

COMESA

Investigation

Under the COMESA Regulations, any person or consumer may request that the CCC conducts an investigation where there is activity that would restrict competition in COMESA.

Proposed decision

Where the CCC decides to investigate, it notifies the interested parties of the investigation and is required to complete the investigation within 180 days from the date of the request (this time period can be extended by notification to the parties). If the CCC decides that there has been a breach of regulations, it will notify the respondent party and will allow the party an opportunity to defend itself.

Final decision

Within 10 days of the hearing of the defence by the parties involved, the CCC is required to notify the interested parties of its determination. Based on this determination the CCC may decide that the party in breach should cease its conduct, pay a fine in an amount determined by it or take whatever act it deems necessary to diminish or remove the effect of the illegal conduct.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

General investigatory powers	Competition Act (CAK)		COMESA (CCC)	
	Civil/administrative	Criminal	Civil/administrative	Criminal
Order the production of specific documents or information	Yes	Yes*	Yes	No
Carry out compulsory interviews with individuals	Yes	Yes*	Yes	No
Carry out an unannounced search of business premises	Yes	Yes*	Yes	No
Carry out an unannounced search of residential premises	Yes	Yes*	Yes	No
Right to 'image' computer hard drives using forensic IT tools	Yes	Yes*	Yes	No
Right to retain original documents	Yes	Yes*	No**	No
Right to require an explanation of documents or information supplied	Yes	Yes*	Yes	No
Right to secure premises overnight (eg, by seal)	No	n/a	No	No

* In Kenya, in theory there is a criminal element attached to cartel behaviour under the CA. However, this is an untested area of competition law and any successful criminal sanctions would have to be enforced in line with the Evidence Act (Chapter 80 of the Laws of Kenya), the Penal Code (Chapter 63 of the Laws of Kenya), the Fair Administration of Actions Act and the Constitution of Kenya 2010.

** In COMESA, the CCC can request the authorities of member states to undertake investigations on its behalf.

The CAK does not require prior approval of the courts to conduct its investigative powers. The High Court of Kenya affirmed this in the case of *Mea Limited v Competition Authority of Kenya and another* [2016] eKLR.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Kenya

The CAK and the CCC, in April 2016, signed a cooperation framework agreement, which specifies that, among other things, the CAK and CCC will share information in respect of investigations that concern the other regulator's jurisdiction. The CAK has also signed a memorandum of understanding with the Competition Commission of South Africa in which both regulators have agreed to exchange information on competition issues.

COMESA

Rule 40 and 43 of the COMESA Competition Rules provide that the CCC may transmit to the competent authorities of the member states copies of the most important documents in relation to a restrictive business practice and request such authority to undertake an investigation. The officials of the CCC may assist the officials of such authority in carrying out their duties.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Kenya's jurisdiction has interplay with COMESA and the EAC that arises from Kenya's membership of these two regional organisations.

The CAK and CCC have agreed to assist each other in their enforcement activities, to the extent compatible with their competition laws and within the reasonably available resources through:

- locating and securing evidence and voluntary compliance with requests for information from undertakings or natural persons within the respective jurisdiction;
- conducting investigations;
- assisting the requesting party with relevant information that may be in the possession of the other party; or
- assisting the other party with information that may come to the attention of the other party.

Either the CAK or the CCC may request the other to commence enforcement activities in relation to anticompetitive effects that have an impact on the territory of the other.

This cooperation between CAK and CCC is likely to create efficiency in the investigation and enforcement of the regime on cartels in both jurisdictions.

Risk could also be triggered as investigations may be carried out in other jurisdictions.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Kenya

Following the steps outlined in question 9, the CA may do any of the following:

- declare the conduct to constitute an infringement of the prohibitions of the CA;
- restrain the undertaking from engaging in that conduct;
- direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
- impose a financial penalty of up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking in question; or
- grant any other appropriate relief.

A party may also enter a settlement agreement with the CA any time after an investigation, which may include an award of damages to a complainant or the imposition of a pecuniary penalty.

COMESA

The COMESA Competition Rules provide that the initial determination of the CCC is made by an initial committee of three commissioners, after which parties may appeal to the full Board of Commissioners. The decisions that the initial committee may reach include ordering cessation of the prohibited conduct, imposing a fine or ordering any other action it deems necessary to remove or reduce the conduct.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

Kenya

The CAK bears the burden of proving that undertakings have engaged in cartel conduct by entering an agreement whose object or effect is to distort or restrict competition.

The RTP Guidelines state that there is a hard-core restriction on cartels but do not set out the standard of proof that the CAK must meet before establishing that a cartel exists.

COMESA

The Draft RBP Guidelines provide that the burden of proof falls on the CCC or the person alleging that an agreement is restrictive to establish that the object of an agreement entered into between parties is to restrict competition. After discharging this burden, the onus is on the parties to the agreement to defend it and to establish that it has a positive effect on economic progress or it satisfies the conditions to warrant an exemption.

Where it is found that the object of the agreement is not to restrict competition, the burden of proving that the effect of the agreement is to restrict competition is on the person making this allegation.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Kenya

Yes, the RTP Guidelines provide that the CAK may rely on circumstantial evidence when making a decision as to whether an agreement has been reached between the undertakings in question. There need not be a formal agreement in place between undertakings to warrant the CAK reaching this determination and that the provisions of the CA have been infringed.

COMESA

The COMESA regime is silent on the issue of circumstantial evidence.

16 Appeal process

What is the appeal process?

Kenya

The CA provides that a person aggrieved by a determination of the CAK may appeal in writing to the Competition Tribunal within 30 days of the decision. We understand the Competition Tribunal has started receiving appeal applications. The appeal process as detailed in the Competition Tribunal (Procedure) Rules, 2017 is summarised below:

Filing of pleadings

Appeal to the Competition Tribunal is by way of a Notice of Appeal and Memorandum of Appeal filed together with documents supporting the person's appeal.

Service and response

Upon filing the Memorandum of Appeal, the filing party is required to serve the respondent with a notice of appearance to allow the respondent to file a reply to the appeal.

Case management conference

Once the respondent's reply is filed, the Competition Tribunal sets a date for pretrial conference and directions during which the parties to the appeal deal with issues such as clarification of matters in dispute, appointment of experts and creation of a timetable for the hearing.

Hearing and determination

On the hearing date(s) the appellant has the right to begin the appeal. Either party may call witnesses and/or expert witnesses to make their appeal. The Competition Tribunal may issue summons to compel witnesses to attend proceedings. The Competition Tribunal may grant any interim or final orders as it deems fit.

Urgent appeals

Where a person wishes to get interim relief pending the hearing of an appeal, the person can file a Memorandum of Appeal together with a Notice of Motion under a certificate of urgency. In such circumstances, the Competition Tribunal is convened as soon as possible to give directions on the hearing of the appeal. Appeals from the Competition Tribunal lie in the High Court of Kenya.

COMESA

The COMESA Competition Rules provide that if the respondent party is dissatisfied with the initial determination (made by an initial committee of three commissioners), it can appeal to the full Board of Commissioners within 30 days from the date of receipt of notification of the initial committee's decision. The Board of Commissioners has powers to cancel, reduce or increase the fine imposed by the initial committee.

Sanctions**17 Criminal sanctions**

What, if any, criminal sanctions are there for cartel activity?

Kenya

The CA provides for imprisonment for a term not exceeding five years, a fine not exceeding 10 million Kenya shillings as the criminal penalties for engaging in cartel activity. Individuals or directors of undertakings involved in cartel conduct may be subject to an imprisonment term if found guilty of the offence. We are not aware of any instances where criminal sanctions have been imposed on any person or undertaking in respect of cartel conduct. As we are not aware of any criminal sanctions imposed by the CAK to date, we are not able to compare the CAK's previous decisions or sanctions.

COMESA

The COMESA Regulations only provide for civil and administrative sanctions.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Kenya

Section 36 of the CA lists the actions that the CAK can take following an investigation. These are to:

- declare the conduct that is the subject matter of the CAK's investigation of an infringement;
- restrain the company or individual from engaging in that conduct;
- direct any action to be taken by the company or individual to remedy or reverse the infringement;
- impose a financial penalty up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking in question; or
- grant any other appropriate relief.

In its annual report for 2015-2016, the CAK set out the fines imposed on companies found to have engaged in price fixing. These companies paid fines ranging from 100,000 to 5 million Kenya shillings. The imposition of fines is the most common form of sanction that has been imposed by the CAK to date.

COMESA

The CCC can require an undertaking to cease its conduct, pay a fine or take any other action it deems necessary to remove or reduce the conduct. The fines can be up to a maximum of 10 per cent of the COMESA turnover of the undertaking in breach. We are not aware of any penalties imposed by the CCC in relation to cartel conduct, so we are not able to comment on the frequency of fines or to make a comparison.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Kenya

The RTP Guidelines are silent on the principles and formulas that may be used by the CAK to determine the amount of administrative fines payable after an investigation. The CA only sets the upper limit of the administrative fines payable as up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings found to have infringed the provisions of the CA. In practice, however, the CAK does take into account mitigating and aggravating factors in determining the penalties.

As for criminal sanctions, Kenya's Sentencing Policy Guidelines (the Sentencing Guidelines) are informative for judicial officers deciding any criminal case. The Sentencing Guidelines provide the principles that should guide the court when deciding whether to impose a custodial or non-custodial sentence, including the gravity of the offence, criminal history and character of the offender. When considering the appropriate term of imprisonment, the Sentencing Guidelines require the court to consider the mitigating or aggravating circumstances of the case.

COMESA

The COMESA Competition Rules require the CCC to consider the gravity and duration of infringement by the parties in question prior to imposing a fine. Parties are entitled to make oral submissions, including submissions in relation to the quantum of the fine.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not listed as one of the sanctions available for cartel conduct in Kenya under the CA or in the COMESA Regulations.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Kenya

Parallel proceedings may be pursued in respect of the same cartel conduct. Criminal proceedings can only be undertaken by the Public Prosecutor while administrative sanctions are a preserve of the CAK. Persons affected by cartel conduct may pursue damages from civil courts.

COMESA

Since the COMESA Regulations do not contain criminal sanctions, there can be no parallel criminal and administrative proceedings. However, the COMESA Regulations do not prohibit individuals affected by cartel conduct to institute civil proceedings in their member states in order to obtain damages or any other redress.

Private rights of action**22 Private damage claims**

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Kenya

The CA is silent on private damage claims.

Direct and indirect affected parties may rely on the Constitution of Kenya (the Constitution) to institute claims where cartel conduct causes a denial of, a violation or infringement of, or a threat to rights in the Constitution, including consumer rights such as the protection of economic interests.

It is unclear whether courts would permit passing-on and double recovery in respect of such claims.

It is also unclear what level of damages would be awarded if these claims were successful, as the competition laws of Kenya are silent on this. As Kenya is a common law jurisdiction, decisions of courts in the Commonwealth countries are of persuasive value to Kenyan courts and therefore a decision in a common law jurisdiction such as in the United Kingdom would be persuasive in Kenya.

Courts have the discretion to determine whether to award costs and, if so, the quantum of costs in civil matters.

COMESA

The COMESA competition regime is silent on whether private damage claims are available for direct and indirect purchasers. In this respect we are not able to determine how passing-on and double recovery issues are dealt with and what level of damages (eg, single, double, treble) and cost awards can be recovered or how recent damages awards compare with previous cases.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Kenya

The Constitution permits class actions, but the CA is silent on this.

A person acting as a member of or in the interest of class of persons can institute a class action in the High Court of Kenya by way of a petition for the denial of, the violation or infringement of, or the threat to a right in the Bill of Rights of the Constitution.

A person would have to establish that cartel conduct caused the denial of, the violation or infringement of, or the threat to a right guaranteed in the Constitution.

COMESA

The COMESA competition regime is silent on whether class actions are permissible.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Kenya

Yes. In May 2017, the CAK published the Leniency Programme Guidelines (the Leniency Guidelines) that provide for a leniency programme (the Leniency Programme) and govern the processing and granting of leniency to parties that report cartel conduct.

According to the Leniency Guidelines, the CAK accepts applications for leniency in the following circumstances:

- when it has no knowledge of the contravention;
- when it has knowledge of a contravention but lacks sufficient information to proceed with investigation; or
- when it has commenced an investigation but requires additional evidence to penalise offenders.

Parties that report cartel conduct are offered a full or a partial reduction of the administrative financial penalty imposed by the CAK depending on when they report. It is envisaged that the incentive will encourage parties engaged in cartel conduct to provide evidence and, in effect, improve compliance with the CA.

The importance of being the first applicant for leniency or 'the first through the door', is that the applicant is granted 100 per cent reduction in the administrative financial penalty, which is also termed 'immunity'.

The full or partial leniency in the Leniency Programme does not absolve an applicant for leniency from criminal liability under the CA. The Director of Public Prosecutions may still prosecute the applicant for offences under the CA.

COMESA

COMESA does not currently have a leniency programme or the option of offering immunity.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Yes, the Leniency Programme extends to subsequent applicants for leniency.

Subsequent applicants for leniency may benefit from a partial reduction of the administrative financial penalty imposed by the CAK as follows:

- second through the door may be granted up to 50 per cent reduction in any penalty;
- third through the door may be granted up to 30 per cent reduction in any penalty; and
- any subsequent applicant that significantly contributes to an investigation may be granted up to 20 per cent reduction in any penalty.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

As set out in question 25, cooperating at an earlier stage affects the level of any administrative financial penalty imposed by the CAK.

The Leniency Guidelines do not provide for an 'immunity plus' or an 'amnesty plus' option.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

The Leniency Guidelines are silent on when an application for leniency should be initiated though, generally, the application would be expected to be made before or during an investigation into cartel conduct by the CAK and offer evidence that would be crucial in prosecuting offenders. Markers are available and they allow for an applicant to provide initial information on cartel conduct to the CAK while gathering further information in relation to a cartel and in the interim being offered a place in line for the leniency for a certain period.

The Leniency Guidelines set out the timelines below for the leniency application process.

Step*	Timeline
Submission of a marker application to the CAK	No timeline
Submission of the relevant documentation and information orally or in writing to the CAK	Within 28 days from the date the marker application is submitted
An applicant seeking the extension of its marker by the CAK due to unavoidable circumstances	After expiry of the 28 days
Initial meeting between the applicant and the CAK after the marker application has been finalised	No timeline
Decision on whether applicant's case qualifies for leniency	Within 14 days after date of initial meeting
Communication from the CAK to the applicant in writing on whether the applicant qualifies for leniency	Within 14 days of the decision being made
Further meeting with the CAK to discuss and grant conditional leniency to the applicant pending any further investigation and determination by the CAK	No timeline
Execution of the conditional leniency agreement between the CAK and the applicant which should also cover the directors and employees of the applicant	No timeline
The CAK engaging the Director of Public Prosecutions with regards to the criminal aspects of the cartel conduct	No timeline
Investigation, analysis and verification by the CAK with the applicant being obliged to co-operate as a serious breach of this obligation may lead to revocation of the conditional leniency agreement	No timeline

Update and trends

The CAK, in March 2018, published various draft rules and guidelines for stakeholder review and comments. The draft rules and guidelines which (if adopted) have an impact on cartels include:

- the Competition (General) Rules, 2018 (the Draft Competition Rules);
- the Block Exemption Guidelines; and
- the Search and Seizure Guidelines.

By way of summary, the Draft Competition Rules set out the process of conducting of investigations into RTPs, the criteria for determination of exemptions, settlement in respect of RTPs and consumer infringements; and determination of penalties and remedies. The Draft Competition Rules also propose the introduction of forms for lodging complaints. The Block Exemption Guidelines propose to introduce a block exemptions regime in Kenya allowing for the exemption from competition assessment of a category of agreements, decisions and practices by or, between undertakings from application of prohibitions under section 21 and 22 of the CA. However, the Block Exemption

Guidelines propose covering only certain franchise agreements, stadia branding rights, media content generation and one-off sporting and promotional events. The Search and Seizure Guidelines set out the procedure for conducting dawn raids for the purposes of ensuring they are conducted in a transparent and consistent manner.

In its 2016/2017 Annual Report, the CAK highlights its interactions with regional and international competition agencies in a bid to create partnerships, networks and deepening integration regionally and internationally. In particular, the CAK participated in the International Competition Network’s Cartel workshop Annual Conference, Chief/Senior Economist workshop during the 2016/2017 financial year and its own annual conference. The CAK notes that it has, based on its relationship with the International Competition Network, developed guidelines on fining and settlement of RTP cases, among others.

The CAK’s 2016/2017 Annual Report also notes that the CAK was engaged in initiatives in the financial year which enabled it to dismantle barriers to entry and abusive behaviour that restricted competition in purple tea exports.

Step*	Timeline
Subsequent meetings convened by the CAK	No timeline
Final meeting with the CAK to be given the leniency certificate or execute the leniency contract	After all conditions in the Leniency Guidelines have been met and the CAK has completed its investigation
* In the various steps, the applicant should always claim confidentiality for any confidential information or documentation provided to the CAK.	

- the disclosure is authorised by law or required by a court or a tribunal;
- the CAK is of the view that disclosure is not likely to cause detriment to the person providing the information or to the person to whom it relates; or
- the CAK is of the view that the public benefit from the disclosure outweighs the detriment occasioned.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

An applicant for leniency is expected to ensure total cooperation with the CAK throughout the investigation and until a determination by the CAK. The applicant should:

- provide full, timely and truthful information and documents in its possession or under to control;
- keep the application process confidential and not to reveal it to other members of the cartel; and
- immediately stop the cartel conduct.

These requirements also apply to subsequent applicants for leniency in respect of the same matter.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Leniency Guidelines provide that the identity of an applicant remains confidential throughout the investigation and when a decision is made by the CAK. In addition, an applicant may pursuant to the CA claim confidentiality in respect of the whole or part of the materials disclosed to the CAK during an investigation.

The same level of confidentiality extends to subsequent applicants for leniency.

The Leniency Programme does not envisage any proceedings where confidential information may be disclosed to third parties.

Despite the CAK’s obligation not to disclose confidential information, the CA provides that it may disclose this information in the following circumstances, where:

- the disclosure is to a person performing an action under the CA;
- there is an obligation in law to disclose;
- the consent of the person who provided the information has been obtained;

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The CAK may enter into a settlement with the party alleged to have engaged in a cartel activity in respect of the administrative financial penalty to be imposed or the quantum of damages to be awarded to the complainant.

Decisions of the CAK may be appealed to the Competition Tribunal or one may institute judicial review proceedings in respect of the decisions.

With regards to the criminal aspect of cartel conduct, the Director of Public Prosecutions may enter into a plea agreement with a person alleged to have engaged in a cartel activity after they have been charged in court. This will be in accordance with the Criminal Procedure Code, which applies to all criminal prosecutions, and is subject to the court’s approval.

Decisions of courts in criminal matter may be appealed to the superior courts.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Full or partial leniency in respect of administrative financial penalties imposed by the CAK covers a corporate applicant, its directors and its employees. It is unclear whether it would cover its former employees.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The Leniency Programme is new and untested, hence it is unclear whether there will be nuances to the practical steps set out with the Leniency Guidelines and also highlighted in question 27.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

We are not aware of any ongoing or anticipated assessment or review of the Leniency Guidelines.

Defending a case**34 Disclosure**

What information or evidence is disclosed to a defendant by the enforcement authorities?

The Kenyan competition regime is silent on this. However, it would be expected that the CAK would disclose to the alleged offender information and evidence sufficient to establish the existence of cartel conduct and also enable the alleged offender to defend itself while safeguarding the CAK's obligation to maintain confidentiality as per the CA and Leniency Guidelines.

In addition, it should be noted that the CAK's obligation to maintain confidentiality is subject to the exceptions set out in question 29, which may be used as a basis for the disclosure of confidential information.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

The Kenyan competition regime is silent on these issues. If there is a likelihood of conflict of interest, it would be advisable for the corporation and its employees to each seek independent counsel.

It would also be advisable for present and past employees to seek independent legal advice during an investigation by the CAK where there is likelihood that the offenders may be prosecuted.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

The Kenyan competition regime is silent on this. If there is a likelihood of conflict of interest, it would be advisable for corporate defendants to each have their own independent counsel.

The decision on whether to be represented by the same counsel may depend on whether the corporate defendants are affiliated, in which case their interests are likely to be aligned.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes. Kenyan laws do not preclude this.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

No. Fines or other penalties and private damage awards are not tax-deductible.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The Kenyan competition regime is silent on this and, being a relatively new regime, it is unclear what approach the CAK or courts would take where penalties have been imposed in other jurisdictions.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The Leniency Guidelines only provide for the grant of full or partial leniency as a way in which the administrative financial penalties imposed by the CAK may be reduced, but is silent on any other ways in which they may be reduced. It is unclear whether a pre-existing compliance programme would reduce the administrative financial penalty.

The Kenyan competition regime is silent on the ways in which a fine imposed by a court, following a conviction for engaging in cartel conduct, may be reduced. The CAK has in the past considered mitigating factors such as cooperation with the CAK, past conduct of parties and duration of breach, among others, to reduce penalties imposed in relation to breaches in respect of merger notifications. Although the CA does not make specific reference to the application of mitigating factors in enforcement against cartels, there is a strong likelihood that the CAK would do so.

A&K | 
ANJARWALLA & KHANNA

Anne Kiunuhe
Njeri Wagacha

ak@africalegalnetwork.com
nww@africalegalnetwork.com

The Oval, 3rd Floor
Junction of Ring Road, Parklands and Jalaram Road
Westlands
Nairobi
Kenya

Tel: +254 203 640 000/+254 703 032 000
www.africalegalnetwork.com/kenya

Korea

Hoil Yoon, Sinsung (Sean) Yun and Kenneth T Kim

Yoon & Yang LLC

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation is the Monopoly Regulation and Fair Trade Act (MRFTA).

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

In general, the Korea Fair Trade Commission (KFTC) enforces the law. The Commission is an independent administrative branch of the Korean government responsible for administrative investigation, prosecution and adjudication. It has nine commissioners, consisting of a chair, a vice-chair, three standing commissioners and four non-standing commissioners. In addition, it has approximately 628 employees as at September 2018. Within the Secretariat of the Commission, the Cartel Investigation Bureau is primarily responsible for the administrative investigation and prosecution of cartels. As for criminal prosecution, upon receipt of a criminal referral from the Commission, the Prosecutors' Office has the authority to investigate and prosecute cartels for criminal punishment.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The proposed amendment to the MRFTA that recently passed the regular session of the National Assembly (30 August 2018) imposes liability within treble the damages that actually occurred to the injured party on the undertakings and organisations of the undertakings involved in a cartel. However, in the case of a leniency applicant in a cartel case, the MRFTA carved out an exception wherein such leniency applicant is liable only within the limit of the actual damages incurred to the injured party. This punitive damages provision is scheduled to be implemented one year after the President publicly announces the aforementioned proposed amendment.

Additionally, the KFTC made a pre-announcement for legislation of a proposal that would fully amend the MRFTA on 24 August 2018, and this proposed amendment (i) abrogated the 'KFTC's exclusive discretion to refer a case to the Prosecutor's Office for criminal punishment' in regard to hard-core cartels such as price fixing, output restriction cartels, market division cartels and bid rigging; (ii) introduced the court's authority to order the submission of materials to support the substantiation of the damages amount suffered by the injured party in a damages lawsuit based on a cartel; and (iii) doubled the ceiling of the maximum administrative fine that can be imposed on a cartel (20 per cent of the relevant revenue). Moreover, in connection with information exchange, which was previously unclear on whether it constitutes a cartel, the proposed amendment added a new provision that views a conduct that actually restricts competition in a certain trade area by exchanging certain information, such as prices and outputs as a cartel. The KFTC plans to introduce the above proposed amendment to

the MRFTA to the National Assembly after undergoing the procedure of collecting opinions of relevant government agencies and interested parties.

In July 2017, before the legislation or the pre-announcement for legislation of the foregoing proposed amendments, the Korean government had planned to review the possibility of adopting a class action system in its effort to eradicate cartel activities in Korea. Currently, Korea adopts the class action system only in limited areas, such as securities, etc. However, the Korean government considered expanding the coverage of the class action system to antitrust issues. Moreover, by evaluating the current maximum administrative fine imposition rate of 10 per cent to be low relative to those in the EU, UK and US, the new government had announced that it would enhance the applicable sanctions by, for example, raising the maximum administrative fine imposition rate in the future.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 19(1) of the MRFTA generally prohibits 'any agreement' between or among competitors that unreasonably restrains competition. Specific types of conducts where agreements among undertakings are prohibited under the above provision are as follows:

- (i) fix, maintain or alter prices;
- (ii) determine the terms and conditions for trade in goods or services or for payment of prices or compensation thereof;
- (iii) restrict the production, shipment, transportation, or trade in goods or services;
- (iv) restrict the territory of trade or customers;
- (v) hinder or restrict the establishment or expansion of facilities or installation of equipment necessary for the manufacturing of products or the rendering of services;
- (vi) restrict the types or specifications of goods at the time of production or trade thereof;
- (vii) establish corporation of the like with other undertakings to jointly conduct or manage important parts of businesses;
- (viii) decide the successful bidder, successful auctioneer, bidding price, highest price or contract price, and other matters prescribed by the Enforcement Decree of the MRFTA; or
- (ix) practically restrict competition in a particular business area by means of interfering or restricting the activities or contents of business by other undertakings (including the undertaking that has conducted the activity) other than the acts referred to in (i) to (viii) above.

In theory, cartels are not illegal per se; to be illegal, cartel behaviour must be unreasonably anticompetitive in a relevant market. In practice, however, the illegality of hard-core cartels is proven without much evidence of anticompetitiveness. Meanwhile, an agreement among undertakings is required to constitute illegal cartel activities, and, not only explicit agreements but also implicit agreements are included in such agreement. Moreover, according to article 19(5) of the MRFTA, it may be assumed that there is an agreement among undertakings where there is a significant possibility that such undertakings collaboratively engaged in the applicable act (see questions 14 and 15 for a more detailed explanation). In this case, if there is proof of direct or indirect contact or information exchange among undertakings, this may serve

as circumstantial evidence that enforces the above assumption. For reference, the recently pre-announced legislation of the KFTC's proposed amendment of the MRFTA also explicitly prescribes that information exchange, which in the past was a subject of controversy on whether it constitutes a cartel, is one type of cartel.

The MRFTA provides for both administrative sanctions (such as administrative fines) and criminal prosecution. The Commission will file a criminal referral with the Prosecutors' Office if the violations are so objectively obvious and serious as to greatly restrain competition.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are some very limited statutory exemptions from the MRFTA that apply to specific activities and that are provided for in the relevant statutes for specific industries such as export and import, small businesses, marine or air transport and agriculture.

In principle, the same cartel regulations apply to government-regulated conducts as ordinary cases that do not involve government-regulated conducts. However, the application of the MRFTA is excluded in the following cases:

- where administrative agencies are granted by other laws the specific power to issue administrative dispositions to undertakings regarding competition factors such as prices, and undertakings agreed on prices, etc, based on such administrative disposition; and
- where other laws stipulate that administrative agencies may provide administrative guidance to undertakings in regard to engaging in cartel activities that are prohibited under the MRFTA and the administrative agencies induced the agreement among undertakings by providing administrative guidance in compliance with the relevant provisions of such laws and, as a result, the undertakings reached an agreement within the scope of such administrative guidance.

6 Application of the law

Does the law apply to individuals or corporations or both?

The MRFTA applies to both corporations and the individuals involved.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The law extends to conduct that takes place outside Korea if it has an effect on the relevant market in Korea. For example, in 2002 and 2003, the Commission imposed administrative fines on the foreign companies that participated in the graphite electrodes and vitamins cartels, respectively. In addition, in December 2008, the Commission imposed administrative fines on the four companies that participated in the Asian paper cartel following an investigation that was triggered by a leniency application and conducted in cooperation with the Australian Competition and Consumer Commission. Recently, in November 2016, two Japanese companies that engaged in bid-rigging practices regarding an automotive component (ie, compressor) were sanctioned by applying the extraterritorial application provision. While the entire agreements were formed in Japan, the Commission deemed that the Korean market was directly affected because the products subject to the cartel were supplied to Korean companies.

Article 2-2 of the MRFTA, which took effect on 1 April 2005, expressly provides for extraterritorial application of the MRFTA.

The Korean Supreme Court is of the position that cases where 'activities have an effect on the Korean market' under article 2-2 of the MRFTA should be limited to cases where the applicable activity that occurred outside of Korea has a direct, significant and reasonably foreseeable effect on the Korean market. However, if the Korean market is included in the subject of a collaborative agreement to restrain competition between undertakings outside of Korea, then such foreign activity (ie, the agreement to restrain competition) is subject to the

application of article 19(1) of the MRFTA since such agreement has an effect on the Korean market unless other special circumstances exist.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Unlike jurisdictions that explicitly prescribe a waiver provision for export cartels (eg, the US), Korea does not have a separate waiver provision for export cartels.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

In Commission proceedings, before an adjudication or decision is made, there are two stages: an investigation and a deliberation. In an investigation, the Commission typically conducts an onsite inspection of the suspected violators, seizes or requests documents, questions witnesses and requests information from the suspected violators. The Commission reviews information and documents obtained and, if appropriate, issues an examiner's report against the suspected parties. The parties are then allowed to examine the documents attached to the examiner's report, and to respond to it in writing and at an oral hearing. While respondents have three weeks to provide a written response to the examiner's report (two weeks for a case handled by a subcommittee), if the parent company of the respondent is located abroad or the contents of the case are complicated, the period to submit the response may be extended. The KFTC will hold the hearing within 30 days after it receives the written responses from the respondents (or, if a response is not submitted, 30 days from the date when the deadline for submission has expired). At the end of a hearing, a final decision is taken by the full college of the commissioners and then notified to the respondents. A written decision is issued several weeks or, in a complex case, several months after a final decision is taken internally.

It is difficult to generalise about the timing of cartel cases. However, from initial investigation to final disposition, they usually take at least one year and, more often, a few years. Once the KFTC has commenced an investigation of alleged illegal activities, it cannot issue corrective orders or impose administrative fines after five years has passed from the commencement of such investigation and, accordingly, the final disposition must be made within five years from the date of the initial investigation.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Under article 50 of the MRFTA, the Commission has broad administrative investigative powers. The Commission may request the submission or production of information, documents or other materials (including computer records and electronic data), oral statements or written answers to questions. Such requests may be addressed to suspected violators, parties or witnesses. The Commission may appoint expert witnesses and request them to give their opinions. The Commission may seize any documents or materials so produced.

Commission officials may enter the business premises of suspected violators, examine books and records and other materials belonging to them, request the production of such books, records or materials, and request oral statements. The Commission may seize any documents or materials so produced.

No court approval is required for the above investigation procedures.

Anyone who obstructs Commission investigations or refuses to comply with any of the Commission's requests mentioned above is subject to administrative fines or criminal sanctions under the 22 June 2012 amendment to the MRFTA. Prior to the amendment, only civil fines were imposed for any interference with Commission investigations; however, the amendment provides for criminal sanctions (ie, imprisonment of up to three years or a criminal fine of up to 200 million won, or both) for refusing, obstructing or evading a Commission investigation through means such as a verbal or physical assault or intentionally delaying or obstructing the entry of Commission officials onto the business premises. However, Commission officials have no power of

forcible entry or search and seizure. Also, Commission officials have no general surveillance powers (including wiretapping).

As for criminal investigations by the Prosecutors' Office, upon receipt of a criminal referral from the Commission, as in other criminal cases, the Prosecutors' Office has broad powers to investigate, such as arrest or search and seizure. In order for prosecutors to conduct investigations including an arrest, search or seizure, warrants issued by the court are required.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Korea cooperates with a number of other countries either through cooperation agreements (eg, with the EU) or memoranda of understanding (eg, with Brazil, China, Japan and the US). Although the level of cooperation in the past has been rather limited, there has been growing cooperation recently with these countries in cartel cases (eg, by conducting coordinated dawn raids in the *Air Cargo*, *LCD*, *CRT*, *Marine Hose* and *Electric Cable* investigations, or through informal exchanges of information in the investigation of individual cases, often with waivers obtained from cooperating companies). Korea actively participates in the OECD Competition Committee. In addition, Korea has actively participated in the International Competition Network since its creation in 2001. Korea has also attended the annual East Asia Top-level Officials' Meeting on Competition Policy from 2005.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

A cartel investigation in the US and the EU may increasingly lead to the Commission launching an investigation in Korea (eg, through coordinated dawn raids upon exchanges of information, as in the *Auto Parts*, *Air Cargo*, *LCD*, *CRT*, *Marine Hose* and *Electric Cable* investigations, or as in the *Graphite Electrodes* and *Vitamins* cartels).

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The Commission both investigates and adjudicates on cartel matters. Following an investigation by the officials of the Commission Secretariat, the full college of commissioners (except for in minor matters on which the decision may be taken by a chamber of three commissioners) begins a deliberation, which consists of at least an oral hearing. At the end of the deliberation, the decision is taken by the full college of commissioners.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The Commission has the burden of proof in Commission proceedings. Until recently, article 19(5) of the MRFTA provided, in effect, that once a unilateral action or parallel behaviour is established, a rebuttable presumption shall be created that an agreement existed, thereby shifting the burden of proof concerning the existence of an agreement onto respondents. The validity of the presumption has been disputed, and thus, effective from 4 November 2007, article 19(5) was amended to provide for a presumption only when certain circumstantial evidence of a meeting of the minds exists.

It may be said that the standard regarding the burden of proof that the KFTC has to establish regarding the existence of collaborative acts is 'highly probable'. While it is difficult to clearly define the applicable degree for 'highly probable' under Anglo-American law, it may be viewed as requiring a standard that is higher than the balance of probabilities standard.

In criminal proceedings, the burden of proof falls on the Prosecutors' Office. The prosecutor must establish the case through evidence that has evidentiary value to the degree that there is no reasonable doubt in the mind of the judge regarding the facts of the charges. This may be understood as requiring evidentiary value similar to that of beyond a reasonable doubt.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

According to article 19(1) of the MRFTA, an unfair collaborative act is established only when an 'anticompetitive agreement' exists. Here, 'an agreement' includes not only an 'explicit agreement', but also an 'implicit agreement', such as a tacit understanding between enterprises. In particular, according to article 19(5) of the MRFTA, even in the absence of direct evidence establishing the existence of agreement between enterprises, when a substantial probability exists to assume the presence of the relevant collaborative acts by the enterprises in light of the relevant circumstances, the existence of an agreement can be legally presumed (see questions 4 and 14). The Review Guidelines on Unfair Collaborative Acts of the KFTC offer the following items as examples of circumstantial evidence for establishing the legal presumption under article 19(5) of the MRFTA:

- when evidence of direct or indirect communication or exchange of information is present;
- when a joint action is deemed to be the sole mechanism to contribute to the interests of the relevant enterprises and an individual action is found to be adverse to each of the relevant enterprises' interests;
- when the conformity of the relevant enterprises' conducts cannot be explained as a consequence of the market status; and
- when the conformity of conducts would be difficult without an agreement in light of the relevant industry structure.

Therefore, in theory, even without direct evidence for the existence of an agreement, unfair collaborative act can be established through circumstantial evidence. However, review of the history of the KFTC's handling of cases indicates that majority of the cases were supported by specific or direct evidence, such as 'witness statements by cartelists', collected through the leniency programme and many have applied article 19(1) rather than article 19(5) of the MRFTA. For reference, in July 2016, with respect to the case concerning suspected cartel for CD interest rate by the banks, the KFTC found a number of items of circumstantial evidence. However, owing to the absence of direct evidence proving the existence of an agreement, the KFTC had concluded the aforementioned case by rendering a non-violation decision, despite an investigation spanning four years, on the grounds that existence of an unfair collaborative act is difficult to substantiate.

16 Appeal process

What is the appeal process?

Commission decisions may be reconsidered by the full college of commissioners upon application by respondents. The respondents may object to the decision of the KFTC within 30 days from receipt of the written decision from the KFTC. Commission decisions may also be appealed by respondents to the Seoul High Court. Commission decisions taken upon reconsideration may be appealed only to the Seoul High Court by the respondents. The respondents may appeal to the Seoul High Court within 30 days from receipt of the written decision from the KFTC or from the receipt of the decision on reconsideration. The Seoul High Court has exclusive jurisdiction to review the legality of the KFTC's decision, including the amount of any administrative fines imposed, through a panel composed of three judges. Generally, litigation procedures at the Seoul High Court take about six months to two years. From the Seoul High Court, either the Commission or the respondents may lodge an appeal to the Supreme Court; such appeal can be made within two weeks from the date of receiving the decision of the Seoul High Court. While a panel composed of four Supreme Court justices decides cases at the Supreme Court, in the event that such panel cannot reach a unanimous decision or there is a need to change a previous Supreme Court decision, the determination

is made by a full panel, which comprises more than two-thirds of the 14 Supreme Court justices. The time it takes for the Supreme Court to render a decision varies for each case, and it is difficult to uniformly indicate such time frame.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Corporate violators are subject to a criminal fine of up to 200 million won. Individuals are subject to imprisonment of up to three years or a criminal fine of up to 200 million won, or both. Under the MRFTA, the KFTC must first make a referral to the Prosecutor's Office for a party to be indicted for illegal acts where criminal sanctions may be imposed. Meanwhile, as examined above, under the 16 July 2013 amendments to the MRFTA, which became effective on 17 January 2014, the KFTC's obligatory referral obligations have been strengthened. Prior to the amendments, only the prosecutor general could make a request for referral to the KFTC. According to the amendments to the MRFTA, the chair of the Board of Audit, the administrator of the Public Procurement Service or the administrator of the Ministry of SMEs and Start-ups may make a request to the KFTC to refer a case to the Prosecutor's Office. If such request for referral is made, the KFTC is obliged to make such referral. The amendments to the MRFTA also explicitly recognise an exception to referral in the case of cartel activity leniency applicants.

The Commission is increasingly filing criminal referrals with the Prosecutors' Office against corporations as well as individuals. Upon investigation and indictment by the Prosecutors' Office, in most cases the courts imposed only criminal fines (rather than imprisonment) on individuals as well as corporations. To date, such trend appears to be continuing. In a small number of cases, however, the courts imposed imprisonment on individuals with or without a suspension of execution.

Number of cases where the KFTC made a criminal referral to the Prosecutor's Office	
Year	Number of criminal referrals
2007	7
2008	5
2009	5
2010	1
2011	8
2012	2
2013	12
2014	36
2015	9
2016	22
2017	27
2018 (to July)	32

Source: Korea Fair Trade Commission

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The KFTC can impose administrative fines against corporate violators that engaged in cartels of up to 10 per cent of the relevant sales and, if there are no sales, an amount of up to 2 billion won. Relevant sales refer to the sales amount of relevant products or services, or an amount that is equivalent thereof, by the corporate violators during the violation period in a specific transacting sector. Corporate violators are also subject to a cease-and-desist order and other appropriate administrative corrective orders. While there are cases where only a corrective order is issued regarding cartel activities, in most cases an administrative fine is imposed along with the corrective order. There are no civil sanctions that may be pursued by the government.

The amount of administrative fines that are imposed on cartel cases is continuously increasing. Some of the recent examples of cartel cases where a large amount of administrative fine was imposed are

as follows: the *Liquefied Petroleum Gas* case (2009), the *Refineries* case (2011), the *Life Insurance* case (2011), the *Steel Sheet* case (2012) and the *Honam Express Railway Construction Bid Rigging* case (2014).

Number of cartel cases and total amount of administrative fines imposed by the KFTC		
Year	Number of cartel cases found guilty	Fines imposed (won)
1981 to 2001	359	Per year, average of 22,187 million
2002	47	53,109 million
2003	23	109,838 million
2004	35	28,759 million
2005	46	249,326 million
2006	45	110,548 million
2007	44	307,043 million
2008	65	205,325 million
2009	61	62,903 million
2010	62	586,000 million
2011	71	571,000 million
2012	41	398,939 million
2013	46	369,731 million
2014	76	1,125,923 million
2015	88	626,265 million
2016	64	756,040 million
2017	69	361,509 million
2018 (to July)	105	88,711 million

Source: Korea Fair Trade Commission

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The KFTC's Notification on Detailed Standards Regarding Imposition of Administrative Fines is the guideline on the imposition of administrative fines and, as an administrative regulation, it has binding force internally at the KFTC. Key factors for an increase in administrative fines include:

- if the statutory violation was repeated in the past three years;
- if the statutory violation period is extensive; and
- if other enterprises that did not participate in the statutory violation were retaliated against.

Key factors for reduction in administrative fines include:

- cooperation in the investigation by the KFTC; and
- voluntary correction of the statutory violation (here, voluntary violation has to be beyond simply discontinuing the violation, but rather it has to involve an affirmative removal of any effect caused by the violation (ie, price reduction)).

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

In the case of a party that engages in a cartel regarding government or public institution procurement, such party can be restricted from participating in a tender held by the government or public institution for a period of up to two years. The head of the relevant government or public institution has the authority to restrict such participation.

Currently, the MRFTA on Contracts to Which the State is a Party (the MRFTA in regard of the Operation of Public Institutions applies such Act) restricts the right of a party to participate in tenders for two years in the case of a party that led the cartel and was the successful

bidder, one year in the case of a party that led the cartel and six months in the case of a party that participated in a cartel.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

As stated above, the MRFTA provides for both administrative sanctions that may be pursued by the Commission and criminal sanctions that may be pursued by the Prosecutors' Office. However, article 71 of the MRFTA provides for criminal prosecution only when the Commission files a criminal referral with the Prosecutors' Office. Under the MRFTA, the Commission shall file a criminal referral with the Prosecutors' Office if it determines that a violation of the MRFTA is objectively so obvious and serious as to greatly restrain competition, and the prosecutor general may request the Commission to file a criminal referral with the Prosecutors' Office when he or she believes that a violation of the MRFTA is objectively so obvious and serious as to greatly restrain competition. In addition, article 315 of the Korean Criminal Code and article 95 of the Construction Industry Basic Law provide for the offence of bid rigging, which may be prosecuted by the Prosecutors' Office even without regard to receiving any criminal referral from the Commission. Consequently, both administrative sanctions and criminal sanctions can be pursued in respect of the same conduct. According to the proposed amendment of the MRFTA that has recently been pre-announced for legislation, with respect to hard-core cartels such as price fixing, output restriction cartels, market division cartels and bid rigging, the Prosecutors' Office may commence an investigation and indict without a criminal referral from the KFTC.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Article 56 of the MRFTA provides for awarding damages to a person who has suffered from a violation of the MRFTA, such as cartel behaviour, unless the defendant companies prove that the violation was neither intentional nor negligent. When the amount of damages is difficult to prove with specific evidence, the court may award an amount of damages on the basis of overall evidence in the proceedings. Indirect purchasers may bring a damages lawsuit but may, depending on the case, have difficulty in establishing causation and the amount of damages. According to the proposed amendment to the MRFTA, which recently passed the regular session of the National Assembly, a cartelist is stipulated to be liable up to treble the damages that actually occurred. However, the proposed amendment also prescribes that a leniency applicant could be found liable only up to the actual damages occurred. In addition, the litigation costs are borne by the unsuccessful party, and the successful party may make a request for payment of the stamp fee, delivery fee and a portion of the attorney fees (this is designated as a certain percentage of the value of the litigation under the law) to the unsuccessful party. Meanwhile, a lawsuit for compensation of damages is not limited to only direct purchasers; indirect purchasers are also permitted to raise such claims.

In the case of a civil damages claim based on cartel activities, to date there are no precedent cases where the defendants' pass-on defence was directly accepted or a detailed analysis was implemented regarding dual recovery issues. However, in its decision on the flour cartel case (Korean Supreme Court, case No. 2010Da93790, rendered on 29 November 2012), the Supreme Court determined that, if it is possible that damages were partially reduced based upon an increase in the price of the products, it would be valid to take into account such circumstances when calculating the amount of compensation of damages based upon the principle of fairness. In sum, in the above decision, while the pass-on defence was not directly accepted, the Supreme Court took into account that pass-on may have actually occurred and, accordingly, this was ultimately reflected when calculating the final compensation of damages amount at the stage of limiting the liability of the defendants.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

No class actions are permitted for a violation of the MRFTA. If there are several parties that were injured due to a cartel, sometimes a lawsuit is commenced by several joint plaintiffs or, under the system of selecting a representative party from those injured from the cartel, a lawsuit is commenced by one plaintiff or a number of plaintiffs among those several parties that were injured. In such system, if several parties that have the same interest need to become joint parties to the litigation, a party that could represent all the parties is selected as the 'representative party' on their behalf; this system makes the litigation simpler and more convenient. The decision that the representative party receives from the court is also effective against those parties that selected the representative party. The difference between the representative party system and class action system is that, while the representative party is a party selected or authorised by several parties for joint litigation, the representative in a class action obtains permission from the courts without the authorisation from the injured parties and carries out the litigation on behalf of such injured parties. The National Assembly is discussing the possibility of adopting a class action system for parties that have been injured by illegal acts such as cartels. Moreover, the government announced its intent to introduce a class-action system for statutory violations that affect consumers in its New Government Economic Policy Direction, which was introduced on 25 July 2017. Subsequently, the discussion on whether to adopt the class action lawsuit system has been continuing to date.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

For the first time, in 1996, Korea adopted the leniency programme only for the first company to report. In 2001, the MRFTA was amended to provide for leniency for a company who reported, or cooperated in the investigation of, a cartel. On 1 April 2005, the Commission issued the Notification on Implementation of the Leniency Programme for Corrective Measures Etc Against Confessors, which adopted a 'marker' system, required a leniency application to be in writing and allowed a maximum of 12 days within which to supplement evidence after receipt of a marker from the Commission. On 1 July 2006, the Commission amended the Notification, permitting oral applications for leniency and increasing the period for supplementation of evidence to 15 days, which may be extended by the Commission by up to an additional 60 days upon showing of a reason.

Under article 35 of the Enforcement Decree of the MRFTA adopted in 2001, the first company to report the cartel to the Commission prior to the Commission's commencement of investigation would be given a reduction in administrative fine of no less than 75 per cent. After the commencement of a Commission investigation, the first to come forward to the Commission would be given a reduction in administrative fine of no less than 50 per cent. Other parties to come forward to the Commission and cooperate would be given a reduction in administrative fine of up to 49.99 per cent.

So long as a party comes forward to the Commission and cooperates with the Commission, even if it is not the first or second to do so, such company would benefit from the leniency programme. The Commission has discretion in determining the percentage rate of reduction in administrative fine within the permitted range for any leniency applicants. 'Amnesty plus' was not available under the 2001 rules, although the Commission has discretion in determining additional reductions similar to 'amnesty plus'.

Effective for cartel activity that started on or after 1 April 2005, article 35 of the Enforcement Decree of the MRFTA was amended. Under the 2005 rules, the first to come forward to the Commission before or after the commencement of the Commission investigation and cooperate would be given an automatic reduction in fine of 100 per cent. The second to come forward to the Commission before or after the commencement of the Commission investigation and cooperate would be

given an automatic reduction in administrative fine of 30 per cent, but effective on 4 November 2007, article 35 of the Enforcement Decree was again amended to increase the 30 per cent to 50 per cent for leniency applications made on or after the effective date.

Under the 2005 and 2007 rules, if a company is not first or second to come forward to the Commission and cooperate, such company will not benefit from the leniency programme. The Commission has no discretion in determining the percentage rate of reduction in administrative fine for leniency applications.

In addition, the 2005 rules provide for 'amnesty plus', granting an automatic reduction in administrative fine of between 20 per cent and 100 per cent, depending on the relative scale of the second cartel over the first cartel. The 2007 rules deny leniency to cartel participants who have forced others to participate or not to stop participating.

Joint leniency applications were not allowed until article 35 of the Enforcement Decree of the MRFTA was amended, effective on 13 May 2009, and the Notification was amended effective on 19 May 2009, permitting joint leniency applications under certain circumstances. Joint leniency applications are now permissible by affiliate companies belonging to a same business group, provided that they were not competitors. Joint leniency applications are also permissible by both a transferor company and a transferee company of a transfer of a cartelised business, and by both the new company and the predecessor company of a corporate spin-off, provided that they did not participate in the same cartel at the same time.

Prior to the amendments in May 2009, leniency applicants had to terminate any cartel activity at the latest before the Commission rendered its final decision in order to qualify for leniency. Following the amendments, leniency applicants are now required to terminate the cartel activity immediately after their application in order to qualify for leniency, except when they are requested by the Commission to assist its investigation.

In the past, upward movement of leniency rank was available only if a higher-ranked leniency applicant failed to meet the leniency requirements. The May 2009 amendments, however, also provide for upward movement of leniency rank in the event of a voluntary withdrawal of a higher-ranked leniency application or a cancellation of higher leniency rank.

Article 35 of the Enforcement Decree of the MRFTA was amended to take effect as of 22 June 2012. Under this amendment, in the case that two companies engaged in a cartel, the first company applying for leniency would be given a 100 per cent reduction in fine, but the second company would not be given any reduction in fine for leniency (although up to a 30 per cent reduction in fine may be available for 'voluntary cooperation'). In the case that three or more companies engaged in a cartel, no reduction in fine would be available to the second (or subsequent) company filing a leniency application after two years from the time the first company filed for leniency (again, although up to a 30 per cent reduction in fine may be available for 'voluntary cooperation').

A company whose leniency application has been accepted by the Commission will be exempt from criminal prosecution, except where the violation is objectively so obvious and serious as to greatly restrain competition. A company executive who sponsors a cartel on behalf of his or her company would be exempt from criminal prosecution under the same conditions as the company. On 1 November 2007, however, a considerable uncertainty arose to the exemption from criminal prosecution when, in a case for which the Commission filed a criminal referral against several participants other than two leniency applicants, the Prosecutors' Office indicted the two leniency applicants as well as all the other participants, on the belief that under the Criminal Procedure Act a Commission criminal referral against a participant would be deemed to be effective as against any and all of the participants in the same cartel. Similarly, the Prosecutors' Office indicted two executives of the corporate leniency applicants against whom the Commission did not file a criminal referral. The lower courts dismissed the indictments against the corporate leniency applicants and their executives on the ground that the indictments lacked proper criminal referrals from the Commission. The uncertainty has recently been resolved by the Supreme Court, which upheld the decisions of the lower courts in September 2010. Meanwhile, as examined above, under the 16 July 2013 amendments to the MRFTA which became effective on 17 January 2014, an exemption from the obligation to refer a leniency applicant for cartel activities is explicitly recognised.

On 21 July 2011 the Commission revised the Notice to decrease the minimum reduction rate of 20 per cent to 'up to 20 per cent' for 'amnesty plus', and to enable the Commission to grant a total of longer than 75 days of supplemental period especially for international cartel cases.

Based on the 2 January 2015 amendment to the Notification on Implementation of the Leniency Programme for Corrective Measures Etc Against Confessors, the previous practice of having the secretary general of the KFTC provisionally confirm the marker of the leniency applicant was abolished and the Notification was amended so that the marker of the leniency applicant would only be confirmed through deliberation and adjudication by the Commission. In the past (ie, before 2015), under the Notification, when a marker was perfected by a leniency applicant, the secretary general of the KFTC issued a notice of provisional confirmation of the marker to the applicant, but some leniency applicants tended to slow down their cooperation with the KFTC's investigation once they had received such a provisional confirmation. Thus, in order to prevent leniency applicants from slowing down their cooperation after receiving a notice of provisional confirmation, the KFTC abolished the system of issuing a notice of provisional confirmation of a marker for a leniency applicant, by amending the above notification.

Based on the 15 April 2016 amendment to the Notification, the attendance of officers and employees of the leniency applicant at the hearing was added as one of the standards for determining whether the leniency applicant had 'faithfully cooperated'. According to the KFTC press release, such amendment was made since it was necessary to determine the credibility of the details in the leniency application and to prevent changes to previous statements by providing the commissioners with an opportunity to directly examine the relevant officers and employees.

Under the 29 March 2016 amendments to the MRFTA, which became effective on the same date, if a party that received a reduction or exemption from corrective measures or administrative surcharges for its leniency applicant marker or cooperation with the investigation engages in a new cartel after such reduction or exemption, such party will not be eligible for any reductions or exemptions from corrective measures or administrative surcharges for its leniency applicant marker or cooperation with an investigation for five years from the initial reduction or exemption from corrective measures or administrative surcharges (the relevant provision became effective from 30 September 2016).

The Amended Notification on Mitigation of Administrative Fines, which came into effect on 30 September 2016, includes the following changes:

- improvement on leniency application procedures;
- specification of amnesty plus standards;
- enhancement of the requirements for succession of ranks; and
- amendment to the standards for determining repetitive cartels.

Among the changes, the standards for amnesty plus stipulated in details the leniency ratio by comparing the size of the collaborative acts that have been voluntarily reported in addition and the size of the relevant collaborative acts. For example, if the additionally reported cartel is smaller than or the same size as the relevant cartel, a maximum mitigation of 20 per cent is possible, while if the size of the additional reported cartel is at least four times larger than the relevant cartel, the entire amount of the administrative fine is waived. In the case of succession of ranks, when a latter-ranked applicant succeeds the rank of higher-ranked applicant, it has to satisfy the requirements for leniency corresponding to the relevant higher rank in order to have its new leniency status acknowledged by the KFTC. For example, in order to obtain first rank, the relevant applicant has to satisfy the requirement of 'the KFTC lacking sufficient evidence'. In other words, even when a second-rank applicant can succeed the first-rank one, if the KFTC had already secured sufficient evidence at the time of the leniency application by the second-rank applicant, such second-rank applicant cannot succeed the first-rank position notwithstanding the revocation of the first-rank position since the second-rank applicant had failed to satisfy the relevant requirement.

Over the past several years, as the table below shows, the number of cartel cases in which the Commission accepted leniency applications has increased dramatically.

Number of cartel cases in which leniency applications have been accepted by the KFTC		
Year	Number of cartel cases in which leniency applications accepted	Fines imposed (won)
1999	1	314 million
2000	1	43 million
2001	0	–
2002	2	1,288 million
2003	1	3,433 million
2004	2	–
2005	7	173,673 million
2006	7	54,992 million
2007	10	221,373 million
2008	21	150,600 million
2009	17	42,000 million
2010	18	557,100 million
2011	32	552,200 million
2012	13	275,128 million
2013	23	352,312 million
2014	44	769,428 million
2015	48	406,020 million
2016	27	753,319 million
2017	41	221,386 million
2018 (to July)	29	49,811 million
Source: Korea Fair Trade Commission		Note: Fines after reduction

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

As examined in question 24, after the Enforcement Decree of the MRFTA was amended in 2005, if a company is not first or second to come forward to the Commission and cooperate, such company will not benefit from the leniency programme. However, even if the leniency programme is not applicable, if an undertaking consistently acknowledges that it engaged in the applicable conduct and cooperates with the investigation from the investigation stage until the conclusion of deliberation, the amount of administrative fines imposed on such undertaking may be reduced within the scope of 30 per cent pursuant to the provisions of the Notification on Detailed Standards Regarding Imposition of Administrative Fines.

26 Going in second

What is the significance of being the second cooperating party? Is there an ‘immunity plus’ or ‘amnesty plus’ option?

See question 24.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

With respect to the first question, the application for immunity can be filed until the end of deliberation by the commissioners and there are no time limits in regard to filing prior to or after the time when the KFTC’s investigation has commenced. However, in case of cartels involving two enterprisers, the second-rank leniency applicant must file its application for leniency within two years from the date on which the voluntary report of the first-rank leniency applicant was filed.

With respect to the second question, there is a marker system under the Notification on Implementation of the Leniency Programme

for Corrective Measures Etc Against Confessors. If an applicant files for leniency with the Commission, the Commission official who receives such application will note the date and time, and rank or marker on such application, and will provide it to the applicant after signing off on such application. If an applicant requires a significant amount of time to obtain evidentiary materials or there are special circumstances present where evidentiary materials cannot be submitted at the time of such application, an application that omits certain portions may be submitted. Under such circumstances, the applicant may be initially granted a 15-day supplemental period, which may be extended for up to 60 additional days if a valid reason is provided to the Commission. However, as an exception, if it is recognised that such extension is required to collect relevant evidentiary materials and obtain statements in international cartels, such extension may go beyond 60 days. If the applicant satisfies the applicable requirements and is confirmed for leniency by the Commission, then such application will be deemed to have been filed as of the time when the initial application was made.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

Under article 35 of the Enforcement Decree of the MRFTA, a leniency applicant must faithfully cooperate until the conclusion of the KFTC investigation by, inter alia, making statements regarding all the relevant facts of the unfair collaborative acts and submitting the relevant materials, to receive a reduction or exemption of the corrective order or administrative fine, or both. According to the KFTC’s Notification on Imposition of Corrective Measures and Operation of Leniency System for Leniency Applicants of Unfair Collaborative Acts, ‘until the end of the investigation’ refers to the period ‘until the end of deliberation by the Commissioners’, and whether a leniency applicant has faithfully cooperated is comprehensively determined based on whether:

- all the facts regarding the relevant collaborative acts known by the leniency applicant were provided in statements without undue delay;
- all materials regarding the relevant collaborative acts that were held or could be collected by the leniency applicant were promptly submitted;
- prompt responses and cooperation were provided regarding inquiries by the KFTC that were necessary to confirm facts;
- officers and employees (if possible, including previous officers and employees) made utmost efforts to continuously and truthfully cooperate, inter alia, during the KFTC’s investigation and the examination process (including personal attendance of the hearing);
- evidence related to the collaborative acts was destroyed, manipulated, mutilated or concealed; and
- the facts regarding the illegal acts or leniency application were provided to a third party prior to the issuance of the examiner’s report without the approval of the KFTC.

There is no particular difference in the obligation to cooperate between a first-ranked leniency applicant receiving a 100 per cent exemption of the administrative fine or a lower-ranked leniency applicant receiving a 50 per cent reduction of the administrative fine.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The identity of leniency applicants and the information and evidentiary materials are treated as confidential. The investigations, hearings and decisions must be conducted or made in a manner so as not to disclose the information. However, the Commission may disclose the information ‘if necessary for the bringing or carrying on a lawsuit relating to the case’ in or for which a leniency application was made. In an administrative lawsuit regarding the Commission’s disposition or

Update and trends

The KFTC has engaged in continuous and active investigations and sanctions of international cartels.

In September 2018, the KFTC uncovered nine Japanese capacitor makers and sellers that agreed to jointly increase and maintain the prices of aluminum and tantalum capacitors supplied to several countries including Korea between July 2000 and January 2014. Based on such findings, the KFTC issued a corrective order against and imposed total administrative fines of 36.095 billion won on such enterprises. Additionally, the KFTC referred four corporations and one employee to the Prosecutor's Office for criminal prosecution. According to the press release distributed by the KFTC, the above enterprises continuously met through cartel meetings, such as president-level meetings and working-level meetings between July 2000 and 25 January 2014, and implemented the cartel by exchanging sensitive information such as output, units sold, price increase plans, and increase rates and mutually adjusting such elements of production and sales. According to the foregoing press release, the aforementioned cartel restricted competition by preventing the increase or decrease of prices for capacitors exported to Korea during the violation period. In other words, the prices of capacitors supplied to the large buyers such as Samsung and LG as well as small and medium-sized buyers were prevented from declining or had increased. Moreover, such prevention of price reduction or increase in price had negative effects on the price or competition concerning quality of the products manufactured by the buyers.

Meanwhile, the KFTC issued a corrective order against and imposed total administrative fines of 1.715 billion won on two Japanese steel ball makers that agreed on sales price increase or decrease rates of steel balls that were supplied to domestic bearing makers in February 2018. Additionally, the KFTC referred both enterprises to the Prosecutor's Office for criminal prosecution. According to the KFTC's press release and decision, when the price of rolled steel, which is the raw material for steel balls, rose to unprecedentedly high levels in 2004, the two Japanese steel ball makers agreed to jointly pass on the raw material increase portion to the steel ball sales price. Specifically, the two Japanese steel ball makers demanded a specific trading company in Japan, which is the agent that purchased steel balls on behalf of the Korean bearing makers, to increase and decrease the steel ball sales price based on the ratio of the agreed increase and decrease ratio. Further, the foregoing enterprises shared the information on steel ball sales price negotiations between them and the trading company in Japan and agreed and implemented the final change ratio of the steel ball sales price.

As shown by the above, the KFTC has been actively and continuously taking on cartel cases involving multinational or foreign companies and imposing administrative penalties as well as making criminal referrals.

a civil lawsuit for compensation of damages for a cartel, the relevant court may order the KFTC to submit leniency-related materials upon a motion by the parties. In such case, the KFTC should comply with such court order and submit the relevant materials. The degree of confidentiality protection afforded to lower-ranked leniency applicants is the same.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Not only are plea bargains and settlements for cartel activities not permitted by the KFTC, the consent decree system only applies to other violations of the MRFTA excluding cartel activities; they are also not permitted by the Prosecutor's Office and the courts.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

A company whose leniency application has been accepted by the Commission will be exempt from criminal prosecution, except where the violation is objectively so obvious and serious as to greatly restrain competition. Also, a company's current and former employees who sponsor a cartel on behalf of their company would be exempt from criminal prosecution under the same conditions as the company.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

See question 27.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

Among the materials attached to the examiner's report, the KFTC must disclose all materials to a defendant, excluding confidential materials necessary for the protection of trade secrets or privacy, materials related to the leniency application, and confidential materials prescribed under other statutes.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Subject to the Bar rules on conflicts of interest, counsel may represent those employees under investigation, as well as the corporation.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Owing largely to the leniency programme, in general, representation of multiple corporate defendants would neither be possible nor advisable. This is the case regardless of whether such corporate defendants are affiliated.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

In general, corporate internal rules and regulations may permit the corporation to pay the legal costs or penalties, or both, imposed on its employees for behaviour other than intentional violations or gross negligence.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Since administrative fines that are imposed owing to cartel activities constitute 'public charges imposed as sanctions for non-performance of duties, or a violation of prohibitions or restrictions under Acts and subordinate statutes' under article 21(iv) of the Corporate Tax Act, they

are not included as deductible expenses when calculating the income amount. In the case of civil compensation of damages, since they are not expenses that are generated from ordinary business activities, they are also not included as deductible expenses. In sum, both of the above amounts are not tax-deductible.

39 International double jeopardy

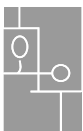
Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Even if a company has had sanctions imposed on it by foreign competition authorities based on the same cartel activity, in principle this does not influence the KFTC's sanctions imposed for such cartel activity. However, with respect to criminal procedures, under article 7 of the Criminal Act, the criminal sanctions imposed in Korea may be reduced or exempted in the case of a party that already had criminal sanctions imposed on it abroad. To date, there are no precedent cases in civil damages claims where it was analysed or considered that the compensation of damages related to the applicable case was already made in other jurisdictions.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The best way to obtain leniency and reduce any administrative or criminal fine is to be the first to come forward to the Commission and cooperate fully, completely and in good faith. If a company that violated the MRFTA receives a rating of 'A' or higher in the assessment rating of its compliance programme, the KFTC may provide a one-time reduction of the administrative surcharge, but this does not apply in the case of cartel activities.



YOON & YANG

법무법인(유) 화우

**Hoil Yoon
Sinsung (Sean) Yun
Kenneth T Kim**

**yoon.hoil@yoonyang.com
ssyun@yoonyang.com
ktkim@yoonyang.com**

34th Floor, ASEM Tower
517 Yeongdong-daero, Gangnam-gu
Seoul 06164
Korea

Tel: +82 2 6003 7000
Fax: +82 2 6003 7800
www.yoonyang.com

Malaysia

Sharon Tan and Nadarashnaraj Sargunaraj

Zaid Ibrahim & Co

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Competition Act 2010 (the Competition Act), which came into effect on 1 January 2012, aims to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers, and to provide for matters connected therewith. The Competition Act has introduced general competition law for all markets in Malaysia, except those carved out for sector regulators under the Communications and Multimedia Act 1998 in relation to network communications and broadcast sectors, and the Energy Commission Act 2001 in relation to the energy sector. The Gas Supply (Amendment) Act 2016 also introduced general competition law provisions to the Gas Supply Act 1993, which are applicable to the Malaysian gas market. There is an exclusion for upstream oil and gas activities, described in question 5.

In addition, although not expressly carved out from the application of the Competition Act, the Postal Services Act 2012, which came into force on 1 April 2013, has introduced general competition law, which is applicable to the postal market. The Malaysian Aviation Commission Act 2015, which came into force on 1 March 2016, introduces competition provisions applicable to aviation service.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Competition Act is enforced by the Malaysia Competition Commission (MyCC), a body corporate established under the Competition Commission Act 2010, comprising representatives from both public and private sectors. The Competition Act allows any affected enterprise to make written or oral representations concerning any proposed decision or finding of infringement by MyCC. MyCC is also empowered to conduct hearings for the purposes of determining whether an infringement has occurred. MyCC's decision is appealable to the Competition Appeal Tribunal (CAT). In certain circumstances, the decision by MyCC or CAT may be challenged in court by way of public law relief (judicial review).

Competition law in the communications sector and postal market are enforced by the Malaysian Communications and Multimedia Commission (MCMC), while the Energy Commission oversees competition in the energy and gas sectors. The Malaysian Aviation Commission (MAVCOM) oversees competition in the aviation service sector.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The Malaysian Aviation Commission Act 2015, which came into force on 1 March 2016, introduces competition law provisions applicable to the aviation service sector. In February 2018, the Malaysian Aviation Commission Act was amended to widen the powers of MAVCOM to issue guidelines, circulars, directives, practice note or notices as it

considers appropriate. Following public consultation, MAVCOM issued the following guidelines on competition in the aviation service market:

- Guidelines on Aviation Service Market Definition (published on 19 January 2018);
- Guidelines on Anticompetitive Agreements (published on 19 January 2018);
- Guidelines on Abuse of Dominant Position (published on 19 January 2018);
- Guidelines on Substantive Assessment of Mergers (published on 20 April 2018);
- Guidelines on Notification and Application Procedure for an Anticipated Merger or Merger (published on 20 April 2018);
- Guidelines on the Determination of Financial Penalties (published on 22 June 2018); and
- Guidelines on Leniency Regime (published on 22 June 2018).

Following the amendment to the Gas Supply Act 1993, the Energy Commission has published Guidelines on competition for the gas market in relation to Market Definition, Anti-Competitive Agreements and Abuse of a Dominant Position.

MyCC has proposed to review and amend the Competition Act and the Competition Commission Act 2010 and had carried out a public consultation on 16 May 2016 on the proposed amendments, but the proposed amendments have yet to be tabled in parliament.

In its early days of enforcement, MyCC has concentrated its efforts on competition advocacy and issuing guidelines to shape its interpretation of the substantive provisions of the Competition Act and procedural requirements. MyCC had issued the following guidelines following public consultation:

- Guidelines on Market Definition (published on 2 May 2012);
- Guidelines on Anticompetitive Agreements (published on 2 May 2012);
- Guidelines on Complaints Procedures (published on 2 May 2012);
- Guidelines on Abuse of Dominant Position (published on 26 July 2012);
- Guidelines on Financial Penalties (published on 14 October 2014); and
- Guidelines on Leniency Regime (published on 14 October 2014).

The guidelines are non-exhaustive and do not set a limit on MyCC's powers of investigation and enforcement under the Competition Act.

MCMC has also indicated that the Communications and Multimedia Act 1998 is being reviewed and amended, but these amendments have yet to be tabled in Parliament.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Cartel activities are prohibited under Chapter 1 of the Competition Act (Chapter 1 Prohibition). Section 4(1) of the Competition Act provides:

A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

This prohibition is comparatively similar to article 101 of the Treaty on the Functioning of the European Union.

Section 4(2) of the Competition Act deems certain agreements between competing enterprises as having the object of significantly restricting competition. This means that MyCC need not examine the anticompetitive effect of horizontal agreements that:

- fix a purchase or selling price or any other trading conditions;
- share markets or sources of supply;
- limit or control production, market outlets or market access, technical or technological development or investment; or
- constitute bid rigging.

MyCC will not only examine the actual common intention of the parties, but will assess the aims of the agreement (ie, its object) by taking into consideration the surrounding economic context. If the agreement is highly likely to have a significant anticompetitive effect, MyCC may find the agreement to have an anticompetitive object.

Once an anticompetitive object is shown, MyCC does not need to examine the anticompetitive effect of the agreement. However, if the anticompetitive object is not found, the agreement may still infringe the Competition Act if there is an anticompetitive effect. Provisions in agreements that infringe the Competition Act will be unenforceable as they are considered illegal under the Contracts Act 1950.

The term 'agreement' has been widely defined in the Competition Act to include any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices. 'Concerted practice' has been defined, following EU case law, to mean any form of coordination between enterprises that knowingly substitutes practical cooperation between them for the risks of competition.

Broadly, section 5 of the Competition Act permits relief from liability for a Chapter 1 Prohibition where:

- there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- the benefits could not reasonably have been provided without the agreement having the anticompetitive effect;
- the detriment to competition is proportionate to the benefits provided; and
- the agreement does not eliminate competition in respect of a substantial part of the goods or services.

Although theoretically any Chapter 1 Prohibition may be capable of relief from liability under section 5, in practice it is unlikely that hard-core cartels will be able to fulfil the conditions in section 5.

MyCC has indicated that it is only concerned with agreements that have a significant impact (ie, more than a trivial impact). According to the Guidelines on Anticompetitive Agreements, MyCC will not generally consider agreements between competitors whose combined market shares do not exceed 20 per cent of the relevant market to have a significant effect on competition, provided that such agreements are not hard-core cartels. Under certain circumstances, an agreement between competitors below the threshold may nonetheless have a significant anticompetitive effect, and MyCC will have the power to take enforcement action against the parties to such agreement.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The Competition Act applies to any commercial activity both within Malaysia and outside that has an effect on competition in any market in Malaysia. The definition of 'commercial activity' does not include:

- any activity, directly or indirectly in the exercise of governmental authority;
- any activity conducted based on the principle of solidarity; or
- any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.

An enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly is excluded from the application of the Competition Act insofar as the Chapter 1 Prohibition and Chapter 2 Prohibition (with respect to an abuse of dominant position) would obstruct the performance, in law or in fact, of the particular task assigned to the enterprise.

Commercial activities regulated by the Communications and Multimedia Act 1998, Energy Commission Act 2001, the Petroleum Development Act 1974, the Petroleum Regulations 1974, the Gas Supply Act 1993 and the Malaysian Aviation Commission Act 2015 are excluded from application of the Competition Act.

Under the Communications and Multimedia Act 1998, licensees must not engage in any of the following:

- conduct that has the purpose of substantially lessening competition in a communications market;
- agreements that provide for rate fixing, market sharing or boycotts; or
- tying or linking arrangements.

A licensee that has been determined to be in a dominant position can be directed to cease conduct that has the effect of substantially lessening competition in a communications market.

As stated in question 3, the Competition (Amendment of First Schedule) Order 2016 provides further exclusion on any activities regulated under the Malaysian Aviation Commission Act 2015.

MyCC may grant individual or block exemptions where the criteria in section 5 of the Competition Act (see question 4) have been satisfied. Exemptions are made public. They will be made for a limited time period and may be subjected to conditions. MyCC has granted a conditional block exemption to liner shipping agreements in respect of voluntary discussion agreements and vessel sharing agreements made within Malaysia or have an effect on the liner shipping services in Malaysia. This exemption, which took effect from 7 July 2014, was valid for three years and recently renewed for another two years.

6 Application of the law

Does the law apply to individuals or corporations or both?

Both, insofar as they are engaged in commercial activity. The Chapter 1 Prohibition applies to agreements between enterprises. 'Enterprise' is defined as any entity carrying on commercial activities relating to goods or services. This would include, for instance, companies, partnerships, businesses and state-owned corporations.

When an employee engages in conduct that would infringe the Chapter 1 Prohibition, liability for such infringement may be imputed to his or her employers.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Yes. The Competition Act applies to commercial activity transacted outside Malaysia that has an effect on competition in any market in Malaysia. Since the Competition Act came into force, MyCC has not investigated any extraterritorial cartels.

The Malaysian Aviation Commission Act also applies to any commercial activity, agreement or merger transacted or executed outside Malaysia that has an effect on competition in any aviation service market in Malaysia.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no such express exemption or defence under the Competition Act. There have also been no reported cases on anticompetitive conduct that affects only customers or other parties outside Malaysia.

The Competition Act applies to any commercial activity within and outside Malaysia. For commercial activities transacted outside Malaysia, the Competition Act would only apply if the conduct has an effect on competition in any market in Malaysia.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

Trigger

MyCC may conduct any investigation it thinks expedient where it has reason to suspect that any enterprise has infringed or is infringing any prohibition under the Competition Act. Investigations of cartels are usually triggered by a complaint or a participant in the cartel seeking a benefit under the leniency regime. MyCC encourages aggrieved parties to lodge complaints in accordance with the Guidelines on Complaint Procedures. If MyCC decides not to investigate a complaint, it must inform the complainant of the decision and reasons for the decision.

MyCC may, through inter-agency cooperation, work with other competition authorities in enforcement, investigations and other actions, and thus investigate international cartels.

Apart from MyCC's powers to initiate investigations on its own accord, the minister has powers to direct MyCC to investigate any suspected infringement.

Where markets are not competitive, MyCC may conduct a market review to determine if any feature or combination of features of the market restricts competition. This may include a study into the market structure, conduct of enterprises, supplies and consumers in the market. Information gathered from the review can trigger an investigation. By way of illustration, MyCC has conducted a review of the broiler market in Peninsular Malaysia that focused on the structure of the domestic broiler market; and the interactions of farmers, wholesalers and retailers across the broiler supply chain.

In December 2017, MyCC carried out a review of the pharmaceutical sector in Malaysia that examined industry issues such as:

- market structure and supply chain issues;
- the level of competition among players at different levels of the supply chain;
- identification of anticompetitive practices; and
- whether governmental intervention in the industry would be necessary.

MyCC also carried out a review of building materials in the construction industry. The specific objectives of the market review include to:

- determine the market structure, supply chain and profile of industry players that are involved in manufacturing and distribution of selected key building materials;
- identify the prices of selected key building materials at the manufacturing and wholesale levels;
- assess competition in the manufacturing and distribution levels of selected key building materials;
- identify anticompetitive practices among the industry players in the manufacturing and distribution levels of selected key building materials; and
- determine the extent of market distortion and whether government intervention is necessary in curbing anticompetitive conduct in the selected key building materials' market.

Collection of evidence

MyCC has wide powers of investigation. It may request information by written notice and conduct dawn raids (see question 10).

Notice of proposed decision

If, after the completion of the investigation, MyCC proposes to take enforcement action, it must give written notice of its proposed infringement decision to each enterprise that may be directly affected by the decision. The notice will:

- set out the reasons for MyCC's proposed decision in sufficient detail to enable such enterprise to have a genuine and sufficient prospect of being able to comment on the proposed decision on an informed basis;
- set out the penalties or remedial action; and
- present an opportunity for the enterprise to make written or oral representations to MyCC and the deadline for such representations.

MyCC may also conduct hearings to determine whether an enterprise has infringed the Chapter 1 Prohibition.

Decision

If MyCC determines that there has been an infringement, it must notify the persons affected by the decision and require that the infringement be ceased immediately. It is empowered, inter alia, to impose a financial penalty of up to 10 per cent of the worldwide turnover during the period of the infringement.

If MyCC finds that there is no infringement, it must give notice of such decision and specify its reasons.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

MyCC has wide powers to collect evidence and may direct a person to give MyCC access to his or her books, records, accounts and computerised data. However, these powers are subject to lawyer-client privilege and may, at the request of the person disclosing, be protected by confidentiality. As anticompetitive conduct is not a criminal offence, there is no privilege against self-incrimination.

Information requests

MyCC may, by written notice, require any person (not only those suspected of being in a cartel but also third parties) whom MyCC believes to be acquainted with the facts and circumstances of the case to produce relevant information or documents. MyCC may also require the person to provide a written explanation of such information or documents. Where the document is not in the custody of the person, he or she must, to the best of his or her knowledge and belief, identify the last person who had custody of the document and state where the document may be found. A person required to provide information has the responsibility to ensure that the information is true, accurate and complete, and may be required to provide a declaration that he or she is not aware of any other information that would make the information untrue or misleading.

Dawn raids

MyCC may search premises with a warrant issued by a magistrate where there is reasonable cause to believe that any premises have been used for infringing the Competition Act or there is relevant evidence of it on such premises. The warrant may authorise the MyCC officer named on the warrant to enter the premises at any time of day or night, and by force if necessary. During such searches, MyCC officers may seize any record, book, account, document, computerised data or other evidence of infringement.

The powers extend to the search of persons on the premises, and there is no distinction in these powers regarding business or residential premises. Where it is impractical to seize the evidence, MyCC may seal the evidence to safeguard it. Attempts to break or tamper with the seal may be prosecuted as a criminal offence.

Where the MyCC officer has reasonable cause to believe that any delay in obtaining a warrant would adversely affect the investigation, or the evidence will be damaged or destroyed, he or she may enter the premises and exercise the above powers without a warrant.

In addition to powers under the Competition Act, MyCC investigating officers have the powers of a police officer as provided for under the Criminal Procedure Code.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Under the Competition Commission Act 2010, MyCC has the powers to cooperate with any body corporate or government agency for the purpose of performing its functions. We understand that MyCC cooperates with authorities in other jurisdictions. However, the scope of such cooperation remains unclear. A number of cooperation initiatives that MyCC has undertaken include:

- East Asia Top Level Official's Meeting on Competition Policy;
- ASEAN Competition Action Plan 2016–2025;
- Malaysia-Japan International Cooperation Agency: Economic Partnership Program – Capacity Building for Competition Law;

- ASEAN–Australia–New Zealand Free Trade Area Economic Cooperation Work Programme; and
- Malaysia Competition Commission Attachment Programme to the Australian Competition and Consumer Commission, Australia.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The Competition Act came into effect on 1 January 2012 in Malaysia. To date, no cross-border cases have been investigated by MyCC. However, it is highly likely to take note of investigations by other competition authorities, particularly in closely related markets.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel conduct is investigated and adjudicated by MyCC, which has the power to impose fines and give directions as it sees fit to bring the infringement to an end (see question 18).

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof in establishing that an infringement has occurred lies with MyCC.

An enterprise that seeks to rely on any exclusion, exemption or other defence (ie, the criteria under section 5 of the Competition Act for relief of liability; see question 4) bears the burden of proving that such exclusion, exemption or other defence applies.

The standard of proof is a balance of probabilities (ie, the same evidential standard for civil claims).

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The evidential burden in establishing that an infringement under the Competition Act has occurred is borne by MyCC. The standard of proof is the balance of probabilities. Given that cartels usually function in secrecy and that members of a cartel usually work to avoid detection, it is rare to find any direct evidence of its existence. Investigating authorities would have to rely on circumstantial evidence to determine the existence of a cartel.

16 Appeal process

What is the appeal process?

Appeals against MyCC's decisions are made to the Competition Appeal Tribunal (CAT), which has exclusive jurisdiction to review on appeal any findings of infringement or non-infringement made by MyCC. The president of the CAT is a judge of the High Court, and the CAT comprises between seven and 20 other members appointed by the prime minister on the recommendation of the minister in charge of domestic trade.

A person aggrieved by MyCC's decision may appeal to the CAT by filing a notice of appeal to the CAT within 30 days of the decision. This means that the right of appeal is not limited only to the enterprise made subject to MyCC's decision, but extends to third parties who are aggrieved or whose interest are affected by that decision (which may include third party consumers). This notice of appeal shall state in summary form the substance of the decision of MyCC being appealed against, and an address for service of notices related to the appeal.

The CAT may confirm or set aside the decision being appealed against, or any part of it, and may:

- remit the matter to MyCC;
- impose or revoke, or vary the amount of, a financial penalty; and
- exercise MyCC's powers to make decisions, give directions or take such other appropriate actions.

The CAT's decision is decided on a majority of its members, and is final and binding on the parties to the appeal. Nonetheless, the CAT's decision may be subjected to judicial review by the High Court. MyCC had in 2014 found both Malaysian Airline System Bhd and AirAsia Bhd liable for market sharing where each party was fined 10 million ringgit for entering into a collaboration agreement that saw the two airlines sharing markets in the air transport services sector within Malaysia. MyCC's final decision was subsequently overturned on appeal by the CAT, and the fines imposed on the airlines were set aside. MyCC subsequently filed for an application to the High Court for judicial review against the CAT's decision.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Currently, cartel conduct under the Competition Act is not a criminal offence.

However, obstructing MyCC's investigation may lead to criminal sanctions. Among other things, it is an offence to:

- refuse to give access to documents when directed by MyCC;
- provide false or misleading information, evidence or documents;
- destroy, conceal, mutilate or alter any evidence with the intent to defraud MyCC or obstruct MyCC's investigation;
- tamper with or break a seal affixed to protect the integrity of evidence;
- tip off others in a manner that is likely to prejudice any investigation or proposed investigation; or
- threaten reprisals on persons who file complaints of infringements or cooperate with MyCC in its investigations.

On conviction of any of the above, the penalty for a body corporate is a fine of up to 5 million ringgit, and for subsequent offences up to 10 million ringgit. For individuals, the fine is up to 1 million ringgit or imprisonment of up to five years, or both; and for subsequent offences, a fine of up to 2 million ringgit and imprisonment of up to five years, or both.

To date, there have been no such criminal sanctions imposed under the Competition Act.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

On finding an infringement, MyCC may impose a financial penalty of up to 10 per cent of the worldwide turnover of an enterprise over the period during which the infringement occurred. There is no minimum financial penalty which MyCC may impose under the Competition Act.

The concept of a single economic unit is recognised under the definition of 'enterprise', and this may enlarge the turnover of the relevant enterprise to include parents with decisive influence, and subsidiaries that do not have autonomy to determine their actions on the market.

MyCC must require that the infringement be ceased immediately, and may specify steps to be taken to achieve this or give any other appropriate direction.

The financial penalty is potentially higher than that in other jurisdictions where the fine is limited to a specified number of years, whereas in Malaysia it may be for the entire duration of an infringement. However, the magnitude of this may not be felt for a while, as it applies only from 1 January 2012, the date on which the Competition Act came into force.

MyCC may bring proceedings before the High Court against any person who fails to comply with its directions.

To date, the financial penalties that have been proposed or imposed by MyCC ranged from 20,000 to 20 million ringgit. In addition, MyCC had in October 2017 published its proposed decision to impose a 213.45 million ringgit penalty against the General Insurance Association of Malaysia (PIAM) and several of its members in relation to an alleged anticompetitive agreement to fix trade discount rates for parts of certain vehicle makes, and labour hourly rates for workshops under the PIAM Approved Repairers Scheme.

Although not all infringing enterprises have been fined with financial penalties, it appears from recent trends that MyCC is taking a stricter stance for deterrence.

The first cartel case in early 2012, investigated by MyCC, involved the Cameron Highlands Floriculturist Association (CHFA). In this case, MyCC found CHFA to be liable for fixing the price of flowers sold to distributors and wholesalers in Malaysia. MyCC, which had initially proposed a financial penalty of 20,000 ringgit on CHFA in its proposed decision, removed that sanction in its final decision stating that CHFA had followed up with consultations with MyCC soon after receiving the proposed decision and exhibited exemplary cooperation in complying with the Competition Act. The final decision from MyCC required CHFA to:

- cease and desist the infringing act of fixing prices of flowers;
- provide an undertaking that its members shall refrain from any anticompetitive practices in the relevant market; and
- issue a statement on the above-mentioned remedial actions in the mainstream newspapers.

In January 2015, MyCC imposed fines totalling 252,250 ringgit on 24 ice manufacturers for allegedly fixing the selling prices of edible tube ice and block ice. The proposed financial penalties for each manufacturer ranged from 1,080 to 106,000 ringgit. Before issuing the proposed decision, MyCC had issued interim measures to the ice manufacturers seeking to prevent them from acting in accordance with their plan (which was advertised through local newspapers in December 2013) to collectively increase the price of edible tube ice by 0.50 ringgit per bag and 2.50 ringgit per block from 1 January 2014. In determining the level of financial penalty, MyCC stated that it took into account the seriousness of the infringement, duration of the infringement and mitigating factors, such as being cooperative during investigation.

In another price-fixing case involving the Pan-Malaysia Lorry Owners Association (PMLOA), MyCC did not propose financial penalties but issued proposed interim measures to PMLOA and accepted an undertaking from PMLOA and related lorry enterprises that they will not engage in any future anticompetitive conduct such as price fixing and shall cease and desist from increasing the transportation charges of up to 15 per cent after MyCC stated that this action constitutes price fixing.

MyCC had also in 2014 found both Malaysian Airline System Bhd and AirAsia Bhd liable for market sharing where each party was fined 10 million ringgit for entering into a collaboration agreement that saw the two airlines sharing markets in the air transport services sector within Malaysia. The penalty is less than the maximum fine of 10 per cent of both airlines' respective worldwide turnovers between January and April 2012 (infringement period) as MyCC took into consideration the full cooperation of both parties in providing requested data and information. MyCC had also considered the voluntary action taken by both parties to remove reference to routes and market focus stated in the collaboration agreement as well as the fact that both parties have implemented competition compliance programmes. MyCC's final decision, however, was subsequently overturned on appeal by the CAT on 4 February 2016 and the fines imposed on the airlines were set aside. MyCC has filed for an application for judicial review to the High Court against the Competition Appeal Tribunal's decision.

In March 2015, MyCC imposed fines totalling 247,730 ringgit on 14 members of the Sibü Confectionery and Bakery Association for its involvement in price fixing in December 2013, by increasing the prices of products of confectionery and bakery products between 10 and 15 per cent in Sibü, Sarawak. In determining the level of financial penalty, MyCC took into account, among other things, the duration of the infringement, seriousness of the infringement and relevant turnover of the enterprises.

In June 2016, MyCC issued its decision against an information technology service provider to the shipping and logistics industry and four container depot operators for price fixing. The final decision states that Containerchain (M) Sdn Bhd (Containerchain), the information technology service provider, had engaged in concerted practices with the container depot operators resulting in the operators increasing the depot gate charges from 5 ringgit to 25 ringgit. MyCC also alleged that the concerted practice resulted in the container depot operators offering a rebate of 5 ringgit to hauliers on the agreed depot gate charges.

The financial penalties imposed on the operators and the information technology service provider ranged from 52,980 ringgit to 163,623 ringgit, with a combined total penalty of 645,774 ringgit.

MyCC is expected to take a stricter stance when enforcing hard-core cartel cases and we expect higher fines to be used as part of MyCC's efforts to combat cartels. In March 2018, it was reported in the media that MyCC was investigating 16 cases across six industries, including government procurement, pharmaceutical, information technology, financial products and logistics.

In September 2018, it was reported in the media that MyCC was investigating tyres and beverage companies in Malaysia for possible cartel conduct to fix prices.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

MyCC has issued guidelines on financial penalties with the aim of reflecting the seriousness of the infringement and deterring anticompetitive practices leading to an infringement of a prohibition under the Competition Act.

In determining the amount of financial penalty to impose, MyCC has indicated that it will take into account some or all of the following factors:

- seriousness (gravity) of the infringement;
- turnover of the market involved;
- duration of the infringement;
- impact of the infringement;
- degree of fault (negligence or intention);
- role of the enterprise in the infringement;
- recidivism;
- existence of a compliance programme; and
- level of financial penalties imposed in similar cases.

MyCC has also indicated that it will take into account aggravating factors, mitigating factors and the grant of leniency.

Aggravating factors

The aggravating factors may include:

- the role of the enterprise as an instigator or leader or having engaged in coercive behaviour with others;
- obstruction of or lack of cooperation in the investigation;
- the enterprise has a record of committing similar infringements or other infringements under the Competition Act (recidivism);
- continuance of the infringement after the start of investigation; and
- involvement of board members or senior management in the infringement.

Mitigating factors

Meanwhile, the following non-exhaustive list of mitigating factors may also be taken into consideration:

- low degree of fault;
- relatively minor role in the infringement especially if involvement is secured by threats or coercion;
- cooperation by the enterprise in the investigation;
- existence of a corporate compliance programme that is appropriate having regard to the nature and size of the business of the enterprise; and
- any compensation made to victims of the infringements.

Leniency

If the enterprise has received leniency, then the amount of the financial penalty as determined above, including any reduction to comply with the legal maximum requirement, will be reduced by the amount stipulated in the grant of leniency. The Competition Act gives MyCC broad discretion on the amount of reduction, if any, of the financial penalty that it would have otherwise imposed on the enterprise receiving leniency.

The guidelines on the method of setting fines are not exhaustive and do not have the force of law.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

No.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

As stated in question 17, cartel conduct under the Competition Act is not punishable as a criminal offence. MyCC can impose civil penalties as provided for under the Competition Act.

Private rights of action**22 Private damage claims**

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Yes, any person who suffers loss or damage directly as a result of an infringement may bring a private action against the infringing parties in the civil courts regardless of whether such person dealt directly or indirectly with the enterprise. MyCC cannot award damages, and this right of private action is intended to enable an aggrieved person to obtain compensation.

Such civil action may be initiated even if MyCC has not conducted or concluded an investigation into the alleged infringement. However, in practice, the evidential burden on private parties makes this unlikely unless MyCC's investigation and adjudication process is slow.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are not possible in Malaysia. The only form of group litigation in Malaysia is representative actions.

Where numerous persons have the same interest in any proceedings, the proceedings can be commenced and (unless the court orders otherwise) continued by any one or more claimants, otherwise known as 'representative proceedings'. The representor must satisfy the following criteria to initiate a representative action:

- common interest;
- common grievance; and
- the relief sought must be beneficial to all.

A member of a class who is not represented by the representor may apply to court to be added as a co-plaintiff.

Cooperating parties**24 Immunity**

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Yes. This immunity, under section 41 of the Competition Act, is only available for a breach of the Chapter 1 Prohibition and particularly an admission of an infringement under section 4(2) which deems certain agreements between competing enterprises as having the object of significantly restricting competition (see question 4).

The Competition Act empowers MyCC to grant differing percentages of reductions and provide for reduction of up to a maximum of 100 per cent of any penalties, which would otherwise have been imposed (ie, full immunity). The reductions would depend on whether the enterprise was the first person to bring the suspected infringement to the attention of MyCC, the stage in the investigation at which it

admits its involvement in the infringement as well as information or other form of cooperation to be provided and the information already in possession of MyCC.

The leniency regime is only available in cases where the enterprise has:

- admitted its involvement in an infringement of section 4(2) of the Competition Act; and
- provided information or other form of cooperation to MyCC that significantly assisted, or is likely to significantly assist, in the identification or investigation of any finding of an infringement against any other enterprises.

Based on MyCC's Guidelines on Leniency Regime, what would be considered as 'significant assistance' will be determined by MyCC on the specific circumstance of the case under consideration. In relation to information provided, the information about a prohibition under section 4(2) provided by the enterprise should include the following:

- detailed description of the suspected infringement of a prohibition under section 4(2) including:
 - objectives, activities and functioning of the cartel;
 - the products or services involved and their geographic scope; and
 - activities of the cartel with dates, times, places, purpose, and content of any meetings, conversations or other contact;
- copies of documents such as minutes or notes of meetings or conversations, meeting agendas, price lists, etc;
- if the applicant no longer has a copy of a relevant document, the names and persons who may have copies of the document;
- name including full legal name, contact details and relevant office locations of the applicant and those of any subsidiary or related companies involved and names and positions of individuals of such enterprises who have participated in or have knowledge of the cartel activities;
- names and contact details of all enterprises involved and names and positions of individuals of the enterprises involved who have participated in or have knowledge of the cartel activities;
- name, contact details and relevant office locations of any trade association involved and names of employees and officers of the association who have participated in or have knowledge of the cartel activities;
- names of competition agencies or authorities to which the applicant has or is contemplating making a leniency application; and
- any other relevant information about the cartel and any other information that may assist MyCC in reviewing the leniency application.

The information or other form of cooperation provided by the enterprise may be about the infringement of which the applicant is admitting involvement. Such information or other form of cooperation may also be about another infringement of a prohibition:

- another infringement of a prohibition that satisfies section 4(2) (ie, another cartel);
- an infringement of a prohibition under section 4(1) that does not satisfy section 4(2); or
- an infringement of a prohibition under section 10 with respect to an abuse of a dominant position.

An applicant must admit involvement in a cartel infringing section 4(2) but may provide information or other form of cooperation about a different infringement of a prohibition under section 4 or a prohibition under section 10. To illustrate, an applicant admits involvement in a cartel and provides information or cooperation about a different infringement. The second infringement could concern a prohibition of section 10 with respect to an abuse of dominant position.

Note that leniency would not be able to protect a successful applicant from other legal consequences such as private actions brought by an aggrieved person who has suffered loss or damage directly caused by the infringement.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

There is no separate programme, and any subsequent leniency applicant may still benefit from the leniency regime. The percentage of reduction would depend largely on the stage in the investigation at which it admits its involvement in the infringement, and the value of the incremental information or other cooperation it is able to provide. Such percentage of reduction is expected to commensurate with the additional information and assistance such enterprise is able to provide MyCC.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The leniency regime is designed to encourage cartelists to be the 'first in' to supply as much information as possible in order to expedite MyCC's investigation. By being the second as opposed to third or subsequent cooperating party, the second cooperating party is more likely to receive a greater reduction if the application is made during the early stages of an investigation. Further, subsequent applications would be assessed in light of information that MyCC has in its possession including that received from leniency applicants who have received leniency.

Conceptually, the Malaysian leniency regime contains elements of 'amnesty plus' option comparatively similar to that applied in the EU. However, the scope and operational mechanism may differ.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Yes. Based on MyCC's Guidelines on Leniency Regime, an applicant has 30 days to complete its leniency application from the date he receives a 'marker' which gives the applicant priority in receiving leniency while his application is being prepared. Failure to do so will result in the applicant losing its priority position.

Parties would in practice consider:

- whether MyCC is already investigating the cartel that may affect its position in the leniency queue;
- the possibility that another cartel has blown the whistle;
- the competition law implications in other jurisdictions, as MyCC is able to disclose the information to competition authorities in other jurisdictions, some of which may have criminal sanctions;
- whether concurrent leniency applications should be made in multiple jurisdictions; and
- whether the enterprise can offer an undertaking on acceptable terms to MyCC (see question 30).

The possibility of liability from follow-on actions should also be considered. MyCC cannot provide immunity from third-party damages actions.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

Only an enterprise that admits its involvement in any prohibited behaviour and provides information to MyCC that significantly assists in the identification or investigation of any prohibited behaviour by other enterprises may benefit from leniency. Different percentages of reductions of fines are available under the leniency regime, depending on whether the enterprise was the first person to bring the suspected infringement to the attention of MyCC and the stage of the investigation at which the enterprise provides information or admits involvement in the infringement.

Update and trends

In September 2018, MyCC appointed Datuk Seri Mohd Hishamudin Md Yunus as its new Chairman. Datuk Seri Mohd Hishamudin Md Yunus has extensive experience and served as a Court of Appeal Judge, Chief Registrar of the Supreme Court, Senior Federal Counsel and the President of the Sessions Court.

The MyCC has an impressive track record and is expected to continue its enforcement focus against cartel conduct. Based on media reports, MyCC has identified the pharmaceutical sector as a priority sector. In addition, MyCC has indicated that it will focus on the logistics, transportation, financial, consumer services and various fast-moving consumer goods sectors.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Generally, confidentiality including the identity of the applicant will be maintained as the Competition Act prohibits the unauthorised disclosure of confidential information. However, MyCC is authorised to make disclosures to other competition authorities in conjunction with their investigations and where necessary for the performance of MyCC's functions.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

As infringement of the Chapter 1 Prohibition is not a criminal offence, there is no applicable plea bargain concept.

However, MyCC may accept an undertaking from an enterprise to take remedial action subject to conditions that MyCC may impose. Where this is the case, MyCC shall close the investigation without any finding of infringement, and it cannot impose a penalty on the enterprise. The undertaking will be made public. MyCC may apply to the High Court for an order that the enterprise complies with the terms of the undertaking accepted by MyCC. A breach of the High Court order may be punished as a contempt of court.

Offering a suitable undertaking is particularly useful to avoid a finding of infringement, which can trigger follow-on civil actions.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

There is no effect, as there is no liability for infringement of the Chapter 1 Prohibition on employees. Nor are there criminal sanctions on individuals involved in a cartel.

Note, however, that individuals can have personal liability for offences under the Competition Act (see question 17).

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

It would be important for a leniency applicant to come forward at an early stage in the investigation as his or her application would be assessed in light of information that MyCC has in its possession including that received from leniency applicants who have received leniency.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

MyCC has issued guidelines on its leniency regime.

Defending a case**34 Disclosure**

What information or evidence is disclosed to a defendant by the enforcement authorities?

There is no automatic right under the Competition Act for disclosure of information or evidence by MyCC. However, MyCC may allow reasonable access to its investigation file, in the interest of procedural fairness and to ensure that the enterprise can properly defend itself against the allegations raised in a proposed decision and to enable the effective exercise of the rights of defence. Certain documents may not be disclosed on the grounds of confidentiality.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

The Competition Act does not impose personal liability for employees involved in a cartel. Typically, therefore, representation is at the enterprise level. A present or past employee would be advised to obtain independent legal advice where the employee is suspected to have committed a criminal offence, for example, where he or she has given bribes to bid-rig a project.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Counsel may represent multiple corporate defendants, subject to strict adherence to professional and ethical responsibilities. Conflicts of interest are likely to arise between the alleged parties to a cartel.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Not applicable. Financial penalties are only imposed on the infringing enterprise.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

No.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

No.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Applications for leniency may result in full or partial immunity from fines. Based on recent cases, it is also particularly helpful for the enterprise to cooperate with MyCC in the investigation. MyCC's Guidelines on Financial Penalties state that MyCC may take into account existence of a compliance programme as a mitigating factor to reduce any potential fines to be imposed.

It is not clear whether compliance initiatives undertaken post-investigation would be considered by MyCC as a mitigating factor.

Given that competition law is only newly introduced in Malaysia, MyCC is keen to encourage compliance and is likely to take into account genuine efforts to comply with the Competition Act.

Zaid Ibrahim & Co
a member of ZICO | law

Sharon Tan
Nadarashnaraj Sargunaraj

sharon.suyin.tan@zicolaw.com
nadarashnaraj@zicolaw.com

Level 19 Menara Milenium
Jalan Damanlela
Pusat Bandar Damansara
50490 Kuala Lumpur
Malaysia

Tel: +60 3 2087 9999
Fax: +60 3 2094 4666/4888
www.zicolaw.com

Mexico

Rafael Valdés Abascal and Agustín Aguilar López

Valdés Abascal Abogados SC

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The legal basis of competition policy and law enforcement is provided by article 28 of the Constitution, which prohibits monopolies and monopolistic practices.

The Federal Law of Economic Competition (LFCE) provides a detailed regulation on, inter alia, merger control, relative monopolistic practices (abuse of dominance practices and vertical restraints) and absolute monopolistic practices (cartel conduct) with the aim of promoting competition and preventing anticompetitive conduct.

Cartels are covered by article 53 of the LFCE, which prohibits absolute monopolistic practices. Criminal responsibility for a cartel is established in article 254-bis of the Federal Criminal Code and is prosecuted according to the National Code of Criminal Proceedings, while civil responsibility is regulated by the Federal Civil Code, the Federal Code of Civil Proceedings and article 134 of the LFCE.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Federal Economic Competition Commission (CFCE) enforces the LFCE and is in charge of preventing, investigating and sanctioning administrative infringements derived from cartel conduct. The CFCE has jurisdiction over all industries, with the exception of the broadcasting and telecommunications industries, where the Federal Telecommunications Institute (IFT) enforces the LFCE.

CFCE and IFT decisions may be challenged before competition, broadcasting and telecommunications specialised federal courts, through an *amparo* proceeding.

The CFCE and IFT may bring criminal charges before the public prosecutor. Criminal prosecution and adjudication correspond to the Mexican Attorney-General and the federal criminal courts, respectively.

Federal specialised courts in competition, broadcasting and telecommunications have jurisdiction over individual and collective damages' claims.

Please note, except as mentioned otherwise, any references made in this chapter to the CFCE will also apply to the IFT in the context of the broadcasting and telecommunications industries.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

Article 28 of the Constitution was amended in June 2013 (in force since 12 June 2013) to strengthen competition policy and law enforcement as well as to increase the effectiveness of the telecommunications regulatory framework. Derived from this constitutional amendment, a new LFCE was enacted and the Federal Criminal Code was amended. Both legislative changes were published in the Federal Official Gazette on 23 May 2014 and came into force on 7 July 2014.

Some of the relevant changes contained in these constitutional and legislative reforms are the following:

- executive branch agencies, the Federal Competition Commission (CFC) and the Federal Telecommunications Commission were replaced by new autonomous constitutional entities: the CFCE and the IFT, respectively;
- the five former commissioners were replaced by seven new commissioners for each entity;
- the power to apply the LFCE in the broadcasting and telecommunications industries was transferred to the IFT;
- the CFCE and the IFT are empowered to issue law regulations;
- new federal courts specialised in competition, broadcasting and telecommunications were created;
- the scope of exchanging information as a cartel conduct was extended. Under the former LFCE, the exchange of information was illegal only when its purpose or effect was to fix prices. Under the new LFCE, the exchange of information is illegal also when its purpose or effect is to commit any of the other absolute monopolistic practices (ie, restriction of output, allocation of markets or bid rigging);
- the minimum sanction for criminal offences increased from three to five years. Thus, cartel conduct may be sanctioned with five to 10 years' imprisonment;
- obstructing CFCE or IFT dawn raids is sanctioned with one to three years of prison whenever such obstruction consists of destroying information and documents; and
- CFCE and IFT decisions may be challenged only through an *amparo*, which is a proceeding followed before federal courts. *Amparos* against said authorities will be decided by the specialised district judges and circuit courts.

In November 2014, the CFCE issued its Regulations of the LFCE. Also, the IFT issued its Regulations of the LFCE in January 2015. Mostly, the aim of the aforesaid regulations is to detail procedural aspects, but they also regulate cartel conduct indicia (see question 4).

In June 2015, the CFCE issued its guidelines regarding the Immunity and Reduction of Sanctions Programme and the initiation of investigations. Those guidelines are not binding; their purpose is to explain the proceedings to the public using practical and clear language. Also, at the end of 2015, the CFCE published its Guidelines for Information Exchange among Competitors and regarding the Cartel Investigation Procedure.

In January 2017, the IFT published its Guidelines on the Immunity and Reduction of Sanctions Programme.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 53 of the LFCE prohibits absolute monopolistic practices (cartels), which are defined as any contract, arrangement or combination between competitors, whenever its purpose or effect is one of the following:

- to fix, raise, coordinate or manipulate the purchase or sale price of goods or services (price fixing);

- to limit the production, processing, distribution, marketing or purchasing of goods, or to limit services, including their frequency (restriction of output);
- to divide, distribute, allocate or impose specific portions or segments of a current or potential market of goods or services by means of clients, suppliers, time spans or certain territories (allocation of markets);
- to establish, arrange or coordinate bids or abstentions in tenders, contests, auctions or purchase calls (bid rigging); or
- to exchange information having as a purpose or effect any of the above-mentioned conducts.

According to the LFCE, cartels are per se illegal. Thus, the authority does not need to assess market power or any adverse effect over the market. In other words, the restriction of competition is presumed whenever the above conduct takes place, without the opportunity to demonstrate efficiencies.

According to CFCE's Regulations, the following will be considered cartel conduct *indicia* and, as such, may be used for initiating a cartel conduct investigation:

- the invitation or recommendation addressed to one or more competitors to coordinate prices, output, or production, distribution and commercialisation terms and conditions, or to exchange information with the same purpose or effect;
- a situation where the price offered in Mexico by two or more competitors regarding internationally interchangeable goods or services is considerably superior or inferior to the international reference price, as well as a situation where the tendency of its evolution in a specific time span is considerably distinct to the tendency of international prices in the same period, except when such difference derives from the application of tax laws, or from transport or distribution costs;
- the instructions, recommendations or business standards adopted by chambers of commerce or professional associations to coordinate prices, output, or production, distribution and commercialisation terms and conditions of a certain product or service, or to exchange information with the same purpose or effect;
- a situation where two or more competitors establish the same maximum or minimum prices for certain good or service; as well as a situation where those competitors adhere to the prices issued by a competitor, certain chambers of commerce or associations; and
- regarding broadcasting and telecommunications industries, a situation where two or more competitors refrain from participating, or coordinate their bids in certain geographic areas.

With respect to information exchange, the Guidelines for Information Exchange among Competitors establish some criteria under which such conduct will be assessed. First, the Guidelines point out the relevance of the nature and characteristics of the information to be exchanged: strategic, detailed and recent information, exchanged in a frequent basis, is more likely to restrain competition and, as such, the exchange of the aforesaid information is more likely to be investigated by the CFCE. Likewise, the Guidelines explain that the market structure is also a key element to take into consideration: concentrated and more static markets, with symmetric participants and homogeneous products, are more propitious to collusion and, as such, strategic information exchange in those markets is riskier and more likely to be investigated by the CFCE.

Also, the Guidelines for Information Exchange among Competitors include the following recommendations regarding information exchange in a due diligence process in the context of a horizontal concentration:

- each economic agent must identify the strategic information. Therefore, all non-public information that would not be shared normally with third parties regarding prices, discounts, sales and purchase terms and conditions, clients and suppliers, must be identified;
- the use of strategic information must be limited to indispensable matters and as long as it is strictly needed for an adequate evaluation of the transaction. Such an exchange is indispensable when the information is reasonably related to the parties' understanding of the future profits of the concentration and to determine the value of the transaction;

- when possible, the use of historic and aggregated information to evaluate the relevant aspects of the transaction and for planning the final integration should be preferred;
- the economic agents must establish protocols or strict rules regarding access to strategic information and sign a confidentiality agreement regarding such information. Such rules must:
 - limit the use of information only to previous audits; and
 - indicate that access to strategic information will only be granted to employees that must know such information and whose functions do not contemplate strategic operational decision-making and/or sales;
- the integration of an isolated and compact team in charge of the concentration. Such team will control the use and generation of the information. It is recommended for this team:
 - to be integrated by persons that do not work for the commercial areas of the economic agents and to avoid contact with such areas; and
 - to sign confidentiality agreements to oblige themselves to protect and maintain confidentiality of the information;
- if possible, delegate the collection, management and use of the strategic information to an independent third party that will evaluate such information in the most disaggregated level to then aggregate it for its analysis in the concentration;
- maintain real-time records of all information exchanges and contact between the parties. Such records must be sequential and detailed to the extent that it is possible to rebuild in a reliable way the source of information, the moment in which the information was sent and received by the parties, and the use that was given to the information;
- whenever it becomes necessary to impose restrictions regarding the use and disposal of certain assets or to increase liabilities, in the phase that goes from the execution of the purchase agreement to the closing of the transaction, restrictions shall be minimal to protect the value of the assets that will be transferred;
- parties must not coordinate prices, output, allocate markets or bid rig before closing, nor impose future decisions to the other party; and
- inform the individuals involved in the concentrations the legal framework regarding merger control and cartel conduct.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no industry-specific infringements, defences or exemptions for cartel conduct. The LFCE has transversal effect and includes all branches of economic activity, whether regulated or not.

6 Application of the law

Does the law apply to individuals or corporations or both?

The LFCE applies to both individuals and corporations. Moreover, if the CFCE determines that a corporation has been party to a cartel, individuals who have contributed to or represented the corporation can be sanctioned for those actions, in addition to the fine imposed on the corporation.

Government entities are also subject to the LFCE, and government officials may be sanctioned if they contribute to anticompetitive practices. For example, the Rural Development Minister of the state of Jalisco was sanctioned by the CFCE owing to his alleged collaboration with tortilla producers and retailers to fix the price of tortillas (CFCE decision DE-009-2016).

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

This matter has been little addressed by Mexican authorities, but there are some precedents in which the CFC intervened with respect to conduct that took place abroad. In IO-09-99, the CFC learned that two

foreign companies had pleaded guilty before a Texas court to participating in an agreement to fix the price of various types of vitamins, with international scope. Since the companies had affiliates and subsidiaries in Mexico, the CFC initiated a cartel investigation, given the possible extensive effects of the cartel in national territory.

In another precedent (IO-002-2009) the CFCE learned, through the leniency programme, that several non-Mexican companies fixed prices globally in the market of production, distribution and commercialisation of hermetic compressors through the information exchange between their executives in emails, telephone calls and meetings outside Mexican territory (Brazil and Europe). The CFCE determined that the Mexican hermetic compressors market was affected by the global cartel as such products were imported to Mexico for their commercialisation. The CFCE fined the non-Mexican companies and their Mexican subsidiaries.

In another recent precedent (IO-001-2013) the CFCE learned, through the leniency programme, that several non-Mexican companies rigged bids globally in the market of production, distribution and integration of air conditioned compressors for automobiles. The CFCE determined that the Mexican air conditioning compressors for the automobile market was affected by the global cartel as such products were used in the manufacture of cars that were produced and sold in Mexico. The CFCE fined the non-Mexican companies.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

If an export cartel agreement has been reached within the Mexican territory but does produce effects within this territory, the economic agents may argue lack of jurisdiction.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

An investigation can be initiated by the investigative authority of the CFCE, ex officio or through a complaint that can be lodged by any person.

The investigation may last up to 120 business days. This period can be extended by the CFCE up to four times, but only for justified causes.

During this time, the CFCE can issue information requests as well as subpoenas and may practise dawn raids and obtain all the information it needs to prosecute a suspected infringer of the LFCE. During the investigation, case files may not be accessed.

Once the investigation has finished, if the CFCE's investigative authority considers there is enough evidence to presume the responsibility of a party, it submits to the CFCE's plenary a statement of probable responsibility (*dictamen de probable responsabilidad* (DPR)) describing the charges. The defendant is summoned with the DPR and, thereafter, the proceeding follows the basic rules of a trial, in which the defendant has the constitutional rights of due process; the investigative authority acts as a prosecutor and the complainant may cooperate with the latter. The LFCE grants 45 business days to the defendant to respond to the DPR and enclose the proof in his or her possession to rebut the accusation. After all evidence is submitted, the defendant and the investigative authority may present written arguments in a 10-business-day term. Also, the defendant and the complainant have the right to ask for a hearing before the plenary of the CFCE. Once this proceeding is concluded, the CFCE's plenary issues its final decision.

At any time, the investigative authority may ask the plenary to issue a precautionary measure. The investigated party or defendant may ask the plenary to determine a caution to avoid the precautionary measure, and the amount should be enough to compensate for possible damages caused to the competition process by the anticompetitive conduct.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The CFCE is empowered to perform dawn raids, which cannot last more than four months. If the implicated party is not at the corresponding

place, these proceedings can be carried out with any person found at the premises; there is no need to leave any kind of subpoena.

It is also empowered to request any person to provide the information and documents deemed necessary to carry out the investigation. The authority can subpoena any person as well, to testify about facts under investigation. The implications of being requested or subpoenaed as the 'denounced agent', as a 'third adjuvant' or as a 'person related to the investigated market' are unclear, and thus it is unclear what rights these requested or summoned people have. There are no judicial binding specific criteria for competition and antitrust that suggests that requested or deponents' information may not be used to incriminate them. Notwithstanding, the Supreme Court determined that the principle of presumption of innocence is applicable to administrative sanctioning proceedings.

These investigative powers may be invoked by the CFCE's investigative authority without the CFCE's plenary or any court approval.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Yes. Inter-agency cooperation usually takes place through provisions established in international free trade agreements or in cooperation agreements between agencies.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Rules regarding cooperation between jurisdictions are contained in specific chapters of various free trade agreements that Mexico has entered into (with Chile, Colombia, EFTA, the EU, Israel, Japan, North America, Uruguay and Venezuela). They are also contained in bilateral antitrust treaties with Canada, Chile, Korea and the US. Among these jurisdictions, the most significant interplay takes place with the US.

It is noteworthy that people cooperating under the leniency programme established in article 103 of the LFCE are entitled to object to the CFCE about sharing their data and the information provided under this programme. CFCE may ask some economic agents under the leniency programme to grant an authorisation or waiver to share information with other agencies.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel cases are determined by the plenary of the CFCE. This body consists of seven commissioners, and decisions are taken by a simple majority. Damages and criminal responsibility are adjudicated under the terms mentioned in questions 1 and 2.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

A systematic interpretation of articles 73 and 79 of the LFCE indicates that the CFCE has the burden of proof in cartel cases. Indeed, the law empowers it to issue requests for information and documents, to perform dawn raids and to subpoena parties to testify with the purpose of gathering evidence to prove the responsibility of the alleged infringers. Moreover, article 79 establishes that the DPR shall contain the evidence that the CFCE considered to subpoena the party to the administrative trial. In short, the CFCE must not issue a DPR without sufficient evidence.

As explained in question 9, defendants have 45 business days to answer the DPR and submit the necessary evidence to rebut the accusation. It should not, however, be understood that the burden of proof is thus passed on to the defendant; rather, defendants have the opportunity to prove a different theory of the case.

Certainly, not presenting evidence does not entitle the CFCE to presume responsibility. Nevertheless, *amparo* trials do not allow parties to submit different evidence from that provided to the administrative authority – hence the importance of taking advantage of this opportunity when answering the DPR (however, it is important to mention that evidence can be submitted in *amparo* trial against the final decision of the CFCE).

The LFCE does not establish standards of proof to be satisfied by the CFCE. Nevertheless, there are precedents in which the CFC has acknowledged the existence of such standards (DE-22-2006 and IO-01-2007). In terms of these resolutions, the evidence contained in the file must dismiss any alternative hypothesis that could reasonably explain the situations observed in the market.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Considering that all participants in a cartel have the incentive to hide or destroy any proof of their conduct, courts have established a binding criterion stating that there is no need to prove the arrangement through direct evidence. Accordingly, a presumption of the existence of a cartel is enough to sanction it under the terms of the LFCE, as long as such presumption relies on facts that have been proven through direct evidence; in other words, a cartel can be sanctioned using circumstantial evidence.

16 Appeal process

What is the appeal process?

Against the decision of the CFCE, the parties can initiate an *amparo* trial before a federal district judge, who will rule on violations to fundamental rights during the administrative proceeding or in the adjudication. The *amparo* ruling may be appealed before the circuit courts. Only after this latter decision can the cartel case be considered legally settled.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

According to article 254-bis of the Federal Criminal Code, individuals face sanctions of between five and ten years' imprisonment for entering, ordering or executing any contract or arrangement between competitors for one or more of the purposes or effects listed in question 4.

For a criminal action to be lodged, the CFCE must bring charges before the public prosecutor. Charges may be pressed with the DPR (see question 9). The term in which the criminal action expires is seven-and-a-half years.

Considering criminal sanctions for cartel conduct were enacted in 2011, and that the main procedural obstacle to press charges was recently removed (previous to 2014, in order for CFCE to press charges, a final judgement of administrative responsibility was needed), there is no experience in Mexico regarding criminal sanctions for cartel conduct. There are only a few cases in which the CFCE has brought charges before the public prosecutor, which are currently under way.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Cartel conduct is sanctioned with a fine of up to the equivalent of 10 per cent of the infringer's income. In case of recidivism the CFCE may impose a fine of up to two times the applicable fine or order the divestiture of assets.

Individuals that represent or collaborate with the company in committing anticompetitive practices are liable to receive fines of up to 16.1 million pesos. Such individuals also face disqualification from acting as an adviser, administrator, director, manager, officer, executive, agent, representative or proxy at any company for up to five years.

Individuals that contributed, facilitated or instigated the execution of cartel conduct are liable to receive a fine of up to 14.5 million pesos.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

According to article 130 of the LFCE, when determining the fine to be imposed for anticompetitive conduct the CFCE must consider the infringer's economic capacity as well as the gravity of the conduct. In order to determine the latter, CFCE shall assess the following elements:

- the damage derived from the conduct;
- the indicia of intention;
- the defendant's market share;
- the size of the affected market;
- the duration of the conduct; and
- possible obstruction of the CFCE actions.

Criminal sanctions shall be imposed by the corresponding federal criminal judge. As provided by the Federal Criminal Code, prison punishments will range from five to 10 years, depending on the aggravating or mitigating circumstances of each case.

According to article 134 of the LFCE, monetary relief equivalent to the actual damages and losses caused by the defendants may be claimed by the affected parties before the specialised courts.

Consideration of the elements listed in article 130 of the LFCE is binding upon the CFCE, and the range of imprisonment time established by the Federal Criminal Code is binding upon the judge.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not explicitly covered by competition law. Notwithstanding, if cartel conduct (more likely bid rigging) is committed against government entities, the Ministry of Public Services may debar the infringers under article 60 of the Law of Procurement, Leasing and Services for the Public Sector.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Yes. As stated in question 17, once the CFCE's investigative authority has issued the DPR, it may bring criminal charges before the public prosecutor.

According to article 134, administrative responsibility is a condition to initiate individual or class actions before civil courts, in order to claim compensation for the damages derived from the anticompetitive practice.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Yes, private damage claims are available on the terms mentioned above.

Damages claims for antitrust infringements have not been frequent in Mexico, since a decision from the competition authority judging a party to be responsible (as a legally settled matter) is necessary for initiating a civil process on the matter. Thus, private antitrust tort practice is still under development.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

As provided in article 585 of the Federal Code of Civil Proceedings, class actions can be lodged by:

- the CFCE;
- no fewer than 30 members of a class;
- not-for-profit civil associations whose purpose is the defence of rights and interests in antitrust matters; and
- the Attorney-General of Mexico.

This regime came into force in February 2012 and there have been no class actions since then. Therefore, the efficiency of its implementation, such as the balance of its advantages and disadvantages, is still pending.

Cooperating parties**24 Immunity**

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Article 103 of the LFCE, as well as articles 114 to 116 of the CFCE's Regulations contemplate the leniency, immunity or amnesty programme. In June 2015 the CFCE issued the Immunity and Reduction of Sanctions Programme Guidelines. These guidelines show the criteria upon which the CFCE applies the law and regulations regarding leniency.

Any corporation or individual who has been or is involved in cartel activity may apply for leniency.

In order to qualify for the programme, the applicant must submit evidence, fully and continuously cooperate with the CFCE during the corresponding proceeding, and cease its participation in the cartel activity.

One of the benefits of the programme consists of reductions in the applicable administrative fines. The fines may be fixed at the symbolic amount of one unit of measurement and update (the basis for calculating fines in Mexico) – which in practice is equivalent to being awarded 'full immunity' – for the first applicant or may be reduced by up to 50, 30 or 20 per cent of the applicable fine for the second and subsequent applicants. The level of the reduction also depends on the sufficiency of the evidence provided to the CFCE and the cooperation during the proceedings.

Likewise, all qualified beneficiaries of the leniency programme will be exempted from criminal responsibility, but will still be subject to private monetary damage claims through individual or class actions.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Yes. See question 24.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Second and subsequent applicants who provide the CFCE with additional evidence may get reductions of up to 50, 30 or 20 per cent of the applicable fine, considering the timing of the application and the sufficiency of the evidence they provide to the authority. Also, as previously stated, all qualified beneficiaries of the leniency programme will be exempted from criminal responsibility, notwithstanding the time in which they applied.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Leniency may be sought at any moment before the CFCE has ended the cartel investigation proceeding. Since only the first applicant may obtain full immunity, and the order in which subsequent applicants approach the CFCE will be considered to fix the percentage of the fine reduction, time is crucial in applying for leniency. The CFCE uses markers in order to determine who the first applicant is and who the subsequent applicants are.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The applicant must submit evidence, cooperate fully and continuously with the CFCE during the corresponding proceeding, and cease its participation in the cartel activity. All applicants, in order to qualify, must submit more information than the one that is available in the records of the investigation.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The CFCE will keep confidential the identity of all (ie, first and subsequent) leniency applicants during the proceeding and even after the cartel is sanctioned. In addition, the CFCE will not share the identity of or the information provided by the applicants with other jurisdictions unless it is authorised to do so in writing by such applicant.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

If the requirements are fulfilled by the applicant, the CFCE issues a resolution expressing the applicant's place in line and the corresponding fine reduction. The benefit will be conditional upon the cooperation of the applicant during the investigation and sanction proceedings. If applicants fail to cooperate (eg, if the applicant destroys or hides evidence or alerts other cartel participants to the investigation), they will lose the benefits of the leniency programme (see question 24).

Also, the Plenary of the CFCE is entitled to request the dismissal of the criminal case if the administrative sanctions are complied with by the economic agent, as long as the following criteria are met: absence of pending appeals against the CFCE's decisions; and the economic agent is a first-time offender in the terms provided by article 127 of the LFCE and in the terms provided by article 254-bis of the Federal Criminal Code.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Leniency or immunity granted to a corporation is extended to its employees to the extent that they apply and qualify for the programme and provide full and continuous cooperation with the CFCE. If the corporation fails to provide full and continuous cooperation but the employees who received the extension provide such cooperation, such employees will remain protected as if they were the applicants themselves.

Update and trends

In a decision issued in 2018 regarding a cartel case in the market of production and distribution of chicken, the Federal Specialised Circuit Courts determined that the CFCE's interpretation of the elements that configure cartel conduct were incorrect and established the elements that do configure such conduct.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

If a corporation detects potential cartel activity, it should conduct an internal investigation to assess the existence of enough elements to prove such activity. If so, it should move quickly to apply for the leniency programme. Since providing the CFCE with enough evidence is a requirement to qualify for the programme, in the absence of such evidence, it will be better to prepare a strong defence instead of applying for the programme.

According to the Guidelines on the Immunity and Reduction of Sanctions Programme, the following are examples of the information and documents that may be submitted during the application:

- detailed description of the good or service, including its use, characteristics and price;
- a narrative of the collusive agreement or information exchange, describing the conduct or conducts that are being performed or that were performed. In this narrative, it must be admitted that the applicant participated in such conduct. Also, to back up such narrative the applicant can provide agreements, memoranda, minutes, activity reports, correspondence, emails, telephone records, personal reports and signed testimonies of the participants, among other documents. When the applicant provides digital evidence from computers, laptops, smartphones and other electronic devices, the source and extraction method of the information must be provided;
- identification of the individuals and/or legal entities involved in the collusive agreement or in the information exchange;
- duration of the conduct, the geographical reach of such conduct and specific time of the agreements including the status of the applicant's participation (whether its participation has ceased or not);
- a narrative regarding how the agreements worked. In other words, how the participants communicated, the methods for the information exchange, etc;
- details of the meetings, communications and agreements, including dates, places, participants, objectives and the achieved results;
- actions taken to ensure, follow up and verify compliance of the agreements entered into by competitors;
- a statement about the existence of hard copies of information exchange or agreements, if applicable; and
- identification of the relevant information that is not available for the applicant and the reasons that explain its unavailability (eg, the company is not the owner or has been destroyed).

Likewise, the guidelines establish that cooperation during investigation proceedings includes:

- terminating the cartel conduct;
- keeping confidentiality regarding the information that was delivered to the CFCE during its application, at least until the publication of the investigation notice;
- delivering all requested information within the terms granted by the CFCE;
- cooperating during the investigation errands;
- implementing all possible actions in order to make the involved individuals to participate in the investigation (ie, when they are subpoenaed); and
- refrain from destroying, falsifying or hiding information.

Also, according to the guidelines cooperation during the sanction proceeding includes:

- refrain from denying, directly or through the submission of evidence, the participation in the cartel;
- submitting useful new evidence;
- refrain from destroying, falsifying or hiding information; and
- cooperating during the procedural errands.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

Considering the guidelines were issued in June 2015 (CFCE) and in January 2017 (IFT), we do not expect that the current guidelines will be subject to any modification soon.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

According to the article 79 of the LFCE, the following information or evidence should be contained in the authority's DPR:

- the identification of the economic agents under investigation and, if possible, the corresponding persons;
- the matter under investigation and the probable purpose or effects on the market;
- the evidence and other elements of conviction available on the file and its analysis; and
- the elements that support the DPR and the legal provisions that are considered infringed, as well as the consequences that may result of such infringement.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Counsel may represent both the corporation and its employees if a conflict of interest does not exist or a potential conflict of interest is not foreseeable.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Counsel may represent multiple corporate defendants to the extent a conflict of interest does not exist or a potential conflict of interest is not foreseeable. If evidence of the cartel activity exists, counsel should not represent multiple defendants, since each of them will be interested in applying for the leniency programme.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes, if it is not prohibited by the corporation's policies.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Private damages awards are tax-deductible while fines are not.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Competition law does not contemplate cases of double jeopardy, and no administrative or judicial criteria have yet been issued on this matter. Notwithstanding, we consider that sanctions due to non-compliance of

local legislation can coexist with sanctions imposed in other countries. Damages awarded and paid in another country should be taken into account whenever such damages include concepts that demand compensation in Mexico.

40 Getting the fine down

**What is the optimal way in which to get the fine down?
Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

The optimal way to get the fine down is to apply for the leniency programme. However, for those who do not qualify for the programme, immediately ceasing participation in the alleged cartel and cooperating with the CFCE during the investigation and sanction proceedings may lead the authority to consider a lower fine. The existence of a compliance programme may help, as one of the elements that the CFCE must consider when imposing a fine is the indicia of intention (see question 19).



Rafael Valdés Abascal
Agustín Aguilar López

rafael.valdes@vaasc.com
agustin.aguilar@vaasc.com

Guillermo González Camarena 1450, 5th Floor
Santa Fe
01210 Mexico City
Mexico

Tel: +52 55 5950 1580
Fax: +52 55 5950 1589
www.vaasc.com

Netherlands

Jolling de Pree and Bart de Rijke

De Brauw Blackstone Westbroek NV

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Dutch Competition Act (the Act) entered into force on 1 January 1998 and is modelled closely on European Union competition law. The cartel prohibition contained in the Act is a copy of article 101 of the Treaty on the Functioning of the European Union (TFEU), excluding the effect on interstate trade criterion. An English-language version of the Act is available on the website of the Dutch Authority for Consumers and Markets.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

In 2013, the Dutch Competition Authority merged with the Independent Post and Telecommunications Authority (OPTA) and the Consumer Authority (CA) into a single regulator, the Authority for Consumers and Markets (ACM). This organisation has the task of applying and enforcing the Act. The ACM also applies article 101 TFEU in relation to agreements and concerted practices affecting competition in the Netherlands. The ACM has over 500 employees.

The ACM has independent status from the Ministry of Economic Affairs. The Minister for Economic Affairs (the Minister) is empowered to set out general policy rules, and can instruct the ACM to undertake activities in relation to EU and international competition issues. However, the Minister is prohibited from giving instructions to the ACM with respect to any specific case.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The ACM is currently focusing on the upcoming digital challenges for competition law. In its annual publication *InSight*, the ACM calls upon lawmakers to help it cope with the rapid digitalisation of markets. According to the ACM, the speed of the digital economy requires swifter regulatory intervention than is currently available. It therefore suggests looking into the possibilities, at the EU level, of ex ante, ex post, and self-regulation to keep powerful market participants in check.

As mentioned in question 2, the Dutch Competition Authority merged with OPTA and the CA to become a single regulator, the ACM. On 1 August 2014, the Streamlining Act came into force, harmonising the different powers, enforcement tools and procedures of the ACM's predecessors.

In July 2016, the maximum fine levels that can be imposed by the ACM for cartel infringements were increased. Instead of keeping pace with the European Commission's cap of 10 per cent of a company's total turnover in the preceding business year, the maximum fine is set by multiplying the cap of 10 per cent of a company's turnover by the numbers of years of the cartel infringement, subject to a maximum duration of four years. In the case of a repeated infringement, the maximum fine level will double. As a result, a maximum fine of 80 per cent

of a company's turnover can be imposed on repeat offenders. Fines for individuals who oversaw and gave instructions regarding cartels have also increased from €450,000 to €900,000.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

According to article 6 of the Act, which, as noted above, mirrors article 101 TFEU, agreements, decisions and concerted practices are prohibited if they have as their object or effect the prevention, restriction or distortion of competition on the whole or a part of the Dutch market. Similar to the assessment under article 101 TFEU, the distinction between restrictions by object and restrictions by effect is important. For restrictions of competition by object, there is no need to look at any actual effects. The prohibition covers all types of behaviour, horizontal or vertical, irrespective of whether they are based on formal, oral or tacit agreements or concerted practices.

Article 6 does not provide specific examples of restrictive clauses. In practice, any agreement that fixes prices, limits output or divides markets, customers or sources of supply will almost inevitably be considered to infringe article 6. Horizontal price-fixing agreements, collective vertical price fixing, collective boycotts and horizontal agreements aimed at partitioning markets or quota schemes (including limitation of sales and prohibited tendering agreements – bid rigging) are regarded by the ACM as very serious infringements of the competition rules.

As in EU competition law, agreements restricting competition are only prohibited if they affect competition to an appreciable extent.

Article 7 provides for an exemption for restrictive agreements, including hard-core cartels, where no more than eight participants with an aggregate turnover of less than €5.5 million (for companies involved in the supply of goods) or €1.1 million (for other companies) are involved. An additional exemption is available for any restrictive agreement between (any number of) undertakings that are actual or potential competitors if their combined market share on any relevant market does not exceed 10 per cent and whose agreement does not appreciably affect interstate trade.

As noted above, article 101 TFEU also forms part of the substantive law on cartels in the jurisdiction, having direct effect in relation to agreements and concerted practices affecting competition in the Netherlands where there is also an effect on interstate trade.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no industry-specific offences under the Act. The competition rules apply across the board, including in regulated sectors such as telecommunications. The Act provides for non-application of the cartel prohibition to collective labour agreements, sector agreements on pensions between employers' organisations and employees' organisations and (under certain conditions) agreements or decisions on occupational pension schemes by an association of practitioners of a liberal profession.

At present, there are various non-industry-specific exemptions from the cartel prohibition, such as agreements benefiting from an EU exemption (falling under a block exemption), which are exempt from the cartel prohibition. However, the ACM has the express power to declare an EU block exemption non-applicable in the Netherlands.

In addition, various categories of agreement can be exempted from the cartel prohibition by general administrative order. Such national block exemptions have been issued for agreements offering temporary protection from competition to undertakings in new shopping centres and certain cooperation agreements in the retail trade.

Restrictive practices necessary for the operation of services of general economic interest may also fall outside the scope of the cartel prohibition.

Similar to the EU rules under Regulation No. 1/2003, companies must self-assess agreements in light of article 6(3) of the Act, which mirrors article 101(3) TFEU. In general, the ACM will not provide written opinions (comfort letters) as to whether an agreement fulfils the criteria of article 6(3). However, similar to the Commission, it will provide advice in 'novel' cases. More and more parties prefer an informal discussion with the ACM over informal opinions.

To assist companies in self-assessment, the ACM has issued guidelines on, inter alia, the application of article 6(3), on the cooperation between companies and on competition in the healthcare sector. The Minister has also published policy rules on competition and sustainability and a bill to facilitate sustainability initiatives is currently pending. In April 2015 the ACM published a guidance paper setting out its strategy and enforcement priorities with regard to vertical agreements. In this guidance, the ACM states that – in the absence of market power – vertical agreements are usually beneficial to consumers and that enforcement will focus on vertical agreements that negatively affect consumers. In addition, the Minister has published policy rules on consortia arrangements. The policy rules on consortia arrangements are largely based on the Commission guidelines on horizontal agreements and on the application of article 101(3) TFEU. Further guidance as to how to apply these policy rules was published in May 2015.

6 Application of the law

Does the law apply to individuals or corporations or both?

The cartel prohibition applies to undertakings and associations of undertakings. The term 'undertaking' is construed broadly and – in accordance with the case law of the Court of Justice of the European Union – is generally defined by the ACM as 'every entity engaged in economic activity, regardless of its legal status and the way in which it is financed'. Therefore, the Act may also apply to individuals running an unincorporated undertaking. Publicly owned entities may also qualify as undertakings. Intention to make profit is not required.

Agreements concluded between undertakings belonging to the same group of companies are, for the purposes of the Act, considered as agreements within one single economic entity and are in principle not subject to the cartel prohibition.

In December 2014, the ACM, for the first time in its history, imposed fines on a number of investment companies because their former portfolio company engaged in cartel conduct. The ACM seems to follow the European Commission's approach of holding private equity funds liable for cartel infringements by current or former subsidiaries. But the ACM appears to have introduced a new element by imposing individual fines on the investment companies, rather than fining them jointly with the portfolio company. In January 2017, the Rotterdam District Court upheld the ACM's fining decision. Pursuant to the Act, principals and de facto managers can be made subject to fines of up to €900,000 for involvement in a cartel. In addition, maximum fines of €900,000 can be imposed on individuals for non-cooperation with the ACM's investigations. Similarly, maximum fines of €900,000 or 1 per cent of turnover can be imposed on companies for non-cooperation. The ACM has stated that, as a matter of policy, it will investigate the possibility of imposing fines on individuals in every cartel case. In November 2010, the ACM for the first time used its power to impose personal fines on individuals for a cartel infringement. Personal fines varying between €10,000 and €250,000 were imposed on three executives of two construction companies for their involvement in a cover-pricing cartel. In March 2016, the ACM imposed a fine of €12.5 million on four companies in the cold storage industry. Five executives each received

personal fines, the highest of which was €144,000. The cold-storage companies were involved in merger talks between 2006 and 2009 and during these talks, exchanged competitively sensitive information with each other, shared customers and made price arrangements. One of the cold-storage companies admitted to having been 'too open, too soon' when holding merger talks. As a result, it implemented structural changes to its corporate culture and structure to prevent it from happening again. The ACM used a procedure similar to the European Commission's cartel settlement regime to lower the fine imposed on this cold storage company by 10 per cent in return for an acknowledgement of its involvement in and its liability for the infringement. The cold storage company's executives made use of the same procedure to have their personal fines reduced. On 12 April 2018, the District Court of Rotterdam quashed four fines imposed for other reasons than the ACM's use of the (informal) settlement procedure. According to the District Court, the ACM insufficiently substantiated why it had considered the various exchanges between the parties part of a single and continuous infringement, particularly now that these exchanges could also have been part of legitimate talks to explore the intended merger transaction.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Act applies to all conduct that affects competition on part or the whole of the Dutch market. The place of establishment of the undertakings is not relevant. With respect to restrictive practices, the decisive factor is the place where the agreement, decision or concerted practice is implemented, not where or by whom it is agreed.

In 2004 (*Shrimps*, No. 2269), the ACM decided it had jurisdiction to impose fines on Dutch, Danish and German undertakings that participated in a cartel that concerned a relevant market comprising Denmark, Germany and the Netherlands. The Danish and German undertakings did not achieve the relevant turnover in the Netherlands. The ACM held that undertakings do not need to have activities in the Netherlands for their restrictive agreements to produce effects on the Dutch market and therefore to be caught by the cartel prohibition. The ACM's decision was upheld by the District Court of Rotterdam. It follows that the ACM does not necessarily require an undertaking to have direct sales in the Netherlands for its agreements to be subject to the cartel prohibition. There have been no decisions (yet) in which the ACM based its jurisdiction on the basis of indirect sales in the sense of cartelised intermediate products that were sold outside the Netherlands and were incorporated into (final) products sold to customers in the Netherlands. In March 2016, the Trade and Industry Appeal Tribunal upheld how the ACM calculated the fines imposed on a number of companies for participating in a silver skin onion cartel. The cartel participants generated 60 per cent of their combined turnover within the European Union. For the first time, the ACM based the fines imposed on the cartel participants' EU-wide turnover instead of national turnover. The Tribunal held that the ACM was right to do so, since EU Regulation No. 1/2003 authorises the ACM to apply EU competition rules and impose fines.

The ACM also takes account of fines imposed or to be imposed by national authorities of other member states. After consulting with the French and German competition authorities, it adjusted the fine imposed on the Grain Millers group for participating in a flour cartel, as the total of fines to be imposed by the three competition authorities would lead to its bankruptcy.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no express export cartel exemption laid down in the Act. The Act only applies to conduct affecting competition in part or the whole of the Dutch market; a pure export cartel (ie, without any effects on the domestic market) is therefore unlikely to be caught under the national cartel prohibition. However, pure export cartels may prove to be rare. For instance, in the *Silver Skin Onion* cartel, although a substantial proportion of the silver skin onions was destined for export and supplied to customers outside the Netherlands, the ACM took the participants' EU-wide turnover into account when calculating the fine by arguing

that the sales to customers outside the Netherlands had a potential or actual effect on the competitive process in the Netherlands with a possible negative impact on efficiency and innovation by the participants (the ACM did exclude the turnover achieved in third countries such as Russia from its calculations). In March 2016, the Trade and Industry Appeal Tribunal upheld how the ACM calculated the fines. According to the Tribunal, the ACM was right to take account of the EU-wide turnover, since EU Regulation No. 1/2003 authorises the ACM to apply EU competition rules and impose fines.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

Akin to investigations under EU law, investigations are initiated on the basis of third-party complaints, requests for leniency by a party to an agreement or concerted practice, or ex officio on the initiative of the ACM. Investigations start with fact-finding, by making requests for information to parties possibly involved in a suspected infringement or carrying out on-the-spot inspections (either announced in advance or in the form of dawn raids).

If, on the basis of the information gathered, the ACM has a reasonable suspicion that an infringement has occurred, it will normally pursue a case. Having said this, the ACM has repeatedly emphasised its discretion to prioritise and is encouraging the use of civil law tools by third parties. In March 2016, the ACM published its prioritisation policy on how it prioritises enforcement requests. In this prioritisation policy, the ACM has set the following three criteria to determine which requests will be given priority:

- to what extent does the identified behaviour in the request harm consumer welfare;
- what is the magnitude of the public interest when the ACM takes action; and
- to what extent will the ACM be able to act effectively and efficiently?

According to the ACM, enforcement requests do not need to score high on all three criteria in order to be followed up by an enforcement investigation. In cases where more than one criterion has a high score, there is often sufficient reason to launch a full investigation.

The ACM will send a report (comparable to a statement of objections under EU competition law) to the undertakings concerned. The addressees of the report have access to the (non-confidential) documents contained in the ACM's files and may submit a written reply concerning the contents of the report to the ACM. In practice, addressees of the report are also invited to present their views in an oral hearing before the ACM. The legal department of the ACM subsequently reassesses the case and the ACM issues a decision within approximately seven to eight months of sending the report.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Broadly speaking, the powers of the ACM are the same as the powers provided to the Commission under EU Regulation No. 1/2003. The powers given to the ACM may only be used insofar as they are reasonably required.

The ACM's surveillance officials are authorised to enter all premises, with no prior judicial authorisation being required. Private homes are an exception, in that the ACM is not allowed to enter without prior authorisation by the Rotterdam District Court. In the case of a Commission inspection, prior authorisation is required from the Rotterdam District Court if a company withholds permission for an extensive inspection of business premises or if a private home or vehicle is to be inspected.

During the dawn raid, the ACM's inspectors may interview one or more employees. If there is a reasonable suspicion of a violation by the company, the inspectors must inform the company that it is not obliged to answer questions. The ACM generally accepts that all employees of the company may invoke the right not to answer questions. However, for former employees the right to remain silent is limited to cases in which they can be held personally liable for an infringement.

Surveillance officers are also authorised to request information, to examine books and other business records, and to make copies, although attorney-client privilege exists. It should be noted that – as opposed to EU case law – in the ACM's dawn raids based only on Dutch competition law, attorney-client privilege also exists in relation to in-house lawyers who are admitted to the bar. The ACM is of the view that without attorney-client privilege, an in-house lawyer would no longer qualify as a viable competitor for external lawyers, and therefore has retained attorney-client privilege for in-house lawyers. As a result, conflicting regimes remain depending on the capacity in which the ACM conducts an investigation. If the ACM officials conduct investigations on the basis of Dutch competition law, Dutch national rules apply and the correspondence with both in-house and external counsel is covered by attorney-client privilege. The same applies to investigations by the ACM at the request of the Commission or a competition authority of another member state. However, if the ACM inspectors only assist the Commission officials, EU rules apply and correspondence with in-house counsel has no legal privilege coverage.

The ACM is focusing increasingly on searches of computer records during dawn raids. The standard procedure for investigations is laid down in the '2014 ACM Procedure for the inspection of digital data' and the '2014 ACM Procedure regarding the legal professional privilege of lawyers'. This Procedure is partly the result of a ruling in interim relief proceedings, in which the District Court of The Hague ruled that the procedure of the digital logbook laid down in the previous ACM guidelines, Digital Procedure 2007, was an insufficient safeguard against fishing expeditions, since it only provided insight into which files had been opened during the investigation without specifying how long for and how thoroughly the files were examined. As a remedy, the court ordered the ACM to invite an authorised representative of the parties to be present during its investigation of the digital copies to make sure that no copied data beyond the purpose and subject matter of the investigation would be examined. The Procedure takes account of this ruling by providing the relevant company the opportunity to be present during the examination of the digital copies it claims are outside the scope of the ACM's investigation. Interesting to note is that, the Court of Appeal of The Hague ruled in April 2013 that the ACM can order a forensic IT firm to produce a list of companies active in the sector under investigation by the ACM for which the IT firm carried out competition compliance audits. According to the Court of Appeal, the ACM has a legitimate interest in obtaining this list, since the results of these audits could be used by the audited companies to destroy evidence of possible anticompetitive conduct.

In addition, the ACM has a 'sealed envelope' procedure similar to that known under EU case law to further safeguard legally privileged documents during ACM dawn raids. If a company refuses to allow the ACM officials to take a cursory look at a document because it considers it to be covered by legal privilege, the ACM inspector will place the document in a sealed envelope without having examined it and hand it to an independent ACM official: the legal professional privilege officer. The company subsequently has 10 business days to substantiate its legal privilege claim in writing to the legal professional privilege officer. This procedure – although an improvement – still remains controversial, as the legal professional privilege officer is not independent, as prescribed by the General Court in the *Akzo* case. The ACM contends that a company's employees are obliged to answer questions, although they have the right not to answer questions that could incriminate their employer. The Streamlining Act, which entered into force on 1 August 2014, clarifies that only a company and its current employees have a right to remain silent. Contrary to an earlier ruling by the Trade and Industry Appeals Tribunal, former employees cannot invoke the right to remain silent when questioned by the ACM in connection with an investigation against their former employer. In September 2010, the ACM imposed a fine of €51,000 on the Dutch National Association of General Practitioners (LHV) for breaking a seal. This fine was quashed in appeal. According to the Trade and Industry Appeals Tribunal, LHV could not be held responsible for the seal break because a security guard at LHV's shared office building broke the seal during his rounds. The guard was not directly employed by LHV and LHV had taken all the necessary steps to inform the persons who could possibly enter the room of the affixed seal. It informed the cleaning staff as well as the facilities manager of the shared office building and had affixed yellow tape across the door as an extra precaution. The Tribunal did not

consider it necessary for LHV to have instructed the security guard directly, because contact with the security staff usually ran through the facilities manager. As of 1 July 2016, a clause is included in the Establishment Act of the ACM to clarify that a company will also be sanctioned for the breakage of an affixed seal if it has not taken all the necessary precautions to prevent a seal break.

In July 2015, the Dutch Trade and Industry Appeals Tribunal clarified that the ACM can use evidence obtained through telephone taps installed by other agencies for its own competition law investigations. The ACM itself is not authorised to tap phones when investigating suspected anticompetitive practices. In November 2017, the District Court of The Hague ruled that, when carrying out a dawn raid, the ACM can copy all business-related as well as private data from company employees' mobile phones. The court found that the considerable size of the data stored on mobile phones makes it impossible for the ACM to select the relevant data at the company's premises. As a result, the ACM is allowed to copy all the mobile phones' data to select from at its offices at a later date. According to the court, the interests of an ACM investigation outweigh the right to privacy, as long as there are sufficient safeguards in place to prevent the ACM from inspecting data without being entitled to do so. According to the court, the ACM Procedure for the inspection of digital data provides for these safeguards.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The ACM is an active member of various forums for international cooperation:

- the European Competition Network (ECN) provides for formal cooperation between the Commission and EU member state competition authorities. This cooperation may intensify as a result of the Commission's draft Directive to grant greater enforcement powers to NCAs. On 30 May 2018, political agreement was reached on the Commission's proposal;
- the European Competition Authorities Association, which facilitates informal cooperation between the European Economic Area (EEA) national competition authorities, the Commission and the European Fair Trade Area Surveillance Authority; and
- the ACM is also part of the International Competition Network and is involved in competition work undertaken by the Organisation for Economic Co-operation and Development.

The ACM can supply information obtained in the course of the application of the Act to foreign competition authorities. This is an exception to the general rule that information collected about companies should remain confidential and is for internal use only for performance of the tasks entrusted to the ACM. However, such information may only be transferred by the ACM if the confidentiality of the information (where relevant) is sufficiently protected, adequate assurances are given that the information will not be used for purposes other than the enforcement of foreign competition law and the provision of such data is in the interests of the Dutch economy.

Similar provisions allow the exchange of information collected under the Act with national administrative agencies authorised to enforce competition rules under different statutes. There are cooperation protocols between the ACM and a number of other regulators, including the Dutch Inland Revenue, the Public Prosecutor and the Netherlands Authority for Financial Markets.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Aside from the allocation of cases within the ECN, international inter-agency cooperation does not formally affect the investigation, prosecution and sanctioning of cartel activity in the jurisdiction. Of note, however, is an investigation of a public bid-rigging cartel in the painting business, in which the ACM requested that the Belgian competition authority search the home of a manager who resided in Belgium.

The evidence was used by the ACM, even though the case was solely based on an infringement of Dutch competition law and not on article 101 TFEU. In addition, in late 2010 the ACM imposed fines, (largely) upheld by the Trade and Industry Appeal Tribunal in 2016, on Dutch, Belgian and German flour producers for their participation in a cartel. The ACM closely cooperated with other European competition authorities in this investigation (see question 7). In December 2017, the ACM issued a press release that its collaboration with the German Competition Authority (Bundeskartellamt) had led to settlements in the towage sector. Following a number of leniency requests, the ACM and the Bundeskartellamt both launched investigations into a possible cartel involving harbour towage service providers in the Netherlands and Germany. During the investigations, the competition authorities concluded that the Bundeskartellamt was best positioned to take action against the cartel. The Bundeskartellamt reached settlements totalling approximately €17.5 million with the harbour towage service providers involved and closed its investigations in March 2018.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The ACM both investigates and adjudicates on cartel matters in the public interest on the basis of administrative law procedures. There is, however, a separation (Chinese walls) between the ACM's staff who carry out investigations and prepare the statement of objections, and those who decide on a possible sanction. In 2011, the Trade and Industry Appeals Tribunal confirmed that high standards apply to the interdepartmental Chinese walls within the ACM. The Tribunal upheld the Rotterdam District Court's earlier ruling that the ACM legal department's meddling in the investigation of an alleged competition law infringement was contrary to the Chinese walls set up between the legal department, responsible for levying sanctions, and the competition department, responsible for conducting investigations. The ACM's statutory Chinese walls go one step further than the traditional all-in-one system according to which the European Commission and many other antitrust regulators seem to be organised. The European Court of Human Rights has confirmed that all-in-one systems of investigation and fining comply with the fundamental right to a fair trial, provided they are safeguarded by sufficiently extensive review of the sanctioning decision by an independent court.

In addition, private parties may initiate civil procedures, for example, for interim relief (under article 3:296 of the Civil Code) and damages. Actions for damages are based on article 6:162 of the Civil Code (unlawful act) or article 6:212 of the Civil Code (concerning unjust enrichment). Actions can be brought by parties to a contract seeking rescission or suspension of terms and conditions. Such civil procedures are now being used more frequently in relation to cartel cases (see question 22). Furthermore, civil procedures can be initiated with respect to breaches of article 101 TFEU.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof for showing that the cartel rules have been infringed lies with the ACM. The District Court has full jurisdiction to establish whether the ACM has proved to the requisite legal standard that an infringement has occurred, and that the infringement affected competition to an appreciable extent.

The Act includes a provision expressly stating that the company claiming the benefit of article 6(3) of the Act – which is similar to article 101(3) TFEU – shall bear the burden of proving that the conditions of that paragraph are fulfilled.

The Trade and Industry Appeal Tribunal ruled in July 2016 that the question whether certain evidence can be used to back up other evidence depends on its credibility. As a result, leniency statements do not necessarily have to be supported by evidence different to other leniency statements. In October 2009, the District Court of Rotterdam ruled that two general statements of leniency applicants, supported solely by written evidence provided by the same applicants, provided insufficient evidence of a construction company's participation in public bid rigging. The ACM had imposed a fine on the company on the

basis of two statements of leniency applicants that the company had participated in a system of public bid rigging. These statements were supported by written evidence on four projects that derived from the same leniency applicants. The evidence of three projects originated from one applicant. The court held that, in view of the company's denial of having participated in the public bid rigging, the statements constituted insufficient proof of the infringement. The ACM was consequently not authorised to impose a fine. This judgment was confirmed by the Trade and Industry Appeals Tribunal in April 2012. In May 2014, the District Court of Rotterdam overturned the fines on Pilkington and Scheuten for their participation in a double glazing cartel. The ACM had based its decision entirely on the leniency statements by rival companies AGC and Saint Gobain. According to the court, the companies' confessions were based on leading questions by the ACM, which affected their reliability. Without any further supporting evidence, the ACM had failed to prove that Pilkington and Scheuten participated in the cartel. This ruling has far-reaching consequences for how the ACM should accumulate evidence based on leniency statements. The ACM should limit itself to what leniency applicants can state by their own account. 'Refreshing' their memory by confronting them with statements of other leniency applicants will not be tolerated by the court.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes, as long as the circumstantial evidence proves to the requisite legal standard that an infringement has occurred, and that the infringement affected competition to an appreciable extent. See also question 14.

16 Appeal process

What is the appeal process?

Decisions of the ACM in cartel cases are subject to a three-stage appeal process. The first stage is carried out by the ACM, with the possibility of advice by an independent advisory committee. The second and third stages are before specialist administrative law courts.

First, an addressee of a decision (and other interested parties) can file for administrative review with the ACM. Such an appeal must be lodged within six weeks of the notification of the decision. In this first stage of the appeal process, the ACM reviews its decision on the basis of the appeal. The review is not handled by the initial case handlers. In cases where a sanction has been imposed, an advisory committee of independent experts can advise the ACM. Since 1 August 2014, it is no longer statutorily required to set up an advisory committee on administrative appeals. The administrative review decision may itself be appealed against to the Rotterdam District Court (administrative law chamber), again within six weeks of the notification of that decision. Further appeal is possible against this judgment to the Trade and Industry Appeals Tribunal. The courts have full jurisdiction to establish whether the ACM has proved to the requisite legal standard that an infringement has occurred, and that the infringement affected competition to an appreciable extent.

Since 1 September 2004, it is possible to dispense with the administrative review stage on the basis of the Direct Appeal Act 2004. When filing an administrative review application with the ACM, an applicant can request that the ACM allow a direct judicial appeal to the Rotterdam District Court. It is for the ACM to decide, depending on whether the case is suitable for direct appeal and subject to certain other rules, whether to grant the request.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions under the Act.

In criminal law cases published in June 2005, the Rotterdam District Court discussed the relationship between Dutch criminal and competition law. These cases related to criminal charges brought concerning alleged widespread fraud in the Dutch construction sector. (Reference was also made in these cases to the European Commission's 1992 *SPO* decision concerning a Dutch association of joint price-setting organisations.) However, these criminal cases are

separate from (administrative law) competition cases before the ACM. The Court held that Parliament intended sanctions under the Act to be administrative, not criminal. It held that in practice, the ACM can better deal with most infringements of the Act than the public prosecutor, as competition law is a complicated field of law and distinct from typical criminal cases. Furthermore, it noted that the involvement of just one agency removes possible double jeopardy problems. A distinction was made, however, for criminal sanctions relating to facts prior to 1998. The ACM had no power to impose fines for this period prior to the entry into force of the Act. The previous Act (the WEM) provided for criminal sanctions, including imprisonment for economic delicts, with the public prosecutor responsible for prosecution. In May 2008, the District Court of The Hague confirmed that competition law is an exclusive matter for the ACM; moreover, it noted that criminal prosecution is barred for facts that are an infringement of both criminal law and competition law, because it considers the Act a *lex specialis* of the general Criminal Law Act.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Agreements prohibited by the cartel prohibition laid down in article 6 of the Act are null and void. The consequences of this are governed by civil law. In accordance with article 3:41 of the Dutch Civil Code, an agreement can be partially null and void. The Dutch Civil Code's statutory conversion provision converts invalid clauses into valid ones that correspond as much as possible to the original clause. The Supreme Court ruled in December 2009 that the cartel prohibition's absolute nullity sanction prevents the statutory conversion provision from applying to clauses with an anticompetitive object. In a ruling of December 2013, the Supreme Court made clear that the same goes for clauses with an anticompetitive effect. As noted earlier, article 101 TFEU has a direct effect in relation to agreements and concerted practices affecting competition in the Netherlands, where there is also an effect on interstate trade.

Under its powers of enforcement under the Act and under EU Regulation No. 1/2003, the ACM can impose administrative fines for infringements of the cartel prohibition in the Act and of article 101 TFEU. Such fines are imposed on the natural or legal person to whom the infringement can be attributed. If this person can show that he or she cannot be held responsible for the infringement, no fine will be imposed. The Act enables the ACM to fine directors of legal persons personally for breach of the cartel rules (fines can also be imposed for non-cooperation with an ACM investigation). Pursuant to the Act, fines of up to €900,000 can be imposed on principals and de facto managers for breach of the cartel prohibition. In *Wegener* (September 2012), the District Court of Rotterdam held that a member of the supervisory board of an undertaking can qualify as a principal or de facto manager only in exceptional circumstances, because the powers and influence that a supervisory board member is generally able to exercise are limited to supervising the company. According to the court, a supervisory board member's role in a company must have been atypical for him or her to be held personally liable as principal or de facto manager.

In determining the fine, the ACM must take the statutory limits and the policy rule on fines into account (see question 19).

In addition to the imposition of administrative fines, the ACM can impose an order under threat of periodic penalty payments. Such an order is designed to lead to the quick termination of an infringement, and therefore serves a different purpose from a fine. Both a fine and an order under threat of periodic penalty payments can be imposed for the same offence. Furthermore, the ACM can impose a binding order to comply with the Act on the undertaking or individual acting in violation of the cartel prohibition or impose a periodic penalty payment in the form of a structural measure (similar to article 7 of EU Regulation No. 1/2003). The ACM can also issue binding instructions on an undertaking to behave in a particular way to comply with the cartel prohibition, without the ACM having to establish that the undertaking has committed an infringement. The ACM can impose fines of up to €900,000 or 1 per cent of turnover for non-compliance with the binding instructions it has issued.

Alongside fines or penalties, or both, for infringement of the cartel prohibition in the Act, significant administrative fines can also be

imposed for certain other forms of conduct (referred to as non-cooperation). The ACM can impose fines of up to €900,000 or 1 per cent of turnover (in line with EU No. Regulation 1/2003) for non-compliance with the duty on undertakings to cooperate with an investigation, and a maximum of €900,000 on individuals. The Act also enables the ACM to impose fines for breach of the duty to cooperate if companies do not make their accounts available to the ACM when it is setting fines.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

In July 2014, the Minister for Economic Affairs published a new policy rule on fines to be applied by the ACM. This policy rule is binding on the ACM in determining the fine to be imposed. According to the policy rule the basic fine is calculated as a percentage (0–50 per cent) of a company's sales of products or services covered by the infringement during the last full year of the infringement multiplied by the number of years and months the infringement lasted. In setting the fine, the ACM will take account of aggravating or mitigating circumstances. As stated in question 3, the maximum fine levels that can be imposed by the ACM for cartel infringements were increased in July 2016. As a result, the maximum fine that can be imposed for a cartel infringement is 10 per cent of a company's turnover multiplied by the number of years the cartel infringement lasted, subject to a maximum duration of four years.

The policy rule on fines states that aggravating circumstances are, in any event:

- the circumstance that the ACM or another competent authority, including the European Commission or a judicial body, has previously established irrevocably that the offender committed the same or a similar violation;
- the circumstance that the offender hindered the ACM's investigation;
- the circumstance that the offender instigated or played a leading role in committing the violation; and
- the circumstance that the offender used or made provision for control methods or coercive methods for the continuation of the practice to be sanctioned.

The policy rule on fines finds that the following are in any event mitigating circumstances:

- the circumstance that the offender, other than under the Leniency Policy Rule, provided the ACM with a degree of cooperation that went beyond the offender's statutory obligation; and
- the circumstance that the offender, of its own accord, provided full compensation to the parties injured by the violation.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

No; debarment from government procurement procedures is not included as a sanction for cartel infringements in the fining guidelines or in the Competition Act.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Cartel activity cannot lead to both criminal and civil or administrative sanctions. The Act does not provide for criminal sanctions. Behaviour that could lead to criminal sanctions based on the Criminal Law Act is barred from prosecution by the Public Prosecutor if that behaviour also infringes competition law (District Court of The Hague, as noted in question 17).

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

The cartel prohibition has a direct effect in the sense that private parties can commence legal proceedings to obtain injunctive relief or to recover actual (but not punitive) damages (see question 13). The same applies in respect of article 101 TFEU.

The use of civil proceedings is encouraged by the Minister and the ACM, in line with similar promotion of the use of civil procedures at EU level.

The rules of the Civil Procedure Code apply, as does the Act implementing the Damages Directive (2014/104/EU), which entered into force in February 2017.

The burden of proof rests with the claimant unless any special rule or the requirement for reasonableness and fairness prescribes otherwise. (The chair of the ACM board has advocated ACM decisions being made binding on Dutch courts as evidence of a competition law infringement in civil proceedings. This would ease the burden of proof on claimants.)

In July 2016, the Dutch Supreme Court ruled in *TenneT/ABB* on the question whether the passing-on defence is a defence that disputes the amount of the damage or whether it must be characterised as a deduction of collateral benefits from the amount of the damage. In the latter case, it must be established that there is a causal link between the harmful event and the benefits and that deduction of the benefits is reasonable. The Supreme Court held that a court may choose between these approaches. According to the Supreme Court, the requirements are on balance the same in both approaches, especially that in both approaches the deduction must be reasonable. Also, the Supreme Court held that the burden of proof that part or all of the price overcharge has been passed on is with the liable party. In March 2017, the District Court of Gelderland ruled that ABB should pay TenneT, the Dutch electricity grid operator, approximately €68 million in damages for the losses it suffered as a result of ABB's participation in the *Gas Insulated Switchgear* cartel. The district court dismissed ABB's passing-on defence for three reasons:

- TenneT would have passed the overcharge on to its customers lower down the supply chain (ie, the distribution system operators), which in turn would have passed it on to the end consumer (ie, the electricity users). The chance of end consumers bringing their own damages actions is near to negligible;
- TenneT is a wholly state-owned company. Therefore, the damages paid to TenneT will ultimately benefit all Dutch citizens (eg, by reduced transport and electricity tariffs or profit distribution); and
- it could not be ignored that ABB participated in a cartel but obtained immunity from fines under the European Commission's leniency programme, thereby 'escaping' a fine that would have been tenfold the amount that ABB will now need to pay in damages.

In July 2018, the Court of Appeal of Arnhem-Leeuwarden published an interim judgment in the *TenneT/ABB* proceeding appointing independent economic experts to learn more about how to establish the possible overcharge and how to determine whether the overcharge was passed on or not.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Article 3:305a of the Civil Code allows class actions. However, the practical relevance of this provision in the context of claims based on infringements of the Act is fairly limited, as it is not possible to institute a class lawsuit to obtain damages. In November 2016, a bill on a Collective Damages Action was submitted to the lower house of the Dutch parliament. Current Dutch law does not provide for a collective damages action.

Special claim vehicles are often used in civil cartel damages litigation in the Netherlands. These litigation vehicles claiming damages on behalf of cartel victims can either do so on the basis of an

assignment-based model or by way of a collective action requesting a declaratory ruling establishing the cartel participants' liability. At the moment, for cartel cases with mass exposure the possibility of declaring a settlement binding on all injured parties may be best suited. According to article 7:907 of the Civil Code, a settlement reached by the defendant and a foundation or association with a statutory goal to represent the injured parties can be declared binding on all injured parties by the Amsterdam Court of Appeal. Pursuant to the Dutch Act on the Collective Settlement of Mass Claims, the parties to a settlement agreement may request the court to declare the settlement agreement binding on all persons to which it applies according to its terms (the interested persons). The settlement agreement must have been entered into between one or more potentially liable persons and one or more foundations or associations that, pursuant to their articles of association, promote the interests of the interested persons. If the court declares the settlement agreement binding, all interested persons are bound by its terms. There is an exception for interested persons that timely submit an opt-out notice, which can only be submitted after the binding declaration has been issued. Being bound by the terms of the settlement agreement basically means that interested persons who do not opt out have a claim for settlement relief and are bound by the release in the settlement agreement. On 12 November 2010 and 17 January 2012, the Amsterdam Court of Appeal delivered important decisions regarding an international collective settlement of mass claims. The Court assumed jurisdiction and declared an international collective settlement binding in a case where none of the potentially liable parties and only a limited number of the potential claimants were domiciled in the Netherlands. The decision will have to be recognised in all European member states, Switzerland, Iceland and Norway under the Brussels I Regulation and the Lugano Convention. The Netherlands is the only European country where a collective settlement of mass claims can be declared binding on an entire class on an opt-out basis. This makes the Netherlands an attractive venue for settling international mass claims, irrespective of whether any (class action) litigation has taken place in the Netherlands. In addition, Dutch courts seem to seize jurisdiction quite easily and legal costs are capped, making it a popular country for assigned claims. The upcoming launch of the Netherlands Commercial Court (NCC) will also add to the Netherlands remaining an attractive jurisdiction for cartel damages actions. The NCC will enable parties to have their proceedings relating to international trade disputes conducted in English within short time frames by a team of specialist judges.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

A leniency programme has been in place since 2002. A new policy rule on leniency applicable to companies as well as individuals wishing to confess to involvement in a cartel was published in July 2014. The policy rule provides that immunity from fines is available for the first party to present information to the ACM about a cartel prior to the start of an investigation which enables the ACM to carry out a targeted inspection or, in the event the ACM has already initiated an investigation, the first to provide information that was not yet in the ACM's possession enabling the ACM to prove the cartel infringement. In addition, the party should not have compelled other companies to take part in the cartel agreement and should continue to comply with its duty to cooperate. Not only companies, but also individuals, can apply for leniency. An individual can apply for leniency independently or jointly with other individuals, on the condition that these individuals at the time of the leniency application are all employees of the same company involved in the cartel. Individuals may also be granted leniency if a company applies for leniency. If a company does so, current employees can benefit from the same leniency if they declare to the ACM that they want to be considered as leniency co-applicants of the company and they individually comply with the leniency requirements. Former employees can benefit from a company's leniency application in the same manner, but only if the ACM determines that there is no conflict with the interest of the investigation.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

If immunity from fines is no longer available, parties can still apply for leniency by way of fine reduction if they supply information to the ACM that has significant added value to the investigation and provided they cooperate fully with the ACM's investigation. The duty to cooperate includes the obligation to:

- refrain from any practice that may obstruct the ACM's investigation;
- provide the ACM with all documents in its possession as soon as it obtains those documents or can obtain them;
- immediately terminate its involvement in the cartel, unless otherwise agreed with the ACM; and
- keep its employees and – insofar as is possible – former employees available for statements.

Parties that have not applied for leniency but cooperate with the investigation beyond the legal requirements may also obtain a fine reduction. The policy rule on fines provides that such cooperation qualifies as a mitigating factor when setting the fine.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The second cooperating party can obtain a fine reduction between 30 and 50 per cent for providing the ACM with information that has significant added value. A fine reduction between 20 and 30 per cent is available to the third party submitting information of significant added value. Subsequent parties can obtain fine reductions up to 20 per cent. All leniency applicants will have to continue to comply with their duty to cooperate in order to qualify for leniency. The Dutch rules do not provide for 'amnesty plus'.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Whether it is advisable for a company to apply for leniency depends on the specific circumstances of the situation, but although there are no deadlines for applying for leniency, once the decision to apply for leniency has been taken, it is advisable to present the information as soon as possible.

It is also possible to obtain a marker for an incomplete leniency application, if the information provided by the leniency application offers a concrete basis for a reasonable suspicion of the applicant's involvement in a cartel. In most cases, it may prove time-consuming and burdensome to gather all the evidence on the cartel agreement. The marker secures the leniency applicant's position in relation to other possible applicants during a time period that is determined by the ACM's Leniency Office on a case-by-case basis.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The same level of cooperation applies to all leniency applicants, in that from the moment a company submits its leniency application, it should:

- refrain from any practice that may obstruct the ACM's investigation (such as destroying evidence, or any action that would result in the (future) leniency application becoming public knowledge);
- provide the ACM with all documents in its possession as soon as it obtains those documents or can obtain them;
- immediately terminate its involvement in the cartel, unless otherwise agreed with the Leniency Office; and

- keep its employees and – insofar as is possible – former employees available for statements.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The candidate leniency applicant can contact the ACM's Leniency Office anonymously or through an authorised representative to discuss the applicability of the policy rule to a 'hypothetical' case. Prior to applying for leniency, the candidate applicant can also – through an attorney – (anonymously) contact the Leniency Office by telephone to determine whether it can still qualify for full immunity. If the Leniency Office confirms the availability of full immunity, the candidate applicant is obliged to immediately apply for leniency.

Corporate statements containing incriminating information do not have to be provided in writing but can be provided orally. Further, any information presented to the ACM by a company in the context of an application for leniency should not be made public to the extent that the information qualifies as confidential information (eg, business secrets) within the meaning of the relevant article of the Dutch Act on transparency in public administration. The identity of the applicant for leniency is not made public before the ACM has issued its report (comparable to the Commission's statement of objections).

However, confidentiality of information contained in leniency applications in respect of exchange of information between agencies remains a controversial issue (see question 12).

Moreover, the policy rule on leniency also covers breaches of article 101 TFEU with effect in the Netherlands. Rules for exchange of leniency application information and cooperation with the Commission and other EU member state competition authorities are included. The policy rule refers to the Commission's Notice on cooperation within the ECN and states that the ACM will follow the Notice with regard to the position of applicants claiming the benefit of a leniency programme and exchange of information (in relation to article 101 TFEU).

The policy rule on leniency states that the identity of the leniency applicant will remain confidential until the ACM has issued a report, unless there is a legal obligation to do so earlier or the leniency applicant agrees to earlier disclosure of its identity. Addressees of the report will be allowed to inspect the leniency statements (without being able to photocopy or photograph it) but can only use it within the context of the administrative procedure relating to the cartel at hand.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

There are no publicly available guidelines on how the ACM handles settlement. However, the ACM is willing to consider settlement of competition infringements by alternative means (to refrain from imposing substantial fines to competition law infringements). In August 2015, the ACM for the first time applied a procedure similar to the European Commission's cartel settlement regime and lowered by 10 per cent cartel fines imposed on two natural vinegar producers in return for an acknowledgement of their involvement in and their liability for the cartel. The vinegar producers' employees made use of the same procedure to have their personal fines reduced. In the cold storage cases (see question 6), the ACM used a procedure similar to the European Commission's cartel settlement regime to lower the fine imposed on a cold storage company by 10 per cent in return for an acknowledgement of its involvement in and its liability for the infringement.

The ACM may further decide to refrain from sanctions if companies pledge in writing to refrain from certain behaviour, which enables the ACM to adopt a commitments decision (comparable to a commitments decision under article 9 of Regulation No. 1/2003). If the commitments are broken, the ACM can – without further investigation – impose a fine amounting to the higher of 10 per cent of turnover or

Update and trends

As of 1 September 2018, Martijn Snoep – former partner at law firm De Brauw Blackstone Westbroek – is the new chairman of the ACM. He succeeds Chris Fonteijn, who left office on 1 May 2018.

The ACM is currently conducting a study into the technologies used in the design of algorithms and their theoretical effects on competition, to assess the risks involved. Apart from extending its toolkit and amending statutory rules, the ACM suggests more structural solutions such as a code of conduct, transparency, and arrangements on who is responsible for the algorithm.

In its annual publication *InSight*, the ACM also calls upon lawmakers to help it cope with the rapid digitalisation of markets. According to the ACM, the speed of the digital economy requires swifter regulatory intervention than is currently available. It therefore suggests looking into the possibilities, at the EU level, of ex ante, ex post, and self-regulation to keep powerful market participants in check.

€450,000. The ACM cannot accept a pledge if it intends to impose a fine, which will be the case with hard-core cartels. In February 2018, the ACM approved commitments offered by KLM Royal Dutch Airlines and Amsterdam Airport Schiphol not to have any contact about the restriction of growth opportunities of other airlines relative to KLM and other members of the Sky Team airline alliance. The ACM wanted to avoid KLM receiving improper preferential treatment.

According to the ACM, compliance programmes are particularly relevant to sectors in which the ACM's enforcement policy has been successful (eg, the construction industry and insurance sector).

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

If a company applies for leniency, individuals can benefit from the same leniency if they declare to the ACM that they want to be considered as a leniency co-applicant of the company and they individually comply with the leniency requirements. Individuals can also apply for leniency by themselves, expressly stating that they do not act on behalf of the company of which they are (former) employees. Individuals can also apply for leniency jointly on the condition that at the time the leniency application is made they are all employees of the same company involved in the cartel.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Applications for leniency must be lodged with the ACM's Leniency Office. Leniency officers are officials of the ACM who are not entrusted with surveillance or investigative duties. The Leniency Office has its own telephone and fax numbers and email address. It will notify a company of the date and time that its application for leniency has been received by the Leniency Office.

The order of applications is determined by the date and time of the initial telephone call or other oral or written contact between the undertaking and the Leniency Office when a company has unequivocally requested leniency on the basis of the policy rule.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

Since 1 August 2014 the current policy rule with regard to leniency has been in force. There are no further changes or amendments foreseen to these guidelines at this time.

Defending a case**34 Disclosure****What information or evidence is disclosed to a defendant by the enforcement authorities?**

A defendant has a right to access to its file. As a result, the ACM will need to provide it with access to all documents in its case file on which the ACM's decision to impose a fine are based, but also all information that could be to the benefit of the defendant's defence that are in the ACM's case file. In December 2015, the Trade and Industry Appeals Tribunal ruled that transcripts of oral leniency statements should be disclosed. In appeal proceedings against a cartel decision, the ACM had requested that copies of the transcripts of the oral leniency statements be disclosed only to the Trade and Industry Appeals Tribunal, not to the cartel participants appealing the ACM's decision. Counsel for these cartel participants had earlier obtained access to the transcripts at the ACM offices (without being allowed to make copies). The Trade and Industry Appeals Tribunal rejected the ACM's request for restricted disclosure. According to the Tribunal – that appeared to act on its own initiative without any defendant having protested against non-disclosure – a balance should be struck between the interests of the cartel participants in having access to all relevant evidence for a proper defence against their cartel fine and, on the other hand, the interest of the leniency applicants not to be disproportionately harmed by disclosure and the importance of effective ACM enforcement. In this particular case, the interests of a proper defence outweighed the success rate of the ACM's leniency programme. The content of the leniency statements was known to the other cartel participants and the involvement of the leniency applicants in the cartel could also be derived from other, non-confidential documents. The Tribunal therefore ruled that the ACM should submit copies of the transcripts.

35 Representing employees**May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?**

According to the Rules of Conduct of Members of the Bar, members may not represent the interests of two or more parties if the interests of those parties conflict or if subsequent developments are likely to bring them into conflict. If counsel represents employees as well as the corporation, and a conflict of interests arises, it should withdraw as counsel for one of

the parties. It is subsequently barred from acting in that case against the party it no longer represents. Subject to these Rules of Conduct, counsel may represent both a corporation and its (former) employees.

36 Multiple corporate defendants**May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?**

See question 35. There is no absolute prohibition on defending multiple corporate defendants. However, since a company's leniency application covers its employees but hurts its competitors, conflicts of interest are more likely to arise when defending multiple corporate defendants.

37 Payment of penalties and legal costs**May a corporation pay the legal penalties imposed on its employees and their legal costs?**

Yes, although the ACM has stated that account must be taken of the corporation's payment of the employees' fine when calculating the fine to be imposed on the corporation.

38 Taxes**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

In January 2011, the Dutch Supreme Court ruled that cartel fines imposed by the ACM are not deductible for corporate tax purposes. The Supreme Court's ruling confirmed the earlier rulings by the District Courts of Haarlem and Breda on the non-deductibility of fines imposed by the ACM. Both courts had concluded that Dutch corporate income tax legislation explicitly excludes the possibility to deduct fines imposed by the ACM as a result of competition law infringements. There is no case law as of yet on the tax deductibility of private damages.

39 International double jeopardy**Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

The ACM does take into account fines imposed by other national authorities. It, for instance, adjusted the fine imposed on the Grain Millers group for participating in a flour cartel owing to its imminent

BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY
URÍA MENÉNDEZ

Jolling de Pree
Bart de Rijke

jolling.depree@debrauw.com
bart.derijke@debrauw.com

Square de Meeûs 40
1000 Brussels
Belgium

www.belex.com
www.bredinprat.fr
www.debrauw.com
www.hengeler.com
www.slaughterandmay.com
www.uria.com

bankruptcy if it were to pay the fines imposed by the ACM and the French and German competition authorities.

There is no case law as of yet on whether overlapping liability for damages in other jurisdictions is taken into account in private damage claims, although the District Court of The Hague recently clarified that a claimant in a cartel damages action does not have to disclose a settlement agreement with a defendant to the co-defendants. But given that all cartel members are jointly and severally liable for the harm caused by the cartel, the claimant should reduce its damages claim by the settling defendant's internal contribution share in the overall damage. If the settlement amount significantly exceeds that share, the claim will need to be reduced by the actual settlement amount to avoid overcompensation.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

In the policy rule on fines, the ACM notes that a mitigating factor includes the fact that the company identified the infringement itself, terminated the infringement of its own accord and notified the ACM before the ACM initiated an investigation.

Note also the importance of turnover calculations for forming the basis of the fine calculation. This has been shown in the ACM's administrative review decision concerning mobile telephone network operators and dealer bonuses, where reductions in fines of more than 50 per cent were accorded by the ACM on review.

Aside from the leniency programme, there is no standard separate procedure for reducing the amount of a fine prior to its imposition in a decision.

Portugal

Mário Marques Mendes and Alexandra Dias Henriques

Gómez-Acebo & Pombo

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Portuguese Constitution lists the following among the general principles of economic organisation and as primary duties of the state:

- ensuring the efficient functioning of the market to guarantee balanced competition between undertakings;
- opposing monopolistic forms of organisation;
- pursuing abuses of dominant position and other practices that may harm the general interest; and
- guaranteeing the protection of the interests and rights of the consumer.

The Constitution has evolved from the original 1976 version to reflect the various (if not somewhat conflicting) political, social and economic concerns of the legislature. That said, the principles referred to above, along with the recognition of private property, private enterprise and consumer protection, show that competition is seen as an essential element of the Portuguese economic system.

The Portuguese competition regime underwent significant reform in 2012 with the adoption of a new Competition Act, Law No. 19/2012 of 8 May (the Act), which superseded the previous regime put in place by Law No. 18/2003 of 11 June (the former Competition Act).

The Act largely follows the rules established at EU level, and addresses agreements between undertakings, decisions of associations of undertakings and undertakings' concerted practices (as well as the abuse of a dominant position, the abuse of economic dependence, concentrations and state aid). The Act also includes the leniency regime for immunity or reduction of fines imposed for breach of competition rules, which was formerly set forth in a separate statute (Law No. 39/2006 of 25 August).

Decree-Law No. 125/2014 of 18 August adopted and approved the new statutes of the Competition Authority (Autoridade da Concorrência – the AdC), superseding Decree-Law No. 10/2003 of 18 January, which created the AdC and approved its former statutes.

As regards appeals, Law No. 46/2011 of 24 June 2011 determined the creation of a specialised court to handle competition, regulation and supervision matters (the Specialised Court), which was established in the town of Santarém as of 30 March 2012. The new Specialised Court is now the exclusive first instance for review of all the decisions adopted by the AdC.

Also relevant are:

- Regulation No. 1/2013 of 3 January 2013, which sets out the leniency administrative procedure;
- the general regime on quasi-criminal minor offences (enacted by Decree Law No. 433/82 of 27 October 1982), which applies, on a subsidiary basis, to the administrative procedure on anticompetitive agreements, decisions and practices, and to the judicial review of sanctioning decisions;
- the Penal Code and the Criminal Procedure Code, both of which apply on a subsidiary basis to quasi-criminal minor offences by virtue of the general regime on quasi-criminal minor offences;
- the Civil Code and the Civil Procedure Code regarding civil liability for anticompetitive infringements; and

- Law 23/2018 of 5 June, which implemented in Portugal the EU Private Enforcement Directive (the Private Damages Act), which entered into force on 4 August 2018.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Cartel matters are investigated and decided by the AdC. There is no separate prosecution authority.

According to its statutes the AdC is an independent administrative entity endowed with administrative and financial autonomy, management autonomy and organic functional and technical independence and with own assets. As per the statutes, the AdC's mission is the promotion and defence of competition in the public, private, cooperative and social sectors, in compliance with the principle of market economy and freedom of competition having in view the efficient functioning of the markets, the optimal allocation of resources and the interests of consumers.

The responsibilities of the AdC include:

- ensuring compliance with national and EU competition laws, regulations and decisions;
- implementing practices that may promote competition and develop a competition culture among economic operators and the public in general;
- establishing priority levels as regards matters which the AdC is called to assess, under the competition legal regime;
- releasing, notably among the economic operators, guidelines deemed relevant for the competition policy;
- following the activity of, and establishing cooperation links with, the EU institutions, national, foreign and international entities with responsibilities in the area of competition;
- promoting research in the area of competition law;
- contributing to the improvement of Portuguese legal regimes in all areas relevant to competition;
- carrying out the tasks conferred upon member states' administrative authorities by EU law in the field of competition; and
- ensuring the technical representation of the Portuguese state in EU or international institutions in competition policy matters, without prejudice to the powers of the Foreign Affairs Ministry.

The AdC is composed of two bodies: the Board of Directors and the Sole Supervisor, supported by the organisation required for the performance of the AdC's responsibilities, established in an internal regulation.

The Board of Directors is the highest body of the AdC and is responsible for the definition of the AdC's action and by the management of the AdC's services. The Board of Directors consists of a chair and up to three other members. A vice president may also be appointed as long as in total an odd number of members is maintained. The members are appointed by the Council of Ministers upon the proposal of the minister for economic affairs and pursuant to the hearing of the competent Parliament commission.

The Sole Supervisor is responsible for the control of the legal, regular and sound management of the AdC's assets and financial management, and also carries out an advisory role to the Board of Directors. The Sole Supervisor is a chartered accountant or a chartered accountancy firm appointed by joint decision of the ministers responsible for financial and economic affairs. The Sole Supervisor must be an auditor registered with the Securities Market Commission or, if this is not adequate, a chartered accountant or a chartered accountancy firm member of the Chartered Accountants Chamber.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

Law No. 19/2012 of 8 May superseded the previous regime put in place by Law No. 18/2003 of 11 June (see question 1). Pursuant to the Act, the current regime should be reviewed in accordance with the evolution of the EU competition regime. Meanwhile, Decree-Law No. 125/2014 of 18 August has enacted the AdC's statutes, superseding Decree-Law No. 10/2003 of 18 January.

It is also worth underlining the long-awaited implementation of the EU Private Enforcement Directive through the Private Damages Act, which introduced changes to a number of articles of the Act, notably regarding confidentiality and access to documents.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 9 of the Act, in line with article 101(1) of the Treaty on the Functioning of the European Union (TFEU), prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, in whatever form, having as their object or effect to prevent, distort or restrict competition in the whole or part of the national market to a considerable extent. It then lists some of the behaviour that may be prohibited, including:

- directly or indirectly fixing purchase or sale prices or any other transaction conditions;
- limiting or controlling production, distribution, technical development or investments;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making a condition of the signing of contracts the acceptance, by the other parties, of additional obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Cartels are likely to correspond to one or more of these situations. Furthermore, acts not listed under article 9 may naturally fall within its scope, provided that the conditions for its application are fulfilled.

Only significant restrictions of competition are relevant, excluding de minimis infringements.

The AdC has already interpreted article 9 of the Act in the sense that infringements the object of which is to prevent, distort or restrict competition (as opposed to infringements the effects of which are to prevent, distort or restrict competition) are infringements per se, insofar as they are prohibited because they represent a danger to competition whether or not they produce the effects that they potentiate (see, for instance, the AdC's decision in case 1/2011 regarding competitive restrictive practices in the production, processing and marketing of flexible polyurethane foam).

Infringements to article 9 of the Act constitute quasi-criminal minor offences and are punished as either intentional (cases where undertakings act intentionally and aware of the unlawfulness of their conduct) or negligent (violation of duties of care) behaviours (see articles 67 and 68 of the Act).

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

Under the Act, undertakings legally charged with the management of services of general economic interest or that benefit from legal monopolies are subject to competition provisions, as long as the application of these rules does not impede, in law or in fact, the fulfilment of their mission.

According to article 10(1) of the Act, agreements, decisions and practices prohibited under article 9 may be considered justified, provided that they contribute to improving the production or distribution of goods and services or to promoting technical or economic development. Similarly, to the provisions of article 101(3) TFEU, this exemption will only apply when, cumulatively, they:

- allow the consumers of those goods and services a fair share of the resulting benefit;
- do not impose on the undertakings concerned any restrictions that are not indispensable for attaining these objectives; and
- do not afford such undertakings the possibility of eliminating competition in a substantial part of the product or service market in question.

Undertakings that invoke the above justification bear the burden of proof of the aforesaid conditions.

Agreements, decisions or practices are also deemed justified when, though not affecting trade between member states, they satisfy the remaining application requirements of a block exemption regulation adopted under article 101(3) TFEU. This benefit may be withdrawn by the AdC if the behaviour covered leads to effects incompatible with the provisions of article 10(1) of the Act.

As far as regulated sectors are concerned, the AdC's responsibilities are to be carried out in cooperation with the corresponding regulatory authorities. The Act establishes a mutual information obligation regarding possible anticompetitive behaviour in those sectors (see question 9) establishing the terms of their reciprocal cooperation.

6 Application of the law

Does the law apply to individuals or corporations or both?

The notion of 'undertaking' adopted in the Act is very broad and in line with EU case law. It covers any entity exercising an economic activity that involves the supply of goods and services in a particular market, irrespective of its legal status or the way it is financed. Groups of undertakings are treated as a single undertaking where they make up an economic unit or maintain ties of interdependence or subordination among themselves. See question 18 regarding the liability of individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Act applies to restrictive practices occurring in Portugal or that may have an effect within it.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

No.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

Proceedings regarding infringements of article 9 of the Act, as well as infringements of article 101 TFEU that the AdC initiates or in which it is called to intervene, are governed by the Act and, on a subsidiary basis,

by the quasi-criminal minor offences regime (see question 1). The most relevant steps are as follows.

Inquiry

Initiating an inquiry: principle of opportunity

Under the Act, the AdC may initiate an inquiry ex officio or upon a complaint. In this respect, it should be noted that the Act has adopted the principle of opportunity, pursuant to which, in exercising its powers, the AdC shall be subject to the criteria of public interest in the promotion and defence of competition, and on the basis of such criteria it may grant different degrees of priority in handling the matters it is called to assess. In deciding whether proceedings for infringement of competition rules shall be initiated, the AdC shall take into account:

- the competition policy priorities;
- the elements of fact and of law that are submitted to the AdC;
- the seriousness of the possible infringement;
- the likelihood of proving the existence of the infringement; and
- the scope of the investigation activity required to perform the mission of ensuring compliance with national and EU competition rules.

The AdC has meanwhile adopted the guidelines on the priorities in exercising sanctioning powers and on the investigation in proceedings regarding competition restrictive practices.

As regards processing of complaints, the AdC shall register all complaints received and initiate the corresponding proceedings. However, if on the basis of the information available the AdC considers that there are no sufficient grounds for acting, it shall inform the complainant granting a delay of no fewer than 10 working days to submit observations. If such observations are submitted by the complainant within the prescribed deadline but the AdC does not change its position, declaring that the complaint has no grounds or should not be granted priority, such decision may be appealed to the Specialised Court (see question 16). Conversely, in the absence of the timely submission of the observations, the case is closed.

Scope

Within the framework of the inquiry, the AdC shall carry out all the investigation actions required to establish the existence of an infringement and of the corresponding infringers, and to collect evidence.

Settlement proceedings

During the inquiry phase, the AdC may fix a deadline to the concerned undertaking of no less than 10 working days to express in writing its intention of participating in discussions with the AdC aiming at a possible submission of a settlement proposal. During the inquiry phase, the concerned undertaking may also submit in writing to the AdC its intention of initiating the said discussions.

A concerned undertaking participating in settlement discussions shall be informed, 10 working days before the start of such discussions, of the facts that are attributed to it, of the evidence supporting the application of a sanction and of the limits of the fine.

At the end of the discussions, the AdC notifies the concerned undertaking to submit a settlement proposal within a deadline of no fewer than 10 working days. The AdC may either reject the proposal (a decision that cannot be appealed) or accept it. In this latter case, the AdC shall prepare the draft settlement document, which it notifies to the concerned undertaking. The concerned undertaking shall, within a deadline of no fewer than 10 working days prescribed by the AdC, confirm that the draft settlement document reflects the settlement proposal. In the absence of such confirmation:

- the draft settlement document becomes ineffective;
- the infringement proceedings shall continue; and
- the settlement proposal is deemed ineffective and cannot be used as evidence against any undertaking involved in the settlement proceedings.

The draft settlement document is converted into a definitive sanctioning decision upon the above confirmation by the concerned undertaking and upon payment of the applied fine. Facts included in the decision can no longer be used in other infringement proceedings and the facts confessed by the concerned undertaking cannot be rebutted in an appeal. Furthermore, a reduction of fine granted in

leniency proceedings is added to the reduction granted in the settlement proceedings.

Closure with conditions

The AdC may also accept commitments offered by a concerned undertaking that are likely to eliminate the effects on competition of the practices under scrutiny, closing the case with conditions attached aimed at guaranteeing compliance with the commitments offered. Before approving a decision to close the case with conditions attached, the AdC shall publish on its website and in two major national newspapers, at the expense of the concerned undertaking, a summary of the case, fixing a deadline of no fewer than 20 working days for submission of observations by interested third parties. The AdC may, within two years, reopen the case closed with conditions attached if:

- a substantial change in the facts on which the decision was grounded has occurred;
- the conditions attached to the decision are not complied with; or
- the closure decision was grounded on false, inaccurate or incomplete information.

Decision

The inquiry must be concluded within a maximum deadline of 18 months. However, if such deadline cannot be met, the Council of the AdC (the AdC's decision-making body) shall inform the concerned undertaking of that fact, indicating the period required for the completion of the inquiry. Upon completion of the inquiry, the AdC may:

- start the investigation phase notifying the concerned undertaking of the statement of objections, when the AdC concludes that, on the basis of the findings, there is a reasonable possibility of adoption of a sanctioning decision;
- close the case when the findings do not allow for the conclusion that there is a reasonable possibility of adoption of a sanctioning decision;
- put an end to the proceedings adopting a sanctioning decision within settlement proceedings; or
- close the file with conditions attached, under the terms referred to above.

If the inquiry has been initiated following a complaint and the AdC considers, on the basis of the findings, that there is no reasonable possibility of adoption of a sanctioning decision, the AdC informs the complainant thereof, fixing a deadline of no fewer than 10 working days for the submission of observations. If such observations are submitted and the AdC's position remains unchanged, the latter shall adopt an express closure decision, which may be appealed to the Specialised Court (see question 16).

Investigation

Scope

In the statement of objections, the AdC shall fix to the concerned undertaking a deadline of no fewer than 20 working days to submit written observations on the matters that may be relevant to the decision and on the evidence gathered, and to request complementary evidence it may deem convenient. In the observations submitted, the concerned undertaking may request an oral hearing. Upon reasoned decision, the AdC may refuse to undertake additional action with regard to complementary evidence if it considers that the request has mere delaying purposes. The AdC may also carry out additional collection of evidence, even after the submission of the written observations by the concerned undertaking and its oral hearing. In this latter case, the AdC shall notify the concerned undertaking of the evidence gathered, fixing a deadline of no fewer than 10 working days for submission of observations. Furthermore, whenever the new evidence substantially changes the facts initially attributed to the concerned undertaking, the AdC shall issue a new statement of objections, the above applying *mutatis mutandis*. Pursuant to the Act, the AdC has adopted guidelines on the investigations and procedural steps.

Settlement proceedings

In its observations regarding the statement of objections, the concerned undertaking may also submit a settlement proposal, in which case the proceedings shall be suspended for a period established by the AdC that cannot exceed 30 working days. The remaining steps of the settlement

proceedings are largely similar to those indicated above in respect of the submission of a settlement proposal during the inquiry phase.

Closure with conditions

During the investigation phase, the AdC may also close the case with conditions attached, under the same terms as those referred to above.

Decision

The investigation must be concluded within a maximum deadline of 12 months from the notification of the statement of objections. However, if such deadline cannot be met, the Council of the AdC shall inform the concerned undertaking thereof, indicating the period required for the completion of the investigation. Upon completion of the investigation, the AdC may:

- declare the existence of a restrictive practice and, if applicable, consider such practice justified under article 10 of the Act;
- adopt a sanctioning decision within settlement proceedings;
- close the case with conditions attached, under the terms referred to above; or
- close the case without conditions.

Decisions declaring the existence of a restrictive practice may include the admonition or the application of fines and other sanctions set in the Act and, if required, the imposition of behavioural or structural remedies indispensable to put an end to the restrictive practice or to the effects thereof. Structural remedies may only be imposed in the absence of a behavioural remedy equally effective, or, if such remedy exists, it is more costly to the concerned undertaking than the structural remedy.

Interim measures

The AdC may, at any time during the proceedings, order the suspension of a restrictive practice or impose other interim measures required to restore competition, or indispensable to the effectiveness of the final decision to be adopted, if the findings indicate that the practice in question is about to cause a serious damage that is irreparable or difficult to repair. The interim measures may be adopted by the AdC *ex officio* or upon request by any interested party, and shall be effective until they are revoked and for a period of up to 90 days, extendable for equal periods within the time limits of the proceedings. Imposition of interim measures is subject to a prior hearing of the concerned undertaking, except if such hearing puts at risk the effectiveness of the measures, in which case the concerned undertaking is heard after the measure is adopted. Whenever a market subject to sectoral regulation is concerned, the opinion of the corresponding sectoral regulator shall be requested.

Liaison with sectoral regulators

Whenever the infringement occurs in a sector subject to specific regulation, the AdC shall immediately inform the corresponding regulatory authority so that the latter may submit observations. Furthermore, prior to the adoption of the final decision, the AdC shall obtain a prior opinion from the relevant regulatory authority, except in the case of a decision of closure of the case without conditions. Likewise, when a sectoral regulatory authority assesses a practice that may amount to a violation of competition rules, it shall immediately inform the AdC. In this latter case, the sectoral authority, before issuing a final decision, shall submit a draft thereof to the AdC to obtain its opinion.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Act enhanced the extensive powers of investigation already granted to the AdC by the former Competition Act. Under the Act, in investigating restrictive practices the AdC may, notably:

- question the concerned undertaking and other persons involved, personally or through their legal representatives, and request from them documents and other data deemed convenient or necessary to clarify the facts;
- question any other persons, personally or through their legal representatives, whose statements are considered relevant, and request from them documents and other data;
- carry out searches, examine, collect and seize extracts from accounting records or other documentation at the premises, land or

transportation means of the undertakings or associations of undertakings (this action requires a decision from the competent judicial authority, issued upon an AdC's substantiated application);

- during the period strictly required for the foregoing measures, seal the premises and locations of the undertakings or associations of undertakings where accounting records or other documentation, as well as supporting equipment, may be found or are likely to be found (this action requires a decision from the competent judicial authority, issued upon an AdC's substantiated application); or
- request from any public administration services, including police authorities, the assistance that may be required for the performance of the AdC's functions.

In addition, in the case of a grounded suspicion that, in the domicile of shareholders, board members or employees, or other workforce of undertakings or associations of undertakings, evidence of infringements to article 9 of the Act or to article 101 TFEU may be found, the AdC may, upon decision by the competent judge issued upon an AdC's substantiated application, carry out searches in such domiciles. A search in an inhabited house, or in a locked part thereof, may only be carried out from 7am to 9pm, otherwise being null and void. Searches in the office of an attorney-at-law or doctor may only be carried out in the presence of a judge, who shall previously inform the chair of the local attorneys' bar or doctors' association, as applicable, so that he or she, or a delegate thereof, may be present. These rules apply, *mutatis mutandis*, to searches elsewhere, including vehicles of shareholders, board members or employees or other workforce of undertakings or associations of undertakings.

Seizure of documents must be authorised, ordered or confirmed by a decision of the judicial authority. Seizure of documents in the office of an attorney-at-law or doctor, which are subject to professional secrecy, is not permitted unless such documents are the object or an element of the infringement, otherwise being null and void. Seizure of documents in a credit institution, which are subject to banking secrecy, is carried out by the competent judge when there are grounded reasons to believe that such documents are related to the infringement or are of great interest to establish the facts.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Following the decentralisation carried out under Council Regulation No. 1/2003, cooperation between national competition authorities, including the AdC and the European Commission, takes place in the framework of the European Competition Network (ECN). According to the last Activity Report recently made available, in 2017 the AdC participated in 23 ECN meetings and in 10 oral hearings and meetings of the advisory committees on restrictive practices and merger control. According to the same Activity Report, in 2017 the AdC announced the opening of five infringement cases regarding potential infringements of articles 101 and 102 TFEU to the ECN Network. The AdC also emphasises its position as coordinator of the Working Group on Cooperation Issues and Due Process, together with the national competition authorities of Germany and Hungary. This working group closely monitors the developments in the preparation and negotiation of the ECN+ Directive, which aims to give the member states' competition authorities the power to apply the law more effectively and to ensure the proper functioning of the internal market.

Besides such cooperation, the AdC is also a member of the ECA (European Competition Authorities Association). Furthermore, at a multilateral level, the AdC cooperates within international organisations, including the OECD and the UNCTAD. The AdC also participates in multilateral cooperation networks, such as the International Competition Network (ICN), the Portuguese Speaking Countries Competition Network and the Iberian-American Competition Network. At a bilateral level, the AdC cooperates through technical cooperation protocols and projects of mutual interest with other European and international competition authorities. In 2017, the AdC hosted the ICN annual conference, which took place in Oporto, from 10 to 12 May. This event is organised every year by one of the ICN member countries, was held for the first time in Portugal and was attended, according

to the AdC information releases, by about 600 participants coming from over 100 jurisdictions and international organisations (notably OECD, European Commission, World Bank, UNCTAD and private practitioners), including the European Commissioner for Competition, Margrethe Vestager. The AdC also recently held, on 18 and 19 October, the V Lisbon Conference on Competition Law and Economics, which takes place every two years. This year, according to the Authority, it brought together 300 participants from more than 30 countries and international organisations. Issues such as the role of competition policy, the impact of digitalisation, and competition and innovation in financial services, among others, were discussed.

Furthermore, under Council Regulation No. 1/2003, the following EU competences were taken up by the AdC at the national level:

- the investigation of infringements of articles 101 and 102 TFEU;
- the withdrawal of the application of EU block exemption regulations to acts leading to effects incompatible with article 101(3) TFEU within the national territory, or in a section of it presenting all the characteristics of a separate geographical market;
- the rejection of infringement claims or the suspension of procedures when the alleged infringement is being investigated by the European Commission or another member state's competition authority;
- assistance with the European Commission's inspections of undertakings or associations of undertakings within the national territory; and
- inspections or other investigative measures in the national territory, applying the respective national legislation, on behalf of another member state's competition authority or on request from the European Commission, to determine the existence of a violation of articles 101 or 102 TFEU.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

See question 11 as regards the interplay between the Portuguese and the EU jurisdictions. According to the AdC's public records, within the framework of Council Regulation No. 1/2003, in 2004 one case was referred to the AdC within the European Competition Network (see the AdC's 2004 Activity Report, page 25).

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

See question 9.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof concerning accusations of anticompetitive behaviour rests with the AdC. However, exemptions such as those mentioned in question 5 must be proved by the alleging parties. As regards the level of proof at the end of the enquiry phase (see question 9), the decision to start the investigation phase is taken on the basis of a balance of probabilities; conversely, taking into account criminal procedure principles, such as the *in dubio pro reo* principle, which apply to quasi-criminal minor offences by virtue of the general regime on quasi-criminal minor offences (see question 1), the level of proof required for the final decision is the procedural certainty that without any reasonable doubt is formed by the decision maker.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Pursuant to article 31(4) of the Act, the evidence will be assessed in accordance with the rules of experience and the free opinion of the AdC. In its guidelines for the investigation of cases relating to the application of articles 9, 11 and 12 of the Act and 101 and 102 TFEU, the AdC

underlines such legal principles and invokes the rules of experience connected with social and economic relations that are the subject of the competition rules. According to the AdC, such rules of experience allow account to be taken of the specific aspects resulting from the nature and context of the practices in question, in particular the difficulty of obtaining direct evidence in relation to certain infringements, such as concerted practices, and the need to consider circumstantial evidence.

16 Appeal process

What is the appeal process?

As stated above, Law No. 46/2011 of 24 June determined the creation of the Specialised Court to handle competition, regulation and supervision matters, as of 30 March 2012. The new Specialised Court is now the exclusive first instance for review of all the decisions adopted by the AdC.

Under the current regime, the AdC's sanctioning decisions (typically involving anticompetitive agreements, decisions and practices, abuses of economic power and infringements of the merger control rules) may be appealed to the Specialised Court under the rules established in the Act and, on a subsidiary basis, under the quasi-criminal minor offences regime. The appeal shall not suspend the effects of the AdC's decision, except for decisions that impose structural remedies as established in the Act. Appeals that refer to decisions applying fines or other penalties may suspend the enforcement of such decisions only if the party concerned requests it on the basis of the allegation that the enforcement of the decision may cause it considerable harm and if such party offers a guarantee, and provided such guarantee is submitted within the time limit set by the court. The Specialised Court shall have full jurisdiction in the case of appeals lodged against decisions imposing a fine or a periodic penalty payment, and can reduce or increase the corresponding amounts.

As regards an appeal of the AdC's final decision condemning the concerned undertaking, it must be lodged within a non-extendable deadline of 30 working days. During a (also non-extendable) deadline of 30 working days, the AdC shall forward the file to the public prosecutor. The AdC may attach to the file written conclusions, together with elements or information it deems relevant for the Court's decision, and shall also indicate and submit the relevant evidence. The AdC shall further be given the opportunity to bring to the hearing any elements deemed relevant for the decision and to have a representative participating in such hearing. Although the Court may in certain cases decide by means of a court order without prior hearing, the AdC, the public prosecutor or the concerned undertaking may oppose such decision. The Court's final decision, as well as all decisions other than routine decisions that do not involve the refusal or the recognition of any right, must be notified to the AdC. The withdrawal of the case by the public prosecutor depends on the AdC's agreement. The AdC has standing to autonomously appeal from the Court's decisions (other than routine decisions).

Appeals of decisions of the Specialised Court that may be appealed are filed with the Appellate Court of Lisbon as a court of last resort.

The duration of the appeal proceedings depends on the complexity of the cases and of the concerned courts' workload. It may nevertheless last longer than 12 months.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The application of general criminal law can only derive from behaviour also corresponding to a penal offence (fraud, extortion, disturbance of public auction or tender, etc), since there are no criminal sanctions for competition law offences. Cartel activity per se is considered a quasi-criminal minor offence.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

In relation to sanctions for quasi-criminal minor offences, under the Act, fines can be imposed of up to 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision

adopted by the AdC, for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings:

- for infringements of article 9 of the Act or article 101 TFEU;
- for non-compliance with the conditions attached to the decision of closing the case at the end of the investigation phase (see question 9);
- for non-compliance with the behavioural or structural remedies imposed by the AdC (see question 9); or
- for non-compliance with a decision ordering interim measures.

In cases where any of these infringements is carried out by individuals held responsible under the Act (see below), the applicable fine cannot exceed 10 per cent of the corresponding remuneration in the last full year in which the infringement took place.

In addition, refusal to provide information or the provision of false, inaccurate or incomplete information, or non-cooperation with the AdC, are subject to fines of up to 1 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the AdC for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings. In cases where any of these infringements is carried out by individuals held responsible under the Act (see below), the applicable fine ranges from 10 to 50 'account units' (each account unit currently amounting to €102).

Furthermore, the absence of a complainant, of a witness or of an expert to a duly notified procedural act is punishable with a fine ranging from two to 10 account units.

Multiple infringements are punished with a fine, the maximum limit of which is the sum of the fines applicable to each infringement. However, the total fine cannot exceed double of the higher limit of the fines applicable to the infringements in question.

Additionally, should the infringement be considered sufficiently serious, the AdC can impose, as ancillary sanctions:

- the publication, at the offender's expense, of an extract of the sanctioning decision in the official gazette of Portugal and in a Portuguese newspaper with national, regional or local coverage, depending on the relevant geographical market; or
- in cases of competition law infringements carried out during, or due to, public procurement proceedings, the prohibition, for a maximum of two years, from participating in proceedings for entering into public works contracts, for concessions of public works or public services, for the lease or acquisition of goods or services by the state, or for the granting of public licences or authorisations.

The AdC may further impose periodic penalty payments of up to 5 per cent of the average daily turnover in Portugal in the year immediately preceding that of the final decision, per day of delay counted from the date established in the notification, where the undertakings do not comply with an AdC decision imposing a sanction or ordering the adoption of certain measures.

Individuals, legal persons (regardless of the regularity of their incorporation), companies and associations without legal personality may be held liable for offences under the Act.

Legal persons and equivalent entities are liable when the acts are carried out:

- on their behalf, on their account by persons holding leading positions (eg, the members of the corporate bodies and representatives of the legal entity); or
- by individuals acting under the authority of such persons by virtue of the violation of surveillance or control duties. Merger, demerger or transformation of the legal entity does not extinguish its liability.

The members of the board of directors of the legal entities, as well as the individuals responsible for the direction or surveillance of the area of activity in which an infringement is carried out, are also liable when:

- holding leading positions, they act on behalf or on the account of the legal entity; or
- knowing, or having the obligation to know, the infringement, they do not adopt the measures required to put an end to it, unless a more serious sanction may be imposed by other legal provision.

Undertakings, whose representatives were, at the time of the infringement, members of the directive bodies of an association that is subject to a fine or a periodic penalty payment, are jointly and severally responsible for paying the fine, unless they have expressed in writing their opposition to the infringement.

In relation to civil sanctions, anticompetitive agreements, decisions and practices are considered null and void (except where they are considered justified; see question 5), and civil liability may also arise for the damage caused (see question 22).

The calculation of the above-mentioned fines must follow the mandatory criteria established in the Act (see question 19). In addition, on 20 December 2012, the AdC published guidelines regarding the methodology to be used in the application of fines. In drafting these guidelines, the AdC took into consideration the European Commission's guidelines on the method of setting fines imposed pursuant to article 23(2) (a) of Regulation No. 1/2003. The AdC's guidelines only apply to cases in which the inquiry phase (see question 9) was initiated after the Act came into force. Furthermore, the AdC states in the guidelines that they are not aimed at allowing for the prior calculation of the actual fines to be applied but rather at providing information necessary for the understanding of the methodology followed by the AdC in fixing such fines.

According to the AdC's public decision record, which appears on the AdC's website and only includes definitive decisions (ie, decisions that either were not subject to judicial review, or were subject to appeal and the final judicial decision has already been adopted), and in cases where the AdC has determined that an infringement occurred, the AdC has imposed fines except in those cases where it has exempted the concerned undertakings from the fines pursuant to the application of the leniency regime.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Under the Act, the following circumstances may be considered relevant for setting the amount of the fines:

- the seriousness of the infringement in terms of affecting effective competition in the Portuguese market;
- the nature and size of the market affected by the infringement;
- the duration of the infringement;
- the level of participation in the infringement by the concerned undertakings;
- the advantages that the offending concerned undertakings have enjoyed as a result of the infringement, if possible to determine;
- the behaviour of the concerned undertakings in putting an end to the restrictive practices and in repairing the damages caused to competition, notably through the payment of compensation to those injured following an out-of-court agreement;
- the economic situation of the concerned undertakings;
- records of previous competition infringements carried out by the concerned undertakings; and
- cooperation with the AdC until the close of the administrative proceedings.

Consideration of the above circumstances is mandatory for the AdC. However, the absence of a hierarchy and the consideration of circumstances not listed above leave room for discretion.

Furthermore, as stated above, on 20 December 2012 the AdC published guidelines regarding the methodology to be used in the application of fines (see question 18).

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

As stated in question 18, in the case of competition law infringements carried out during, or due to, public procurement proceedings, the AdC can impose, as an ancillary sanction, a prohibition, for a maximum of two years, from participating in proceedings for entering into public

works contracts, for concessions of public works or public services, for the lease or acquisition of goods or services by the state, or for the granting of public licences or authorisations.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

As stated above (see questions 17 and 18) cartel activity per se is considered a quasi-criminal minor offence and does not involve the application of criminal sanctions, without prejudice to the application of general criminal law if the behaviour in question also corresponds to a specific criminal offence.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Before the entry into force of the Private Damages Act (4 August 2018), third-party claims for damages were dealt with under the general principles and provisions applicable to civil liability as provided for in the Civil Code. The standard liability requirements are the existence of an illicit act (the anticompetitive behaviour), injury to the claimant and a causal link between the two.

With the implementation of the EU Private Enforcement Directive through the Damages Act, those standard liability requests do not change. Also, the purpose of this liability is still merely to repair damage (ie, to restore the situation that would have existed if the event that determines the need for the reparation had not occurred). The amount of compensation shall be measured by the difference between the actual patrimonial situation of the damaged party and the patrimonial situation of such party that would exist if the damage had not taken place. This includes not only the amount of the damage caused by the illicit conduct, but also interest and the amount of any benefits that the damaged party could not obtain due to the illicit action.

Any injured party has individual standing.

In actions for damages whose request is based on the repercussion of the additional costs on an indirect customer, the latter has the burden of proof of the existence and of the scope of such repercussion. However, unless evidence is provided to the contrary, it is presumed that the additional costs were passed on to the indirect customer, whenever this shows that: (i) the defendant had committed an infringement of competition law; (ii) this infringement had an additional cost for the direct client of the defendant; and (iii) he acquired the goods or services affected by the infringement, or goods or services derived from the goods or services affected by the infringement, or that contain them.

A novelty resulting from the new damages actions regime is the presumption that the cartels are responsible for damages caused by the infringements that they practise, unless proven otherwise. According to the Damages Act, if it is practically impossible or excessively difficult to calculate accurately the total damage suffered by the injured person or the value of the repercussion above-mentioned, taking into account the available evidence, the court shall calculate it with recourse to the Commission Communication (2013/C 167/07) of 13 June 2013 on the quantification of damages in actions for damages on the grounds of infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union. Moreover, the Competition Authority shall assist the court, at the latter's request, in quantifying damages resulting from an infringement of competition law, and may request the court to provide a reasoned exemption from providing such assistance.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions, whereby individual litigants or associations may, under certain conditions, sue in representation of injured parties, were already provided for in Law No. 83/95 of 31 August and article 31 of the

Code of Civil Procedure being applicable to competition law injuries. The Damages Act restated the application of the said regime and added some rules in this respect. The process is now governed by ordinary civil procedure rules and by the Damages Act itself. In addition to the entities mentioned in Law 83/95, of 31 August, the following now have standing to bring actions for compensation for infringements of competition law: (i) associations and foundations for the protection of consumers; and (ii) associations of undertakings whose members are adversely affected by the infringement of the competition law in question, even if their statutory objectives do not include the defence of competition. From the public records and from our experience, class actions are not a very popular and frequently chosen course of action in Portugal, only one case involving competition law being reported in 2015, with no further details thereon being publicly available.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Act establishes the leniency rules in article 75 et seq. In addition, as stated above (see question 1) the AdC has adopted Regulation No. 1/2013 of 3 January 2013, which sets out the leniency administrative procedure.

Under the Act, the AdC can grant immunity or reduction of fines in procedures for quasi-criminal minor offences that concern agreements and concerted practices between competitors prohibited by article 9 of the Act and (where applicable) article 101 TFEU, which are aimed at coordinating the competitive behaviour of the undertakings or at influencing relevant competitive conditions.

To obtain full immunity, an applicant must:

- be the first undertaking to inform the AdC of its participation in an agreement or a concerted practice, as long as it provides information and evidence that, in the AdC's discretion, enables the latter:
 - to substantiate a request for searches or seizure of data, provided that the AdC, at the time the information and evidence are submitted, does not have sufficient elements to perform such acts; or
 - to establish the existence of an infringement, provided that, at that moment, the AdC does not have sufficient evidence of the infringement available;
- cooperate fully and continuously with the AdC from the moment of the initial request by:
 - providing all data and evidence already obtained or to be obtained in the future;
 - responding immediately to any request for information;
 - avoiding acts that may endanger the investigation; and
 - not informing the other participants in the concerted practice;
- put an end to its participation in the infringement before it provides the AdC the information and evidence, except as reasonably required, in the AdC's opinion, to preserve the investigation effectiveness; and
- not have coerced other undertakings to participate in the breach.

The information and evidence to be provided must contain complete and precise information on:

- the agreement or concerted practice;
- the undertakings involved, including the objectives, activity and way of operation;
- the product or service concerned; and
- the geographical scope, the duration and the manner in which the breach has been carried out.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

As stated above, under the leniency rules set forth in the Act, the AdC can grant immunity or reduction of fines.

The AdC shall grant a reduction of fines to undertakings which, not being eligible to immunity, submit information and evidence that adds significant value to those already in the possession of the AdC and provided the conditions are met regarding cooperation with the AdC and putting an end to the infringement (see question 24).

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

As regards full immunity, as noted above, only the first undertaking to provide information and evidence may obtain full immunity from fines.

Concerning the reduction of the fine, the corresponding level of reduction is determined by the AdC as follows:

- a reduction from 30 to 50 per cent granted to the first undertaking that provides information and evidence;
- a reduction from 20 to 30 per cent granted to the second undertaking that provides information and evidence; or
- a reduction of up to 20 per cent granted to the subsequent undertakings that provide information and evidence.

In fixing the fine, the AdC shall take into account the order of submission of the information and evidence, as well as their added value for the investigation. If a leniency application is submitted after the notification of the statement of objections (see question 9) the above reduction limits are reduced by half. There is currently no 'immunity plus' or 'amnesty plus' option.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

See questions 24, 25 and 32.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

See questions 24 and 25.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The AdC shall classify as confidential the leniency application as well as the documents and information provided by the applicant.

The rules apply to both full (immunity) and partial (reduction of fines) leniency.

For the purpose of preparing the observations in response to the statement of objections, a concerned undertaking shall be granted access to the leniency application and to the related documents and information by the AdC. However, the concerned undertaking shall not be allowed to make copies of such elements unless authorised by the leniency applicant. Third parties' access to the leniency application and to the related documents and information shall require the leniency applicant's consent, without prejudice of the right of access under the terms established in the Damages Act. The Damages Act has introduced amendments to the Act in respect of confidentiality applicable to leniency applications. In any event, leniency statements (regarding an exemption from or reduction of the fine) are protected.

The concerned undertaking shall not be granted access to copies of its oral statements and third parties shall have no access to them.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Under the Portuguese leniency regime, the AdC is not granted the power to enter into arrangements such as plea bargains. Settlements are permitted under the terms described above, and a reduction in fine granted in leniency proceedings is added to the reduction granted in the settlement proceedings (see question 9). In its most recent cartel decisions, the AdC, in determining the amount of the fines, took into account the cooperation of the companies during the investigation through the use of both the leniency regime and the settlement proceedings. The facts confessed by a concerned undertaking in a settlement procedure cannot be subject to judicial review for the purposes of any appeal.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Individuals and employees of an undertaking who are responsible for the direction or surveillance of the area of activity in which an infringement occurred, may be granted immunity or reduction of fines if they fully and continuously cooperate with the AdC, even if they have not requested such benefits.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

As stated above, Regulation No. 1/2013 sets out the leniency administrative procedure.

Under Regulation No. 1/2013, a leniency request is made by means of an application addressed to the AdC and must include:

- the object of the application, specifying whether it is a request for immunity or for a reduction in fine, or both;
- the identification of the applicant, the capacity in which the application is filed (ie, a company or the members of its board of directors or equivalent entities, or the individuals responsible for management of supervision of the sector of activity concerned in the infringement) and the corresponding contacts. In the case of legal entities, the information shall include the identification of the current members of the board of directors as well as of the members of such board during the duration of the infringement;
- detailed information on the alleged cartel;
- the identification and contact details of the undertakings involved in the alleged cartel, as well as of the current members of their boards of directors and of the members of such boards during the duration of the infringement;
- identification of other jurisdictions where a leniency application has been filed in respect of the same infringement; and
- other information deemed relevant for the request for immunity or reduction of the fine.

Together with the leniency application, the applicant shall submit all the evidence in its possession or under its control.

The leniency application must be submitted at the AdC's head office by any means, notably:

- fax (+351 217902 093);
- mail addressed to the AdC's head office;
- email sent to the address clemencia@concorrenca.pt with an electronic signature; or
- hand delivery, notably in a meeting with the AdC's services in charge of the investigation.

Submission of a written application can be replaced by oral statements made in a meeting with the AdC's services in charge of the investigation. Such statements shall be accompanied by all the evidence in the possession of or under the control of the applicant. The statements shall

Update and trends

The AdC continues to actively investigate cartels, having notably announced, in its priorities set for 2018, the strengthening of the research capacity in the context of the digital economy.

Even though no decisions have been adopted so far this year, in August and September, respectively, the Authority issued (i) a Statement of Objections to five insurance companies and 14 directors and managers for participating in a cartel and, (ii) a Statement of Objections to five companies and six directors and managers for cartel activity among railway maintenance companies.

be recorded in the AdC's head office with an indication of their time and date. Within the time frame established by the AdC, the applicant confirms the technical accuracy of the recording and, if necessary, corrects the statements. In the absence of any comment from the applicant, the recording is considered approved by the applicant. The transcription of the statements must be complete and accurate and shall be signed by the applicant.

The request for immunity or reduction of fine shall be deemed made on the date and at the time of its receipt at the AdC's head office. The AdC shall provide a document confirming receipt of the application and the date and hour of its submission.

In special cases and upon reasoned request, the AdC may accept a simplified leniency application if the applicant has filed, or is filing, a leniency application with the European Commission and the Commission is in the situation provided for in the Commission Notice on cooperation within the network of competition authorities (2004/C 101/03). The application shall, in these cases, be made in Portuguese or English according to the form attached to Regulation No. 1/2013 or by oral statements. The AdC shall provide a document confirming the receipt of the simplified application and the date and hour of its submission. If the AdC starts an investigation of the infringement, it shall request that the applicant completes the application within a time frame of no fewer than 15 days, which, if applicable, shall include a Portuguese translation of a simplified application filed in English. If the application is not completed or the Portuguese translation is not filed within the established deadline, the application shall be refused. If an application is filed only for the purposes of immunity and this latter is no longer available (see question 25), the AdC shall inform the applicant that the application may be withdrawn or completed for the purposes of reduction of the fine. If the applicant completes the application within the established deadline, the request shall be deemed to have been made on the date and hour the application was initially filed.

Upon receipt of a written or oral application for immunity or reduction of fine, the AdC may, on its own initiative or upon reasoned request, grant a marker to the applicant establishing a period of no fewer than 15 days for the completion of the application by the applicant. To benefit from the marker, the applicant must indicate in the application:

- its name and address;
- information on the alleged cartel, and on the products, services and territory affected;
- an estimate of the duration of the alleged cartel;
- whether other applications for immunity or reduction of fines have been filed or are planned to be filed with other competition authorities regarding the alleged cartel; and
- the justification for the marker.

If the applicant completes the application within the established deadline, the request shall be deemed to have been made on the date and hour the application was initially filed. If the application is not completed, the application shall be refused. Following an analysis of the application, the AdC shall notify the applicant if it considers that the requirements for immunity are not met, in which case the applicant may, within 10 days of such notification, withdraw the application or request the AdC that this latter is considered for the purposes of reduction of the fine.

As regards an application for reduction of a fine, if the AdC considers, on a preliminary basis, that the information and evidence submitted by the applicant adds significant value to that already in its possession, it shall inform the applicant of its intention to grant a reduction of the fine, indicating the level of the applicable reduction. The aforementioned

rules governing the application for immunity or reduction of fine apply. If the AdC considers, on a preliminary basis, that the information and evidence submitted by the applicant does not add significant value to those already in its possession, it shall notify the applicant, in which case this latter may, within 10 days of such notification, withdraw the application. (See also question 25.)

Immunity or reduction of fines shall only be granted if all the requirements set forth in the Act are fulfilled (see questions 24 and 25). The final decision on immunity or reduction of fines shall be taken in the final decision of the proceedings adopted by the AdC at the end of the investigation (see question 9).

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

As stated, Law No. 19/2012 superseded Law No. 18/2003, the previous competition statute, and, in respect of leniency, Law No. 39/2006. Recently, the Damages Act introduced amendments to the Act notably in respect of confidentiality applicable to leniency applications (see question 29). Pursuant to the Act, the current regime, including in respect of leniency provisions, should be reviewed in accordance with the evolution of the EU competition regime (see question 3).

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The defendant can request the consultation of the case file and obtain, at his or her own expense, any extracts, copies or certificates. Nevertheless, the AdC can refuse access to the file until the notification of the statement of objections in cases where the proceedings are subject to secrecy and whenever it considers that such access may harm the investigation. The AdC shall have due care for the legitimate interests of the undertakings, or associations of undertakings, or of other entities, relating to non-disclosure of their business secrets. In order to respond to the statement of objections, the defendant may also have access to the application for immunity from the fine or reduction of the fine, and to the documents and information submitted for the purpose of immunity or reduction, though no copy can be made unless authorised by the applicant.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Employees can be interviewed or requested to provide information or documents relevant to an investigation by the AdC. In such cases, joint representation of a corporation and employees by the same counsel may constitute a conflict of interest under article 99 of the Portuguese Bar Association Legal Regime.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

The representation by counsel of multiple corporate defendants may be acceptable to the extent it does not raise any conflicts of interest (see question 35).

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

In principle, nothing seems to prevent a corporation from voluntarily paying the costs or penalties (or both) imposed on its employees, or from reimbursing employees for such costs or penalties.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Fines, or other penalties and private damages awards are not tax-deductible.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The *ne bis in idem* principle, which is essentially the equivalent of the double jeopardy principle, applies in the framework of quasi-criminal minor offences and therefore applies to cartel infringements (see question 1). However, in applying the principle, the AdC shall take into account whether the infringement previously sanctioned is the same as that subject to its assessment, in terms of both the specific behaviour in question and the territory where it occurred or had effect.

As regards liability for private damage claims, the overlapping liability for damages shall be taken into account, notably in the determination of the actual amount of damages that may be claimed before the Portuguese jurisdiction (see question 22).

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

See questions 9 (in respect of the settlement proceedings and of the closure of the case with conditions attached) and 24 to 32 (on the leniency regime). In addition, the behaviour of the undertaking concerned in putting an end to the restrictive practices and in repairing the damage caused to competition may be taken into account in the determination of the amount of the fine, under the framework described in question 19. We are not aware of any decisions in which the AdC has explicitly taken into account the pre-existence or the commencement of compliance programmes in determining the level of the fine.

G A _ P

Gómez-Acebo & Pombo

Mário Marques Mendes
Alexandra Dias Henriques

marquesmendes@ga-p.com
adhenriques@ga-p.com

Avenida Duque de Ávila, No. 46, 6º
1050-083 Lisbon
Portugal

Tel: +351 21 340 86 00
Fax: +351 21 340 86 08
www.ga-p.com

Russia

Evgeniya Rakhmanina

Linklaters CIS

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Cartels in Russia are primarily regulated by the Federal Law of the Russian Federation No. 135-FZ On Protection of Competition, dated 26 July 2006 (the Competition Law). Liability for cartels is set out in the Administrative Liability Code (the Code of Administrative Violations of the Russian Federation) and the Criminal Code (the Criminal Code of the Russian Federation).

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Federal Antimonopoly Service of the Russian Federation (FAS) is the authority responsible for investigating cartel matters. The FAS extensively cooperates with the Ministry of Internal Affairs of the Russian Federation, the public prosecution authority and other law enforcement agencies (further generally together referred to as 'law enforcement agencies', although they are vested with different rights and authority throughout the process described herein) on all matters relating to enforcement of antimonopoly compliance; cartel matters included. The FAS initiates antimonopoly legislation infringement proceedings and administrative liability proceedings, however, law enforcement agencies are involved when the case requires criminal investigations (whether at the initiative of the FAS or independent of such) and the law enforcement agencies are vested with the authority to initiate criminal proceedings.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The biggest recent change in terms of cartel regulation has been the introduction of a leniency policy in criminal proceedings for individuals engaged in cartel activities. While leniency was introduced in Russia as far back as 2007 (just a year after the current Competition Law was adopted), up until 2015, it only applied to administrative liability, which meant that while companies which engaged in cartel activities and applied for leniency could be offered immunity from significant administrative fines, the respective officers of the company (criminal liability does not apply to legal entities in Russia) could still be subject to criminal liability under the Criminal Code and administrative leniency would not immunise them in this regard. Administrative leniency is now also offered to the second and third applicants in the form of a minimum administrative fine envisaged by the law.

Further, the definition of a cartel was adjusted recently and since the beginning of 2016 it now not only includes anticompetitive agreements between sellers, but also between buyers. Since 2015, a cartel is the only anticompetitive violation that entails criminal liability in Russia, other anticompetitive agreements and actions, including abuse of dominance, are no longer subject to criminal liability.

The present-day Competition Law – since the beginning of 2016 – also allows joint activity (joint venture) agreements between competitors to be cleared by the FAS, in which case, once clearance has been received, such agreements are not subject to the cartel restrictions envisaged by the Competition Law.

The FAS also adopted Clarification No. 3 of the Presidium of the FAS of Russia 'On Proving Prohibited Agreements (Including Cartels) and Coordinated Actions on Product Markets, Including at Tenders (Actions)' in February 2016, which streamlines the application of cartel regulation in Russian and is primarily targeted at territorial departments of the FAS for the purpose of uniform application of the respective sections of the Competition Law that regulates cartels.

Further, while cartel regulation is not expected to undergo any significant changes, the FAS has been issuing further clarifications aimed at uniform application of the law and allowing the FAS to target areas of significant concern where existing regulation is insufficiently enforced, such as cartels in state tenders, and promoting private claims from persons or entities affected by cartels. Recent relevant clarifications include Clarification No. 11 of the Presidium of the FAS of Russia 'On Calculating Damages Resulting from Infringement of Antimonopoly Legislation', issued in October 2017, and Clarification No. 14 of the Presidium of the FAS of Russia 'On Qualification of Agreements Between Business Entities Which Participate in State Tenders', issued in May 2018.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Cartels are defined in article 11 of the Competition Law as agreements between competitors (sellers and buyers alike) that lead to, or may lead to, price (surcharge, rebate, tariff, etc) fixing, price maintenance at tenders and auctions (bid rigging), allocation of the market by territory, volume of purchase or sales, assortment of goods (services) or by the selection of buyers or sellers, termination of production or reduction of volumes of production, or a refusal to enter into agreements with certain buyers or sellers.

Notably, cartel agreements can be written or verbal, and an agreement leading to any of the above consequences or potentially leading to any of such consequences, can be recognised as a cartel.

As a rule, agreements entered into between competitors, which lead or may lead to any of the above consequences, as long as the existence of such agreements has been identified, can be recognised as a cartel irrespective of whether they in fact led to such consequences (ie, cartels are per se infringements in Russia), and very few exemptions from this rule are offered by the Competition Law. Such exemptions include express clearance given by the FAS in respect of a joint activity (joint venture) agreement between competitors further to their application for such, and agreements entered into by members of one 'group of persons' where the contracting parties are controlled (via a shareholding stake of more than 50 per cent) by the same entity or person or where once contracting party controls (also via a shareholding stake of more than 50 per cent) the other contracting party.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

Cartel prohibitions set out in article 11 of the Competition Law, and the liability for infringement thereof set out in the Administrative Code and the Criminal Code, equally apply to all industries and all businesses irrespective of their size. No industry-specific defences or exemptions are set out in these legal acts.

At the same time the Competition Law does allow competitors to apply to the FAS with an application for clearance of a proposed joint activity (joint venture) agreement in cases where such an agreement between competitors may be found to lead to any of the negative consequences listed in article 11 of the Competition Law (including price fixing, market or customer allocation, etc), which would in the absence of FAS clearance result in the agreement being recognised as a cartel.

When applying for such clearance, the competitors willing to enter into a joint activity (joint venture) agreement must provide evidence to the FAS that the agreement and the competitors' behaviour under this agreement:

- will not allow the parties to eliminate competition on the respective market;
- do not impose restrictions on the parties or third parties that are disproportionate to the results targeted by such agreements;
- will or may result in improvement and advancement of production and sale of products (services) or stimulation of economic progress or increase of competitiveness of Russian products (services) on the global market; or
- will or may result in customers receiving benefits (advantages) proportionate to the benefits (advantages) received by the contracting parties.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Competition Law equally applies to legal entities (both commercial and non-profit) and individuals, both Russian and foreign, as well as federal and local and municipal authorities, state non-budget funds and the Central Bank of Russia.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Competition Law enjoys extraterritorial application and equally applies to agreements entered into (activities engaged in) outside of the territory of the Russian Federation between Russian and (or) non-Russian entities and individuals if they affect the competition on the territory of the Russian Federation.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Formally, the Russian Competition Law applies only to those relations and agreements that affect competition on the market of the Russian Federation, and those relations to which Russian legal entities, state authorities and individuals are a party. Thus it is less likely that the FAS would investigate conduct that affects only customers and other parties outside the Russian Federation.

However, at the same time, the FAS cooperates with a number of foreign and supranational authorities, including within the Eurasian Economic Union, BRICS, as well as cooperation with the EU, the Organisation for Economic Co-operation and Development (OECD) and others. Thus there is a residual risk that the FAS could investigate or assist with the investigation of such conduct in the interests of and in cooperation with such authorities.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

A cartel investigation can be triggered by a claim submitted to the FAS by any individual or legal entity (customers, competitors included), by an instruction or query from another state authority (the President of the Russian Federation and the Government of the Russian Federation included), as well as by the own initiative of the FAS if the FAS identifies signs of potential infringements through any other sources, including the mass media.

Investigations under the Competition Law can be on-site or off-site, scheduled or unscheduled; however, cartel investigations are usually in the form of on-site unscheduled dawn raids that then continue in the form of further requests for documents and information from the FAS to the entities and individuals involved.

The law requires that an investigation be carried out within one month and in exceptional cases may be extended by another two months if the FAS requires more time and involvement of third parties (eg, expertise, translations, etc) to identify an infringement of the Competition Law or absence of such infringement.

If the FAS identifies signs of infringement of antimonopoly legislation as a result of the investigation, it initiates antimonopoly legislation infringement proceedings.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

When carrying out an investigation, the FAS is entitled to receive copies of all documents and information it may request, including agreements, correspondence, protocols and clarifications; irrespective of whether the originals are in hard copy or on electronic media; irrespective of whether they are protected as commercial secret or not.

In the case of an on-site investigation, the FAS is entitled to inspect premises (but not the residential premises of an individual) and carry out photo and video recording.

When investigating a cartel and carrying out a dawn raid, search and seizure rights will be required, and other operational investigation powers (including wiretapping, extraction of hard drives, etc) may also be required with which the FAS is not vested and for which purpose the FAS will engage law enforcement authorities. Certain operational investigation powers that restrict the constitutional rights of an individual, including access to the individual's residential premises, will require court approval.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

On a regional and international level, the FAS actively cooperates with authorities in other jurisdictions for the purpose of promoting competition and battling cartels; multinational cartels in particular:

- the FAS is a member of or actively cooperates with a range of international organisations and associations, including the Interstate Council for Antimonopoly Policy in the CIS, the Organization of the Petroleum Exporting Countries, the OECD, the United Nations Conference on Trade and Development and the International Competition Network;
- the FAS plays an active role in creating and participating in international working groups (eg, in working groups on competition issues in oil and oil products' markets (created at the initiative of the FAS and the Austrian Federal Competition Authority), in the market of international communications (roaming) and for studying competition problems within the pharmaceutical sector); and
- the FAS is a party to cooperation agreements with competition authorities of several jurisdictions (eg, with Brazil, Bulgaria, China, France, Hungary, Poland, Romania, Slovakia).

Further, the FAS is actively promoting other forms of interstate cooperation, such as proposing the following means of battling cartels by:

- the development of the draft international convention 'On Combating Cartels'; and
- the initiation of developing guidelines encompassing international best practice in identifying bid rigging.

At the same time, in practice, the FAS tends to be closest in its formal and informal communications with the competition authorities of the Commonwealth of Independent States and former states of the Soviet Union, other BRICS members and a few European competition authorities.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

If cartel cases involve a number of jurisdictions, the FAS can use various means of cooperation with international antitrust agencies including mutual assistance in sharing information and conduct of investigations, exchanging general information on competition and cartel concerns.

As an example, the FAS has actively cooperated with state authorities in Vietnam in a case where the FAS attempted to identify a cartel on the market of wholesale supplies of fish related to the import of pangasius from Vietnam to Russia by several Russian fish companies. According to the FAS officials, such cooperation significantly contributed to the process of investigation of the alleged cartel.

The FAS continues to stress the importance of battling international cartels, such as the international shipping conference cartel, the members of which have already been fined by the FAS for infringing Russian competition legislation, and the importance of cooperation between competition authorities for the purpose of this battle.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

If, based on the results of an investigation, the FAS identifies signs of an antimonopoly infringement, the FAS initiates antimonopoly legislation infringement proceedings and sets up a case-specific commission to hear the case. If the case in question relates to financial and credit institutions, at least half of the commission's members will be representatives of the Central Bank of Russia.

The FAS determines the case based on the evidence presented by the parties and the results of the investigation. To identify a cartel, the FAS has to consider a number of circumstances, including the existence of a verbal or written agreement between the parties to the alleged cartel, the subject of such agreement, the territory to which such agreement applies, the term and the parties to such agreement. The agreement may be qualified as a cartel owing to a mere fact of its conclusion, which means that the establishment of the consequences of the agreement and whether it in fact restricted competition, is not necessarily required.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof is vested with the FAS in both judicial and administrative proceedings. The level of proof, in practice, often depends on the authority determining the case. While the FAS may identify a cartel basing on indirect evidence, courts are likely to require provision of direct evidence to demonstrate the existence of facts constituting a cartel.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

An infringement can be established on the basis of circumstantial evidence and, in fact, this has become the norm in Russian cartel cases. There is, at the time of writing, an initiative in Russia to streamline this practice and set boundaries for the use of such circumstantial evidence, considering the severity of liability for cartels; however, this initiative is at an early stage of discussion between practising lawyers and regulators, and it remains to be seen what will become of it.

16 Appeal process

What is the appeal process?

If the FAS decision is inconsistent with its practice, appeal can be sought in a prejudicial procedure in the appellate body within the FAS structure (the FAS Appellate Body). As a general rule, the FAS Appellate Body is required to issue its decision within two months and has the ability to cancel or change the substance of the previous decision.

The appellant can also challenge in court the original FAS decision within three months from its issuance and challenge the decision of the FAS Appellate Body no later than one month after it is issued. The courts may change the substance or overturn the FAS decisions. The FAS can then appeal court decisions.

The Public Prosecutor's office is authorised to review compliance of the FAS (as well as other authorities) with Russian legislation.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Criminal sanctions are set out in article 178 of the Criminal Code and criminal sanctions can only be applied to individuals (entities are not subject to criminal liability in Russia).

Restriction of competition as a result of entry into an agreement between competitors, which is prohibited by antimonopoly legislation of the Russian Federation, may entail a fine, community service, disqualification (deprivation of the right to hold certain offices or engage in certain activities), or imprisonment, or a combination thereof.

Under the Criminal Code:

- fines can be imposed in the amounts of 300,000 to 1 million roubles or in the amount of the individual's salary or other income for a period of one to five years;
- community service with or without disqualification can be imposed for one to five years;
- imprisonment with or without disqualification can be imposed for up to seven years; and
- disqualification can be imposed for up to three years and, if imposed together with community service or imprisonment, applies throughout the term of community service or imprisonment but the clock on disqualification only starts after the sentence of community service or imprisonment has been served.

The severity of the fine, application of disqualification and length of imprisonment depends on the level of damage incurred on citizens, entities or the state, the level of benefit gained as a result of the anti-competitive behaviour under consideration, as well as whether the behaviour involved abuse of official power, destruction of or damage to property or threat thereof, or if it involved use of force or threat thereof.

Information on the application of criminal sanctions for anticompetitive behaviour is not publicly available in Russia; however, the FAS has confirmed that there have been several cases of application of criminal sanctions for cartel activity and criminal cases are ongoing at the moment.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Cartel activity may entail the following sanctions in accordance with article 14.32 of the Administrative Code:

- an administrative fine imposed on a legal entity to the amount of 1 per cent to 15 per cent of the total annual turnover of the infringing entity from sales on the market on which the violation occurred, or in the amount of expenses carried by the infringing entity for the purchase of goods (works, services) on the market on which the violation, or 10 to 15 per cent of the starting price of the tender (auction), but no less than 100,000 roubles and no more than 4 per cent of the total annual turnover of the infringing entity from all sales; and
- an administrative fine imposed on the legal entity's officers to the amount of 20,000 to 50,000 roubles or disqualification for up to three years.

Alternatively, in accordance with article 51 of the Competition Law, the FAS may require that the infringing entity transfer all income received from its anticompetitive behaviour to the Russian federal budget. This form of liability, if duly complied with by the infringing entity, replaces the above administrative liability and cannot be used in combination with such administrative liability.

Individuals and legal entities whose rights have been affected by anticompetitive behaviour of the cartel participants are entitled under article 37 of the Competition Law to seek protection through court procedures, in particular, by seeking redress of infringed rights, recovery of damages and losses, including loss of profit, compensation of damage inflicted on property.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Russian legislation does not envisage specific sentencing principles or guidelines. While the Administrative Code and Criminal Code provide for a range of fines (see question 18) the actual fine imposed on the infringing entity or individual is ultimately in the discretion of the regulator and, subsequently, courts. At the same time, both the Administrative Code and Criminal Code provide for aggravating and extenuating circumstances that would affect the liability to be imposed on the infringing entity.

Aggravating factors include continuing the infringement and multiple infringements; mitigating factors include contrition, voluntary termination of the infringement, assisting the regulators with identifying the infringement, voluntary reimbursement of damage inflicted, and voluntary performance of the measures ordered by the regulator to terminate the infringement before an official administrative decision is made in respect of such infringement.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Participation in cartels does not entail automatic debarment from government procurement procedures under Russian law.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Where a cartel has the signs of an administrative and a criminal violation, both criminal and administrative sanctions can be pursued in respect of the same conduct. Moreover, individuals and legal entities whose rights have been affected by anticompetitive behaviour of the cartel participants – if such individuals and legal entities decided to seek protection of such rights – may pursue such civil liability at the same time in respect of the same conduct.

In practice, the most common scenario of parallel proceedings is as follows: the FAS identifies behaviour that may be in violation of the Competition Law, initiates antimonopoly legislation infringement

proceedings in order to establish that a cartel has in fact been identified, then initiates administrative liability proceedings in which the FAS determines the appropriate sanction for such infringement, and in parallel, if the cartel also has signs of a criminal violation, the FAS will provide the Ministry of Internal Affairs of the Russian Federation with case materials for the law enforcement authorities to consider initiating a criminal case in respect of the relevant officers (individuals). If the law enforcement authorities do not to initiate a criminal case owing to relevant damage or benefit thresholds envisaged by the Criminal Code not being met or impossible to determine, the FAS will consider imposing administrative fines on the relevant officers (individuals). Civil cases in respect of the same conduct are most often brought to court by persons seeking protection of their rights after the administrative and criminal violations have been identified and proven by the respective regulators.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Individuals and legal entities whose rights have been affected by anticompetitive behaviour of the cartel participants are entitled under the Competition Law, as well as under the Civil Code of the Russian Federation, to seek protection of their rights through court procedures. In particular, they may seek recovery of damages and losses, including loss of profit. Both indirect and direct purchasers can thus seek protection through private damage claims if their rights were harmed by the cartel in question.

While Russian legislation provides for private damage claims and the FAS has been active in promoting them, follow-on claims in particular, private actions are still a very rare occurrence. Mostly, this is a result of the difficulties connected with:

- the calculation of damages and lost profit;
- proving damages and their connection with the antimonopoly infringement; and
- inequality of parties to the proceedings, especially when claims are made by purchasers and consumers against strong market players.

Information on damages awards to date is not publicly available. The FAS, however, has been encouraging all those affected to initiate follow-on damage claims and in October 2017 issued Clarification No. 11 of the Presidium of the FAS of Russia 'On Calculating Damages Resulting from Infringement of Antimonopoly Legislation', which is aimed at streamlining the application of the existing regulation and provides an aggregate view of court approaches.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Considering the complexity, cost and unpopularity of private damage claims, the FAS is currently promoting class actions as a means of battling cartels and other anticompetitive behaviour that affects a large number of people.

Currently, Russian legislation provides for co-participation as a mechanism for protecting rights of a large group of persons; however, this mechanism considers each claimant independent from the other claimants, and several other similar mechanisms where only specific persons may file a claim on behalf of a group (eg, the public prosecutor, other state authorities).

As a result, an initiative to incorporate class actions into Russian legislation has been voiced by various state authorities, lawyers and practitioners, and several draft laws have been prepared by various institutions; however, at this stage, class actions remain under debate and discussion with significant push-back exercised by businesses. A new – the latest in the long-running series – draft law amending class action regulations was recently submitted to Parliament for consideration in October 2017; this envisages new procedures to be introduced and regulated in the civil procedure, arbitration procedure and administrative procedure codes.

Update and trends

The FAS continues to stress the importance of battling cartels, including international cartels, which will require cooperation between competition authorities in various jurisdictions.

The FAS is engaged in a constant battle against bid-rigging cartels at various state tenders in a vast number of different markets. Cartels at state tenders have, in fact become, one of the hottest – if not the main – targets of FAS cartel investigations over the past two years. The FAS, according to its own statistics, initiates approximately 400 cartel cases a year (360 cartel cases in 2017), 85 per cent of which are related to state tenders (310 cases in 2017). According to the FAS, approximately 30 per cent of state tenders in Russia are in the pharmaceutical industry (in 2016, 70 cases were in the pharma industry, spanning over the entire country). Construction and national defence and security are also ‘popular’ industries for cartels. The FAS also highlights that foreign companies have become a more common cartel participant in state tender cartels than before. In a country where state tenders account for over US\$500 billion in state and municipal purchases, such cartels have become a national hazard, and will obviously continue to be targeted by the FAS. In terms of criminal liability, according to the FAS, in 2017 nine criminal cases were initiated; in 2018, 15 cases had been initiated by July, and one CEO (for the first time) had been disqualified.

Further, the FAS intends to propose amendments to the Criminal Code and the Criminal Procedural Code, as well as the Competition Law, which will identify and regulate different types of cartels, cartels in state tenders will become a special subcategory, the statute of limitations will be increased, and the FAS will receive more authority and powers in cartel investigations.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being ‘first in’ to cooperate?

The leniency policy envisaged by Russian administrative legislation provides that an entity or individual who voluntarily informs the FAS of entering into an agreement or engaging in activities that are non-compliant with Russian antimonopoly legislation will be exempt from administrative liability if, at the time of such application to the FAS, the FAS was not in possession of relevant documents and information in respect of the said infringement, the applicant ceases participation in the said agreement or activities and the provided documents and information are sufficient to identify an infringement. Only the first applicant who performs all three requirements listed above shall be subject to the leniency programme and shall be exempt from all administrative liability. Several applicants may not apply for leniency together.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Since 2015 administrative leniency is now also offered to the second and third applicants in the form of a minimum administrative fine envisaged by the law if, at the time of their respective applications to the FAS, the respective applicants confirm participation in the administrative infringement, cease participation in the said agreement or activities and the provided documents and information are sufficient to identify the infringement. This reduction of a fine under the leniency programme, however, is not offered to the organiser of a cartel.

26 Going in second

What is the significance of being the second cooperating party? Is there an ‘immunity plus’ or ‘amnesty plus’ option?

There is no significant difference between the second or third cooperating party. All subsequent cooperating parties may expect a reduction of

their respective fines for cooperation; however, only the first applicant is exempt from administrative and criminal liability.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

A leniency application can be filed at any time before the FAS identifies and formally adopts a decision on the infringement of antimonopoly legislation, which will then trigger administrative liability proceedings.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

An immunity (full leniency) application requires that the applicant provides documents and information in respect of the respective infringement to the FAS that allows the FAS to identify an infringement of antimonopoly legislation and confirm that the applicant no longer participates in such agreement or activity.

Subsequent applicants, similarly, must provide documents and information allowing the FAS to identify the infringement (including if the first applicant did not provide sufficient documents and information and possibly was not granted immunity), confirming their involvement in the infringement and confirming the termination of such involvement.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Confidentiality of the leniency application submitted to the FAS, and contents thereof, is afforded to the first applicant and such confidentiality is maintained until the FAS adopts a decision on the infringement of antimonopoly legislation.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Both the antitrust and criminal authorities can settle the case with the defendant under Russian law to reduce the liability for the antimonopoly infringement. The FAS will oversee the defendant’s compliance with the terms of the agreed settlement.

The Public Prosecutor can enter into a pretrial cooperation agreement with the defendant after initiating a criminal case under Chapter 40.1 of the Criminal Process Code of the Russian Federation. In this case the sentence will not exceed half of the maximum term for the sentence envisaged for the respective violation. The court will oversee the defendant’s compliance with this cooperation agreement. Alternatively, the defendant can opt for a special procedure under Chapter 40 of the Criminal Process Code and agrees with the charge, in which case the court does not hear the case further and the sentence shall not exceed two-thirds of the maximum term.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

If a legal entity is subject to an administrative sanction, this does not prevent an individual from being sanctioned for the same infringement with an administrative sanction under article 2.1 of the Administrative Code of the Russian Federation; and, similarly, if an individual is subject to an administrative or criminal sanction, this does not prevent a

legal entity from being sanctioned for the same infringement with an administrative sanction. The above applies to both current and former employees.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The administrative leniency policy requires that the applicant provides documents and information in respect of the respective infringement to the FAS that allows the FAS to identify an infringement of antimonopoly legislation and confirm that the applicant no longer participates in such agreement or activity.

The criminal leniency policy requires that the applicant voluntarily informs the authority of the infringement, actively assists in uncovering or investigating the infringement, reimburses the damage caused or otherwise redresses the harm caused, and that the authority ensures no other crimes are identified in the applicant's behaviour.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There currently are no ongoing or anticipated reviews of the immunity/leniency regime besides the surveillance by the regulators and market players as to how the newly introduced criminal leniency programme will be applied in practice.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

Entities and individuals involved in antimonopoly legislation infringement proceedings are entitled to receive all documents and information allowing them to identify an antimonopoly legislation infringement or absence of such with the exception of document submitted to the authorities as part of a leniency application – both administrative and criminal.

Disclosure of certain confidential documents will require the consent of the owner of such documents to disclose to the other participants of the antimonopoly legislation infringement proceedings for familiarisation, while other documents provided to the regulator cannot be marked as confidential in accordance with the Competition Law and will be disclosed to the other participants by the FAS in full.

In criminal proceedings the defendant is entitled to receive all information contained in the criminal case materials, including those that may contain state and other protected forms of secrets (commercial secrets included).

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

In antimonopoly legislation infringement proceedings and administrative liability proceedings, employees under investigation may represent themselves or can be represented by counsel, attorneys and even other employees of the same company under a power of attorney. The same counsel that represents the corporation that employs the employees can represent the employees under Russian law. In criminal proceedings, however, only an individual may be subject to criminal liability and only an attorney may represent the individual and the individual's close family members. The need to seek independent legal advice for an employee depends on the substance of the cartel case in question.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Counsel may represent multiple corporate defendants in antimonopoly legislation infringement proceedings irrespective of their affiliation. However, in administrative liability proceedings and criminal proceedings each representative represents only one defendant (in some cases one counsel (attorney) may represent multiple defendants in criminal proceedings as long as such representation does not create a conflict of interest).

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Legal penalties (administrative and criminal) may only be paid by the individual held liable for the respective infringement under Russian law. However, Russian law does not prevent a corporation from reimbursing its employees for the legal penalties paid by such employees or legal costs incurred by such employees.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Antitrust fines and other penalties paid to the state budget are tax-deductible. Private damages awards may also be deductible if they can be recognised as overhead costs under the Russian Tax Code.

Linklaters

Evgeniya Rakhmanina

evgeniya.rakhmanina@linklaters.com

Paveletskaya Square 2, Building 2
115054 Moscow
Russia

Tel: +7 495 797 9797
Fax: +7 495 797 9798
www.linklaters.com

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Russian law does not take any penalties imposed in other jurisdictions into account when determining whether a company may be subject to overlapping liability for engaging in anticompetitive behaviour on the territory of several countries.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The optimal way to get the fine down is to apply for leniency or, if not applicable, to cooperate with the FAS, provide information and documents required to identify the infringement and cure the negative consequences thereof. Alternatively, challenging the FAS decision in court is often the most efficient means of reducing a fine.

The FAS has suggested introducing amendments to existing anti-monopoly legislation that will require all companies to adopt antitrust compliance programmes and allow for a reduction of fines in the case of pre-existing compliance programmes. This is an open discussion that is likely to gain more traction over the coming months and years.

Singapore

Lim Chong Kin and Corinne Chew

Drew & Napier LLC

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Competition law in Singapore is governed by the Singapore Competition Act (Cap 50B) (the Act). Cartel activities are prohibited by section 34 of the Act (the section 34 prohibition), which provides that:

[...] agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited [...]

The section 34 prohibition became effective on 1 January 2006, and since its introduction, the following infringement decisions in respect of the prohibition have been issued:

- bid rigging in the provision of termite control services in Singapore, 9 January 2008 (the *Pest-Busters* case);
- price fixing in the provision of coach tickets for travelling between Singapore and destinations in Malaysia, 3 November 2009 (the *Express Bus* case);
- bid rigging in electrical and building works, 4 June 2010 (the *Electrical Works* case);
- price fixing of monthly salaries of new Indonesian foreign domestic workers in Singapore, 30 September 2011 (the *Domestic Workers* case);
- price fixing of modelling services in Singapore, 23 November 2011 (the *Modelling Services* case);
- information sharing in the provision of ferry services between Batam and Singapore, 18 July 2012 (the *Ferry Services* case);
- bid rigging by motor vehicle traders at public auctions, 28 March 2013 (the *Motor Vehicle Traders* case);
- price fixing of ball and roller bearings sold to aftermarket customers, 27 May 2014 (the *Ball Bearings* case);
- infringement of the section 34 prohibition in relation to the provision of air freight forwarding services for shipments from Japan to Singapore, 11 December 2014 (the *Freight Forwarding* case);
- infringement of the section 34 prohibition in relation to the distribution of life insurance products in Singapore, 17 March 2016 (the *Financial Advisers* case);
- bid rigging in the provision of electrical services and asset tagging tenders, 28 November 2017 (the *Electrical Services* case);
- infringement of the section 34 prohibition in relation to the market for the sale, distribution and pricing of aluminium electrolytic capacitors in Singapore, 5 January 2018 (the *Capacitors* case); and
- infringement of the section 34 prohibition in relation to the fresh chicken distribution industry, 12 September 2018.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Competition and Consumer Commission of Singapore (CCCS), a statutory body established under Part II of the Act, is the agency

responsible for enforcing the Act and investigating cartel matters. Previously known as the Competition Commission of Singapore (CCS), the CCS was renamed the CCCS and took on the additional function of administering the Consumer Protection (Fair Trading) Act (Cap 52A) with effect from 1 April 2018.

Cartel matters are adjudicated by the CCCS, but its decisions can be appealed to the Competition Appeal Board (CAB). A decision of the CAB can subsequently be appealed to the High Court on a point of law arising from the decision, or from any decision as to the amount of a financial penalty. See question 16 for more details.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

As of 1 April 2018, the CCS was renamed the CCCS and took on the additional function of administering the Consumer Protection (Fair Trading) Act.

- On 16 May 2018, the Act was amended to empower the CCCS to:
 - conduct general interviews during its inspections of premises, regardless of whether such inspections take place with or without a warrant, to increase the efficiency and effectiveness of the CCCS's evidence-gathering and investigation process. Prior to this amendment, occupants of inspected premises were only required to provide an explanation of the documents produced or seized on the premises, or information uncovered during the inspections; the CCCS had no powers to pose general questions relating to the same investigation without first serving a written notice under section 63 of the Act. That said, the questions that the CCCS may pose pursuant to the amendment continues to be limited to the subject matter or purpose of the investigation; and
 - accept binding and enforceable commitments for cases involving competition concerns in connection with the section 34 prohibition (among others). This amendment is intended to enable entities under investigation to offer legally binding commitments to the CCCS to address such competition concerns, and to allow the CCCS to immediately enforce these commitments through the Singapore courts upon their breach. This new regime is intended to be less resource-intensive than the existing framework, which allows entities to propose voluntary (non-binding) undertakings to address the CCCS's concerns but requires the CCCS to reopen its investigation into the matter in the event of a breach of these undertakings.

On 5 September 2018, the CCCS released its Guidance Note for Airline Alliance Agreements which is aimed at providing airlines with more clarity on the competition assessment of airline alliance agreements. This guidance note is designed as a short introductory guide to assist airlines in considering their notifications to the CCCS for a decision or guidance on whether their airline alliance agreement infringes the section 34 prohibition.

The guidance note also introduces a streamlined process for the CCCS's review which is designed to provide faster decisions by the CCCS and lower costs for airlines. Notifications utilising this process can expect to receive the CCCS's decision or guidance within seven months from the time the CCCS deems (i) the notification complete

and (ii) the particular notified airline alliance agreement qualified for this streamlined process. This process consists of a two-phase approach and mirrors the CCCS's current merger review timelines (ie, a Phase 1 review of 30 days, and, if required, a Phase 2 review of up to 120 working days) and is intended to address feedback from the industry for expedited decisions.

Separately, the CCCS has indicated that it will be undertaking a comprehensive review of the Act with a view to recommending changes to balance regulatory and business compliance costs against the benefits from effective competition.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

As stated in question 1, section 34 of the Act prohibits 'agreements, decisions by associations of undertakings, and concerted practices', which have as their 'object or effect' the 'prevention, restriction or distortion' of competition in Singapore. Specifically, section 34(2) provides that agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

The illustrative list in section 34(2) is not intended to be exhaustive, and the CCCS has specified in its Guidelines on the Section 34 Prohibition 2016 (Revised Section 34 Guidelines) that many other types of arrangements may have the effect of preventing, restricting or distorting competition (including, inter alia, information-sharing agreements in some circumstances).

The CCCS has also stated that agreements, decisions and concerted practices will fall within the ambit of the section 34 prohibition only where they have an 'appreciable' effect on competition. The Revised Section 34 Guidelines, at paragraphs 2.21 to 2.28, provide further details on when an arrangement might give rise to an appreciable effect on competition. Arrangements involving price fixing, bid rigging, market sharing or output limitation will always be considered, by their very nature, to have an appreciable effect on competition such that it is not necessary for the CCCS to proceed to analyse the actual effects of such arrangements.

One important qualification on the application of the section 34 prohibition is that it does not apply to arrangements that give rise to net economic benefit (an exclusion that is provided for at paragraph 9 of the Third Schedule to the Act). To qualify for the exclusion, it must be shown that the arrangement:

- contributes to improving production or distribution, or promoting technical or economic progress; and
- does not:
 - impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives; or
 - afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

In determining whether an agreement has the object of preventing, restricting or distorting competition, the CCCS is not concerned with the subjective intention of the parties when entering into an agreement. Instead, it will determine if the section 34 prohibition has been breached based on the content and objective aims of the agreement considered in the economic context in which it is to be applied. The CCCS will also consider the actual conduct and behaviour of the parties in the relevant market.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

Certain liner shipping agreements are exempted from the application of the section 34 prohibition by way of a block exemption order (BEO). The BEO initially took effect on 1 July 2006 for a period of five years, and its first extension until 2015 was granted by the Minister for Trade and Industry on 16 December 2010 and second extension until 2020 was granted by the Minister on 25 November 2015. The liner shipping BEO is the only BEO that has been granted in Singapore since the introduction of competition law.

Some other specific activities and industries are excluded from the application of the section 34 prohibition, as specified in paragraphs 5, 6 and 7 of the Third Schedule to the Act. In particular, the section 34 prohibition will not apply to:

- any agreement or conduct that relates to any goods or services to the extent to which any other written law, or code of practice issued under any written law relating to competition, gives another regulatory authority jurisdiction in the matter;
- the supply of ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act (Cap 237A);
- the supply of piped potable water;
- the supply of wastewater management services, including the collection, treatment and disposal of wastewater;
- the supply of bus services by a licensed bus operator under the Bus Services Industry Act 2015 (Act 30 of 2015);
- the supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act (Cap 263A);
- cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Cap 170A);
- the clearing and exchanging of articles undertaken by the Automated Clearing House established under the Banking (Clearing House) Regulations; or
- any activity of the Singapore Clearing Houses Association in relation to its activities regarding the Automated Clearing House.

Most of the exclusions were made on the basis that the specified activities would be subject to robust sector-specific regulation. Full explanations can be found within Annex B of the CCCS's Second Consultation Paper on the Draft Competition Bill (available at <https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/second-round-of-public-consultation-on-the-competition-act>).

Section 33(4) of the Act states that the substantive prohibitions will not apply to any activity carried on by, any agreement entered into or any conduct on the part of the government, any statutory body or any person acting on behalf of the government or that statutory body, as the case may be, in relation to that activity, agreement or conduct.

6 Application of the law

Does the law apply to individuals or corporations or both?

The section 34 prohibition applies in respect of 'undertakings', which is defined in section 2 of the Act as 'any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services'. Where employees engage in conduct that would be contrary to the section 34 prohibition, liability would be imputed to, and assessed in respect of, the employing undertaking.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Yes. Section 33 of the Act specifically states that conduct that takes place outside Singapore will also be prohibited by the section 34 prohibition if it has the object or effect of preventing, restricting or distorting competition within Singapore. More specifically, section 33 of the Act specifies that section 34 of the Act may apply notwithstanding that:

- an agreement referred to in section 34 has been entered into outside Singapore;
- any party to such agreement is outside Singapore; or
- any other matter, practice or action arising out of such agreement is outside Singapore.

To date, the CCCS has issued infringement decisions in respect of three international cartels, namely the *Ball Bearings* case, the *Freight Forwarding* case and the *Capacitors* case. In all three cases, the Japanese parent companies engaged in conduct in Japan that had an anticompetitive effect within a Singapore market.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

To the extent that the conduct has the object or effect of preventing, restricting or distorting competition within Singapore, there is no applicable exemption or defence from the section 34 prohibition on the grounds that the conduct affects only customers or other parties outside the jurisdiction. However, the section 34 prohibition will not apply if such conduct does not have as its object or effect the prevention, restriction or distortion of competition within Singapore.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

In the usual course, parties generally become aware that they are being investigated for a potential contravention of the section 34 prohibition in one of two ways. On the one hand, the CCCS may issue a formal notice, pursuant to section 63 of the Act, requiring the production of information or documents. This notice will set out the details of the potential contravention that the CCCS has reasonable grounds for suspecting has occurred. On the other hand, the CCCS may conduct unannounced searches (dawn raids) of business premises (under a warrant and pursuant to section 65 of the Act) where it has reasonable grounds for believing that there are relevant documents on the premises that would be concealed, removed, tampered with or destroyed if requested by formal notice. The CCCS may also enter premises without a warrant under section 64 of the Act; however, in such cases the CCCS is required to first give written notice of at least two working days of its intended entry, and it will not have the ability to actively search the premises.

Following on from this, it is not uncommon for multiple formal notices (for the provision of information, documents, or both) to be issued by the CCCS to either the infringing parties or any other parties that might have information that is relevant to the investigation. In requesting such information, under section 63(3) of the Act, the CCCS may specify the time, place, manner and form of the provision of such, and it is not uncommon that parties are required to attend formal interviews to provide the information or explain documents.

Upon completion of the investigation, and where the CCCS is proceeding to take enforcement action, the CCCS will give notice to the infringing parties of the directions it intends to impose. These directions will be encapsulated within a proposed infringement decision (PID), which will set out the facts on which the CCCS relies and its reasons for the proposed decision. Upon receipt of the PID, parties are given an opportunity (usually within six to eight weeks) to make written representations to the CCCS on the findings in the PID. Parties, and their authorised representatives, are also afforded a reasonable opportunity to inspect the documents in the CCCS's file relating to the matters referred to in the PID. Parties may also request the ability to make oral representations to elaborate on their written representations.

Thereafter, and having regard to the written representations, the CCCS will issue its final infringement decision.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

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

* Indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority

The CCCS has the power to issue a formal notice to request documents or information from any person where it considers that such document or information would be relevant to its investigations. The CCCS also has the ability to enter business premises to request the provision of documents or information, and where it has a court-obtained warrant, it may also proceed to search business premises. Specifically, where the CCCS has obtained a warrant, it may:

- enter the premises specified in the warrant and use such force as is reasonably necessary for the purpose of gaining entry;
- search any person on the premises if there are reasonable grounds for believing the person has in his or her possession any document, equipment or article that has a bearing on the investigation;
- search the premises and take copies or extracts from any document appearing to be the kind in respect of which the warrant was granted;
- take possession of any document appearing to be the kind in respect of which the warrant was granted if necessary for preserving the document or prevent tampering, or if it is not reasonably practicable to take copies of the document on the premises;
- take any other step necessary in order to preserve the documents or prevent interference with them, including the sealing of premises, offices or files;
- require any person to provide an explanation of any document appearing to be the kind in respect of which the warrant was granted or state to the best of his or her knowledge where it could be found;
- require any person on the premises to produce any document of the relevant kind at the time and place, and in the form and manner, required by the CCCS;
- require any information stored in electronic form to be produced in a form that could be taken away and read; and
- remove from the premises any equipment or article that relates to any matter relevant to the investigation (eg, computers).

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The CCCS has the ability, under section 88 of the Act and with the approval of the Minister for Trade and Industry, to enter into arrangements with any foreign competition body under which each party may:

- furnish to the other party information in its possession if the information is required by that other party for the purpose of performing any of its functions; and
- provide such other assistance to the other party as will facilitate the performance by that other party of any of its functions.

In entering into any such arrangement, the CCCS is required under section 88 of the Act to take certain precautions (including obtaining an undertaking from the relevant counterparty) relating to the subsequent disclosure of any information provided. To date, the CCCS has entered

into a memorandum of understanding to facilitate cooperation on competition enforcement with Indonesia's Commission for the Supervision of Business Competition, and a memorandum of cooperation with the Japan Fair Trade Commission to increase cross-border enforcement cooperation between both authorities.

It has been publicly acknowledged by the CCCS that to date there has been at least one occasion where dawn raids performed by the CCCS in respect of a potential violation of the section 34 prohibition have been coordinated with overseas competition authorities. It is also a condition of leniency that the leniency applicant grant an appropriate waiver of confidentiality to the CCCS in respect of any jurisdiction where the applicant has also applied for leniency or any other regulatory authority for which it has informed of the conduct so that the CCCS may communicate with these authorities for the purposes of its investigations.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

As competition law in Singapore is still at a relatively early stage, it is too early to draw any meaningful conclusions relating to how the interplay between jurisdictions might affect the investigation, prosecution and punishment of cartel activity in Singapore.

Some of the parties of the international cartel in the *Ball Bearings* case were also investigated and penalised by other competition authorities and courts in other jurisdictions, both before and after the CCCS had issued its infringement decision in May 2014 (eg, Japan (March 2013), Canada (January 2014), Australia (May 2014) and China (August 2014)). However, the CCCS infringement decision does not specify that there was direct cooperation between the CCCS and other foreign authorities in respect of investigations.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel matters are investigated and prosecuted by the CCCS, which has the ability to impose fines up to a statutory maximum or to make other directions it deems fit to bring the infringement to an end. Appeals of the CCCS's decisions can be made to the CAB. Thereafter, a more limited right of appeal (in respect of a point of law or the calculation of the financial penalty) is available to the High Court and the Court of Appeal. Further information on the appeal process is set out in question 16.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In establishing that an infringement of competition law has occurred (ie, that the section 34 prohibition has been infringed), the evidential burden of proof is borne by the CCCS. However, in establishing the application of a statutorily provided exclusion, exemption or other defence (ie, that the arrangement in question gives rise to net economic benefit and thus should be excluded through the application of paragraph 9 of the Third Schedule to the Act), the onus would fall on the party seeking to apply the exclusion, exemption or defence.

The standard of proof is the balance of probabilities. However, the CCCS has consistently noted that the standard would depend on the facts and circumstances of the case and 'given the hidden and secret nature of cartels where little or nothing may be committed in writing, even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard' (quoting *JJB Sports plc and Allsports Limited v OFT* [2004] CAT 17).

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes, see question 14 for more details.

16 Appeal process

What is the appeal process?

Appeals of the CCCS's decisions are made to the CAB, which is an independent body established under section 72 of the Act. The CAB comprises 30 members including lawyers, economists, accountants, academics and other business people. In the usual course, a panel of five members will be appointed to hear an appeal. The CAB's powers and procedures are set out primarily in section 73 of the Act and the Competition (Appeals) Regulations.

Parties to an agreement or persons whose conduct in respect of which the CCCS has made a decision as to the infringement of the section 34 prohibition may appeal against (or with respect to) that decision, the imposition or amount of any financial penalty, or any directions issued by the CCCS, to the CAB. An appellant would be required to prove its case on a balance of probabilities to succeed in its appeal.

Appeals are made by lodging a notice of appeal, in accordance with the Competition (Appeals) Regulations, within two months from the date of the CCCS's infringement decision. Thereafter, the CCCS has six weeks to file its defence. The procedure and timetabling of the appeal may be determined at any time during the proceedings by the CAB, usually through holding a case management conference with the parties. The CAB has broad powers to make directions it thinks fit to determine the just, expeditious or economic conduct of the appeal proceedings.

Parties may appeal CAB decisions, in accordance with section 74 of the Act, to the High Court on a point of law arising from a decision of the CAB, or in respect of any decision made by it as to the amount of the financial penalty. Appeals are brought by way of originating summons, and the procedure governing the appeal is set out in Order 55 of the Rules of Court (Cap 322, R 5, 2006 Rev ed).

Parties may also appeal High Court decisions to the Court of Appeal under section 74 of the Act. Such appeals are governed by the same procedure as all other civil appeals in Singapore. There is no further appeal right from the Court of Appeal.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Currently, involvement in cartel activity does not give rise to criminal liability in Singapore. However, criminal prosecutions may arise in the context of cartel investigations where a person:

- refuses to provide information pursuant to a requirement on him or her to do so;
- destroys or falsifies documents;
- provides false or misleading information; or
- obstructs an officer of the CCCS in the discharge of his or her duties.

An offence of a nature described above is punishable by a prison sentence not exceeding 12 months, a fine not exceeding S\$10,000, or both. To date, we are not aware of any such criminal sanctions being imposed in Singapore.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The CCCS, under section 69 of the Act, can make such directions as it considers appropriate to bring an infringement to an end or to remedy, mitigate or eliminate any adverse effect of the infringement. While section 69 provides a general discretion to the CCCS in making directions, it provides specific examples of the directions that the CCCS may make, including:

- requiring parties to the agreement to modify or terminate the agreement;
- to pay to the CCCS such financial penalty in respect of the infringement as the CCCS may determine (where it determines that the infringement has been committed intentionally or negligently), but not exceeding 10 per cent of such turnover of the business of the undertaking in Singapore for each year of infringement for such period, up to a maximum of three years;

- to enter such legally enforceable agreements as may be specified by the CCCS and designed to prevent or lessen the anticompetitive effects that have arisen;
- to dispose of such operations, assets or shares of such undertaking in such manner as may be specified by the CCCS; and
- to provide a performance bond, guarantee or other form of security on such terms and conditions as the CCCS may determine.

In determining the amount of financial penalty to impose, in its Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016 (Revised Penalty Guidelines), the CCCS has stated that it will adopt the following six-step approach:

- calculation of the base penalty having regard to the seriousness of the infringement (expressed as a percentage rate) and the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year;
- adjustment for the duration of the infringement;
- adjustment for other relevant factors (eg, deterrent value);
- adjustment for aggravating or mitigating factors;
- adjustment if the statutory maximum penalty is exceeded; and
- adjustment for immunity, leniency reductions or fast-track procedure discounts.

In every infringement decision published to date, the CCCS has imposed financial penalties on the parties involved in cartel activity, unless they enjoyed immunity under the leniency programme.

The maximum amount of financial penalty imposed may not exceed 10 per cent of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years. There are no minimum penalties (in absolute terms) stipulated in the Act.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Apart from the broad requirement that directions issued by the CCCS must bring an infringement to an end, or remedy, mitigate or eliminate any adverse effect of an infringement, there are currently no publicly available guidelines on how the CCCS will exercise its power to make directions. The CCCS has published guidelines on how it will calculate the appropriate amount of financial penalty to impose on infringing undertakings (namely, the Revised Penalty Guidelines) (see question 18). While these guidelines do not have the force of law, they will generally be followed by the CCCS, subject to any relevant decisions of the CAB relating to calculation of the financial penalty.

Besides setting out the approach that it will adopt in the calculation of penalty, the Revised Penalty Guidelines also provide examples of aggravating and mitigating factors that are considered.

As regards aggravating factors, these include:

- the undertaking's role as a leader in, or an instigator of, the infringement;
- involvement of directors or senior management;
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuance of the infringement after the start of investigation;
- repeated infringements by the same undertaking or other undertakings in the same group;
- unreasonable failure by an undertaking to respond to a request for financial information on business turnover or relevant turnover;
- in the case of bid rigging or collusive tendering, the CCCS may treat each infringement that an undertaking participates in, after the first infringement, as an aggravating factor and calibrate with a proportionate percentage increase in penalties;
- infringements that are committed intentionally rather than negligently; and
- retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

As regards mitigating factors, these include:

- the undertaking's role, for example, that the undertaking was acting under severe duress or pressure;
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- adequate steps taken with a view to ensuring compliance with the section 34 prohibition, for example, existence of any compliance programme;
- termination of the infringement as soon as the CCCS intervenes; and
- cooperation that enables the enforcement process to be concluded more effectively or speedily.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Section 69(1) of the Act confers wide powers on the CCCS to make such directions as it considers appropriate to bring an infringement to an end, or to remedy, mitigate or eliminate any adverse effect of the infringement. However, the Act does not expressly empower the CCCS to issue directions debarring undertakings from government procurement procedures and the position, in this regard, remains untested.

Notwithstanding the CCCS's powers to make directions, we note that undertakings that infringe the section 34 prohibition may potentially be regarded as ineligible to participate in specific government procurement exercises by the relevant procuring authorities if such infringement is considered a breach of the applicable terms and conditions of the procurement exercise.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

As discussed in question 17, there are currently no criminal sanctions for cartel activities in Singapore. It is open to the CCCS to impose multiple administrative sanctions where it considers that such sanctions are necessary or appropriate.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Parties may bring private actions for a breach of competition law under section 86 of the Act, which provides that any person who suffers loss or damage directly as a result of an infringement (including, inter alia, of the section 34 prohibition) shall have a right of action for relief in civil proceedings. The Act does not allow parties to claim for double or treble damages.

Such rights are predicated on an infringement finding by the CCCS, and may only be brought within two years following the expiry of any applicable appeal periods. Third parties do not have standing to bring such claims in other circumstances, or to lodge an appeal with the CAB.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

The only form of group litigation in Singapore is through a representative action (under Order 15, Rule 12 of the Rules of Court). Under this action, proceedings may be commenced without the leave of the court, under the usual court processes. However, the defendant may apply for the representative proceedings to be discontinued, and the court may decide whether a representative action is appropriate and whether it is properly constituted. Notwithstanding the fact that representative

actions may be brought, it would still be necessary for parties to establish that they have suffered direct loss, as required by section 86 of the Act. To date, we are not aware of any such proceedings being taken in Singapore with respect to competition-related matters.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The CCCS operates a leniency programme, which encompasses the prospect of full immunity in certain circumstances. The CCCS's leniency programme is described in detail in its Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016 (Revised Leniency Guidelines).

Under the leniency programme, where a party provides information to the CCCS about a cartel before the CCCS has opened an investigation, that party may benefit from full immunity from financial penalties imposed by the CCCS in respect of such. Paragraph 2.2 of the Revised Leniency Guidelines states that an undertaking will benefit from full immunity from financial penalties if all of the following conditions are satisfied:

- the undertaking is the first to provide the CCCS with evidence of the cartel activity before an investigation has commenced, provided that the CCCS does not already have sufficient information to establish the existence of the alleged cartel activity; and
- the undertaking:
 - provides the CCCS with all the information, documents and evidence available to it regarding the cartel activity immediately and such information, documents and evidence must provide the CCCS with sufficient basis to commence an investigation;
 - grants an appropriate waiver of confidentiality to the CCCS in respect of any jurisdiction where it has also applied for leniency or any other regulatory authority for which it has informed of the conduct;
 - unconditionally admits to the conduct for which leniency is sought and details the extent to which this had an impact in Singapore by preventing, restricting or distorting competition within Singapore;
 - maintains continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CCCS arising as a result of the investigation;
 - refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the CCCS (except as may be directed by the CCCS);
 - must not have been the one to initiate the cartel; and
 - must not have taken any steps to coerce another undertaking to take part in the cartel activity.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Where a party who is not the first to come forward provides information to the CCCS about a cartel, after the CCCS has opened its investigation but before the CCCS has sufficient information to issue a written notice that it proposes to issue an infringement decision, the party cannot benefit from immunity, but may benefit from lenient treatment by way of a reduction of up to 50 per cent of the financial penalties (partial leniency).

To enjoy partial leniency, the following conditions must be fulfilled:

- the undertaking is required to:
 - provide the CCCS with all the information, documents and evidence available to it regarding the cartel activity immediately and such information, documents and evidence must provide the CCCS with sufficient basis to commence an investigation;

- grant an appropriate waiver of confidentiality to the CCCS in respect of any jurisdiction where it has also applied for leniency or any other regulatory authority for which it has informed of the conduct;
- admit unconditionally to the conduct for which leniency is sought and details the extent to which this had an impact in Singapore by preventing, restricting or distorting competition within Singapore;
- maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CCCS arising as a result of the investigation; and
- refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CCCS (except as may be directed by the CCCS); and
- the information adds significant value to the CCCS's investigation.

Any reduction in financial penalties under these circumstances is discretionary on the part of the CCCS. While the Revised Leniency Guidelines do not specifically identify the likely reductions in financial penalties with respect to subsequent applications, it does specify that the CCCS will take into account:

- the stage at which the undertaking comes forward;
- the evidence already in the CCCS's possession; and
- the quality of the information provided by the undertaking.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The undertaking that is 'second in' may benefit from a reduction in financial penalties of up to 50 per cent. While the Revised Leniency Guidelines do not specifically identify the likely reductions in financial penalties with respect to subsequent applications, it does specify that the CCCS will take into account the stage at which the undertaking comes forward, the evidence already in the CCCS's possession and the quality of the information provided by the undertaking.

To date, we are not aware of any public disclosure by the CCCS of the amount of reduction in financial penalties enjoyed by leniency applicants. Accordingly, it may be difficult in practice to make general observations about the difference in treatment between the 'second in' party and those that applied for leniency later. However, on the understanding that the CCCS will take into account the stage at which the undertaking comes forward, and the evidence that it already has in its possession before deciding on the level of reduction in penalties, it is likely that parties that come in later may find it more difficult to produce crucial and quality evidence to justify a significant reduction. To the extent that the 'first in' party has failed to perfect its marker, it is also possible for the 'second in' party to be provided an opportunity to perfect it and benefit from either full immunity or full leniency (where such party may obtain a reduction of up to 100 per cent in financial penalties).

A leniency plus system, whereby a party may benefit from further reductions in financial penalties in respect of one cartel investigation by providing information to the CCCS in respect of another cartel, is available in Singapore. To benefit from this programme, the CCCS states in its Revised Leniency Guidelines that the following conditions must be met:

- the evidence provided by the undertaking relates to a completely separate cartel activity. The fact that the activity is in a separate market is a good indicator, but not always decisive; and
- the undertaking would qualify (in accordance with the usual qualification criteria for leniency applications) for total immunity from financial penalties or a reduction of up to 100 per cent in the amount of the financial penalty in relation to its activities in the second market.

If a party can satisfy the above conditions, then it could benefit from a reduction in financial penalties in respect of the first cartel, which is in addition to any reduction that it already stands to receive for its cooperation in respect of the first cartel.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Immunity may only be sought from the CCCS if the applicant is first to provide evidence of cartel activity before an investigation has commenced. Accordingly, such applications should be made as soon as possible. The marker system has facilitated such early applications, as there is now no need for an applicant to ensure that it has all of the evidence collated and ready for submission to the CCCS at the time it makes its application.

While applications for leniency may be made after the CCCS has commenced its investigation, full leniency can only be granted to the first applicant that provides the CCCS with evidence of cartel activity. While there is no requirement for the applicant to be the first to provide information in a partial leniency application, it is still advisable in every case to approach the CCCS as soon as possible because in both full leniency and partial leniency applications, the CCCS will consider the stage at which the undertaking comes forward and the evidence already in the CCCS's possession before assessing the level of leniency to grant. The earlier the party makes such an application and the higher up the leniency queue they are, the more likely that the information provided will be of value to the CCCS and the more likely that the party will stand to benefit from lenient treatment.

To qualify for reduction in financial penalty through a leniency application, applications must be made before the CCCS issues a written notice under section 68(1) of the Act of its intention to make an infringement decision.

The introduction of the marker system has provided applicants with some flexibility over the need to immediately provide the CCCS with all of the necessary information and evidence required to qualify for leniency or immunity. If the applicant is unable to immediately submit sufficient evidence to allow the CCCS to establish the existence of the cartel activity, the applicant will be given a limited time to gather sufficient information and evidence in order to perfect the marker. If the applicant fails to perfect the marker within the given time, the next applicant in the marker queue will be allowed to perfect its marker to obtain immunity or a 100 per cent reduction in financial penalties. Once the marker has been perfected, the other applicants in the marker queue will be informed that they no longer qualify for full immunity or a 100 per cent reduction in financial penalties. It is then up to them to decide whether to submit subsequent leniency applications. The marker system does not apply to subsequent leniency applications.

The Revised Leniency Guidelines state that in order to qualify for the marker the undertaking must provide its name and a description of the cartel conduct in sufficient detail to allow the CCCS to determine that no other undertaking has applied for immunity or a reduction of up to 100 per cent for such similar conduct. The CCCS also states in its Revised Leniency Guidelines that the grant of a marker is discretionary, but that it is expected to be the norm rather than the exception.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The CCCS's Revised Leniency Guidelines provide that in every leniency and immunity application, the applicant must provide the CCCS with all the information, documents and evidence available to it regarding the cartel activity, and must maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CCCS arising as a result of the investigation. It does not appear from the Guidelines that different requirements or expectations as to the nature, level and timing of cooperation apply to subsequent leniency applicants.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Revised Leniency Guidelines provide, at paragraph 8.1, that the CCCS will 'endeavour, to the extent consistent with its obligations to disclose or exchange information, to keep the identity of such undertakings confidential throughout the course of its investigation, until the CCCS issues a written notice under section 68(1) of the Act of its intention to make a decision that the section 34 prohibition has been infringed'.

To the extent that information is provided to the CCCS in the course of making a leniency application (regardless of whether it is an immunity, full leniency or partial leniency application), in responding to a notice of the CCCS to provide information or in otherwise cooperating with the CCCS, the providing party can request confidential treatment in respect of such information, or the relevant parts thereof, in accordance with section 89(3) of the Act.

At the point that the CCCS issues its PID, information provided to the CCCS that is not subject to confidential treatment as outlined above, will be available for inspection by all parties subject to the CCCS's PID.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

With effect from 1 December 2016, the CCCS has introduced a fast-track procedure for cases involving the infringement of the section 34 prohibition. The CCCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases (Fast Track Procedure Practice Statement) explains that under this procedure, 'parties who admit liability for their infringement will be eligible for a fixed percentage reduction in the amount of financial penalty they are directed to pay pursuant to section 69(2)(d) of the Act'. This procedure is not mutually exclusive from the leniency regime and it is possible for a leniency applicant to benefit from discounts arising from both leniency and the fast-track procedure.

While investigated parties may indicate to the CCCS their willingness to participate in the fast-track procedure, the CCCS retains a broad discretion to determine whether the fast-track procedure would be suitable for the case under investigation. In general, the CCCS envisages that it would initiate the fast-track procedure before the issuance of a PID and that this procedure is suitable for cases where the CCCS is reasonably satisfied, based on information and evidence available to it, that the evidentiary standard of proof has been met such that the CCCS would be prepared to issue a PID or infringement decision.

The fast-track procedure will involve the following steps:

- initiation of the procedure;
- discussion between the CCCS and the participating parties on the timelines involved, the scope and gravity of the conduct, the evidence used to determine the scope of the contemplated infringement, non-confidential versions of key documents that the CCCS regards as necessary to enable the party to ascertain its position regarding the contemplated infringements, and the possible range and quantum of financial penalties calculated according to the Revised Penalty Guidelines; and
- agreement to accept the fast-track procedure offer, which will include:
 - an acknowledgement of the party's liability for the infringement and its involvement in it;
 - an agreement to cooperate throughout the CCCS's investigation;
 - an indication of the maximum amount of the financial penalties each party would accept to be imposed;
 - a reservation of rights by the CCCS to adjust the figures in applying the penalties, provided that the final penalty does not

exceed the maximum amount of financial penalties the party has indicated, and make further adjustments that may reduce the final penalty without further notice to the party;

- confirmation of the party's request to use the fast-track procedure;
- confirmation by the party that it has been sufficiently informed of the contemplated infringements and that it has been given the opportunity to be heard;
- confirmation by the party that it will not make extensive written representations, request to make oral representations to the CCCS or request to inspect the documents and evidence in the CCCS's file, but it can provide a concise memorandum identifying any material factual inaccuracies in the PID;
- an acknowledgement that should the party bring appeal proceedings before the CAB in respect of the CCCS's decision, the CCCS reserves the right to make an application to the CAB for a penalty amount that differs from that calculated in its infringement decision, and may require the party to pay the full costs of the CCCS's appeal regardless of the outcome of the CCCS's appeal; and
- acceptance, which will involve the CCCS adopting a streamlined PID or infringement decision (as appropriate) reflecting the content agreed between the CCCS and each party in the fast-track agreement, and providing for a reduction of 10 per cent on the financial penalty that would have otherwise been imposed but for the party's participation in the fast-track procedure.

Parties to such a procedure may not disclose to any third party any information received from their participation in this procedure unless express prior authorisation by the CCCS has been obtained.

As this procedure has been introduced only recently, it is as yet untested in the courts but it would appear from the language of the Fast Track Procedure Practice Statement that the level of judicial oversight that applies to matters handled under the fast-track procedure would not differ materially from other cases. For more information of such judicial oversight, see question 16.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Contraventions of the section 34 prohibition by employees would be considered contraventions by their employing undertaking in Singapore. In this regard, and given that there are no criminal sanctions for engaging in activity in breach of the section 34 prohibition, there is no distinction between an undertaking and its employees from the perspective of a leniency or immunity application.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Leniency or immunity applications may be made orally or in writing by an undertaking or its authorised representative. In the usual course, initial contact is made by phone and a time is arranged for the application to be made in person.

The Revised Leniency Guidelines indicate that it is possible that anonymous enquiries can be made to the CCCS to see if leniency is still available in respect of a particular matter, but that any subsequent application cannot be made anonymously.

In order to qualify for leniency or immunity, undertakings must, among other things, maintain continuous and complete cooperation with the CCCS throughout the investigation and until the conclusion of any action by the CCCS arising as a result of the investigation. Such undertakings must also provide the CCCS with all the information, documents and evidence available to it regarding the cartel activity.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There have been changes to the leniency system in Singapore with the introduction of the leniency plus system and marker system. No other ongoing or proposed leniency or policy revisions or reviews have been publicly announced.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The CCCS will provide all parties that are subject to a PID with a copy of it. The PID contains the CCCS's arguments of fact and law with regard to the proposed decision and refers to the evidence on which the CCCS proposes to rely. Such parties are also provided with a copy of the CCCS's file on the matter, save for the fact that confidential information of all parties will be redacted, and the CCCS's internal documents will not be disclosed.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

As stated above, cartel involvement does not give rise to liability for individuals or employees. Accordingly, representation is at the corporation level.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

It is possible for counsel to represent more than one party, subject to adherence to the standard professional and ethical responsibilities. Usually, in representing multiple parties, such parties must have a common interest in the proceedings, and this is more likely to be the case if the corporations represented are affiliated.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Penalties are imposed only at the corporation level in Singapore.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Fines and penalties are generally not considered to be tax-deductible. To date, there has been no follow-on private action for competition law infringements, so the position regarding tax-deductibility of awards of private damages remains untested in the context of competition law infringements. However, it is unlikely that such private damages will be considered to be tax-deductible.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Neither the Act nor the CCCS's Revised Leniency Guidelines specify that sanctions imposed in other jurisdictions will be taken into account in determining the amount of financial penalties to impose. To date, the CCCS has also not considered this factor directly in any of its infringement decisions.

There have been no private actions brought in Singapore to date in respect of competition law infringements. However, it is noteworthy that section 86 of the Act provides third parties a right to damages only where they have suffered loss directly as a result of the infringing conduct.

40 Getting the fine down

**What is the optimal way in which to get the fine down?
Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

An application for leniency may result in full immunity from prosecution or a reduction of up to 100 per cent of the financial penalty imposed. Furthermore, the use of the leniency plus system is another avenue open to parties in seeking to further reduce their penalties. For further information about the leniency programme and the leniency plus system, see questions 24 to 27.

Further to this, it is in a party's interest to cooperate during the course of the CCCS's investigation. In all the infringement decisions issued to date, the cooperation of the investigated parties during the investigation was viewed as a mitigating factor, and in many instances parties benefited from a reduced financial penalty. It is also clear from statements of the CCCS in all of these decisions that the immediate cessation of the potentially infringing conduct at a very early stage in the proceedings might be considered, at least, a non-aggravating factor.

The CCCS has stated in its Revised Penalty Guidelines that the existence of a compliance programme may be taken into consideration as a mitigating factor in the context of calculating the financial penalty.

DREW & NAPIER

Lim Chong Kin
Corinne Chew

chongkin.lim@drewnapier.com
corinne.chew@drewnapier.com

10 Collyer Quay #10-01
Ocean Financial Centre
Singapore 049315
Singapore

Tel: +65 6531 4110
Fax: +65 6535 4864
www.drewnapier.com

Slovenia

Stojan Zdolšek, Irena Jurca and Katja Zdolšek
Zdolšek Attorneys at Law

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation is the Slovenian Act on Prevention of the Restriction of Competition (the Competition Act), published in the Official Journal of the Republic of Slovenia No. 36/2008. The Competition Act entered into force on 26 April 2008 and has undergone several amendments since then.

Violation of the prohibition of restricting agreements may amount to a criminal offence, regulated by the Slovenian Criminal Code and the Slovenian Liability of Legal Persons for Criminal Offences Act.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Slovenian Competition Agency (the Agency), which acts as an administrative authority and as a minor offence authority, is responsible for the enforcement of the competition rules. The Agency may also bring an action before the competent court for nullity of prohibited restrictive agreements.

Criminal offences are prosecuted by state prosecutors and adjudicated before competent regular courts having jurisdiction over criminal matters.

Civil actions for damages are adjudicated by courts of general jurisdiction.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The last amendment of the Competition Act, published in the Official Journal of the Republic of Slovenia No. 23/2017, came into force on 20 May 2017, focusing mainly on certain material and procedural rules regarding claims for damages in the light of the implementation of Directive 2014/104/EU.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 6 of the Competition Act prohibits as null and void agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings (all referred to in this chapter as agreements) that have as their object or effect the prevention, restriction or distortion of competition on the territory of the Republic of Slovenia, in particular the following non-exhaustively listed agreements:

- direct or indirect fixing of purchase or selling prices or other trading conditions;
- limiting or controlling production, sales, technical progress or investment;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of their contracts; and
- sharing markets or sources of supply.

When an agreement may affect trade between EU member states, the provisions of article 101 of the Treaty on the Functioning of the European Union (TFEU) shall also apply.

Acting in contravention of the prohibition of restrictive agreements in article 6 of the Competition Act or article 101 TFEU may represent a minor offence pursuant to the Competition Act.

Cartels may also amount to a criminal offence pursuant article 225 of the Slovenian Criminal Code, which defines an illegal restriction of competition as a criminal offence. Whoever, in pursuing an economic activity contrary to regulations governing the protection of competition, violates the prohibition of restrictive agreements between companies, abuses the dominant position of one or more companies, or creates a forbidden concentration of companies and thus prevents or significantly impedes or distorts competition in Slovenia, or in the EU market, or its significant part, or significantly influences trade between member states, which results in a large property benefit for such a company or companies, or a large property damage for another company, shall be sentenced to imprisonment for not less than six months and not more than five years. Intent of the perpetrator has to be proven. Legal persons may be liable and sentenced for a criminal offence pursuant to the provisions of the Liability of Legal Persons for Criminal Offences Act.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no industry-specific infringements or industry-specific defences foreseen in the Competition Act.

The Competition Act recognises the following exemptions: the article 6(3) exemption, de minimis exemption and block exemption.

According to article 6(3) of the Competition Act, similar to article 101(3) TFEU, the undertaking invoking the exception must demonstrate and bear the burden of proving the following cumulative conditions for the exception to the prohibition of restrictive agreements in article 6(1) of the Competition Act: agreements must contribute to improving the production or distribution of goods or to promoting technical and economic progress while allowing consumers a fair share of the resulting benefit, shall not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives, and shall not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services that are the subject of the agreement.

Under the de minimis exemption, regulated in article 7 of the Competition Act, the prohibition of restrictive agreements shall not apply to agreements of minor importance, which are agreements

between undertakings whose cumulative market share does not exceed 10 per cent in the case of horizontal agreements and mixed horizontal-vertical agreements or agreements where it is difficult to determine whether they are horizontal or vertical, or 15 per cent in the case of vertical agreements. In case of the cumulative effects, thresholds are decreased by 5 per cent. But even if these thresholds are not met, de minimis exemption shall not apply to horizontal agreements having as their object fixing of prices, limiting of the production or sales or sharing of markets or sources of supply, and to vertical agreements having as their object fixing of retail prices or granting territorial protection to the participating undertakings or to third persons.

Regarding block exemptions, the provisions of the Regulations of the European Commission or the Council of the European Union shall apply with the necessary changes, even if there is no indication of an effect on the trade between EU states. The Agency may withdraw the benefit of the block exemption if it finds that an agreement has certain effects incompatible with article 6(3) of the Competition Act or article 101(3) TFEU.

6 Application of the law

Does the law apply to individuals or corporations or both?

Pursuant to the Competition Act, an undertaking means any entity that is engaged in economic activities, regardless of its legal and organisational form and ownership status. Therefore, the Competition Act applies to both individuals and corporations and also to an association of undertakings that is not directly engaged in an economic activity but affects or may affect the behaviour on the market of undertakings.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Competition Act prohibits restrictive agreements that have as their object or effect the prevention, restriction or distortion of competition in the territory of Slovenia, irrespective of where they occurred or were entered into.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no such exemption foreseen in the Competition Act.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The Agency initiates the procedure ex officio with an order on the commencement of procedure, although it may exercise certain investigative powers prior to that. An extract of the order on the commencement of procedure is published on the Agency's website.

The Agency is obliged to perform a fact-finding procedure in accordance with the principle of material truth and free assessment of evidence. The Agency shall decide without an oral hearing unless established otherwise. In cases of urgency, interim measures may be adopted.

The Agency notifies the parties about findings on relevant facts and evidence prior to issuing a decision with a statement of objections on which parties may comment within a time limit set by the Agency and not longer than 45 days.

At the closing of the administrative procedure, the Agency may issue a decision establishing the existence of an infringement and require the undertaking to bring such infringement to an end, or a decision by which the Agency accepts the commitments offered by the undertaking and makes them binding. The Agency may terminate the procedure with an order in case the infringement is not found or if the procedure would not be reasonable.

Liability for minor offences is established and fines are imposed by the Agency in a minor offences procedure.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Agency may address a request for information to each undertaking, partners, members of management or supervisory boards and persons employed with the undertaking. If the Agency requests the information with a special order, an undertaking is obliged to submit all requested documents and information, but not to admit an infringement. If an undertaking to which such an order was issued provides incorrect, incomplete or misleading information or does not supply the requested information within the set time limit, a penalty up to €50,000 may be imposed.

The Agency may also carry out an inspection on the premises of an undertaking, either upon consent given by an undertaking or person whose data is being inspected or upon a court order, issued by the judge of the Regional Court in Ljubljana upon the Agency's proposal if there are reasonable grounds for suspicion of an infringement and the probability of finding relevant evidence with investigation exists.

The inspection is conducted by employees of the Agency, whereby specific professional tasks may be carried out by special organisations, institutions or individuals, and with police assistance, if the undertaking obstructs the investigation or there are reasonable grounds to expect that. During the investigation, authorised persons are also empowered to:

- enter and inspect the premises (premises, land and means of transport) at the registered office of the undertaking and at other locations at which the undertaking itself or another undertaking authorised by the undertaking concerned performs the activity and business for which there is probability of an infringement;
- examine the business books and other documentation;
- take or obtain in any form copies of or extracts from business books and other documentation;
- seal any business premises and business books and other documentation for the period and to the extent necessary for the inspection; and
- ask any representative or member of staff of the undertaking to give an oral or written explanation of facts or documents relating to the subject matter and purpose of the inspection.

A penalty amounting to up to 1 per cent of the turnover in the preceding business year on an undertaking and up to €50,000 on a natural person may be imposed in case of an obstruction of an inspection.

The Agency may also conduct the investigation on other premises, on the basis of prior court order, if there are reasonable grounds to suspect that business books and other documentation relating to the subject matter of the inspection are being kept at the premises of an undertaking against which the procedure has not been initiated, or on the residential premises of members of the management or supervisory bodies or of staff or other associates of the undertaking against which the procedure has been initiated.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The Agency cooperates with the European Commission and other competition offices in EU member states on the basis of the Regulation No. 1/2003 and the Competition Act.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The Agency may issue a decision establishing the existence of an infringement of article 6 or article 9 of the Competition Act or article 101 or article 102 TFEU.

In the case of the procedure alleging the infringement of articles 101 or 102 TFEU, the Agency shall conduct a single procedure, in which the Agency shall also conduct a procedure alleging the infringement of the

provisions of article 6 or 9 of the Competition Act. If during the procedure the Agency should determine that the trade between EU member states has not been affected, an order terminating the procedure regarding the infringement of the provisions of articles 101 or 102 TFEU is issued.

Where the European Commission initiates procedure for the infringement of article 101 or 102 TFEU or has already issued a decision on the same matter, in which the procedure had also been initiated by the Agency, the Agency shall terminate the procedure initiated by the Agency with an order. The Agency may also issue an order of termination in cases where a competition authority of another EU member state has initiated procedure for the infringement of articles 101 or 102 TFEU, or has issued a decision on the same matter.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The Agency conducts the administrative procedure and minor offence procedure.

In the administrative procedure, the Agency assesses restrictive practices and may issue a decision establishing the existence of an infringement of article 6 of the Competition Act or article 101 TFEU and require the undertaking concerned to bring such infringement to an end, may accept commitments with the decision, or may issue an order of termination if no infringement is found or if specific circumstances indicate that the procedure would not be reasonable.

In the minor offence procedure, the Agency assesses liability for a minor offence and imposes the fine.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The Agency bears the burden of proof for the alleged infringement. The undertaking against which the procedure is initiated has to demonstrate exculpatory conditions as stipulated in article 6(3) of the Competition Act or article 101(3) TFEU.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Any suitable evidence can be used as evidence in the procedure before the Agency. In certain cases, for example concerted practices, the finding of infringement may be inferred from circumstantial evidence.

16 Appeal process

What is the appeal process?

Judicial protection against the decisions of the Agency before an administrative court is ensured against all decisions and orders of the Agency if not expressly excluded. The party or other participant to the procedure is obliged to file a lawsuit against the decision of the Agency within 30 days. New evidence or facts that have not already been presented in the procedure before the Agency are not allowed. The court shall test a decision within the limits of the claim and within the limits of the grounds stated in the lawsuit, and shall ex officio pay attention to the certain essential procedural infringements pursuant to the Administrative Disputes Act. Matters shall be considered urgent and a priority. In certain cases, a further extraordinary legal remedy – revision to the Supreme Court – is possible.

Decisions issued in the minor offence procedure are subject to judicial review before the District Court of Ljubljana pursuant to the provisions of the Minor Offences Act. Matters are considered a priority. The court may dismiss the request for judicial protection as unfounded, abolish or change the decision of the Agency. Further appeal against the court decision is possible.

Court decisions in criminal procedures may be appealed before the competent higher court, and further appealed before the Supreme Court pursuant to the provisions of the Criminal Procedure Act.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Pursuant to the Criminal Code, the penalty of not less than six months and not more than five years of imprisonment is foreseen for the illegal restriction of competition as a criminal offence. The court may in certain cases remit the penalty for the perpetrator who announced the criminal offence. Granting of immunity by the Agency does not necessarily mean immunity shall also be granted in the criminal procedure.

A fine of at least €50,000 and up to 200 times the amount of damages caused or illegal benefit obtained through the criminal offence may be imposed on a legal entity found liable for the criminal offence. If certain stipulated conditions are met, also the winding-up of a legal person and the prohibition of a specific commercial activity of not less than six months and no more than five years as a safety measure may be ordered pursuant to provisions of the Liability of Legal Persons for Criminal Offences Act.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Pursuant to the Competition Act, a fine for minor offence of up to 10 per cent of the annual turnover of the undertaking in the preceding business year shall be imposed on a legal entity, entrepreneur or individual who performs economic activity in contravention of prohibition of restrictive agreements in article 6 of the Competition Act and article 101 TFEU. A fine between €5,000 and €10,000, or in the case of offences of a particularly serious nature between €15,000 and €30,000, shall be imposed on the responsible person of a legal entity or of an entrepreneur.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Since there are no special guidelines for the calculation of the fine, the Agency is obliged to act in accordance with the provision of the Minor Offences Act, which stipulates the following aggravating and mitigating circumstances for the fine assessment: the level of responsibility of the perpetrator, motive for the infringement, circumstances in which the minor offence was committed, previous convictions and the perpetrator's behaviour after the minor offence, especially if the perpetrator compensates for damage. For legal persons and entrepreneurs their economic power and previous convictions are considered.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Pursuant to the provisions and conditions of the Slovenian Public Procurement Act, a contracting public authority shall exclude an undertaking from the public procurement procedure if the undertaking or the member of administrative, management or supervisory board or any person having representative, management or supervisory powers is convicted for criminal offence of illegal restriction of competition under article 225 of the Criminal Code, unless the award of the contract is justified with reasons of significant importance related to the public interest.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

A minor offence procedure before the Agency may not be initiated against a person who has already been finally sentenced for the criminal

offence concerning the same conduct. On the other hand, the finality of the penalty in the minor offence procedure does not automatically exclude the initiation of a criminal procedure. The Criminal Code regulates the inclusion of fines for minor offences in criminal sentences.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Any person who suffered harm as a consequence of a cartel infringement may claim material damages for actual loss and loss of profit with interest since the occurrence of the damage, according to the full compensation principle. Immaterial damages may be claimed for the defamation of reputation or good name. Multiple damages caused by anticompetitive infringement are not foreseen in Slovenian law.

Where in an action for damages the existence of a claim for damages or the amount of compensation depends on the degree of an overcharge passed on to the claimant as indirect purchaser, the claimant bears the burden of proving the existence and the amount of such passing-on. The claimant has to prove that the defendant has committed an infringement of competition law, that the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant, and that the claimant as an indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them. This shall not apply where the defendant proves that the overcharge was not passed on.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

In 2018 the Slovenian Collective Actions Act entered into force, introducing class actions and class settlement to the Slovenian legal system. According to the express provisions of article 2 of the Act, collective actions may be used for claims based on infringement of article 6 and 9 of the Slovenian Competition Act as well as articles 101 and 102 TFEU.

Collective actions can be filed by a senior state attorney or by a non-profit legal person of private law whose activities are directly related to the rights that have allegedly been breached. However, a class action must meet certain additional criteria in order to be approved by the court. Most importantly, it must refer to the same type of claims, based on the same or at least similar factual and legal questions.

Upon approving the collective action, the court will decide whether the system of inclusion or exclusion is to be used in the proceeding. In the case of the former, every injured individual has to expressly state that he or she wishes to take part in the class action proceeding (opt-in system), whereas in the case of the latter, all injured individuals are automatically included, unless they expressly state that they do not wish to participate (opt-out system). In either case, injured individuals are not formally considered parties to the procedure. They are represented by the person who filed the class action and who has a legal duty to protect their interests. Nevertheless, injured individuals will have the option to participate in the procedure and submit comments and evidence to the court.

The Collective Actions Act entered into force on 21 April 2018; however, class actions can also be filed in cases of mass harm situations that occurred prior to the aforementioned date.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

A leniency programme was implemented with an amendment to the Competition Act in 2009 and the Decree on the procedure for granting immunity from, and reduction of, fines for offenders who are parties to cartels (Official Journal No. 112/09 and 2/14) (the Decree), which

entered into force in January 2010. The Agency can grant either immunity from fines or a reduction of fines with a minor offence decision.

Only the offender involved in a prohibited agreement who first submits information and evidence may be granted full immunity from a fine, provided all the conditions mentioned below are met:

- the offender fully and completely discloses his or her participation in an alleged cartel;
- the offender is the first to submit information in evidence that, in the Agency's view, will enable an inspection in connection with the alleged cartel or the finding of an infringement of article 6 of the Competition Act or article 101 TFEU in connection with the alleged cartel;
- the offender cooperates with the Agency throughout the procedure;
- the offender ends its involvement in the cartel immediately after the beginning of cooperation with the Agency unless for what would, in the Agency's view, be against the interest of the inspection; and
- the offender did not coerce other undertakings to join the cartel or to remain in it.

The applicant that does not meet all the above-mentioned conditions required to be granted full immunity from a fine may still apply for a reduction of the fine provided the following conditions are met:

- the offender provides evidence of his or her participation in the alleged cartel, which represents significant added value with respect to the evidence the Agency already possesses;
- the offender cooperates with the Agency throughout the procedure; and
- the offender ends its involvement in the cartel immediately after the beginning of cooperation with the Agency unless for what would, in the Agency's view, be against the interest of the inspection.

An offender meeting all the conditions needed for fine reduction and who is the first to provide evidence will be granted a fine reduction of 30 to 50 per cent; an offender meeting all the conditions and who is the second to provide evidence will receive a fine reduction of 20 to 30 per cent; and other offenders meeting all the conditions for fine reduction and submitting evidence will be granted a fine reduction of up to 20 per cent.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Subsequent cooperating parties may be charged a reduced fine if the above-listed conditions are fulfilled.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

In determining the level of fine reduction the Agency shall take into account the time of the submission of the evidence to the Agency, the sequential order of applications and the contribution of the submitted evidence to the finding of an infringement. A fine, laid down within the range, may not be lowered below the stipulated threshold.

There are no 'immunity plus' or 'amnesty plus' options.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no deadlines for submitting a leniency application.

An application for a marker is only possible in applications for immunity from a fine. An offender who is not in possession of information that would enable him or her to submit the complete application may apply for a marker in writing with a substantiated request on a form given in the Decree. The Agency may grant a marker if it considers the application to be adequately substantiated and shall also determine the period in which the application has to be completed in order to be considered in the ranking order granted by the marker.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

An offender who applies for leniency, irrespective of the sequential order, is obliged to cooperate with the Agency from the time of submitting an application and throughout the administrative and minor offences procedures, and shall promptly provide the Agency with all relevant information and evidence relating to the alleged cartel, with all the information that may contribute to the establishment of the facts, ensure the cooperation of employees and members of management or supervisory bodies, not destroy, falsify or conceal information or evidence, and not disclose the fact that the application has been submitted or any of its content before the Agency has issued a statement of objections in an administrative procedure without written permission from the Agency. Also prior to submitting the application, an offender must not destroy, falsify or conceal evidence or directly or indirectly disclose the intention to submit an application to the Agency or its content.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Pursuant to the Decree, an application shall be deemed a business secret and the Agency may only disclose information and evidence from the application to a company under an infringement procedure after a statement of the objection has been issued in an administrative procedure. The same level of protection applies to all leniency applicants.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Pursuant to the Competition Act, an undertaking against which the administrative procedure has been initiated may offer commitments with a view to eliminating the circumstances leading to the likelihood of the existence of the infringement. Commitments may be proposed until the expiry of the time limit set by the Agency for comments on the statement of objections. If, in the view of the Agency, the proposed commitments are capable of eliminating the circumstances leading to the likelihood of the existence of an infringement, the Agency shall make the offered commitments binding by adopting a decision.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

An application for immunity or for a reduction of a fine, submitted by a legal entity, an entrepreneur or an individual who performs economic activity, shall also relate to his or her responsible persons unless otherwise indicated in the application. On the other hand, an application submitted by a responsible person shall not relate to a legal entity, an entrepreneur or an individual who performs economic activity unless indicated otherwise in the application.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

An immunity applicant may submit an application to the Agency either in writing (by mail, fax or personally) with three copies (one original and two copies) or by making an oral statement on the record at the Agency premises. Forms for application are provided in the Decree and are also available on the Agency's website. The application must specify whether the application should be considered for immunity only or for a reduction of fine, or both. After receiving the application, the Agency shall inform the applicant whether the application complies with the legal conditions for immunity from or a reduction of a fine and about his or her duty to cooperate. If the offender fulfils all the conditions, the Agency shall grant immunity from or a reduction of a fine with a minor offences decision.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or anticipated assessments or reviews of the leniency regime.

Defending a case**34 Disclosure**

What information or evidence is disclosed to a defendant by the enforcement authorities?

Parties in the procedure before the Agency have the right to review the documents of the case file throughout the procedure after the issuing of the order on the commencement of the procedure unless the director of the Agency determines this would be against the interests of the investigation and postpones the right to inspection of documents with an order (however, not for longer than to the service of a statement of objections).

Parties may not review or make copies of the internal Agency's documents relating to the case file, including correspondence between the Agency and the European Commission or competition protection authorities of other EU member states, confidential information, including business secrets, information relating to confidential sources, minutes of consultation and voting, and draft decisions.

The Agency may disclose information that constitutes a business secret to the undertaking against which the procedure has been initiated if it deems that disclosure, owing to the right of defence, might objectively prevail over the interests of protecting such information as a business secret. A decision adopted by the Agency may not be based on facts and evidence in respect of which the undertaking against which the procedure has been initiated has not been given the possibility to reply.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Counsel may represent both the corporation and employees under investigation in minor offence administrative proceedings before the Agency, provided that there is no conflict of interest. Conflicts of interest may especially exist in situations where an employee committed an act following an order by a superior responsible person or by the management or supervisory board of an undertaking. An employee is therefore advised to seek independent legal advice as early as possible in all situations where it is possible that his or her defence is not aligned with the defence of the undertaking or where his or her individual responsibility may be excluded.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Although it is not per se prohibited that more corporate defendants are represented by the same counsel in the proceedings before the Agency, it is not very likely owing to the possible conflict of interest.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

There is no explicit statutory provision prohibiting payment of legal penalties issued on its employees by the corporation in the Competition Act, but certain tax and justification issues regarding such expenses may arise.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

In accordance with the Slovenian Corporate Income Tax Act, all expenditures that are not in conformity with normal business practice, including penalties imposed by responsible authorities, represent non-recognised expenditure.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The possibility of taking into account penalties imposed in other jurisdictions in the minor offence procedure before the Agency is not foreseen in the Competition Act.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The optimal way to achieve immunity from or a reduction of the fine is by submitting a leniency application as soon as possible. Unless considered one of the mitigating circumstances for the assessment of the fine, pursuant to the Minor Offence Act, a compliance programme by itself is not foreseen as a circumstance affecting the level of the fine under Slovenian law.

Z D O L Š E K
ATTORNEYS AT LAW

Stojan Zdolšek
Irena Jurca
Katja Zdolšek

zdolsek@zdolsek.com
irena.jurca@zdolsek.com
katja.zdolsek@zdolsek.com

Miklošičeva cesta 5
1000 Ljubljana
Slovenia

Tel: +386 1 3078 300
Fax: +386 1 3078 310
www.zdolsek.com

Spain

Alfonso Ois, Jorge de Sicart and Gonzalo Gómez

EY Abogados, S.L.P.

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

In Spain, the competition provisions, and more specifically those in relation to cartel practices, are set out in the Spanish Competition Act 15/2007 (SCA) as well as in Royal Decree 261/2008, which implemented the Regulation on Defence of Competition (RDC). The RDC developed some of the provisions stated in the SCA in relation to cartels, such as the investigating powers of the National Markets and Competition Commission (NMCC). Note that article 101 of the Treaty on the Functioning of the European Union (TFEU) also applies with regard to cartels affecting competition in Spain where there is also an effect on trade between member states.

Moreover, the Civil Procedure Act 7/2001 (CPA) is also relevant as it contains some provisions intended to favour evidence disclosure in claims for damages derived from infringements of competition law.

In addition, the NMCC issued its Communication on the Leniency Programme on 19 June 2013, in order to enhance the method to file and review a leniency application under cartel prosecution proceedings. This communication will be further analysed in questions 24 to 33.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Spanish body empowered to resolve cartel proceedings is the NMCC, which is a public law institution. This new authority has taken over the competition commission and the main regulatory bodies, the energy regulator (the National Energy Commission), telecommunications (the Telecommunications Market Commission), the rail sector (the Railway Regulatory Committee), the postal service (the National Commission of the Postal Sector), airports (the Commission of Economic Regulation of Airports) and the audiovisual sector (the State Council for Audiovisual Media). The NMCC is composed of a council consisting of two chambers, each one dedicated to competition and regulatory matters, and four directorates. The directorates are divided into a competition directorate and three regulatory directorates (telecoms, energy and transport).

The SCA, as amended by Act 3/2013, gives the NMCC powers to pursue investigations, resolve and impose sanctions in competition proceedings and, more specifically, in cartel prosecution proceedings. The act also confers on the NMCC arbitration functions, consultative powers and the task of promoting competition in the market.

The Spanish commercial courts are also entitled to declare the existence of a cartel as they have jurisdiction to declare the infringement of articles 1 and 2 SCA and articles 101 and 102 TFEU.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The last relevant change was the adoption of Royal Decree-Law 9/2017, which transposed Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the

competition law provisions of the member states and of the European Union. Upon the coming into force on 27 May 2017, it introduced a number of significant changes to the SCA and the CPA with a view to enhancing the right to claim full compensation for damage derived from infringements of competition law, for instance, cartels.

Please note that the amendments to the SCA cannot be applied retroactively and the changes introduced in the CPA will apply only to claims initiated after 27 May 2017.

Currently there are no proposals to reform or amend the existing cartel regime. However, the NMCC is in talks to propose some amendments that aim, among other aspects, to clarify the method for calculating fines.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 1 of the SCA prohibits all agreements, collective decisions or recommendations or concerted or consciously parallel practices that have as their object or effect the prevention, restriction or distortion of competition in all or part of the Spanish market and, particularly, those that:

- directly or indirectly fix prices or any other trading or service conditions;
- limit or control the production, distribution, technical development or investment;
- share the market or sources or supply;
- in trading or service relationships, apply dissimilar conditions to equivalent transactions, placing some competitors at a competitive disadvantage; and
- subordinate the conclusion of contracts to the acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of these contracts.

The concept of a cartel is defined under the Fourth Additional Provision, second paragraph, of the SCA as:

any agreement or concerted practice between two or more competitors that has the aim to coordinate their behaviour in the market or influence competition parameters through practices including, among others, fixing prices or other commercial conditions, including intellectual property rights; allocating production or sales; sharing markets or customers, including bid rigging, export and import restrictions; and any other anticompetitive measures against competitors.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

It is not foreseen that there can be exemptions for cartel practices, since these infractions are considered as a very serious infringement of the Spanish competition legislation.

Notwithstanding the above, the SCA foresees a general exemption of the prohibition stated in article 1 of the SCA regarding practices that contribute to improve the production, the commercialisation and distribution of goods and services or to promote technical or economic progress without the need of any prior decision for this purpose, provided that:

- they allow consumers a fair share of its benefits;
- they do not impose on the undertakings concerned restrictions that are not indispensable for the attainment of these objectives; and
- they do not afford participating undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

In addition, this prohibition is not applied to practices that may arise from the enforcement of a law.

6 Application of the law

Does the law apply to individuals or corporations or both?

Competition rules apply to undertakings, which refer to any entity engaged in an economic activity. Therefore, individuals acting as economic actors are also subject to the SCA.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Only conduct that may affect the Spanish market can be reviewed by the NMCC, so its regime cannot be extended to conduct that takes place outside Spanish jurisdiction. In the event that the anticompetitive agreement could be considered as capable of affecting trade between EU member states, the NMCC would apply article 101 TFEU.

Notwithstanding the above, the NMCC is able to collaborate with other competition authorities in order to pursue infringements that may affect the effective competition that take place in other jurisdictions.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

As stated previously, any conduct that does not affect the Spanish market is not subject to article 1 of the SCA. Despite this fact, as mentioned earlier, the NMCC is empowered to cooperate with other regulators in the fight against infringements that may distort effective competition in other jurisdictions.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

In order to determine the possible existence of an infringement, the Competition Directorate may proceed with a preliminary investigation, which is not subject to a given deadline. In the course of the preliminary investigation, the Competition Directorate may send information requests as well as carrying out unannounced investigations (dawn raids).

If, after this preliminary investigation, the Competition Directorate considers that there are reasonable signs of the existence of anticompetitive conduct, it will formally initiate sanctioning proceedings. The decision to initiate proceedings will be notified to the interested parties, providing a copy of the complaint to the defendant.

The SCA foresees a two-phase proceeding:

- the investigation phase is carried out by the Competition Directorate. This stage may be subdivided into three phases:
 - a preliminary phase upon which the Competition Directorate, based on an ex parte complaint or acting ex officio, may collect all the relevant documentation and data, carrying out dawn raids in order to find evidence of the existence of a potential infringement;
 - an intermediate phase, where all the relevant facts obtained in the preliminary phase may lead the Competition Directorate to conclude the existence of a cartel. It may issue a statement of objections (SO) including all its findings. The SO would be

notified to all the potential infringing companies so they are able to argue against such accusations and to submit all the documents and evidence that may be relevant; and

- a final phase, based on the fact that the Competition Directorate has finished its investigation and concludes there is a potential infringement, whereupon the case would be submitted to the NMCC council with a proposal for resolution; and
- the resolution stage, in which the council, after assessing the information gathered by the Competition Directorate and the arguments of the interested parties, must issue a final decision on the infringement and, if that is the case, the imposition of fines.

Note that the entry into force of Law 39/2015 of the Common Administrative Procedure of the Public Administrations seems to allow the Competition Directorate to include a proposal about the amount of the sanctions in the proposal for resolution. Therefore, the companies will be able to give their views on the amount of the sanctions proposed before the case is submitted by the Competition Directorate to the NMCC council.

The maximum term of the sanctioning proceedings is 18 months from the date of the decision to initiate proceedings. The investigation phase usually takes place during the first 12 months, leaving six months for the resolution phase.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The SCA provides the NMCC with several ways to detect and sanction anticompetitive agreements, such as information requests and unannounced investigations.

Duties of collaboration and information

All natural or legal persons and the bodies of any public administrations are subject to the duty of collaboration with the NMCC and are obliged to provide all kinds of data and information that they may have and may be necessary for the identification of cartels.

Unannounced inspections

The SCA allows the NMCC to carry out unannounced investigations, not only at the companies' and associations' premises, but also at the homes of directors, managers and other members of staff of the companies and associations concerned. The performing of the inspection requires previous consent of the company or, otherwise, court approval.

The personnel authorised to carry out an investigation will have the following investigatory powers:

- to enter any premises, land and means of transport of the undertakings and associations of undertakings as well as the homes of entrepreneurs, managers and other members of the staff of the undertakings and associations of undertakings concerned;
- to examine the books and other records related to the business, irrespective of the medium in which they are stored;
- to take or obtain in any form copies of or extracts from such books or records;
- to retain the books or documents mentioned above for a maximum period of 10 days;
- to seal all business premises, books or records and other business assets for the period and to the extent necessary for the inspection; and
- to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

Sanctions for the obstruction of investigations

The SCA considers as an obstruction of the investigatory powers of the NMCC the following conduct:

- the lack of submission and the incorrect, misleading or incomplete submission of books or documents requested by the NMCC;
- the refusal to answer the questions posed by the NMCC or to answer them in an incomplete, inexact or misleading manner; and
- to break the seals affixed by the NMCC's personnel during the inspection.

These infringements would be considered as minor infringements, sanctioned with a fine of up to 1 per cent of the total turnover of the undertaking concerned. In the event it is not possible to determine the turnover of the infringing company, the fine would be between €100,000 and €500,000.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

With reference to cartels, the European Commission is exclusively entitled to investigate and sanction these practices where they may affect the European market; therefore, the national competition authorities may be relieved of their jurisdiction. However, the European Commission shall require the NMCC for assistance on its investigation duties in the prosecution of these practices.

In this sense, the NMCC must inform the European Commission of the submission of a leniency application in relation to a cartel capable of affecting trade between EU member states in order to determine the authority best placed to investigate the presumed cartel and to take the appropriate investigative steps. In similar terms, the NMCC will act in the same way if the applicant indicates that it has submitted or intends to submit a leniency application to other competition authorities of EU member states. Further, the NMCC must collaborate and cooperate in investigations that are being carried out by any other national authority. The NMCC is empowered to exchange information (including confidential information) that may be used as evidence for the enforcement of articles 101 and 102 TFEU with the European Commission and other national authorities.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

As mentioned in the previous question, the national competition authorities must collaborate and ensure their cooperation in relation to cartel investigation matters.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The NMCC is the body entitled to investigate and sanction cartels. The regional competition authorities are also entitled to investigate and sanction cartels but they only have jurisdiction over cartels having effect within their respective territory.

In addition to it, as mentioned in question 2, the commercial courts are entitled to apply articles 1 and 2 of the Competition Act, as well as articles 101 and 102 of the TFEU. Therefore, any individual or company may bring an action before the commercial courts to seek a judgment stating that the defendants have infringed competition law, for instance, by participating in a cartel.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In accordance with Spanish legislation, the burden of proof rests on the party that alleges an infringement of the competition provisions. In this case, the burden of proof falls on the NMCC since the proceedings are initiated by the NMCC, whether ex officio or at the request of a party. Additionally, there is no specific level of proof required by Spanish legislation in order to determine the existence of cartel infringements.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

As in any other competition infringement, the burden of proof of the existence of a cartel rests on the NMCC. A cartel can be proved by using either direct evidence or circumstantial evidence.

Members of an alleged cartel that claim the benefit of an individual exemption must bear the burden of proving that the conditions for an individual exemption are met. It is practically impossible for cartel members to benefit from an individual exemption.

16 Appeal process

What is the appeal process?

No appeal by administrative procedure may be lodged against the resolutions and acts of the council of the NMCC and judicial appeals may only be lodged in the terms foreseen in the Administrative Jurisdiction Act 29/1998, of 13 July, before the National High Court. According to such terms, infringing parties may lodge a judicial appeal against the decision of the competition authority within a period of two months starting from the day after the notification of the decision.

In general terms, appealing does not lead to a suspension of the sanctions imposed by the administrative body (NMCC), unless the involved companies justify serious damage stemming from the imminent execution of the sanction and the National High Court accepts these arguments as valid to suspend the payment of the fine.

Appeals against the decision of the National High Court on points of law may be only lodged with the Supreme Court. In this sense, the National High Court is entitled to review the agency's findings of fact, the legal assessment and penalties. By contrast, the Supreme Court focuses only on points of law unless factual findings are found to be clearly erroneous.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The SCA does not foresee the application of criminal sanctions (such as professional remedies, disqualification orders and jail judgments) for breaches of competition law.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

According to the SCA, the NMCC can impose fines on the economic agents, companies or associations that intentionally or by negligence infringe competition regulation. For these purposes, the SCA classifies the infringements according to their seriousness as minor, serious and very serious. Cartels between competing undertakings are classified as very serious infringements.

The amount of the fine will depend on the seriousness of the infringement. Thus, the NMCC may impose fines of up to 10 per cent of the total turnover of the infringing company in the preceding business year in the case of very serious infringements and fines of up to 5 per cent of the total turnover of the infringing company in the preceding business year in the case of serious infringements. When the turnover of the infringing company cannot be calculated, the NMCC can impose a fine of up to €10 million.

In addition to the fine that would be imposed on the company, the SCA foresees a personal sanction of up to €60,000 for each of the legal representatives of the company or the members of the management bodies who have participated in the anticompetitive practice. In fact, in 2016 the NMCC issued its first resolutions fining the legal representatives of the companies that were liable for the cartels.

Furthermore, the SCA sets out the criteria that are taken into account in order to determine the amount of the fine:

- scope and characteristics of the affected market;
- market shares of the infringing companies;
- scope and duration of the infringement;

- effects of the breach on the rights and legitimate interest of consumers or on other economic operators; and
- the illicit benefits obtained as a consequence of the infringement.

The SCA also foresees a list of mitigating and aggravating factors.

As regards infringements of article 101 of the TFEU, they could be sanctioned with fines up to 10 per cent of the total turnover in the preceding business year of the company concerned.

The sanctioning power of the NMCC shall lapse after four years in the case of very serious infringements. In cases of application of article 101 of the TFEU, the expiration period would be of five years. In this regard, it is important to highlight that the term of the lapse shall be counted from the day when the infringement has been committed or, in the case of continued infringements, from when they have ceased.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The NMCC published a communication on the method of calculating fines deriving from the infringements of articles 1, 2 and 3 of the SCA in February 2009. These guidelines provided a three-step method for quantifying the fines inspired by the methodology used by the European Commission within the scope of Council Regulation (EC) No. 1/2003.

However, the Supreme Court issued a judgment in January 2015 finding that this method was not applicable under Spanish law. In summary, the Supreme Court held that:

- the 10 per cent limit on the annual turnover of the company (or 5 or 1 per cent depending on the seriousness of the infringement) is the maximum sanction; and
- the percentage must be calculated on a company's total annual turnover and according to the criteria set out in the SCA.

These criteria are the following:

- dimension and characteristics of the market affected by the infringement;
- market share of the undertaking responsible;
- the scope and duration of the infringement;
- the effect on consumers, users and other economic operators;
- the illicit profits obtained because of the infringement; and
- the existence of any aggravating or mitigating circumstances.

The main aggravating factors are:

- the repeated commission of infringements established in the SCA;
- the role of leader in, or instigator of, the infringement;
- the adoption of measures for enforcing or safeguarding the achievement of the unlawful conduct; and
- the failure to collaborate with, or the obstruction of, inspections.

The main mitigating circumstances are:

- the undertaking of actions that bring about an end to the infringement;
- the effective non-implementation of the prohibited conducts;
- the undertaking of actions intending to remedy the harm caused; and
- the active and effective collaboration with the NMCC outside the scope of the leniency programme.

From the date of the above-mentioned judgment, many resolutions have been appealed successfully before the High Court on the basis that the amount of the fines imposed had been erroneously calculated since it had been done according to the communication on the method for calculating fines. The High Court has already issued several judgments in which it orders the NMCC to recalculate such fines according to the criteria set by the Supreme Court.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not automatically applicable in the case of sanctions arising from infringements of competition law. Pursuant to the Public Sector Contracts Law, companies that have been sanctioned for a serious infringement related to distortion of competition by a final judgment will not be able to enter into any kind of public sector agreements. However, this prohibition must be expressly imposed in the same resolution declaring the infringement, or if it is not the case, in a latter proceeding initiated for this purpose. On a general basis, debarment from government procurement cannot exceed a three-year period.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

In this regard, sanctions for cartel activities are investigated and declared by means of an administrative proceeding. However, as mentioned in question 2, the commercial courts are also entitled to investigate and decide in relation to cartel matters, such as the prosecution of practices that may alter prices in the market through criminal proceedings.

In addition, the SCA foresees that, in the case of the existence of a criminal preliminary ruling that cannot be dispensed or that directly conditions the content of the pronouncement, it will determine the suspension of the proceedings until it is ruled on by the corresponding criminal court.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

The Council of Ministers approved Royal Decree-law 9/2017, of 26 May 2017, which implements Directive 2014/104/EU on antitrust damages actions into the Spanish legal framework. The transposition has introduced important amendments to the CPA and the SCA. Private damage claims are available for both direct and indirect purchasers, and the compensation includes the right to indemnification for actual loss and loss of profit, plus the legal interests since the claim was submitted. Note that the amendments to the SCA cannot be applied retroactively and the amendments to the CPA are only applicable to claims initiated after 27 May 2017.

Regarding costs, the CPA states that the general rule is that they shall be imposed on the party who has had all of its pleas rejected, unless the court considers that the case posed serious doubts owing to its complexity. If the claim is estimated partially, the parties shall bear their own costs and the common costs shall be shared equally.

The costs of the procedure are composed of:

- attorney's fees;
- attorney-at-law's rates (fixed amount depending on the quantum of the procedure);
- taxes and other duties for exercising jurisdictional right; and
- expert's fees (bill invoiced to the party).

This total amount shall not exceed one-third of the quantum of the proceedings.

The main changes introduced to the SCA are the following:

- Recognition of the right of harmed parties to obtain full compensation for damage suffered.
- The introduction of joint and several liability for all infringers for the damage caused to the harmed parties. Therefore, any harmed party can claim full compensation for damage to any of the undertakings intervening in the cartel. Nevertheless, there

are two exceptions to this rule, one relating to SMEs (according to the definition contained in Commission Recommendation 2003/361/EC, of 6 May 2003, regarding the definition of micro, small and medium-sized enterprises) and the other relating to undertakings that are exempted from the payment of a fine owing to their participation in a leniency programme.

- The establishment of a limitation period of five years for actions for damages arising from infringements of competition law.
- The binding nature of any competition infringement declared by a final decision of a Spanish competition authority or court, for the purposes of an action for damages brought before national courts.
- The introduction of the rebuttable presumption that cartels always cause harm and the implementation of certain rules in order to make it easier for claimants to calculate and quantify the damage suffered.
- The implementation of a new consensual dispute resolution regime that has the aim of fostering consensual agreements with infringers.
- The introduction of the passing-on defence, which establishes that the right to compensation granted to the injured party refers only to the overcharge really suffered and that was not passed on along the supply chain. Moreover, the SCA also sets the possibility for indirect purchasers to claim compensation for the harm caused when direct purchasers have passed on the overcharge generated by the violation of competition rules. The burden of proving such passing-on falls to the claimant, although there is a rebuttable presumption that the indirect purchaser has proved the overcharge if it meets certain criteria.

The changes introduced to the CPA mainly refer to the disclosure of evidence. Not only can the harmed party request such disclosure, in addition the defendant in an action may request the disclosure of evidence by the claimant or third parties in order to prepare its defence, especially if it is planning to apply the passing-on defence. When requesting the disclosure of evidence, it must always be duly justified. In the case of the plaintiff, it must submit a well-founded justification including reasonably available facts and enough evidence to support the credibility of the claim. In the case of the defendant, it must present such justification in relation to its defence.

Although it is too early to say with certainty, the impact on enforcement activity is likely to be significant.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are available in Spain in some limited cases. The CPA clearly establishes the possibility of collective legal standing in cases involving only the defence of consumers' and users' interests. Consumer associations can protect the interests of their associates and even the general interests of consumers and users; therefore, the Spanish Consumers Act allows consumers and final users to file collective proceedings through consumer associations. This could be applicable to antitrust cases, particularly those involving the declaration of an antitrust infringement or injunctions.

This possibility was partially recognised in Spain by means of the CPA, which recognises the rights of consumers to claim against a cartel. A collective action may be more efficient because several consumers or companies affected by a cartel may decide to join forces in a joint or collective action. A collective action could be advantageous to plaintiffs as they can distribute the costs, risks and efforts over several parties instead of one individual plaintiff.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

In this regard, according to the SCA, the RDC and the Communication on Leniency Programme issued by the NMCC on 19 June 2013, the

NMCC shall exempt a company that is allegedly involved in a cartel from the payment of the fine if:

- (i) the company is the first to provide evidence that, according to the NMCC, will allow the NMCC to order an inspection, provided that, at the time of the submission of evidence, the NMCC does not already have sufficient evidence to order an inspection; or
- (ii) the company is the first to provide evidence that, according to the NMCC, may enable it to find an infringement of article 1 in relation to a cartel, provided that, at the time of the submission, the NMCC does not have sufficient evidence to find an infringement and an exemption to a company or individual has not been granted in accordance with point (i).

Notwithstanding the above, only the first company that provides the NMCC with sufficient evidence about the existence of a cartel will obtain full exemption from payment of the fine.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Yes, there is a formal partial leniency programme for parties that cooperate after an immunity application has been made. The NMCC may reduce the fine to a party if it:

- provides evidence of the suspected infringement that represents significant added value with respect to the evidence the NMCC already has;
- cooperates fully, continuously and expeditiously with the NMCC throughout the administrative investigation procedure;
- brings its participation in the alleged infringement to an end at the time that it submits the evidence of the existence of the cartel, except in those cases where the NMCC deems necessary that its participation continues in order to preserve the efficacy of an inspection; and
- has not destroyed evidence related to the application for exemption nor has disclosed, directly or indirectly, to third parties other than the European Commission or other competent authorities, the existence of its application or part of its contents.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Being the second cooperating party is also relevant as it can benefit from fine reductions. The starting point is a reduction of between 30 per cent and 50 per cent for the second cooperating party and it reduces for the subsequent cooperating parties (between 20 per cent and 30 per cent for the third cooperating party and up to 20 per cent for the subsequent cooperating parties).

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Any applicant for leniency (exemption or reduction of a fine) must submit its exemption or reduction application before the Cartels and Leniency Unit (CLU) of the Competition Directorate of the NMCC. Formal leniency applications may be filed directly by the company or natural person or through their representatives.

The applications will only be registered after they are received at the Registry of the NMCC. The order of registration will be set up according to the exact date and hour of submission of any application with the Registry. Applications will be assessed on a chronological basis, according to their exact time of registration.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The granting of an exemption or reduction by the NMCC is subject to the following conditions, which must be met by the company (or, if applicable, by the natural person) that has submitted the leniency application:

- the applicant must cooperate fully, continuously and expeditiously with the NMCC throughout the administrative investigation procedure. Such a cooperation obligation implies that the applicant must:
 - provide the NMCC immediately with all the relevant information and evidence that may be under its possession regarding the existence of the cartel;
 - immediately answer any request for information made by the NMCC in order to clarify the relevant facts of the case;
 - facilitate oral interviews between the NMCC and present (and, if feasible, former) executives and employees of the company;
 - not destroy, hide or falsify any documents or relevant evidence regarding the cartel; and
 - not disclose to any third parties the existence or the contents of the leniency application before the SO is sent by the NMCC to the affected companies, unless otherwise agreed with the NMCC;
- the applicant must bring its participation in the alleged infringement to an end at the time that it submits the evidence of the existence of the cartel, except in those cases where the NMCC deems necessary that its participation continues in order to preserve the efficacy of an inspection;
- the applicant must neither have destroyed evidence related to the application for exemption nor have disclosed, directly or indirectly, to third parties other than the European Commission or other competent authorities, the existence of its application or part of its contents; and
- the applicant must not have adopted any measures to oblige other undertakings to participate in the infringement.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

All leniency applications and their contents (including the identity of the applicant) shall be treated as confidential information by the NMCC, which must file this documentation in a separate folder when classifying the information corresponding to the relevant case file. However, the affected companies will have access to the information deemed essential in order to reply to the SO formulated by the NMCC.

In the event of judicial review, when the leniency application submitted in the infringement proceeding is sent to the National High Court, the NMCC will expressly identify the statements made by the leniency applicant, no copies of which will be allowed. If documents submitted by a leniency applicant are required by a competent court to examine the NMCC's actions before the resolution is issued that puts an end to the administrative proceeding in which the leniency application was filed, those documents will be remitted on a confidential basis, with an express indication that they cannot be communicated to possible interested parties or third parties, given the special protection the SCA guarantees for leniency applications and the serious consequences that could arise from disclosure of the filing or content of the leniency applications.

As stated in the NMCC's Communication on Leniency Programme in relation to civil damages actions brought in relation to cartel infringements prosecuted in competition proceedings in which leniency applications have been submitted, the NMCC will not provide copies of the statements of the leniency applicants, as such disclosure would impair the effectiveness of the leniency programme and weaken the fight against cartels. Moreover, by virtue of the CPA courts cannot request

any party or third party to disclose statements made in the framework of a leniency application.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

As stated in the SCA, the NMCC may resolve the termination of sanctioning proceedings in relation to agreements and prohibited practices when the alleged offenders propose commitments in order to resolve the effects on competition caused by the conduct covered by the proceedings and the public interest is sufficiently guaranteed. However, the Guidelines on Termination by Commitments of Infringement Procedure published by the NMCC set out that, as a general rule, a plea bargain will not be initiated when an infringement of article 1 of the SCA relates to a cartel.

Since the decision to enter into a settlement is an administrative act, according to the Administrative Jurisdiction Act 29/1998, of 13 July, it is possible to file a judicial appeal against such decision.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Exemption from the payment of a fine imposed upon an undertaking shall also benefit its legal representatives or the members of the management bodies who have taken part in the agreement or decision, provided they have cooperated with the NMCC.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The NMCC recommends that applicants submit their applications in a sealed envelope, which, after registration at the Registry of the NMCC, shall be only opened by CLU officials. Applications shall consist of a template (the NMCC has included this template as annexe I of its Communication on Leniency Programme, available on the NMCC website (www.cnmc.es)), which should be signed by the applicant with the relevant information and documentation regarding the existence of the cartel and its main characteristics. According to the provisional guidelines on leniency applications, the leniency applications must be accompanied by, at least, the following information:

- identification of the leniency applicant: name and contact data, a brief description of the applicant and, if necessary, identification of the representative and a copy of the power of attorney;
- participants in the cartel: names and contact data, a brief description of the companies and the form and extent of their participation in the agreement;
- detailed description of the cartel: objective, activities and functioning, products, services and territories affected, duration and nature of the cartel, specific dates, locations, content and participants in meetings, etc;
- evidence relating to the cartel in the possession of the applicant or available to it within a reasonable period; and
- actions adopted (eg, a declaration that the applicant has not disclosed to third parties its intention to submit a leniency application, a declaration that the applicant has not destroyed evidence related to the leniency application).

Each leniency application must be submitted in two versions: the original (to be kept by the NMCC) and a copy (to be kept by the applicant). Both versions should be marked with an adhesive receipt seal by the Registry of the NMCC indicating the exact date and hour of reception of the documents. The NMCC, if requested by the applicant, can also provide it with a document confirming the receipt of its leniency application.

Update and trends

The actions carried out by the NMCC to detect and prosecute anti-competitive practices, particularly cartels, and to promote competition in the markets, need to be adapted to the latest transformations derived from the application of new digital technologies and changes applied in the national and community regulatory framework.

In order to do so, the NMCC will:

- strengthen the defence of NMCC resolutions before the courts;
- strengthen legal and economic foundations of resolution proposals from the Competition Directorate and Council;
- develop guidelines on the submission of economic reports in records;
- elaborate on criteria to be followed by the NMCC in relation to the reports on the quantification of compensations that infringers must satisfy;
- analyse the new markets linked to the digital economy: technological platforms, algorithms and price, access and use of data policies, electronic commerce and online advertising;
- strengthen the surveillance of some sectors and operators, such as service payments from the financial sector, sports rights, television advertising, the pharmaceutical and hospital sector, the port services sector and the agricultural sector;
- contribute to the improvement of the evaluation realised by the authorities on the framework of legislation about competition and market unity;
- promote – by reinforcing the analysis and training actions and cooperation – the improvement of public procurement in Spain, through the use of best practices in terms of minimising distortions on the competition and efficient economic regulation by the contracting bodies of public administrations; and
- enhance the area of active legitimation by improving detection, evaluation and action before acts or dispositions of the public administrations that hinder effective competition, and promote improved collaboration and coordination with the competition authorities of the autonomous communities.

Furthermore, the NMCC has launched several measures in order to strengthen its legal actions. Among others, it has agreed to hold oral hearings again in the framework of sanctioning proceedings that, owing to their complexity, require it, something that has not been done since 2010.

In addition, the informal working group that carries out screening tasks in the NMCC to detect anticompetitive behaviours, especially

in the context of public tenders, will be formalised this year with the creation of an Economic Intelligence Unit in the Competition Directorate. This unit will be led by experts in cartels, and will be staffed by people specialised in statistics, computer science and quantitative techniques for database treatment.

Finally, we summarise below the main decisions in 2018 concerning cartels:

- On 8 March 2018, 10 courier and parcel services companies were sanctioned with a fine of €68 million due to customer allocation. The cartel members committed not to make commercial offers to any of the competitor's customers. In total the NMCC discovered nine different cartels (*Exp/0578/16 Business Messaging and Parcels Services*).
- On 3 May 2018, the NMCC decided to impose a total fine of €7.12 million on five different media companies and €109,000 on three of their directors or legal representatives. The NMCC proved that the sanctioned companies had exchanged sensitive commercial information for one-and-a-half years, in order to allocate the public tenders that were convened for institutional advertising campaigns from the General State Administration (*Exp/0584/16 Media Agency*).
- On 12 July 2018, the NMCC decided to impose a fine on two companies engaged in the purchase of used batteries for their participation in a cartel. From 2008 to 2012 the companies carried out a common strategy to fix the purchase prices of used car batteries. The companies maintained a continuous flow of contact through emails, calls and meetings to agree a common commercial strategy in order to avoid a 'price war'. These types of behaviours caused a distortion of competition, which adversely affected the suppliers in a market where purchasing firms have a significant bargaining power with suppliers given by the characteristics of the relevant market. Therefore the NMCC imposed a total fine of €5.3 million on the companies (*Exp/0569/15 Automotive Batteries*).
- On 26 July 2018, 11 companies were sanctioned for being part of a cartel related to the supply of computer and data processing services for the Public Administration. The companies shared out customers, agreed on prices and terms of trade, and exchanged sensitive commercial information to make public tenders more expensive. The cartel lasted 15 years and the total amount of fines imposed was €29.9 million (*Exp/0565/15 Tenders for Computer Applications*).

If previously agreed with the CLU, applicants may also submit oral leniency applications, which shall be recorded at the NMCC's premises. The transcription of the application shall be immediately registered in the Registry of the NMCC, indicating the exact date and hour of such registration.

Once the CLU receives an exemption application, it will review its contents and confirm to the applicant whether the exemption can be granted. This shall only be confirmed by the council of the NMCC at the end of the investigation procedure and provided that the applicant complies with all the cooperation conditions after submission of the application. If the exemption of the fine is not possible (in cases where a previous exemption has been submitted regarding the same cartel, or where the NMCC was already aware of the existence of that cartel), the CLU shall allow any applicant to withdraw its leniency application or to submit an application for a reduction in the fine.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no review or ongoing policy assessments in relation to the leniency regime.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The opening of a sanctioning proceeding must be notified to the interested party and the minimum information to be included in the

notification must be: identification of the presumed infringers and of the complaints, where such exist; reasons for initiating the proceeding; examining officer or officers and, if applicable, examining clerk, indicating the rules for recusal and if applicable, the persons who have standing as interested party.

Without prejudice to it, any interested party is entitled to have access to all the information contained in the file except those documents, or part of them, that have been declared as confidential.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Counsel may represent the corporation and its employees at the same time, provided that no conflict of interest exists between the parties. This should be decided on case-by-case basis.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

As with the previous question, it is possible for one legal counsel to represent various defendants, unless there is any kind of conflict of interest between the companies. This should be decided on a case-by-case basis.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

There are no specific regulations forbidding a company from paying a penalty imposed on its employees. Nevertheless, an undertaking is not obliged to assume the legal costs and penalties imposed on its employees in cartel investigation proceedings. However, companies may pay employees' costs if they wish.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

With regard to this issue, article 15(c) of the Spanish Corporate Income Tax Act expressly provides that fines and penalties shall not be considered as tax-deductible since they arise from an illegal practice. If the Spanish Tax Institution considered these as tax-deductible, it could be understood as a way of financing the mentioned penalty by the authorities and the penalties would not be as effective. On the other hand, private damages awards can be considered as deductible for tax purposes.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

In Spain, sanctions imposed on a corporation or an individual do not take into account penalties imposed in other jurisdictions.

Regarding private damage claims, the lis pendens rule established in the Brussels I Regulation is applicable. This means that if there are several proceedings dealing with the same cause of action and the same parties before the courts of different member states, all courts other than the court first seized shall immediately suspend its proceedings until the court first seized decides whether it has jurisdiction.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

As mentioned in questions 24 to 33, the optimal way to get a fine decreased is cooperating and contributing with the NMCC during the investigation phase and seeking to benefit from the leniency programme. In addition, please note that there is no specific provision under the Spanish competition regulations that considers the existence of a compliance programme as an element affecting the level of the fine to be imposed.

Moreover, recent amendments introduced to the SCA establish that competition authorities, when calculating the fine before issuing their decision, must take into account whether the defendant effectively granted compensation to harmed parties for the damage caused by its infringement, as it could be regarded as a mitigating factor.



Alfonso Ois
Jorge de Sicart
Gonzalo Gómez

alfonso.oislourenzo@es.ey.com
jorge.desicartlarrotcha@es.ey.com
gonzalo.gomez.gay-pobes@es.ey.com

Torre Azca
Raimundo Fernández-Villaverde 63-65
28003 Madrid
Spain

Tel: +34 91 572 73 79
Fax: +34 91 572 76 63
www.ey.com/es/es/services/tax/law

Sweden

Johan Carle and Stefan Perván Lindeborg
Mannheimer Swartling

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Swedish Competition Act (2008:579) (the Act) came into force on 1 November 2008, replacing the previous legislation dating from 1993. The Act governs all aspects of Swedish competition law.

The object of the Act is to eliminate and counteract obstacles to effective competition in the production of and trade in goods and services. The ultimate aim of the legislation is to promote growth and efficiency in the Swedish market. Consumer protection is covered by other legislation, although consumer interests may be referred to in decisions under the Act.

The Act contains two general prohibitions, one against anticompetitive agreements between undertakings (Chapter 2, section 1) and one against abuse of a dominant position (Chapter 2, section 7). The Act also provides for the control of concentrations (Chapter 4). The Act's provisions on anticompetitive agreements between undertakings and abuse of a dominant position are modelled on articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The Act's merger control rules are modelled on the EU Merger Regulation. The preparatory works (*travaux préparatoires*) to the Act provide that the Act is to be interpreted in line with EU law, including the case law of the Court of Justice of the European Union.

As with article 101(1) TFEU, the elements of an agreement or practice that violate the Act are void and unenforceable unless the conditions for exemption in Chapter 2, section 2 of the Act are satisfied. The conditions for exemption are the same as under article 101(3) TFEU, which require that the efficiencies produced by an agreement outweigh the anticompetitive effects. Moreover, block exemptions have been adopted in the form of separate regulations largely incorporating their EU counterparts.

Fines may be imposed for infringements of the Act and injured parties may claim damages.

A decision by the Swedish Competition Authority (SCA) may be appealed to the Patent and Market Court.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The SCA is responsible for implementing and administering the Act, and thus for investigating cartel matters.

The SCA has the power to order an undertaking to terminate an infringement and to apply to the Patent and Market Court for a fine to be imposed on the undertaking for infringement of the Act. The SCA itself also has the right to impose binding fines on undertakings where the undertaking in question does not dispute the fines (a form of settlement in non-contentious cases – see question 30). The SCA may also initiate investigations and has fact-finding powers. The SCA issues guidelines on the application of the competition rules.

The SCA is an independent governmental body consisting of around 200 officials, led by director general Rikard Jermsten (appointed in 2017) and a management group consisting of the heads

of departments. It is organised into specialised departments and other units. The SCA is independent of the European Commission but is required to cooperate with it.

Instead of being divided according to different sectors as was previously the case, the SCA's competition enforcement tasks are now entrusted to two units, responsible for investigating infringements of the Act and of EU competition law, as well as handling complaints and notifications; the cartel and merger unit (T1) and the abuse and vertical restraints unit (T2). In addition, there is the department responsible for the enforcement of the public procurement rules, as well as the Chief Economist's department, Legal Services and the International Department. Following a further reorganisation, the department previously responsible for general supervision and support of the public procurement rules was transferred to the newly created National Agency for Public Procurement in 2015.

There is no separate prosecution authority since there are no criminal sanctions for cartel activity or any other violation of the Act.

See question 13 for more details.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The Competition Act was amended on 1 January 2016 to include a specific provision allowing the SCA to carry out indexing and searching of digital material at its own premises in connection with dawn raids. Such an off-site review can only be carried out with the consent of the affected undertaking. Furthermore, the undertaking has the right to oversee the measures taken by the SCA concerning the digital material, such as the SCA's electronic search. It should be noted that this was already common practice prior to the amendment.

On 1 September 2016, the Patent and Market Court replaced the Stockholm District Court as the court of first instance for competition cases. The reform was made in order to make the court procedure in such complex matters more uniform. A new court of appeal, the Patent and Market Court of Appeal, has replaced the previous Market Court and is now set up at the Svea Court of Appeal in Stockholm. The Supreme Court is the final court of appeal.

On 27 December 2016, a separate Competition Damages Act (2016:964) entered into force. The Damages Act governs actions for damages for infringements of the competition law provisions and ensures compliance of Swedish law with the requirements of the EU Damages Directive. The amendments include changes and clarifications concerning, for example, liability, limitation periods, compensation, recourse, passing on of overcharges, disclosure and other general procedural provisions.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The Act, like its TFEU equivalent, provides no legal definition of a cartel. In Swedish doctrine and case law the term 'cartel' is generally applied to horizontal agreements and concerted practices covering hard-core restrictions of competition such as price fixing, limitations on production or sale, market allocation and bid rigging.

Cartels may violate the general prohibition against restrictive agreements found in Chapter 2, section 1 of the Act and, to the extent that collective dominance may be involved, the prohibition against abuse of a dominant position found in Chapter 2, section 7 of the Act.

The prohibition renders the cartel agreement null and void and results in liability to pay fines as well as damages (see question 18). However, there are two possible exceptions to this.

First, to fall under the prohibition against anticompetitive agreements, the agreement must restrict competition to an appreciable extent. Like the European Commission, the SCA has published a Notice on Agreements of Minor Importance (KKVFS 2009:1) (the Notice). According to the Notice, agreements between actual or potential competitors where the parties' combined market share does not exceed 10 per cent and agreements between non-competitors, where none of the parties has a market share exceeding 15 per cent, normally fall outside the prohibition against restrictive agreements. Where the individual turnover of each of the parties does not exceed 30 million kronor, the 15 per cent threshold applies irrespective of the type of agreement. However, according to the Notice, these *de minimis* principles do not apply to agreements that contain certain 'hard-core' restrictions. More specifically, typical cartels of the kind referred to above are normally prohibited even where the market shares are below the thresholds set out in the notice.

Second, Chapter 2, section 2 of the Act provides for a directly applicable legal exemption. The conditions for exemption are the same as in article 101(3) TFEU:

- the agreement must contribute to improving the production or distribution of goods or promote technical or economic progress;
- the agreement must pass on to consumers a fair share of the resulting benefits;
- the agreement must not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the positive effects; and
- the agreement must not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The Act contains similar exemption rules as the EU competition law regime on, *inter alia*, motor vehicles. Taxi operations and farming are also, to some extent, covered by special rules. With respect to hard-core cartels, there are no industry-specific bans or exemptions or any specific exemptions applicable to government-sanctioned or regulated conduct. However, the Act will not apply to behaviour that is an intended result of legislation or an inevitable consequence thereof.

6 Application of the law

Does the law apply to individuals or corporations or both?

Chapter 1, section 5 of the Act defines an undertaking as a legal or natural person engaged in an activity of an economic or commercial nature. The term 'undertaking' must be viewed in the broadest sense and is interpreted in the same way as under EU competition law. Virtually every natural or legal person participating in the economic process will be regarded as an undertaking. The term covers any activity directed at trade in goods or services, irrespective of the legal form of the undertaking and regardless of whether or not it is intended to create profits.

Activities that have been held to be commercial activities falling under the Act include healthcare, distribution of fire appliances and leasing of real estate. Activities that have been considered non-commercial activities and thus falling outside the scope of the Act, include the public procurement of translation services, the financing of an information brochure on a national system concerning doctors, the distribution of instructions and dissemination of information as well as the procurement of work clothes for private use.

The Act does not apply to agreements between employers and employees regarding wages and other conditions of employment.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Act prohibits agreements between undertakings that have as their object or effect an appreciable prevention, restriction or distortion of competition. The relevant geographic market can be defined as Sweden, a part of Sweden or an area larger than Sweden. An agreement between undertakings situated outside Sweden may be prohibited under the Act if the agreement has actual or potential effects in Sweden.

In practice, this means that a cartel may be prohibited under Swedish law, and the undertakings involved pursued under the Act, if the cartel has appreciable effects on competition in Sweden, even if the cartel in question is organised outside Sweden or the undertakings involved are not Swedish. However, public international law imposes restrictions on the exercise of extraterritorial jurisdiction under the Act and the SCA is unlikely to take action against foreign undertakings unless such action can be enforced.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The prohibition under the Act requires that the agreement has actual or potential effects on competition in Sweden (see question 7).

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

When obtaining information, either *ex officio* or from an informant (leniency applications or tip-offs) that suggests the existence of a cartel, the SCA must decide whether to proceed with an investigation. If there is sufficient evidence to suggest the existence of a cartel, the SCA may file an application with the Patent and Market Court for authorisation to conduct an inspection (dawn raid) at the premises of one or more of the suspected parties (see question 10).

If the information collected during the dawn raid supports the suspicion, the SCA will continue the investigation. At this stage, it is likely that the SCA will contact customers and competitors uninvolved in the suspected wrongdoing and question persons working for the suspected undertakings.

If the SCA considers that it has sufficient evidence to prove the existence of the suspected cartel, it will issue a statement of objections to the suspected undertakings setting out its position and the evidence it has obtained. After having received the response of the undertakings (and providing that its suspicions remain), the SCA can adopt three different courses of action. It can order the undertakings to cease the violation of the Act, subject to a fine for non-compliance (a cease-and-desist order). The SCA can also sue the undertakings before the Patent and Market Court and request a judgment ordering the undertakings to pay an administrative fine for infringing the Act. The decision of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal. Finally, if the undertaking does not contest the SCA's claim, the SCA does not have to sue before the Patent and Market Court but can instead issue an order for the undertaking to pay fines (a *fining order* - form of settlement; see question 30).

Typical contentious cartel matters will take a fairly long time from start to finish, often several years. The only time limit to which the SCA is subject is that fines may only be imposed if the SCA's application has been served on the undertaking in question within five years from the date on which the violation ended. In 2017, the SCA was criticised by the Parliamentary Ombudsman for its slow handling of an abuse of dominance case that had been investigated for more than four years (Dnr 1145-2016). The case was subsequently closed without any action being brought against the investigated undertaking.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The SCA may order a suspected undertaking, or any natural or legal person, to provide information and documents at its disposal and to ask any person considered likely to have useful information to appear before it for interrogation. If the SCA deems it necessary to undertake an on-the-spot investigation (dawn raid) at the premises of an undertaking, it must file an application with the Patent and Market Court. Authorisation will only be granted if there is reason to believe that an infringement has been committed, if the undertaking fails to comply with an order to provide information, documents, etc, or there is otherwise a risk of evidence being withheld or tampered with, and if the importance of the measure being taken is sufficient to outweigh the disruption or other inconvenience caused to the party affected by it. An order to provide information, documents, etc, as well as a decision to allow a dawn raid, may be imposed under penalty of a fine for non-compliance.

Such an application to the Patent and Market Court can be granted without consulting the suspected undertakings in advance if there is a risk that the value of the investigation would otherwise be reduced (in particular where the undertakings can be expected to destroy or hide evidence if they are informed about the investigation). This is the normal approach.

During a dawn raid, the SCA may examine and take copies of, or extracts from, accounting records and other business documents (including computer records), request oral explanations from representatives or employees of the undertakings and otherwise investigate the premises, property and means of transport of the undertaking. Provided the company under investigation consents, the SCA usually also 'mirrors' digitally stored material and reviews the material at the SCA's own premises (see question 3). To ensure that the undertaking allows the officials of the SCA full access to the premises, the officials are normally accompanied by representatives of the Swedish Enforcement Service.

An undertaking whose premises are about to be searched may send for legal counsel. The investigation may not start until the lawyers have arrived, unless the investigation would be unduly delayed by waiting or the investigative order has been made without consulting the undertaking concerned. Since the latter is typically the case, the SCA does not normally wait long for counsel to arrive before starting its investigation.

The SCA may not examine or take copies of, or extracts from, documents that are covered by legal professional privilege, or collect documents that are not covered by the scope of the court authorisation. In the event of a dispute as to whether a certain document is privileged, the document shall immediately be sealed and sent to the Patent and Market Court by the SCA. The Court shall decide, without delay, whether the document is privileged.

Subject to approval by the Patent and Market Court, dawn raids may also be carried out in the private homes of board members and employees of the undertaking in question.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Under EU law, the SCA must cooperate with the European Commission and assist it in gathering information from undertakings in Sweden. In addition, under Regulation 1/2003 the SCA must cooperate with the national competition authorities of other EU member states within the framework of the European Competition Network (ECN). The ECN allows for exchange of information on current investigations and assistance through evidence sharing and investigative measures. In October 2004, the SCA undertook, under article 22(1) of Regulation 1/2003, its first cross-border dawn raid in cooperation with the Danish Competition Authority concerning alleged anticompetitive behaviour in the market for natural gas. In September 2017, a new Nordic cooperation agreement was proposed to replace and extend the equivalent arrangement to which Sweden had been party since 2003. This Agreement on Cooperation in Competition Cases between Sweden,

Denmark, Finland, Greenland, Iceland and Norway formalises and strengthens the existing framework for information exchange and other inter-authority collaboration to improve Nordic enforcement during cartel, abuse of dominance and merger control investigations.

The SCA also cooperates with other national competition authorities outside the ECN and the Nordic agreement. On a global level, such cooperation takes place within the frameworks of the International Competition Network, the OECD's Competition Committee and the UN's Conference on Trade and Development, with the purpose of exchanging experience regarding methodology and to further the understanding of competition law matters and the value of effective competition policies. On occasion, the SCA has also coordinated certain reports with its equivalents in the Baltic states, for instance, with the Latvian competition authority concerning the waste disposal sector.

Sweden is not, however, a party to any legal assistance treaty in relation to non-EEA countries. This is partly owing to the provisions of the Public Access to Information and Secrecy Act (2009:400), which places restrictions on the SCA regarding the provision of information covered by secrecy to authorities outside Sweden and the possibility of keeping information received from non-Swedish authorities, secret.

Rules on some forms of international cooperation were introduced in 2002. These rules provide that the SCA may, upon application by an authority in a state with which Sweden has entered into an agreement on legal assistance in competition law matters, order an undertaking to provide information, documents and other materials, and require persons who are thought to be able to provide information to attend interrogations.

Furthermore, at the request of such an authority, the Patent and Market Court may, upon written application by the SCA, allow it to carry out a dawn raid to assist the other state in its investigation into whether a party has infringed the competition rules of that state, if the following conditions are met:

- there is reason to believe that an infringement has been committed;
- the conduct under investigation would have been found to infringe Chapter 2, sections 1 or 7 of the Act or of articles 101 or 102 TFEU, if those rules had been applied to the conduct;
- there is particular reason to believe that evidence is in the possession of the party to which the request refers;
- the party in question does not comply with an order to provide information, documents, etc, or there is otherwise a risk that evidence will be withheld or tampered with; and
- the importance of the action being taken is sufficient to outweigh the disruption or other inconvenience caused to the party affected by it.

Under a confidentiality rule introduced together with the rules on international assistance described above, information received by the SCA in the context of international assistance is confidential if it can be assumed that the assistance was requested by the foreign authority on condition that the information would not be disclosed.

In view of the increasing regulation at an EU level of cooperation between national competition authorities of the member states and between national authorities and the European Commission, the rules on international assistance described above are believed to be of practical relevance mainly in the context of cartels limited to another Nordic country where information also needs to be collected in Sweden.

At the domestic level, the SCA cooperates in various ways with the various county administrative boards in Sweden. Pursuant to a government regulation, the county administrative boards have a responsibility to promote competition in their respective counties and to report activities suspected of restricting competition to the SCA. The SCA also regularly consults with other Swedish authorities affected by its activities.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

See question 11.

Cartel proceedings

13 Decisions**How is a cartel proceeding adjudicated or determined?**

The SCA does not have authority to impose fines other than in non-contentious cases. If the SCA decides to sanction companies for cartel activities and the undertakings do not accept the fines, the SCA will have to file an application before the Patent and Market Court. Hence, such an application results in civil litigation under the general procedural framework.

The decision of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal. Leave to appeal is required, but should typically be granted in a cartel case. The judgment by the Patent and Market Court of Appeal may, in turn, be appealed to the Supreme Court subject to the Patent and Market Court of Appeal's leave and provided that the determination of the Supreme Court is of importance as a precedent (see question 16).

When the SCA issues a cease-and-desist order (see question 9), its decision may be appealed to the Patent and Market Court.

14 Burden of proof**Which party has the burden of proof? What is the level of proof required?**

The burden of proof lies with the SCA, or, in the case of private damages claims based on violations of the Act, normally with the party claiming to have suffered damage. The SCA must prove that the conditions are fulfilled for imposing a fine, and the Market Court (now replaced by the Patent and Market Court of Appeal) has held that the level of proof for the SCA is relatively high, but not as high as the level required in criminal cases (ie, beyond reasonable doubt).

15 Circumstantial evidence**Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?**

In principle, there are no rules in Swedish law to limit the type of evidence that the court may try. Parties, like the SCA, can rely on virtually any kind of document, statement and occurrence in attempting to prove their case. The court may freely evaluate the evidence presented by the parties at its discretion. Thus the court has to examine what has been put forward by the parties in line with the principles of free submission of evidence and free evidence assessment. On a purely practical level, proving an infringement on circumstantial evidence alone would, of course, be more challenging. As mentioned in question 14, the SCA must prove that the conditions are fulfilled for imposing a fine and the level of proof for the SCA is relatively high.

16 Appeal process**What is the appeal process?**

As mentioned in question 13, the Patent and Market Court is the court of first instance in fining matters. Its judgments can be appealed to the Patent and Market Court of Appeal, which will review the case on the merits. Leave to appeal in the Patent and Market Court of Appeal will be granted if there is reason to question the accuracy of the Patent and Market Court's decision; it must grant leave to appeal to be able to determine the accuracy of the Patent and Market Court's decision; the determination of the Court may be of importance as a precedent; or otherwise there are extraordinary reasons to grant appeal. Judgments by the Patent and Market Court of Appeal may be appealed to the Supreme Court subject to the Patent and Market Court of Appeal's leave and provided that the determination of the Supreme Court is of importance as a precedent. Also the Supreme Court's leave to appeal is required, and would typically only be granted in exceptional cases.

The party who wishes to appeal must do so in writing within three weeks of the pronouncement of the judgment or from when the plaintiff received the judgment. As regards timing, the procedure before the Patent and Market Court of Appeal is usually less time-consuming than the procedure before the Patent and Market Court.

Sanctions

17 Criminal sanctions**What, if any, criminal sanctions are there for cartel activity?**

There are no criminal sanctions for cartel activity or any other violation of the Act.

18 Civil and administrative sanctions**What civil or administrative sanctions are there for cartel activity?**

Cartel agreements are void *ex tunc*. Unlawful concerted practices between competing undertakings that are not based on agreements are also legally unenforceable. The SCA may order cartel members to cease the cartel activity, subject to a fine for non-compliance with the order. The imposition of the fine requires a decision by the relevant courts.

Further, the cartel members may, as an administrative sanction, upon application by the SCA, be ordered by the Patent and Market Court to pay fines as an economic sanction for their illegal activities. The decision of the District Court may be appealed to the Patent and Market Court of Appeal. As mentioned earlier, the SCA itself has the right to impose binding fines on undertakings where the undertaking in question does not dispute the fine (see question 30).

A fine may not exceed 10 per cent of the turnover of the undertaking concerned during the previous financial year. There is no lower limit to the fine. Unlike under EU competition law, only the turnover of the violating undertaking itself is taken into account in this calculation, rather than the turnover of all undertakings belonging to the same group. Fines are primarily determined according to the gravity and duration of the infringement. The degree of gravity is measured by the harmful effects of the infringement on competition and prices in the market, as well as by the extent of direct economic losses suffered by other parties. Moreover, when setting the fines, it may also be taken into account whether the undertaking in question has previously violated articles 101 and 102 TFEU or the corresponding national rules.

In addition to fines, the current Act introduced the possibility of imposing an injunction against trading for persons who have participated in serious breaches of Chapter 2, section 1 or article 101 TFEU, provided such an injunction is necessitated by the public interest. The new Trading Prohibition Act was introduced in 2014 and the SCA has published guidelines on the application of the rules on injunctions against trading. The new act broadened the scope for trading prohibitions, in the sense that injunctions can now be imposed on all persons that conduct the management of a business. The Act also gives the Swedish Enforcement Authority a mandate to oblige a third party to submit information regarding his or her economic dealings with the person alleged to have participated in the infringement.

In assessing whether an injunction against trading is necessitated by the public interest, special consideration shall be given to whether the conduct was systematic or intended to produce significant personal gain, whether such conduct caused or was intended to cause significant harm, whether the person in question has previously been convicted of criminal acts in respect of business activities and whether the conduct was intended seriously to prevent, restrict or distort competition. The infringement must therefore have been of a serious nature and of relatively long duration for an injunction to be imposed. Furthermore, where the person against whom the injunction is considered has participated in giving significant assistance in the investigation of the infringement by the SCA, the European Commission or a competition authority in another member state, an injunction shall not be considered necessitated by the public interest. This will particularly apply to companies that are first to report an infringement to the SCA. An individual risking such an injunction may apply to the SCA for individual leniency.

An injunction against trading may be issued against members and alternate members of the board of directors, the managing director and the deputy managing director, provided that such a person committed the wrongdoing in respect of business activities or was serving in such a post at the time of the infringement of the competition rules. An injunction against trading can further be imposed against persons who, in another capacity, have in fact conducted the management of a business, or who have held themselves out to third parties as responsible for a business. Negligence in appointing, instructing and supervising staff is normally not sufficient for an injunction against trading to be imposed.

The board of directors and the management are, however, obliged to take corrective actions if they learn that persons within the company are engaged in infringing conduct. If such actions are not taken immediately, infringements that are committed thereafter may be relevant when assessing whether an injunction should be imposed. The SCA may apply for an injunction against trading either in conjunction with an action for administrative fines or in separate proceedings before the Patent and Market Court.

In addition to administrative sanctions, the Act contains an explicit right to claim damages for parties who have suffered injury as a result of infringements of the prohibitions against anticompetitive agreements or abuse of a dominant position. Chapter 3, section 25 of the Act stipulates a right to damages for parties injured as a consequence of infringements of Chapter 2, sections 1 or 7 of the Act or articles 101 or 102 TFEU. Damages should equal, and thus compensate, the injuries sustained (and proven) by the plaintiff. A private antitrust action may be brought under the general Swedish procedural rules. Since the entry into force of the new Competition Damages Act (2016:964) on 27 December 2016, the competence to hear private antitrust actions has moved from the general courts to the Patent and Market Courts.

There is also a possibility for the Consumer Ombudsman to represent consumers in class actions, in accordance with the Group Proceedings Act (2002:599) (see question 23). Finally, the Swedish Arbitration Act (1999:116) stipulates that the civil law consequences of competition law violations may be the subject of arbitration.

Administrative fines imposed by competition authorities are normally not taken into account when determining damages.

To date, the SCA has filed about 30 applications for fines with the Stockholm District Court (now to be filed with the Patent and Market Court) for activities restricting competition. These applications have concerned both alleged abuses of a dominant position and anticompetitive cooperation between undertakings. The highest individual fine so far imposed by the courts amounted to 200 million kronor as a result of a cross-appeal in the *Asphalt* case (see below). A tendency can be observed regarding the SCA's increased interest in different kinds of unlawful behaviour, whereby it no longer focuses only on the most grave and obvious cartels, but also pursues companies for fines in less traditional cases (eg, involving forms of bidding cooperation).

In the biggest cartel case in Sweden to date, following the 2007 judgment of the Stockholm District Court in the *Asphalt* cartel, total fines on all nine companies involved amounted to approximately 500 million kronor after all appeals were settled. Although the amount is high for Sweden, it is considerably lower than the 1.2 billion kronor sought by the SCA. To establish the fines in that case, the court made an overall assessment of the violations that had occurred and all relevant circumstances.

The most recent judgment from the Patent and Market Court on anticompetitive agreements was handed down in July 2018, and concerned Booking.com's price parity clauses, requiring hotels not to offer lower prices on their own websites than on Booking.com, which the Court found to restrict competition. The judgment is the result of a private action. The most recent judgment in a case driven by the SCA on anticompetitive agreements was handed down in February 2018, and concerned procurement-related competition infringements. In December 2017, the Patent and Market Court fined two telecom companies for engaging in anticompetitive arrangements before a public procurement of internet fibre services in 2009, where one company agreed not to participate in the tender. However, one of the parties subsequently appealed and in February 2018 the case was overturned by the Patent and Market Court of Appeal (see 'Update and trends').

It should also be mentioned that the SCA has used its authority to issue binding fines in non-contentious cases on a number of occasions. This power for the SCA was introduced by the current Act (see question 30).

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Swedish legislation does not provide for criminal sanctions for violations of the competition rules. With respect to fines, the Act follows the

method used in EU law and the SCA has also published a methodology paper on how to determine fines. Similar to under EU law, Chapter 3, section 8 of the Act states that the gravity and the duration of the violation shall be taken into account when determining the basic amount of the fine. When the basic amount of the fine has been determined, the SCA may take into account aggravating and mitigating circumstances that result in an increase or decrease in the basic amount as determined above. Regarding aggravating circumstances, particular attention is paid to any steps taken to coerce other undertakings to participate in the infringement, or if the undertaking has had a role of leader in the cartel or has in some way punished other companies in order to keep them adhering to the behaviour that constitutes the infringement. Regarding mitigating circumstances, particular attention is paid to evidence that the undertaking's involvement in the infringement is substantially limited. The lack of intent of the undertaking to be involved in the infringement is also taken into account. However, to participate in the infringement because of pressure from other companies, to prove that no profits were made or that the company suffered damage from the cartel operations are not considered to be mitigating circumstances.

The SCA may also take into account circumstances that are not connected to the specific infringement in question. These circumstances include previous infringements of the prohibitions in the Act or in the TFEU; evidence that shows that the infringement was terminated as soon as the SCA intervened; and the financial situation of the undertaking. As previously stated in question 18, a fine may not exceed 10 per cent of the turnover of the undertaking concerned during the previous year.

Finally, it is stated that no fines will be imposed in minor cases.

The sentencing principles mentioned are binding on the adjudicator. The SCA methodology paper, however, is not binding on the adjudicator, but it is binding on the SCA when determining what fines to ask for (and when imposing binding fines on undertakings not disputing the fines, see also question 30).

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures may be available as a discretionary choice for the government authority that conducts a procurement, according to Chapter 13, section 3, paragraph 1(4) of the Public Procurement Act (2016:1145). It is not a sanction that can be imposed during the competition infringement procedure, but is instead decided in the procurement procedure. For debarment, some conditions must be met.

First, the undertaking must have been guilty of grave professional misconduct proven by any means that the contracting authorities can demonstrate. Non-compliance with the cartel ban, which has been the subject of a final judgment, or a decision by the SCA where the undertaking in question does not dispute the fine, may constitute professional misconduct of that kind.

Second, debarment must be proportionate to the gravity of the professional misconduct, according to Chapter 4, section 1 in the Public Procurement Act and the Supreme Administrative Court in the case RÅ 2010 ref 79. If those conditions are met, the authority may debar an undertaking from participation in a procurement process. The possibility of debarment shall, however, be construed restrictively considering the grave consequences for excluded undertakings.

A decision to debar a tenderer can be made at any time during the procurement procedure, although it should as a general rule be made as early as possible in the procurement procedure, although there is no provision in the Public Procurement Act stating a formal time limit. The decision can be appealed to the Administrative Court of the circuit where the procuring authority is located.

There are a number of cases concerning debarment from government procurement procedures as a result of cartel activity (see, for example, the judgments of the Stockholm Administrative Court of Appeal of 2 December 2013 in cases 3727-13, 3725-13, 4081-13 and 5060-13).

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

See questions 17 and 18.

Private rights of action**22 Private damage claims**

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

An undertaking that has intentionally or negligently violated Chapter 2, section 1 or Chapter 2, section 7 of the Act, or articles 101 or 102 TFEU, is liable to compensate other parties for the damage the violation has caused them, including parties to the agreement violating the Act. Both contractual liability and indemnity liability are included, and the liability covers pure economic loss without any link to personal or property damage. Thus, this means that the proven injury can be recovered, which presumably would be considered single level damages. Hence, Swedish rules on damages are of a 'compensatory nature'. Passing-on defences and similar will thus be permitted under Swedish law.

The scope of persons entitled to damages is not defined in the Act. The scope is limited by considering the purpose and object of the Act and the subjects protected by the Act, as well as general principles on damages, including the principle of proximate cause.

The Act itself gives little guidance on the size of damages that can be awarded, and there are very few cases.

Regarding the judicial procedure, see question 18.

To fulfil the requirements of the EU Damages Directive, a separate Swedish Competition Damages Act (2016:964) has been enacted. It governs actions for damages for infringements of the competition law provisions and includes changes and clarifications on, inter alia, liability, limitation periods, compensation, recourse, passing on of overcharges, disclosure and other general procedural provisions.

Finally, if the SCA after having investigated a possibly anticompetitive agreement, decides not to issue a cease-and-desist order (see question 9), a company affected by the behaviour has the option to file an application at the Patent and Market Court for such an order.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Under the Group Proceedings Act (2002:599), it is possible to initiate individual group actions (class actions), public group actions and organisational group actions. A person who is a member of a group may bring an individual group action. This means that the plaintiff must have standing to be a party to litigation with respect to one of the claims to which the action relates. The organisational action means, as with the public group action, that someone is given standing to sue without the dispute in any way affecting the plaintiff's own legal interests. This is contrary to the normal principles regarding standing under Swedish law. The procedural rules are with only a few exceptions the same as in civil proceedings.

A group action can be initiated in certain competent courts. Since the entry into force of the Competition Damages Act in 2016, the jurisdiction to hear private antitrust group actions has moved from the general courts to the Patent and Market Courts.

No competition cases have to date been subject to a class action in Sweden.

Cooperating parties**24 Immunity**

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Full leniency (ie, immunity from fines) may be granted to the first undertaking to notify the SCA if it is owing only to the information contained in the application that the SCA has obtained sufficient material to take action against the infringement, if the undertaking: (i) provides the SCA with all the information about the infringement that it has at its disposal; (ii) cooperates fully with the SCA throughout the investigation of the infringement; (iii) does not destroy, falsify or conceal relevant information or evidence relating to the alleged anticompetitive agreement; and (iv) has ended its involvement in the infringement, or ends it as soon as possible after informing the SCA. An undertaking that has forced others to participate may not obtain immunity.

In the event that another company has already obtained a marker (see question 27), immunity may not be granted before the period of extension has ended, nor may immunity be granted if the SCA has stated in a decision that the conditions for immunity are fulfilled.

All the information that the leniency applicant has at its disposal relating to the alleged anticompetitive agreement at the time of the application has to be provided for an application to be considered as filed. In addition, the information must be relevant to prove the infringement and include the identification of the other participants, the affected market, as well as the type and duration of the infringement. Even where the SCA already suspects an infringement at the time of the application, this does not prevent an undertaking from being granted immunity. However, the requirements are not fulfilled if the SCA has already in some other way received sufficient information to intervene. It does not matter whether a decision to intervene has already been made.

Additional information to which the undertaking may subsequently gain access during the ongoing investigation must also be given to the SCA. In other words, the undertaking must continuously, and voluntarily, submit all relevant information regarding the infringement and copies of all relevant material to which the undertaking has access, for example, notes or minutes from meetings. Informing other participants about the application or evidence supplied and other measures that hinder the SCA's investigation will remove the possibility of immunity.

If the SCA has received sufficient information to commence an investigation into an infringement and no undertaking has applied for leniency in accordance with the above, immunity may still be granted to an undertaking if it, in addition to criteria (i) to (iv) set out above, is (v) the first to provide information that makes it possible to establish that an infringement has occurred, or (vi) in some other way to a very significant extent has facilitated the investigation of an infringement. The latter criterion will, according to the SCA's guidelines, be interpreted strictly and the availability of immunity is intended to be very limited under this rule. Revised guidelines on immunity and leniency were published in September 2017.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Under the Act, only the first undertaking to cooperate with the SCA may qualify for immunity. However, the undertaking that comes second may get a reduced fine under Chapter 3, section 13 of the Act if the undertaking fulfils the same kinds of conditions on cooperation applicable to immunity applicants. The SCA decides in its writ of summons whether the information an undertaking has provided has added considerable value, and the level of reduction. The reduction for the first undertaking for providing information adding considerable value will be between 30 and 50 per cent, for the second undertaking the reduction will be 20 to 30 per cent, and for other undertakings the reduction will be up to 20 per cent. In determining the level of reduction within these categories, the SCA will take into account at what time the information was provided,

to what extent the information added value and to what extent and with what continuity the undertaking has cooperated with the SCA after the information was provided.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

See question 25.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Although there are no express 'deadlines', if an undertaking wishes to benefit from full immunity under the Swedish leniency programme, it should file an application as soon as it has gathered the necessary information. Otherwise, it runs the risk that one of the other participants may 'blow the whistle' first, considerably limiting the undertaking's chance of qualifying for immunity. However, even if the undertaking is not first in, there is a chance of qualifying for a reduction of the fine.

An undertaking whose application is incomplete may obtain a marker, provided that the application contains information on the market concerned by the infringement, which other companies are involved in the infringement and the object of the infringement. The time limit is at the discretion of the SCA, but is usually no longer than two weeks unless the undertaking can provide sufficient reasons for a longer time limit.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

See questions 24 and 25.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Confidentiality issues are regulated by the Public Access to Information and Secrecy Act (2009:400). Under those rules, information regarding planning and other preparations for investigations, dawn raids, etc, that the SCA intends to undertake may be confidential, provided it can be assumed that the purpose of the investigation will be negatively affected if the information is revealed. The information related to an investigation by the SCA (not only planning and preparations) will be confidential if, considering the object of the investigation, it is of exceptional importance that the information is not disclosed. The information is primarily confidential in relation to the companies subject to the investigation, but it may also be confidential in relation to third parties. Information provided by leniency applicants or other cooperating parties may be treated as confidential under this rule.

The provisions guarantee the confidentiality, in matters regarding investigations of infringements of Chapter 2, section 1 and Chapter 2, section 7 of the Act or articles 101 or 102 TFEU, of reports and other information provided to the SCA by an informant, if it can be assumed that the informant will suffer substantial damage or other substantial detriment if the information is revealed. The confidentiality concerns both legal and natural persons. Both information given on an informant's own initiative and information provided on request from the SCA may be confidential under this rule. However, since the object of the rule is to protect the informant, only information that could somehow disclose the identity of the informant is treated as confidential under this rule. The provisions also guarantee the confidentiality of certain information in the context of legal assistance requested by another state (see question 11).

Information in public records related to the SCA's investigations and other enforcement measures remain confidential for a maximum of 20 years, or otherwise as long as it can be assumed that the informant will suffer substantial damage or other substantial detriment if the information is revealed.

It follows from the rules that the level of confidentiality does not depend on the level of cooperation by the parties.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The SCA may not enter into a plea bargain or a binding resolution to resolve liability and penalty for alleged cartel activity. However, Chapter 3, section 16 of the Act provides the SCA with the right to issue a binding settlement to alleged cartel members. This is referred to as a fine order. This section is of a non-mandatory nature, which means that the SCA can issue settlements in suitable cases. According to the preparatory works of the Act, settlements should not be issued in cases where the facts are uncertain. If the settlement is confirmed in writing by the alleged cartel member, within a period of time determined by the SCA, the settlement will have the same effect as that of a judgment with legal force. A settlement that has been approved in writing can be appealed to the Patent and Market Court within a year of the written confirmation.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

As mentioned in question 18, the current Act introduced the possibility of imposing an injunction against trading for persons who have participated in serious breaches of Chapter 2, section 1 of the Act or article 101 TFEU, provided such an injunction is necessitated by the public interest. However, where the person against whom the injunction could be imposed has participated in the provision of significant assistance in the SCA's investigation of the infringement, an injunction shall not be considered necessitated by the public interest.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

If an undertaking wishes to take advantage of the leniency programme, it should contact the SCA for an assessment of its chances of qualifying for immunity from, or a reduction of, fines (see question 24). The contact must be made by a person empowered to represent the undertaking (but can initially be anonymous). The undertaking cannot qualify for immunity until a formal application has been filed with the SCA. This application can be made in writing. However, in practice, the SCA accepts oral applications since undertakings sometimes hesitate to file written applications due to the risk that the material will be used in proceedings for damages.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or proposed leniency and immunity policy assessments or policy reviews in the public domain.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

As indicated above (see question 29), the SCA may keep certain information confidential for a company concerned during the investigation

Update and trends

In July 2018, the Patent and Market Court ruled in favour of the private action launched by Visita against Booking.com, ordering Booking.com to remove existing, and discontinue its use of, vertical price parity clauses in its agreements with hotels (requiring the hotels not to offer lower prices on their own websites than on Booking.com). The action was launched by Visita, a hospitality sector business association, after the SCA ended its investigation of Booking.com in 2015 by accepting the company's commitments to cease its use of horizontal price parity clauses. The Court found in its judgment that the vertical price parity clauses had been shown by Visita to limit competition in the market for hotel accommodation, raising both prices and barriers to entry into the market. The Court rejected Booking.com's arguments that the clauses were ancillary restraints, necessary for the company's operation, and that the clauses should be exempted on grounds of efficiency. The cease-and-desist order was issued under penalty of a 35 million kronor fine. Booking.com has appealed the judgment to the Patent and Market Court of Appeal. This case is interesting as the outcome is not fully consistent with the view of the SCA. Similar actions throughout Europe have also led to contrasting results.

In April 2018, the Swedish Supreme Court allowed insurance broker Söderberg & Partners' appeal of the Patent and Market Court of Appeal's ruling that it was not possible to challenge an SCA decision on what digital material seized during a dawn raid is transferred to a case file. The case concerns a dawn raid carried out at the premises of Söderberg & Partners in 2017 by the SCA, during which digital material was mirrored and seized. The SCA then reviewed the material and decided that a large amount was relevant and would become part of the case file, at which point the material becomes 'official documents'. Söderberg & Partners challenged the SCA's decision on what was considered relevant material to copy, on the grounds that much of it was not covered by the court order authorising the dawn raid and that it would violate fundamental rights of access to effective remedies and a fair trial to deny the company the possibility to appeal. The Patent and Market Court and the Patent and Market Court of Appeal both dismissed the appeal, taking the view that the SCA's decision was not a reviewable act under the relevant legislation. A ruling from the Supreme Court is currently pending.

In February 2018, the Patent and Market Court of Appeal ruled in favour of Telia (previously TeliaSonera), against the SCA in the case against Telia and the Swedish fibre transmission company, GothNet. The companies had been found by the lower court in 2017 to have

engaged in an anticompetitive arrangement in relation to a public tender in 2009, whereby Telia agreed not to participate in the tender process. When GothNet won the tender, Telia was subcontracted as its exclusive supplier. A total fine of 16 million kronor was ordered by the lower court. The SCA had sought a total fine of 35 million kronor. The court of appeal found in its judgment that Telia's behaviour had not been shown to restrict competition by object or effect and reversed the Patent and Market Court's judgment. Only Telia appealed, resulting in the full annulment of its fine.

The SCA's appeal of the May 2016 judgment of the Stockholm District Court involving three removal firms was dismissed by the Patent and Market Court of Appeal in November 2017. The case concerned five-year non-compete clauses in two share-purchase agreements. The SCA had claimed that the non-compete clauses were not ancillary to the two transactions as there was no direct and necessary link thereto. The lower court dismissed the SCA's case on the basis that there was indeed such a link in one instance and there was insufficient proof of appreciable restriction of competition as regards the other. The court of appeal upheld the judgment, finding that it had not been shown that the non-compete clauses restricted competition by object. The frailty of a case focusing mainly on proving an anticompetitive object (as opposed to looking at effects) has become something of a trend in Sweden in the past couple of years as a result of various judgments, such as this one, the *Telia/Gothnet* case above, and the *Capio* case from 2017.

Two private litigation cases for damages were dismissed by the Patent and Market Court in 2018. The first case concerned alleged anticompetitive agreements (between TeliaSonera and Svea Billing Services). The Patent and Market Court dismissed the claim in March 2018, finding that the defendants had not been shown to have entered into any anticompetitive agreement. The second case concerned alleged abuse of dominance by the municipality-owned company GothNet. The Patent and Market Court dismissed the claim in February 2018, finding that it was not shown that GothNet held a dominant position in the relevant market.

Aside from court cases, the SCA has closed a number of anticompetitive agreement investigations during 2017 and 2018 without taking any further action. The SCA has indicated in statements and reports that it will place a greater focus on the connection between competition infringing behaviour and corruption in the future. This may be expected to lead to increased cooperation with other regulatory authorities, to coordinate efforts in cases combining the fields.

phase. This is typically the case for trade secrets provided to the SCA by certain third parties, for instance competitors or customers, and evidence concerning other parties' involvement in an infringement.

Access to the case file in its entirety (with few exceptions, see below) is normally granted at the stage when the SCA considers that it has sufficient evidence to prove the existence of a suspected cartel and thereby issues a draft statement of claim (similar to a statement of objections). The companies concerned will, before the SCA files an allocation to issue fines, be granted an opportunity to review and comment on the draft application and the evidence disclosed.

As indicated, there are a few limited possibilities, however, for the SCA to keep certain information confidential to a party also after the draft statement of claim has been issued, or to release documents to a limited number of individuals under the proviso that the documents may only be used for exercising defence rights, etc. Similarly, certain information may be disclosed only at the SCA's own premises (typically quantitative data). Also in such cases, the SCA issues a decision to limit the group of people that may have access to the information, for instance legal and economic advisers.

At the stage when the SCA has submitted an application to the Patent and Market Court asking the Court to impose fines on a company, the rules on evidence in the Swedish Code of Judicial Procedure (1942:740) will prevail over the rules set out in the Public Access to Information and Secrecy Act. In practice, this means that all documents submitted to the Court (ie, evidence invoked against a party) must be disclosed to the party in question.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

As mentioned in questions 18 and 31, the Act provides the SCA with the possibility of imposing an injunction against trading for persons who have participated in serious breaches of Chapter 2, section 1 of the Act or article 101 TFEU. The preparatory works of the Act states that nothing prevents the employee being represented by counsel during interrogations held by the SCA. As there are often conflicting interests between an undertaking under investigation on the one hand, and its employees on the other, it is advisable to have separate counsel representing the undertaking and its employees.

Furthermore, when the SCA applies for an injunction against a person in a district court, the court may appoint a public defence counsel if there are special reasons.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

The guidelines on ethics of the Swedish Bar Association contain stringent provisions relating to the representation of clients with conflicting interests. For members of the Swedish Bar and their employees, these provisions limit the possibility to represent multiple corporate defendants. Subject to these limitations, a multiple corporate defence is possible.

37 Payment of penalties and legal costs**May a corporation pay the legal penalties imposed on its employees and their legal costs?**

Legal penalties are imposed on the undertakings involved in the cartel, and are not imposed on the employees of those undertakings. Hence, individual employees cannot be ordered to pay fines or other monetary sanctions. However, undertakings may pay the legal costs of their employees.

38 Taxes**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

No. Fines, penalties and similar public charges (such as fines imposed by the SCA or the European Commission) are non-deductible for Swedish tax purposes.

Private damages awards may be tax deductible depending on the circumstances. In general, private damages awards should be tax-deductible if they qualify as an operating expense. Certain specific exemptions exist but these should not be relevant here.

39 International double jeopardy**Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

To answer this question, first it must be considered whether the SCA or the courts can fine or otherwise penalise an undertaking that has been penalised in other jurisdictions. Second, the question arises as to whether sanctions already imposed in other jurisdictions shall be taken into account when determining the fine. Regard must be had to EU law and consequently to whether the earlier penalty had been imposed within the EU.

The European Competition Network (ECN) was set up with the objective that each case involving application of EU competition law should be dealt with by a single authority in a member state. However, the rules are not binding and Regulation 1/2003 article 13 paragraph 2 stipulates that a complaint that has already been dealt with by another competition authority may be rejected by the authority (here: the SCA). Hence, the SCA can choose not to reject the complaint and the system consequently allows for sanctions under the EU competition rules by more than one authority in the same case. However, the principle of ne

bis in idem is a general principle of EU law (article 50 of the Charter on Fundamental Rights). The ECJ held in *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* that if the Commission had penalised an undertaking for anticompetitive behaviour with reference to the object or effects in a certain territory, the undertaking cannot again be brought to a national court with reference to the object or effects in the same territory. It follows from the principle of ne bis in idem and the condition of 'identity of facts'. Accordingly, an undertaking cannot under the principle of ne bis in idem be fined in a Swedish national court for the same anticompetitive conduct, if the object or effects in Sweden have already been taken into account in a previous proceeding within the EU (including the Commission's power to issue fines).

Thus it should not be considered 'double jeopardy' if a company will be fined in respect of indirect sales in Sweden where the direct sales have been penalised elsewhere, following *Toshiba Corporation and Others*.

With respect to non-EU member states, there are no safeguards protecting an undertaking from fines or penalties in Sweden if the undertaking has been penalised in a state outside the EU.

There is no clear legal ground for taking into account any penalties imposed in other jurisdictions. The SCA does not mention it as a mitigating factor in its methodology paper on how to determine fines (see question 19), nor is it mentioned as a mitigating factor in the Act.

The system of reducing a fine by the amount of previous penalties has been rejected by the advocate general as not satisfying the principle of ne bis in idem (opinion in C-213/00 P, pages 96-97). Similarly, the European Court of Human Rights has rejected that kind of system.

As indicated in question 22, Swedish rules on damages are of a compensatory nature. This means that overlapping liability for damages can be taken into account when assessing damages.

40 Getting the fine down**What is the optimal way in which to get the fine down?****Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

Companies can avail themselves of the leniency principles described in question 24. The existence of a compliance programme does not affect the level of the fine, owing to the difficulties in assessing the impact of such a programme. Hence, compliance initiatives undertaken after the investigation has commenced would typically not affect the level of the fine.



**MANNHEIMER
SWARTLING**

**Johan Carle
Stefan Perván Lindeborg**

**johan.carle@msa.se
stefan.pervan.lindeborg@msa.se**

Norrlandsgatan 21
PO Box 1711
111 87 Stockholm
Sweden

Tel: +46 8 595 060 00
Fax: +46 8 595 060 01
www.mannheimerswartling.se

Switzerland

Mario Strebel, Christophe Rapin and Fabian Koch

Meyerlustenberger Lachenal Ltd

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The legislation governing cartels in Switzerland is the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act). The regulatory framework is complemented by several federal ordinances, general notices, guidelines and communications of the Competition Commission (the Commission).

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The federal authorities investigating cartel matters are the Commission and its Secretariat (the Secretariat), which are based in Berne. They are independent of the federal government. The Commission consists of 12 members and is headed by its president and the two vice-presidents. The majority of the Commission's members must be independent experts (having no interest in or special relationship with any economic group whatsoever). While investigations are conducted by the Secretariat, which also prepares the Commission's decisions, the deciding body in cartel matters is the Commission.

Based on the Commission's internal rules of procedure of 15 June 2015 that entered into force on 1 November 2015, two separate chambers of the Commission with independent decision-making power were introduced; first, a chamber for partial decisions and second, a chamber for merger control clearance. The chamber for partial decisions has been introduced in particular for the closing of hybrid cartel cases (ie, proceedings in which only some of the parties agree to close the investigation with an amicable settlement). All decisions that are not deferred to one of these two chambers shall be made by the Commission. The Secretariat is organised into four services responsible for the product, services, infrastructures and construction markets respectively. Each service is headed by a vice-director. The Secretariat has more than 70 employees, including a significant number of economists.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

There have recently been several changes to the applicable regime. On 22 May 2017, the Commission adapted its Communication on Vertical Agreements (Vertical Agreements Communication) to the Federal Supreme Court's landmark decisions in the *Elmex* toothpaste cases (see question 4). In addition, the Commission adopted an explanatory note as an interpreting aid on 12 June 2017 (the VertBek Explanatory Notes). The latter particularly also contains explanations with regard to online sales restrictions. On 9 April 2018, the Commission amended the VertBek Explanatory Notes in this context in order to adapt to the landmark ruling of the European Court of Justice on third-party platform restrictions in the matter of *Coty International v Parfümerie Akzente*. Furthermore, on 28 February 2018 the Secretariat published for the first time guidelines on the main features of amicable settlements and an overview of the respective procedure based on article 29 of the Cartel

Act (the Amicable Settlement Guidelines). The Amicable Settlement Guidelines also contain a template of the framework conditions for amicable settlement negotiations and a template of an amicable settlement agreement to be concluded with the Secretariat.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The Cartel Act prohibits unlawful restraints of competition such as anti-competitive agreements between two or more independent undertakings operating at the same or different market levels that have a restraint of competition as their object or effect (article 4(1) of the Cartel Act). Importantly, the notion of anticompetitive agreement does not only cover binding or non-binding agreements in a strict legal sense but also 'gentleman's agreements' or concerted practices such as the exchange of information in order to knowingly substitute practical cooperation for the risks of competition. To be unlawful, an agreement must either eliminate effective competition or significantly restrict competition without being justified on economic efficiency grounds (article 5(1) of the Cartel Act).

By law (article 5(3) and (4) of the Cartel Act), the following agreements are presumed to eliminate effective competition and are thus considered as hard-core restrictions (hard-core restraints):

- horizontal agreements that directly or indirectly fix prices, restrict quantities of goods or services to be produced, purchased or supplied, or allocate markets geographically or according to trading partners; and
- vertical agreements that set minimum or fixed prices (resale price maintenance) or allocate territories to the extent that (passive) sales by other distributors into those territories are not permitted (absolute territorial protection).

Such a presumption may be rebutted if it can be shown that, as a matter of fact, effective competition is not eliminated by these agreements. If competition is not eliminated, it has to be assessed whether the agreement significantly restricts competition. In the landmark cases with regard to Gaba and Gebro in the matter of the *Elmex* toothpaste cases of 28 June 2016 (2C_180/2014) and 4 April 2017 (2C_172/2014) respectively, the Federal Supreme Court substantially tightened its practice with regard to hard-core restraints. The Federal Supreme Court decided that vertical and horizontal hard-core restraints as listed above in principle significantly restrict competition. The significance of the competition restraints is assumed for hard-core restraints owing to their quality without the need to examine quantitative effects such as market shares. According to the Federal Supreme Court, already a small degree of a restriction of competition suffices to constitute significance. Horizontal and vertical hard-core restraints must therefore be justified on the grounds of economic efficiency to be permissible.

Economic efficiencies justifying otherwise unlawful anticompetitive agreements include:

- a reduction of production or distribution costs;
- the improvement of products or production processes;
- the promotion of research into or the dissemination of technical or professional know-how; and
- a more rational exploitation of resources.

The strict approach adopted with the *Elmex* toothpaste cases has recently been confirmed by the Federal Supreme Court in its *Altimum.SA* decision (mountaineering equipment) of 18 May 2018 (2C_101/2016). In this decision, the Federal Supreme Court also made clear that the barriers to justify otherwise unlawful anticompetitive agreements based on grounds of economic efficiency are high, in particular for hard-core restraints.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The Cartel Act does not provide for any industry-specific offences or defences or any antitrust exemptions for government-sanctioned activity. However, pursuant to article 3(1) of the Cartel Act, statutory provisions that do not allow for competition in a certain market for certain goods or services take precedence over the Cartel Act. Such statutory provisions include, in particular, provisions that establish an official market or price system and provisions that grant special rights to specific undertakings to enable them to fulfil public duties. However, according to the Federal Supreme Court, such statutory exemptions must be interpreted narrowly.

The Cartel Act also empowers the Federal Council and the Commission to issue ordinances or general notices respectively on specific anticompetitive agreements that are, in principle, justified on efficiency grounds. Such anticompetitive agreements include:

- cooperation agreements relating to research and development;
- specialisation and rationalisation agreements (including agreements concerning the use of schemes for calculating costs);
- exclusive distribution and purchase agreements for certain goods or services;
- exclusive licensing agreements for intellectual property rights; and
- agreements with the purpose of improving the competitiveness of small and medium-sized enterprises provided that they have only a limited effect on the market.

On this basis, several general notices and communications have been published by the Commission:

- On 22 May 2017, the Commission adapted its Vertical Agreements Communication in particular to the Federal Supreme Court's landmark decisions in the *Elmex* toothpaste cases and has additionally issued for the first time explanatory notes as an interpreting aid on 12 June 2017, as amended on 9 April 2018 (see question 4). The latter particularly also contain explanations with regard to online sales restrictions. This communication incorporates the principles developed by the Commission and the appellate courts based on article 5(4) of the Cartel Act and, in principle, seeks harmonisation with the Block Exemption Regulation 330/2010 and the related Guidelines on Vertical Restraints while taking the economic and legal specificities of Switzerland into account.
- On 19 December 2005, the Commission adopted the Communication on Agreements of Minor Importance (*de minimis*), specifically targeting agreements between small and medium-sized enterprises to improve their competitiveness provided that the agreements are no hard-core restraints and have only a limited effect on the market.
- On 1 November 2002, the Commission enacted the Motor Vehicle Communication and a brief explanatory note regarding its application. The aims of the Motor Vehicle Communication were essentially to allow the parallel importation of motor vehicles from the EU and EEA to Switzerland, to suppress the link between retail and after-sales servicing, to facilitate the sale and the parallel importation of spare parts and to give distributors more freedom in relation to multi-branding. On 1 January 2016, the Commission's revised Motor Vehicle Communication entered into force and replaced the communication of 2002.
- Moreover, the Commission has published a general notice on homology and sponsoring of sports goods and another on the use of cost-calculation schemes (cost-calculation aids). The purpose of the latter, which is the much more important of the two in practice,

is to distinguish lawful use of cost-calculation aids from illegal horizontal price fixing. To qualify as a lawful cost-calculation aid, the following requirements must be met:

- the aid may only set out the basis for the cost calculation, but may not stipulate any flat costs;
- know-how may be exchanged to allow the cost calculation; however, information on how prices are set must not be disclosed;
- the parties must be free to set prices and conditions and to determine discounts in whatever form; and
- price elements, discounts or consumer prices shall not be 'proposed'.

Communications of the Commission are not binding upon Swiss courts.

Finally, upon specific request by the parties subject to a decision of the Commission or the appellate courts, the Federal Council may authorise otherwise unlawful anticompetitive conduct in exceptional cases if such conduct is deemed necessary for compelling public interest reasons (article 8 of the Cartel Act). To date, such authorisation has never been granted.

6 Application of the law

Does the law apply to individuals or corporations or both?

Article 2(1)-bis of the Cartel Act makes clear that any undertaking, public or private, engaged in an economic process that offers or acquires goods or services is an undertaking within the meaning of the Cartel Act and that neither the organisation nor the legal form of an undertaking is relevant.

Private undertakings can be both individuals and corporations. Individuals acting as consumers are not caught by the Cartel Act. Individuals acting as officers or employees of an undertaking are not caught by the Cartel Act for competition law infringements, only the undertaking is. Further, undertakings that perform tasks in the public interest and that are vested by law with special rights (such as the Swiss Post for specific postal services) are also (partly) exempted.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Article 2(2) of the Cartel Act in principle codifies the international law principle of the effects doctrine. According to the recent landmark judgment in the *Elmex* toothpaste decisions, the Federal Supreme Court ruled that the Cartel Act applies to all agreements and concerted practices that may have an effect within Switzerland (see question 4). Therefore, agreements concluded abroad or conduct that takes place outside Switzerland but that might have effects in Switzerland may fall under Swiss jurisdiction. In its most recent practice, the Commission imposed severe sanctions on Nikon and BMW because their European dealer agreements contained provisions prohibiting exports to countries outside the EEA. As Switzerland is not part of the EEA (and was as a result affected by those provisions), the Commission was of the opinion that these restrictions led to a foreclosure of the Swiss market. This in general is in line with the Commission's past practice to interpret effects in Switzerland broadly in a sense that the mere possibility of effects suffices. Both the *BMW* and *Nikon* decisions were upheld by the Federal Supreme Court and the Federal Administrative Tribunal respectively.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

In light of the effects doctrine set out above in question 7, conduct that only affects customers or other parties outside Switzerland should, in general, not fall under Swiss jurisdiction. However, in cases where there might be repercussions on the Swiss market as, for instance, in an (re-) import scenario, the Swiss Cartel Act could nevertheless be applicable. In this context, one has to bear in mind that, based on the recent *Elmex* toothpaste decisions by the Federal Supreme Court (see question 4), the scope of the effects doctrine has been significantly widened since not only actual effects, but also potential effects on the Swiss market are deemed sufficient, giving the authorities considerable leeway when determining whether a specific conduct falls under Swiss jurisdiction.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

Cartel proceedings under the Cartel Act are two-staged, consisting of a first stage preliminary investigation that may be followed by a second stage in-depth investigation. Nevertheless, the Commission may open an in-depth investigation even without going through a preliminary investigation.

The Secretariat can initiate preliminary investigations either on its own initiative, at the request of certain undertakings concerned (eg, competitors) or based on information received from third parties. It is at the discretion of the Secretariat to open a preliminary investigation. If the Secretariat concludes that there are indications of the elimination or a significant restriction of effective competition, an investigation will be opened together with one presidium member of the Commission. The Secretariat must open an investigation if requested to do so by the Commission or by the Department of Commerce of the Swiss government. During preliminary investigations, the parties concerned have no procedural rights (that is to say, no right to consult files or records and no right to be heard). By the same token, third parties cannot bindingly request the Secretariat or the Commission to open a preliminary investigation or an investigation respectively. The preliminary investigation shall determine whether an investigation is necessary. The decision to open an investigation must not be taken in the form of a formal decision and cannot be appealed.

For the second stage, the Secretariat must announce the opening of an investigation by means of an official publication. Such announcement must state the purpose of the investigation and the names of the parties involved. Furthermore, affected third parties have the possibility to join the investigation, albeit with limited procedural rights, upon a corresponding request made within 30 days of the announcement. All parties to the investigation are vested with the usual procedural rights. They may consult files and suggest witness statements and have the right to be heard and to participate in hearings. The Secretariat conducts the investigation, but the Commission has the power to intervene and to hold hearings, a right that the Commission has made frequent use of in the recent past.

The Secretariat is empowered to conduct investigations and, together with one presidium member of the Commission, to issue necessary procedural rulings. On the basis of the conducted investigation, the Secretariat brings forward a motion for a draft of a decision, which is comparable to the statement of objections in the European Union. The parties and participating third parties may comment on such draft decision. If important new facts emerge, another round of hearings and witness statements may take place. Formally, however, the decision itself is not issued by the Secretariat, but by the Commission. Accordingly, the investigating and decision-making bodies are separate, even though at least one of the presidium members of the Commission is involved in some of the investigatory actions.

An investigation can have one of the following outcomes. First, the Commission may decide that there is no evidence of an unlawful agreement and close the investigation without any consequences. Second, the formal decision of the Commission can state that an agreement or conduct is unlawful and order measures to restore effective competition or pronounce direct fines, as the case may be.

There are no statutory time limitations applying to investigations. As a rule of thumb, a preliminary investigation can take several months and a formal investigation from several months to two years or more.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Secretariat has broad investigative powers. It may hear the parties that have allegedly committed the violation as well as third parties concerned (such as competitors or suppliers) and ask for written statements. It can compel testimony from witnesses, although not from the parties alleged to have entered into illegal anticompetitive agreements. Any hearings or witness statements must be evidenced in the minutes. The parties involved have the right to access and to comment on these minutes.

Upon specific request for information, the undertakings under investigation are also obliged to provide the Secretariat with all information required for their investigation and to produce necessary documents (article 40 of the Cartel Act), in due consideration, however, of the right against self-incrimination (*nemo tenetur* principle).

The competition authorities may use all kinds of evidence to establish the facts, such as documents, information supplied by third parties, testimony and expert opinions. Moreover, according to article 42(2) of the Cartel Act, the president or each vice-president of the Commission has the power to order inspections or dawn raids and seizures upon request of the Secretariat. The Federal Act on Criminal Administrative Law applies by analogy to such proceedings.

The Secretariat published a note on selected instruments of investigation in January 2016. Therein it laid out its best practice particularly with regard to inspections and the seizure of documents and electronic data. The representatives of the Secretariat in charge of the inspection will, *inter alia*, not wait for the arrival of external lawyers before starting to search the premises. Any evidence discovered while the external lawyers were not present will, however, be set aside and only be screened once the lawyers are present. If deemed necessary, the undertakings being dawn-raided may request the sealing of specific or even all documents and electronic data. Moreover, legal privilege applies to any document produced in the course of the (core) professional activity of independent attorneys admitted to the bar that are allowed to professionally represent parties in Swiss courts. Hence, legal privilege is not granted to work products of in-house counsel. It applies irrespective of when such document was created (ie, before or after an investigation was launched) and of where such document is located, be it in the custody of the attorney him- or herself, the client or any other third party. Legal privilege may be invoked by the attorney him- or herself, the client and also every third party having a protected document in custody.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Switzerland was the first state to sign a second-generation cooperation agreement in competition matters with the European Union on 17 May 2013. This agreement is not sector-specific and constitutes the legal basis for the cooperation between the European Commission (but not the member states) and the Swiss competition authorities. It facilitates significantly the exchange of information and the transmission of documents between both authorities, subject to specific requirements. The agreement entered into force on 1 December 2014. The Cartel Act also provides for a specific regime with regard to investigations in the air transportation industry (article 42a of the Cartel Act). Such investigations are governed by the Agreement between the European Community and the Swiss Confederation on Air Transport of 21 June 1999, allowing sector-specific cooperation between the Commission and the European Commission on a formal legal basis. Moreover, on an informal basis, the Commission and its Secretariat cooperate with various national competition authorities in Europe such as the German Bundeskartellamt as well as with the US antitrust authorities. In the absence of specific future cooperation agreements, such cooperation, however, is not allowed to go beyond the exchange of non-confidential information.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Investigations, prosecutions and sanctions decided by antitrust authorities abroad are not legally binding for the Commission and appellate courts. However, because of the supposedly congruent legal framework as the one in the European Union, as referred to by the Federal Supreme Court in its *Elmex* toothpaste cases (see question 4), and the fact that such regulatory framework has often made significant inroads into the past Swiss competition law practice, its case law will have a significant impact also on future decisions taken by the Swiss authorities.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The Commission is the authority that is empowered to take decisions and remedial actions against cartels, and also to impose fines on undertakings that violate Swiss competition law. It has wide decision-making and remedial powers and can, *inter alia*, also issue injunctions to terminate a specific conduct or to change and modify a specific business practice. Moreover, a specific chamber of the Commission is empowered to render partial decisions on the closure of proceedings, the approval of amicable settlements including other measures, in particular fines and costs, for some of the parties while the proceeding is continued for the other parties (hybrid cartel cases; see question 2). The Secretariat is responsible for conducting investigations and preparing cases and, together with one presidium member of the Commission, to issue necessary procedural rulings (see question 9). In addition, an undertaking impeded by an unlawful restraint of competition from entering or competing in a market may request before the civil courts:

- the elimination of the unlawful agreement or cartel;
- an injunction against the unlawful agreement or cartel;
- damages; and
- restitution of unlawful profits.

Only civil courts have jurisdiction over claims for damages.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

According to the principle of investigation, which applies generally in administrative proceedings and in particular in connection with cartel proceedings, the competition authorities and the courts have to investigate the facts *ex officio*. This obligation to investigate extends to justifications on the grounds of economic efficiencies. Nevertheless, the parties to the investigation or proceedings before the appellate courts are obliged to cooperate in assessing the facts and circumstances. Ultimately derived from the criminal law nature of cartel proceedings and the consequent applicable presumption of innocence, it is, however, in any case for the authorities to prove that an undertaking acted, in fact, illegally by taking part in an agreement or concerted practices.

With regard to the level of proof required, as a general rule, only certainty in the sense that no reasonable doubts shall continue to exist with regard to the relevant facts is deemed sufficient. However, the existence of purely theoretical doubts does not matter. Further, according to the Swiss Federal Supreme Court, exceptions to that rule only exist with regard to complex economic issues such as market definitions and substitutability questions where a balance of probabilities shall suffice since full proof is by the nature of these matters not possible.

In recent judgments of the Federal Administrative Tribunal in the bid-rigging case against building undertakings from the canton of Aargau, it stated that a thorough assessment of the evidence is required without a reduction of the burden of proof or other facilitations, even if accusations from leniency applicants against other undertakings were submitted. The Federal Administrative Tribunal further clarified that accusations made in a voluntary report against other competitors are not sufficient evidence if the non-cooperating undertakings deny these accusations. Instead, the competition authorities must take into account all the specific circumstances of a case (eg, the statements of the undertakings that filed a voluntary report and the statements of the non-cooperating undertakings). If the situation remains unclear, further investigations and taking of evidence is needed, meaning that in practice, additional evidence that corroborates the accusation of another undertaking must be found.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

In line with the principle of free appraisal of evidence, the Commission as well as the appellate courts accept the establishing of a Cartel Act infringement by using circumstantial evidence without direct evidence of an actual agreement. Both direct evidence and circumstantial

evidence are, *a priori*, considered to be of equal value and can be used to fulfil the required level of proof (see question 14).

16 Appeal process

What is the appeal process?

Decisions of the Commission and, to a limited extent, interim procedural decisions also, can be appealed to the Federal Administrative Tribunal within 30 days of the notification of the decision.

The addressees of the decision have the right to appeal, whereas it is uncertain to what extent competitors, suppliers or customers have the same right. The decisive factor is whether these third parties are affected by the decision of the Commission. In principle, only third parties that suffer a clearly perceptible economic disadvantage as a consequence of an anticompetitive conduct shall be regarded as parties to an investigation and thus have the legal standing to appeal a decision.

An appeal can be lodged on the following grounds: wrongful application of the Cartel Act; the facts established by the Commission and its Secretariat were incomplete or wrong; or the Commission's decision was unreasonable, a claim that is, however, rarely invoked in practice. Hence, the appeal before the Federal Administrative Tribunal is a 'full merits' appeal on both the findings of facts and law. However, in practice the Federal Administrative Tribunal grants the Commission a significant margin of technical discretion.

Judgments of the Federal Administrative Tribunal and, to a limited extent, interim procedural decisions, may be challenged before the Federal Supreme Court within 30 days of the notification of the decision. In proceedings before the Federal Supreme Court, judicial review is limited to legal claims (ie, the flawed application of the Cartel Act or a violation of fundamental rights set forth in the Swiss Federal Constitution, in the ECHR or other international treaties). The claim that a decision was unreasonable is fully excluded and claims with regard to the finding of facts are basically limited to cases of arbitrariness.

In addition, the parties involved may at any time during and after appeal procedures request the Federal Council to exceptionally authorise specific behaviour for compelling public interest reasons (see question 5). To date, such authorisation has never been granted.

Judgments of the civil courts may ultimately be challenged before the Federal Supreme Court. If the legality of a restraint of competition is disputed before a civil court, this question shall be referred to the Commission for an expert report. However, civil courts rarely refer such cases and the Commission's expert opinion is not binding upon the civil courts.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

There are no direct criminal sanctions for individuals as natural persons for cartel activities. Swiss law does not provide for imprisonment for cartel conduct. However, individuals acting for an undertaking, but not the undertaking itself, violating a settlement decision, any other enforceable decision or court judgment in cartel matters may be fined up to 100,000 Swiss francs. These sanctions are time-barred after five years following the incriminating act.

Individuals who intentionally fail to comply or only partly comply with the obligation to provide information in an ongoing investigation can be fined up to 20,000 Swiss francs. Statute of limitations for these sanctions is two years following the incriminating act.

Individuals who can be fined include executives and board members, as well as all *de facto* managers and directors.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

From a civil law point of view, the sanction for cartel activities lies in the total or partial nullity of the agreement in question. Although generally accepted in the actual doctrine, it has not yet been confirmed that the nullity of the agreements applies *ex tunc*.

From an administrative law point of view, under article 49a of the Cartel Act, direct sanctions (fines) are imposed on undertakings that:

- participate in a hard-core horizontal cartel according to article 5(3) of the Cartel Act (see question 4);
- participate in hard-core vertical restraints pursuant to article 5(4) of the Cartel Act (see question 4); or
- abuse a dominant position pursuant to article 7 of the Cartel Act.

The maximum administrative sanction is a fine of up to 10 per cent of the consolidated net turnover realised in Switzerland during the past three financial years (cumulative). The Ordinance on Sanctions lays down the method of calculation of the fines (see question 19).

Furthermore, an undertaking that violates to its own advantage an amicable settlement, a legally enforceable decision of the Commission or a judgment of the appellate courts can be fined up to 10 per cent of the undertaking's consolidated net turnover in Switzerland during the past three financial years (cumulative). In calculating the fine amount, the presumed profit arising from such unlawful practice shall be taken into due consideration.

Eventually, an undertaking that fails to provide information or produce documents, or that only partially complies with its obligations during an ongoing investigation, can be fined up to 100,000 Swiss francs.

Since individuals acting as private undertakings fall under the Cartel Act (see question 6), it is possible that also individuals could be fined in cartel cases. It seems noteworthy that prior to the entry into force of the Cartel Act's sanctions regime, the Commission deemed the conduct of certain individuals as unlawful, which, under the sanction regime, would have potentially led to the imposition of fines. However, the Commission has not yet imposed sanctions against individuals acting as private undertakings in cartel cases.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The principle of direct sanctions is set forth in article 49a of the Cartel Act. Sentencing guidelines are laid down in the Ordinance on Sanctions. The Commission has, in addition, issued an explanatory communication. According to the principles in the Ordinance on Sanctions, the penalty must be assessed on the basis of the duration and the seriousness of the unlawful conduct, the probable profit that the undertaking has achieved as a result of its conduct and the principle of proportionality.

In a first step, the Commission determines the base amount of the fine which is up to 10 per cent of the consolidated net turnover generated on the relevant markets in Switzerland cumulatively in the preceding three business years before the illegal conduct has ended, depending on the severity and nature of the infringement.

In a second step, the base amount is increased based on the duration of the infringement.

In a third step, aggravating factors (such as recidivism, a leading role in the illegal conduct or non-cooperation with the authorities) or mitigating factors (such as a passive role in the illegal conduct, effective cooperation with the authorities or settlement) influence the final amount of the fine. Full immunity or a discount can also be obtained based on leniency cooperation (see question 24).

Eventually, the Commission shall ensure that the penalty imposed is proportional and that the maximum fine amount (see question 18) is not exceeded.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

The Cartel Act contains no specific regulation on the exclusion from public procurement procedures in cases of illegal cartel conduct. However, the Swiss Public Procurement Act provides that the contracting authority may exclude undertakings from an ongoing procurement procedure or delete them from a list of qualified undertakings in cases of illegal cartel conduct. In addition, several cantonal procurement acts provide that undertakings may be banned from participating in procurement procedures for a period of several years in cases of illegal

cartel conduct. However, no automatic exclusion applies at the federal or cantonal level.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

According to the Cartel Act, violation of an amicable settlement, a legally enforceable decision of the Commission or a judgment of the appellate courts, as well as the failure to provide information or produce documents, or the partial compliance with the obligation to provide information during an ongoing investigation, are subject to administrative or criminal fines, or both (see questions 17 and 18). Criminal prosecutions against individuals rely on similar criteria to those applied in imposing administrative sanctions. However, the roles of individuals in the violation of a decision or judgment, or the failure to comply with their obligations to provide information, as well as subjective criteria (degree of intent) are more important. Civil sanctions may be accompanied by claims for damages and reparations or restitution of unlawful profits from third parties affected by the illegal cartel activity.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Third parties affected by cartel conduct may sue the cartel members for damages in civil courts. Their claim is limited to the damage actually incurred; no punitive damages are available in Switzerland; the passing-on defence is not excluded in Switzerland. However, a claimant may request the remittance of illicitly earned profits. Court costs as well as legal costs, as determined by the court, must usually be borne by the losing party in the proceedings. The claimant bears the burden of proof. Under Swiss law, the main difficulties are providing specific and sufficient proof of the damage incurred and establishing the required causal nexus between the anticompetitive agreement and the damage. This is even more difficult in the case of indirect purchaser claims.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are not available under Swiss law. Consumers and consumer organisations may participate in investigations before the Commission but, in general, have no legal standing before civil courts. Whether and to what extent trade associations have legal standing is a matter of dispute.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Leniency is an important aspect of cartel enforcement in Switzerland. According to the Cartel Act, an undertaking that cooperates with the Commission in view of the discovery and the elimination of a restraint of competition may benefit from full or partial immunity. Only the first applicant may enjoy full immunity and rather high thresholds apply.

The leniency programme particularly applies to (horizontal and vertical) hard-core restraints. The Commission may grant full immunity from a fine if an undertaking is the first to either:

- provide information enabling the Commission to open an investigation and the Commission itself did not have, at the time of the leniency filing, sufficient information to open a preliminary investigation or an investigation; or
- submit evidence enabling the Commission to prove a hard-core restraint, provided that no other undertaking must already be

considered first leniency applicant qualifying for full immunity and that the Commission did not have, at the time of the leniency filing, sufficient evidence to prove an infringement of the Cartel Act in connection with the denounced conduct.

However, immunity from a fine will not be granted if the undertaking:

- coerced any other undertaking to participate in the infringement and was the instigator or ringleader;
- does not voluntarily submit to the Commission all information or evidence in its possession concerning the illegal anticompetitive practice in question;
- does not continuously cooperate with the Commission throughout the investigation without restrictions or delay; or
- does not cease its participation in the Cartel Act infringement voluntarily or upon being ordered to do so by the competition authorities.

In September 2014, the Secretariat published a revised notice on leniency, which included a form for leniency applications. The notice was slightly revised again in August 2015.

The Cartel Act does not expressly regulate the possibility for the Commission to withdraw immunity after it has been granted in a final decision. However, general principles of administrative procedural law usually enable administrative authorities to withdraw or amend final decisions (including final decisions with regard to immunity) under certain exceptional circumstances, for example, if facts are discovered that justify withdrawal, amendment or a final decision is unjustified. There is no cartel specific case law in that regard. However, the bar for immunity revocation has to be set very high.

In addition, no fine will be imposed if undertakings notify a possible hard-core restraint before it produces any effects (notification procedure). For that purpose, the Commission has published specific filing forms. In contrast, a sanction may be imposed if the Commission communicates to the notifying undertakings the opening of a preliminary investigation or the opening of an in-depth investigation (see question 9) within a period of five months following the notification and the undertakings continue to implement the notified restriction.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Pursuant to the Ordinance on Sanctions and the notice on leniency, full immunity is limited to the 'first in'. Going in second or later in the same investigation will only allow for partial immunity. A reduction of up to 50 per cent of the fine amount calculated according to the method explained in question 19 is available at any time in the proceeding to undertakings that do not qualify for full immunity. Further, the fine amount can be reduced up to 80 per cent if an undertaking provides information to the Commission about other hard-core restraints that were unknown to the Commission at the time of their submission ('leniency plus'). This reduction is without prejudice to any possible full immunity or partial reduction of a fine for the newly disclosed infringements. The continuous cooperation with the Commission throughout the investigation without restrictions or delay is also an indispensable requirement for receiving a partial fine reduction. The decisive factor for determining the reduction percentage is the importance of the undertaking's contribution to the success of the proceedings (the position in the queue is not per se relevant).

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Being the second or third or subsequent cooperating party will not allow for full, but only partial immunity (see question 25). However, as the decisive factor for determining the leniency bonus is the contribution to the success of the proceedings, being second alone does not guarantee a better bonus than the one for the subsequent cooperating parties.

In addition, there is a leniency plus option (see question 25).

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no statutory deadlines for submitting leniency applications or for perfecting a leniency marker. However, pursuant to the Cartel Act, full immunity is limited to the 'first in' but also possible for cooperation that enables the Commission to prove a Cartel Act infringement and therefore when an investigation has already been opened and a dawn raid conducted (see questions 24 and 25). Therefore, it is important to decide immediately upon knowledge of an opened investigation and conducted dawn raid whether to cooperate with the competition authorities and, if such cooperation is desired, to submit a leniency marker or application to the Commission without delay (in writing, such as by fax, or orally by protocol declaration). According to past investigations with several leniency applicants, it may be a matter of days or even hours whether and which undertaking may qualify for full immunity.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

As outlined above, the voluntary submission of all information or evidence in the applying undertaking's possession concerning the unlawful practice, the continuous cooperation with the Commission throughout the investigation without restrictions or delay as well as discontinuing its involvement in the infringement no later than the moment at which it provides information or submits evidence concerning the unlawful practice or upon receipt of the first injunction of the Commission are indispensable requirements for receiving full or partial reduction of the fine (see questions 24 and 25).

In its recent practice, the Secretariat has repeatedly insisted that a leniency applicant must at least admit its involvement in an unlawful agreement subject to potential sanctions. It made clear that it is not sufficient to simply produce factual elements. In the Secretariat's view, a leniency applicant would in principle have to admit that the unlawful agreement had effects on the markets. However, the recent decisions of the Federal Administrative Tribunal in the *Metal Fittings for Windows* case clearly state the right of the leniency applicants to argue against the Commission's legal interpretation of the facts. Only two of these three judgments have not yet become final and been handed down to the Federal Administrative Tribunal again by the Federal Supreme Court.

Where an undertaking does not meet these conditions, but has cooperated with the Commission and terminated its involvement in the infringement no later than the time at which it submitted evidence, the Commission still has the possibility to reduce the sanction.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The right of access to witness statements, hearing minutes and other documents relevant to the investigation may be limited to protect cooperating parties. The level of confidentiality protection is the same for all leniency applicants. Anonymous leniency applications are allowed, although the leniency applicant will be required to reveal its identity within a specific time frame established by the Secretariat on an ad hoc basis.

The Commission and the Secretariat are aware of a leniency applicant's particular need for confidentiality and, in the recent past, have established several measures to protect the leniency applicants' interests in that regard. However, these measures have not been tested in court so far. The catalogue of protective instruments includes the possibility to submit oral leniency statements, paperless proceedings and restricted access to the files. Access rights of other parties subject to an investigation were, in the Secretariat's practice, limited to access

the files at the premises of the Secretariat. The right to take photocopies was limited to annexes, while copies of the main body of corporate statements or hearing minutes were not allowed. In addition, access to the files was only granted shortly before the Secretariat provided the Commission and the parties with the draft decision (ie, shortly before the end of an investigation and the Commission's decision on the merits). The Secretariat has also implemented a number of specific internal measures to protect the leniency applicants' interests. Internal access to the file is restricted, and only the case team knows about the existence or identity of leniency applicants. Moreover, the leniency documents are stored in a separate file. The above practice has been set out by the Secretariat in the notice on leniency.

With judgments of August 2016, the Swiss Federal Administrative Tribunal has authorised the Commission to grant access to certain data of a closed cartel investigation regarding a bid-rigging cartel in the construction sector to municipalities seeking civil damage claims. In doing so, the tribunal limited the access to files in various respects: first, data may only be accessed to the extent necessary, not allowing data retention for later use. Second, access is to be limited to data that 'directly affects' the requesting party. Third, access may only be granted and data may only be used to serve the purpose disclosed in the access request and a legally binding restriction of use must be imposed on the requesting party to that effect. Fourth, access to the files must not include data of undertakings that finally had not been addressees of the decision. The tribunal, however, did not have to decide on information requests of private undertakings where the conditions applied by the court could all the more be relevant. Also, the tribunal did not have to formally decide on the issue of access to leniency application data since the Commission excluded all leniency information before providing it to the municipalities. However, the tribunal did at least not question this practice of the Commission to exclude leniency information completely from access by third parties. Whether these third parties are public or private entities should have no bearing.

In the case of opening an investigation, the Secretariat gives notice by way of official publication. The notice states the purpose of and the parties to the investigation. There is no express obligation to keep the identity of the leniency applicants confidential. In practice, the Secretariat keeps the leniency applicant's identity confidential as long as possible. However, even if the final decision does not reveal the name of the leniency applicant, it is not excluded that a party familiar with the facts of the case may deduce its identity from the context. In addition, the competition authorities' publications must not reveal any business secrets.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Amicable settlements are an important feature of the Swiss cartel enforcement regime. During preliminary investigations, the Secretariat may propose measures to eliminate or prevent restrictions of competition. In the framework of an investigation, if the Secretariat considers that a restraint of competition is unlawful, it may propose to the undertakings involved an amicable settlement concerning ways to eliminate future restrictions. Hence, amicable settlements solely deal with an undertaking's conduct in the future, meaning that a party can voluntarily undertake to terminate respectively not to commit certain illegal conduct any more. However, the fine amounts to be imposed for illegal conduct in the past cannot be agreed on – Swiss competition law does contemplate plea bargaining. This also means that, in principle, an undertaking is allowed to appeal against a decision of the Commission and the imposed fine even if it has entered into an amicable settlement. It would be inadmissible to request a formal waiver of a party's right of appeal. Nonetheless, in practice, the Secretariat requests a party to a settlement agreement to confirm in writing that no grounds to appeal the final decision exist if the Commission will finally approve such agreement and does not exceed the framework of a possible fine set out therein; such requested memorandum of understanding should also be deemed to be void.

Amicable settlements shall be formulated in writing and approved by the Commission, typically in its decision on the merits. The Commission shall either approve the amicable settlement as proposed

by the Secretariat, or refuse to do so and send it back to the Secretariat and suggest amendments. According to the Commission, it cannot amend the terms of a settlement on its own. However, it did so in one case, namely by setting a time limit to the amicable settlement.

Amicable settlements are binding upon the parties and the Commission and may give rise to administrative and criminal sanctions in the case of a breach of any of its provisions by the parties. Amicable settlements do not hinder the Commission from imposing fines on the parties if they have committed illegal hard-core infringements in the past. Yet concluding an amicable settlement is generally regarded as cooperative conduct and is taken into account as a mitigating factor when calculating the fine. In recent cases, reaching an amicable settlement has led to a reduction of the fines of about 10 to 20 per cent. However, the Commission takes the moment of the amicable settlement very much into account. In a late settlement case, the Commission only reduced the fine by 3 per cent and indicated that it would not reduce fines any more if amicable settlements are signed after the Secretariat's second draft decision. According to the Amicable Settlement Guidelines (see question 3), a fine reduction will no longer be granted in case of a settlement after the second draft decision has been served, if any.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

There is no effect on employees of the defendant. They are not addressees of administrative sanctions. However, employees might be subject to criminal penalties if they committed a corresponding offence in connection with the undertaking's conduct leading to the administrative sanction (for instance, fraud or forgery of a document). The granting of immunity or partial leniency concerning a corporate defendant has, in principle, no effect in this regard.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The Secretariat will acknowledge receipt of the leniency application (ie, the leniency marker, if any, or the leniency statement). It will specify the exact date and time of receipt and, in case of a leniency marker, the time frame within which the undertaking shall perfect such leniency marker with a full corporate statement. Subsequently and with the consent of one presidium member of the Commission, the Secretariat will communicate to the applicant whether it deems that the conditions for full immunity from fines are met, any additional information that the disclosing undertaking should submit and, in cases of anonymous disclosure, the time frame within which the undertaking shall reveal its identity.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No, there are currently no ongoing reviews of the immunity/leniency regime.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

While during the preliminary investigation procedure, there is no right of access to file, the defendant has such right after the opening of an investigation. The files include submissions from parties and the comments made thereon by the authorities, any documents serving as evidence as well as copies of rulings already issued. The authority may under certain conditions – for example, owing to essential public or private interests – refuse access to a file. In particular, access to a file may be limited with respect to business secrets as well as information regarding leniency applications of other parties (see question 29).

Update and trends

With regard to trends in the cartel regulation context, in particular the following from the competition law pipeline of the Swiss legislator must be mentioned:

- Fair price initiative/indirect counterproposal: The federal popular initiative 'Stop the high price island – for fair prices (fair price initiative)' was submitted on 12 December 2017. The initiative promises to create the basis for effective legal measures against abusive Swiss surcharges and to guarantee the non-discriminatory procurement of goods and services abroad. It demands that undertakings that are dependent on other undertakings be able to purchase goods or services offered in Switzerland and abroad in the country of their choice at the prices that are practised there. This is to be achieved by introducing the concept of 'relative market power' into the Cartel Act. The initiative also calls for Swiss consumers to be able to shop online without discrimination. On 9 May 2018, the Federal Council recommended the rejection of the popular initiative, at the same time announcing that it intended to submit an indirect counterproposal to the Swiss parliament based on the concept of relative market power and only regulating import issues. It opened consultation on the indirect counterproposal on 22 August 2018.
- Inspired by certain provisions of applicable German competition law, the Hans Altherr parliamentary initiative of 25 September 2014 'Excessive Import Prices. Lifting the domestic procurement constraint' wants to include a provision to combat the abuse of relative market power in the Cartel Act. The deal was suspended in the Swiss parliament in October 2017 until the Federal Council's message on the Fair Price Initiative (see above) was received. The intention was that it would then be assessed whether the parliamentary initiative might be suitable as an indirect counterproposal. The Federal Council has now preceded this with the opening of the consultation on the indirect counterproposal to the fair price initiative on 22 August 2018.
- The motion by Pirmin Bischof of 30 September 2016 'Prohibition of adhesion contracts of online booking platforms against the hotel industry' calls on the Federal Council to submit the necessary legislative amendments in order to prohibit so-called narrow price parity clauses in the contractual relationship between online booking platforms and hotels. Narrow price parity clauses allow hotels to vary their prices depending on the booking platform and in all offline booking channels. However, they may not undercut the contracting party on their own website. In its decision on online booking platforms for hotels, the Commission qualified so-called broad price parity clauses, with which the online booking platforms prohibited the affiliated hotels from offering their rooms on a different distribution channel at a lower price than on the participating online booking platform, as unlawful competition agreements within the meaning of article 5(1) of the Cartel Act. The Commission left the question open whether the narrow price parity clauses introduced by booking platforms throughout Europe are admissible under Swiss competition law. Furthermore, it reserved the right to investigate in this regard if required. On 18 September 2017, the Swiss parliament passed the motion on to the Federal Council. The Federal Council deems the motion's concern being sufficiently covered by its indirect counterproposal to the fair price initiative mentioned above.
- The motion WAK-N of 14 August 2017 'Creation of an effective instrument against inappropriate journal prices' mandated the Federal Council, together with the Commission and the Price Supervisor, to find a solution for the inappropriately high differences between domestic and foreign journal prices.
- The Schneider-Schneiter motion of 15 December 2017 'Geoblocking. Will Switzerland miss the boat again? Task force on digital free trade now!' calls on the Federal Council to set up a task force on digital free trade in order to be able to remove trade barriers such as geoblocking as soon as possible.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Under Swiss law, counsel may represent the employees under investigation as well as the undertaking provided that it discloses the fact to both parties and that there is no conflict of interest. Given that two different kinds of sanction apply to individuals and undertakings, as a general rule it is advisable to seek independent legal advice.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Under the Cartel Act, the Commission may require groups of more than five parties in a cartel proceeding to appoint a common representative, provided that these parties have identical interests and if otherwise the investigation would be unduly complicated. In practice, the Secretariat mainly applies this rule in cases involving trade associations, and provided that the members of such trade associations agree to one representative.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Corporations can pay the legal costs of their employees. However, the employees remain personally liable for any imposed criminal sanctions (see question 17).

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

With a judgment of September 2016, the Federal Supreme Court clarified that fines and other sanctions of a criminal nature are not tax-deductible for legal entities, as they are not deemed to be business-related expenses that would be tax-deductible under Swiss law.

According to the Federal Supreme Court, tax deductibility is only possible insofar as fines aim at disgorging illegally obtained profits (ie, fines that do not have a criminal or punitive purpose, but aim at correcting an unlawful situation). It is thus essential for Swiss (corporate) income tax purposes to distinguish sanctions with a penal nature from such aiming at disgorging illegally obtained profits. The Federal Supreme Court handed down the judgment to the lower instance to assess this question without specific guidance for such differentiation. The judgment was rendered in a case of violation of EU competition law. The same outcome may be expected in case of violations of the Cartel Act.

In this context, it is noteworthy that in a draft bill submitted to the Swiss parliament, an explicit legal basis provides that financial administrative sanctions of criminal nature, such as direct fines under the Cartel Act, as well as the related cost of proceedings, shall not be deductible, whereas profit disgorgement sanctions with non-penal purpose, shall be tax-deductible. The matter is currently still pending before the Swiss parliament.

Private damages awards that take place in the ordinary course of business qualify in principle as business expenses and are deductible from profit taxes.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

It is in the Commission's discretion to take into account sanctions imposed in other jurisdictions. The Commission states in its explanatory communication on the Ordinance of Sanctions that for the sake of reasonability of sanctions, it may consider administrative sanctions imposed outside Switzerland. However, there is no statutory obligation in this respect and, so far, the Commission has not considered foreign sanctions as a mitigating factor in its case law. In private damage claims, it could be argued that damages paid for the same conduct in another jurisdiction could be taken in consideration in order to determine the effective damage of the party.

40 Getting the fine down**What is the optimal way in which to get the fine down?****Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

Generally, the best way to influence the level of fines is to fully cooperate with the competition authorities as early as possible and to disclose all relevant facts. An undertaking cooperating with the competition authorities in view of the discovery and the elimination of a restraint of competition will in principle enjoy full or partial immunity (see question 30). Moreover, a settlement with the authority may also result in a reduction of the potential fine (see questions 24 and 25).

Further, it is more important than ever for undertakings whose activities may produce effects in Switzerland to be fully aware of the potential implications of Swiss competition law for their agreements and practices. It is often advisable for undertakings active in Swiss markets to implement an effective antitrust compliance programme or to undertake a competition law-related due diligence of their agreements or practices to identify possible violations of Swiss competition law, and to take appropriate measures to reduce their potential exposure to investigations and fines.

There is no statutory provision under Swiss law according to which the existence of a compliance programme would affect the level of a fine. It can be taken into consideration by the Commission when deciding on the level of fines. However, the Commission has been reluctant to do so in its recent practice.



Mario Strebel
Christophe Rapin
Fabian Koch

mario.strebel@mll-legal.com
christophe.rapin@mll-legal.com
fabian.koch@mll-legal.com

Schiffbaustrasse 2, PO Box 1765
 8031 Zurich
 Switzerland
 Tel: +41 44 396 91 91
 Fax: +41 44 396 91 92

1 rue de Bourg, PO Box 5379
 1002 Lausanne
 Switzerland
 Tel: +41 21 310 40 20
 Fax: +41 21 310 40 21

Grabenstrasse 25
 6340 Baar/Zug
 Switzerland
 Tel: +41 41 768 11 11
 Fax: +41 41 768 11 12

222 avenue Louise
 1050 Brussels
 Belgium
 Tel: +32 2 646 02 22
 Fax: +32 2 646 75 34

65 rue du Rhône, PO Box 3199
 1211 Geneva 3
 Switzerland
 Tel: +41 22 737 10 00
 Fax: +41 22 737 10 01

www.mll-legal.com
www.mll-news.com

Taiwan

Mark Ohlson, Charles Hwang and Fran Wang
Yangming Partners

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The principal legislation concerning cartels in Taiwan consists of:

- the Fair Trade Law (FTL), the most recent amendments to which were promulgated in June 2017;
- the Guidelines on Filing for Approval of Cartel Activity, the most recent amendments to which were promulgated in September 2016;
- the Regulations for Calculation of Administrative Fines for Serious Violations of articles 9 and 15 of the FTL, the most recent amendments to which were promulgated in March 2015;
- the Regulations on Immunity and Reduction of Fines in Illegal Cartel Activity Cases, the most recent amendments to which were promulgated in March 2015;
- the Enforcement Rules of the FTL, the most recent amendments to which were promulgated in July 2015; and
- the Antitrust Compliance Guideline for Enterprises, promulgated in February 2012.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

At the national level, the Fair Trade Commission (FTC), an independent government authority, governs cartel regulation and enforcement. Its seven commissioners serve four-year terms and may be reappointed. The FTC is empowered to examine and investigate possible violations of the FTL, and to take action against violators by imposing administrative fines and other penalties. The FTC undertakes investigations in response to complaints against cartel activities and on its own initiative.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The amendments to the FTL, which were promulgated in February 2015, included the following significant changes.

First, mutual understanding may be presumed by the FTC based on the market status, the products, the characteristics of the goods or services, the costs and profits, and the financial impact of the business conduct at issue.

Second, the amendments provide for more general conditions for cartel exemptions. In addition to those conditions set forth under article 15 of the FTL (see question 4), an exemption may be granted where a concerted action is considered to be necessary for improving industrial development, technological innovation or operational efficiency.

Third, according to the newly amended article 16 of the FTL, the maximum period for cartel exemption approval was extended from three years to five years.

Fourth, the maximum penalty available was also raised (see question 18).

Lastly, the statute of limitations for imposing administrative penalties on illegal cartels was extended from three years to five years as calculated from the date of termination of the conduct or of the occurrence of the consequences of the act, if the consequences occurred later. Accordingly, proceedings undertaken by the FTC must be completed prior to the expiration of this period.

In addition to the above, the amendments, which were promulgated in June 2015, stipulate the establishment of an antitrust fund (see question 10).

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

According to article 14 of the FTL, cartel activity refers to:

[...] the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price, the quantity, the technology, the products, the facilities, the trading counterparts, or trading territory of goods or services, or to limit each other's business activities with respect to such goods and services, resulting in an impact on the market function with respect to production, trade in goods or supply and demand of services; [...]

Illegal cartel activity is limited to horizontal arrangements, and not vertical arrangements. Means of carrying out a horizontal cartel activity include but are not limited to an act of a trade association restricting the activities of its members by means of its charter and resolutions passed at a general meeting of members, or a board meeting of directors or supervisors. Mutual understanding is not limited to explicit expressions; in certain circumstances, some activities may meet the conditions of article 14 of the FTL if they constitute tacit consent. However, based on the FTL amendments, such mutual understanding could be presumed by the FTC based on the market status, the characteristics of the goods or services, the costs and profits, and the financial impact of the business conduct at issue.

Cartel activity is illegal per se unless the action has met specific conditions and has been approved by the FTC in light of its benefits to the economy and to the public interest. According to article 15 of the FTL, the specific conditions for exemption are as follows:

- unifying the specifications or models of goods for the purpose of reducing costs, improving quality or increasing efficiency;
- joint research and development of goods or markets for the purpose of upgrading technology, improving quality, reducing costs or increasing efficiency;
- developing a separate and specialised area for the purpose of rationalising operations;
- entering into agreements solely concerning competition in foreign markets for the purpose of securing or promoting exports;
- joint acts regarding the import of foreign goods for the purpose of strengthening trade;
- in a time of economic downturn where enterprises in the same industry having difficulty maintaining their business or encountering a situation of overproduction, joint acts limiting the quantity of

production and sales, equipment or prices for the purpose of meeting demand in an orderly fashion;

- joint acts for the purpose of improving operational efficiency or strengthening the competitiveness of small and medium-sized enterprises; or
- joint acts are considered to be necessary for improving industrial development, technological innovation or operational efficiency.

In June 2016, the FTC published amendments to the Guidelines on Handling Cases Involving Trade Associations and Other Organizations, which revised the list of activities that may constitute cartel activities if performed by trade associations or other organisations.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The FTC has published rules that establish standards for applying article 14 of the FTL in specific areas of business activity, including real estate agencies, banking, civil air transport, elevator repair businesses, large-scale retail organisations, and telecommunications. The FTC may grant an exemption for a cartel activity that meets the conditions set forth in article 15 of the FTL (see question 4). For cartel activities by specific types of enterprises, such as small and medium-sized enterprises and petrol station operators, the guidelines promulgated by the FTC (see question 4) specify the criteria for defences and exemptions.

6 Application of the law

Does the law apply to individuals or corporations or both?

The FTL applies to both corporations (and other legal entities) and individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The FTL extends to conduct that takes place outside Taiwan if the conduct has an effect on the relevant market in Taiwan. In September 2012, the FTC issued a decision fining four foreign corporations active primarily in international markets for a cartel to rig bids and fix prices for optical disc drives. This was the first case in which the FTC investigated a cartel based on an application for leniency made pursuant to the new leniency programme adopted in amendments to the FTL in November 2011.

In December 2015, the FTC found that seven aluminium capacitor companies, namely, Nippon Chemi-Con Corporation (NCC), Hong Kong Chemi-Con Limited (NCC HK), Taiwan Chemi-Con Corporation (NCC TW), Rubycon Corporation (RUBYCON), ELNA Co Ltd (ELNA), SANYO Electric (Hong Kong) Ltd (SANYO HK) and Nichicon (Hong Kong) Ltd (NICHICON HK), and three tantalum capacitor companies, NEC TOKIN Corporation (NEC TOKIN), Vishay Polytech Co, Ltd (VISHAY POLYTEC) and Matsuo Electric Co Ltd (MATSUO) participated in meetings or bilateral communications to exchange sensitive business information such as prices, quantity, capacity, and terms of trade to reach agreements; conduct which was sufficient to affect the market function of capacitor in Taiwan. The amounts of the fines imposed by the FTC totalled NT\$5,796,600,000. The FTC stressed that this case has shown the successful results of its efforts in international enforcement cooperation with other competition authorities through years. The FTC had worked with competition authorities of US, EU and Singapore in investigation activities since the beginning. In addition, the FTC also exchanged enforcement experiences with these agencies through telephone conferences or emails. The FTC's decision is the first among competition agencies and will be a highly concern internationally as it is still under investigation at least in countries such as China, the EU, Japan, Singapore, South Korea and the US.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Yes, according to article 15 of the FTL, the specific condition for exemption includes entering into agreements solely concerning competition in foreign markets for the purpose of securing or promoting exports.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

Before opening a formal investigation, the FTC department handling the case reviews all of the facts, evidence and other information provided by informants or obtained through the FTC's own investigation and then drafts a report and submits it with relevant evidence to the FTC commissioner or commissioners on duty for review. If the commissioner or commissioners consider the information or evidence to be sufficient, the FTC department handling the case commences an investigation within one to two weeks. If the commissioner or commissioners consider the information or evidence available to be insufficient, the FTC department handling the case may either seek further specific information or evidence, or decide not to conduct a full investigation.

The FTC department handling the case gives informants written notice when it decides to open an investigation. The informants may also contact the case handler appointed by the FTC to track the progress of the case.

During the course of the FTC's investigation, both parties and any related parties may, in order to claim or defend their legal rights and interests, apply to read, transcribe, photocopy or photograph relevant materials or files obtained by the FTC. With the information or evidence discovered from the investigation, both parties and related parties may, from time to time, file further complaints or answers with additional evidence or supplemental information to strengthen their arguments, or ask the FTC to conduct a further investigation, stating the reasons therefor.

The length of the investigation depends mainly on how complex the facts are, how much evidence needs to be investigated, and the volume of cases that the FTC is handling. A cartel investigation normally takes more than one year to complete. During the investigation, if the enterprise being investigated makes commitments to take specific measures to cease and rectify its alleged illegal conduct within the time period prescribed by the FTC, the FTC may suspend the investigation. If the enterprise has fulfilled its commitments by taking specific measures to cease and rectify its alleged illegal conduct, the FTC may decide to terminate the investigation. However, under any of the following circumstances, the investigation will resume if:

- the enterprise fails to fulfil its commitments;
- there have been significant changes to the facts upon which the decision to suspend the investigation was based; and
- the decision to suspend the investigation was based on incomplete or misleading information that had been provided by the enterprise.

The FTC does not usually reveal the existence of an ongoing investigation publicly. If investigations do become publicly known, it is usually because the case is also being investigated in other jurisdictions or involves foreign companies, and is discovered by the press.

Once an investigation is completed, it is handed over to a meeting of the FTC commissioners for a final decision.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

According to article 27 of the FTL, when the FTC conducts an investigation, it may:

- notify the parties and any related third parties to appear to make statements;
- notify the parties and any related third parties to submit books and records, documents and any other necessary materials or exhibits; and

- dispatch personnel for any necessary on-site inspections of the offices, places of business or other locations of the parties and any related third parties.

Generally speaking, the FTC may also adopt any other investigation methods in addition to those mentioned above so long as the FTC considers the methods appropriate and in accordance with related regulations. Court approval is not required for the FTC to initiate such investigations. However, the FTL does not grant the FTC search and seizure powers.

The FTC may retain material obtained from the investigation that may serve as evidence. The scope and duration of holding the retained material is limited to the need of investigation, inspection, verification or any other purpose of preserving evidence. Any person, subject to an investigation conducted by the FTC, shall not evade, obstruct or refuse to cooperate without justification.

Article 44 of the FTL further states that, should any person subject to an investigation conducted by the FTC pursuant to article 27 evade, obstruct or refuse to cooperate with the investigation without justification, an administrative fine of not less than NT\$50,000 but no more than NT\$500,000 may be imposed. If such person continues to refuse without justification upon another notice, the FTC may continue to issue notices of investigation, and each time may impose successive administrative fines of not less than NT\$100,000 but not more than NT\$1 million per occurrence until the person accepts the investigation, appears to respond or supplies the relevant materials.

Also, according to article 47-1, to strengthen the investigation and sanction over concerted actions and promote the healthy development of market competition, the FTC may set up an antitrust fund. Capital sources of the antitrust fund include 30 per cent of the fines imposed on according to the FTL. The fund shall be used for the following purposes:

- rewards for the reporting of illegal concerted actions;
- promotion of cooperation, investigation and communication matters with international competition law enforcement agencies;
- subsidies to cover expenses incurred in litigation associated with the FTL;
- deployment and maintenance of databases;
- research and development on the systems of competition law;
- education and advocacy on competition law; and
- other necessary expenditures to maintain the market order.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Taiwan is an observer at the OECD Competition Commission and a regular participant at the meetings of the International Competition Network. Taiwan has entered into cooperation agreements or memoranda of understanding with, and has cooperated with, various authorities in other jurisdictions (eg, France and Canada). For those countries where FTC has not established official relationships, according to reports issued by the FTC, the FTC can still obtain agent information from these countries regarding international cartel activities through information on official websites, from private email exchanges with agents of competition authorities of these countries, via telephone conferences with these countries' representatives or via other forms of communications.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Jurisdictions that, like Taiwan, have a strong technology media and telecommunications (TMT) sector tend to have relatively greater interplay with Taiwan given the importance of that sector to the Taiwan economy. For example, there have been a number of multi-jurisdictional investigations originated in the United States, Korea and Japan in recent years relating to the TMT sector. Due to the lack of search and seizure powers of the FTC, the FTC has in many cases launched

investigations only after the competition authorities in other jurisdiction, which have more well-developed investigatory powers, have issued decisions or obtained significant evidence in connection with an investigation in which parties in Taiwan have been involved.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Once an investigation is completed, it is handed over to the FTC commissioners' meeting for a final decision. The FTC consists of seven full-time commissioners, who convene once a week and on an ad hoc basis when necessary. All decisions made at a commissioners' meeting require majority approval by the commissioners in attendance. The duration of meetings is not fixed and depends on the complexity of the case being discussed.

FTC commissioners' meetings are not open to the public, and attendees are prohibited from recording minutes of meetings or disclosing the content of meetings. However, all final decisions of the commissioners' meetings are made public via the FTC website.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The FTC bears the initial burden of proof with regard to the allegations of cartel activities. According to article 14 of the FTL, mutual understanding may be presumed based on a number of factors, such as market condition, characteristics of the good or service, cost and profit considerations and economic rationale of the business conduct. If the FTC provides evidence for the case, the burden of proof then shifts to the suspected violator.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

An infringement can only be established when mutual understanding is proved to exist. Mutual understanding is not limited to explicit expressions; in certain circumstances, some activities may meet the conditions of article 14 of the FTL if such activities constitute tacit consent. Based on the FTL amendments, such mutual understanding could be presumed by the FTC based on the market status, the characteristics of the goods or services, the costs and profits, and the financial impact of the business conduct at issue.

16 Appeal process

What is the appeal process?

Any decision of the FTC commissioners may be appealed to the Taipei High Administrative Court within two months from the date of receipt of the decision. Likewise, the decision of the Taipei High Administrative Court may be appealed to the Supreme Administrative Court within 20 days from the date of receipt of a judgment from the Taipei High Administrative Court.

The right to initiate an appeal belongs to a party who disagrees with and can claim suffering detrimental effects arising from the decision of the FTC. Judicial review focuses on whether there is anything wrong or illegal with the finding of facts and application of the law. In addition, if the decision made by the FTC is considered to be beyond the authority of the FTC or the decision makers are considered to be abusing their power, this would also be deemed to be illegal.

Cases are subject to review of the findings of law and fact in the High Administrative Court, and review of the findings of law in the Supreme Administrative Court.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The FTC may, according to article 40 of the FTL, order an enterprise to cease cartel activity, rectify its conduct or take necessary corrective

action by a specified deadline; in addition, the FTL may also impose an administrative fine of NT\$100,000 to NT\$50 million. Under article 34 of the FTL, if the enterprise fails to satisfy the order or, after ceasing the cartel activity, commits the same violation, the criminal sanction for the actor is imprisonment for no more than three years or detention, a fine of not more than NT\$100 million, or both.

Administrative sanctions for cartel activity must be sought prior to criminal sanctions, and criminal sanctions will not be pursued in respect of the same conduct unless the administrative sanctions fail to stop the cartel activity (see question 18).

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

There are no civil sanctions that may be pursued by the government. However, civil sanctions may be pursued by individuals or private entities for damages incurred (see question 22).

According to article 40 of the FTL, the FTC may order an enterprise to cease cartel activity, rectify its cartel conduct or take necessary corrective action within the time prescribed in the order. It may also levy an administrative fine of NT\$100,000 to NT\$50 million. If the enterprise fails to satisfy the order by the end of the prescribed period, the FTC may continue to issue successive orders, and in each instance of failure to comply may levy an administrative fine of NT\$200,000 to NT\$100 million. If the FTC deems the violation serious, it may impose an administrative fine of up to 10 per cent of the total sales income of the enterprise in the previous fiscal year, without being subject to this limit. As mentioned in question 17, administrative fines are levied in virtually all violations and the criminal sanctions were rarely imposed.

The FTC published the Regulations for Calculation of Administrative Fines for Serious Violations of articles 9 and 15 of the FTL, which establish guidelines for administrative fines for serious violation. According to such Regulation, a serious violation refers to unlawful conduct that has seriously affected market competition and order, as determined by consideration of the following factors:

- the scope and extent of the harm to market competition and order;
- the duration of the damage to market competition and order;
- the market status of the enterprise in violation and the structure of the corresponding market;
- the total sales and profits obtained from the unlawful conduct during the violation period; and
- the type of cartel – joint product or service price decision, or quantity, trading counterpart or trading area restriction.

Conduct leading to one of the following circumstances may be deemed a serious violation:

- the total product or service sales obtained during the violation period by one of the participating enterprises in the cartel actions exceeds NT\$100 million; or
- the total profits obtained from the unlawful conduct exceed the upper limit for administrative fines of NT\$100 million.

The administrative fine to be imposed for a serious violation is calculated by determining the basic amount (30 per cent of the sales of the product or service involved in the cartel during the violation period) and increasing or reducing it according to the following circumstances:

- circumstances supporting fine increases:
 - the enterprise in question organised or encouraged the unlawful conduct;
 - the enterprise in question implemented supervision or sanctioning measures to ensure that the cartel was upheld or implemented; and
 - in the preceding five years, the enterprise in question was sanctioned for prohibited monopolistic activities or for engaging in cartel activities without approval; or
- circumstances supporting fine reductions:
 - the enterprise in question immediately ceased the unlawful act when the FTC began its investigation;
 - the enterprise in question has shown real remorse and has cooperated in the investigation;
 - the enterprise in question has established compensation agreements with the victims or has taken remedial measures;

- the enterprise in question participated in the cartel under coercion; and
- the actions of the enterprise in question are encouraged or approved by other agencies or can be granted in accordance with other laws.

The first two items regarding fine reductions do not apply to enterprises that the FTC has approved for fine reductions under the leniency programme (described below).

The FTC may also grant reductions of or exemptions from fines on enterprises in violation of article 15 of the FTL if such enterprise qualifies for the leniency programme.

The maximum administrative fine is 10 per cent of the previous fiscal year's total sales income of the enterprise sanctioned.

From the date that the FTL came into effect, until 6 September 2018, the FTC has issued orders against 215 cartel offences.

Until late 2011, administrative fines of NT\$50,000 to NT\$25 million were imposed for cartel activities, and the actual fines levied were at the lower end of that range. On 23 November 2011, the FTL was amended to permit administrative fines of up to 10 per cent of the total sales income of an enterprise in the previous fiscal year without being subject to the limit of the administrative fine (set forth above). Subsequently, on 13 March 2013, the FTC levied a record-high administrative fine of NT\$6.32 billion against nine independent power producers. This FTC decision was overturned on appeal to the Executive Yuan and was remanded to the FTC. The FTC later adjusted the fine down to NT\$6.007 billion on 10 July 2014.

Other amendments to the FTL on 23 November 2011 introduced a leniency and immunity programme for cartel activities. In 2012, in a case involving four optical disk drive companies, the FTC used this programme to waive all administrative fines for the first time.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

There are no particular sentencing guidelines for criminal liability of cartel activity. However, in addition to the guidelines for administrative fines that are binding on the FTC (see question 18), the main aggravating and mitigating factors to be considered are:

- motivation, purpose, and expected improper benefit of the act;
- the degree of the act's harm to market order;
- the duration of the act's harm to market order;
- benefits derived on account of the unlawful act;
- scale, operating condition, and market position of the enterprise;
- types of, number of, and intervening time between past violations, and the punishment for such violations; and
- remorse shown for the act and attitude of cooperation in the investigation.

Leniency and immunity programmes in Taiwan apply to administrative fines only.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

No, the FTC does not have the power under the FTL or other Taiwanese regulations to impose debarment from government procurements as a discretionary sanction for cartel infringements. However, according to the Government Procurement Act, in response to cartel infringement, the Public Construction Commission will debar the infringing parties from government procurement procedures for three years after publishing their names in the Government Procurement Gazette.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

As noted in question 17, administrative sanctions for cartel activity must be sought prior to criminal sanctions. However, civil sanctions and administrative sanctions could be pursued in parallel, provided that the civil damages are available only to private parties.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Yes, private damage claims are permitted. Articles 30 and 31 of the FTL provide for awarding damages to a person harmed by a violation of the FTL, such as cartel behaviour. If the violation is intentional, a court may, taking into consideration the nature of the infringement, award compensation beyond actual proven damages, provided that no award shall exceed three times the value of the proven damages. It is doubtful as to whether indirect purchaser claims would be permitted, as the FTL does not expressly exclude such claims from private damage claims. However, the indirect purchaser would need to prove that he or she has suffered damages in order to substantiate such claims. Because private damage claims are rare, it is difficult to compare recent and prior awards of damages.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

According to article 44-2 of Taiwan's Civil Procedure Code, class actions are possible for a violation of the FTL. Multiple parties who have common interests should first appoint one or more persons among themselves to sue on behalf of the appointing parties and the appointed parties. The court may then, with the consent of the appointed party, or upon the court deeming the original appointed party's motion appropriate, publish a notice to the effect that other persons with the same common interests may join the action by filing a pleading within a designated period of time specifying the transaction or occurrence giving rise to such claim, the evidence and a demand for judgment for the relief. Those persons so joining shall be deemed to have made the aforementioned appointment. The appointed parties may conduct all acts of litigation for the appointing parties, provided, however, that the appointing parties may restrict the appointed parties' authority to abandon claims, admit claims, voluntarily dismiss the action or settle the case. However, class action claims for a violation of FTL are too rare to observe trends in the frequency, scope or final outcome of such proceedings.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Yes, but only for administrative sanctions.

On 6 March 2015, the FTC amended the Regulations on Immunity and Reduction of Fines in Illegal Cartel Activity Cases (the Immunity and Reduction Rules) under amendments to the FTL promulgated in February 2015.

According to article 35 of the FTL, the FTC is empowered to reduce or entirely waive administrative fines that would otherwise be imposed on enterprises participating in a cartel if one of the following conditions exists:

- the enterprise files a complaint or informs the FTC in writing about the specific cartel activities that the enterprise has participated in, and also provides evidence and assists with the investigation

before the FTC becomes aware of the illegal conduct or before it has initiated its own investigation (Condition 1); or

- the enterprise reveals the specific illegal conduct, and also submits evidence and assists with the FTC's investigation during the period the FTC is investigating the illegal conduct in accordance with the FTL (Condition 2).

However, if the FTC has already obtained enough evidence to initiate the investigation, or the investigation is already in process when an application is submitted according to the Condition 1, the application may be rejected. This principle also applies if the FTC has already obtained enough evidence to establish the involved enterprises' illegal cartel activities when an application is submitted according to Condition 2.

Under the Immunity and Reduction Rules, the leniency and immunity programme is only available to those enterprises with concrete evidence that they have not coerced other enterprises to participate in or remain part of the cartel actions. In addition, an enterprise may not apply for a reduction in or immunity from administrative fines if it has been found to have been involved in either of the following activities between the time that it first intends to apply for leniency or immunity until the time that the FTC initiates an investigation:

- destroying, forging, altering or concealing evidence related to the cartel in which it is involved; or
- directly or indirectly disclosing to other parties its intention to apply for immunity or reduction of fines, or any of the information that it intends to provide to the FTC to apply for immunity or reduction of fines.

A leniency or immunity applicant must provide concrete evidence that can assist the FTC in initiating an investigation under Condition 1 or establishing that the enterprises involved have participated in a cartel under Condition 2. To facilitate the FTC's initiation of an investigation under Condition 1, the applicant must provide concrete details of the cartel activities in which it has been involved, along with related evidence that the FTC does not possess or is unaware of to give an outline of the cartel activities in question, as well as the time and location where the mutual understanding was established and the content of the mutual understanding or other related matters for the FTC to initiate an investigation. To help the FTC establish the violation by the involved enterprises under Condition 2:

- the applicant must provide a statement of concrete details of the cartel activities in question, along with evidence obtained prior to the time of application, which evidence is capable of proving the existence of the cartel activities; or
- the contents of the statement and evidence from the applicant are able to assist the FTC in its investigation of the cartel activities in question.

If an application complies with the above qualifications, the FTC may approve immunity from or a reduction of the administrative fines with conditions attached, which may include:

- that the applicant shall withdraw from the cartel in question immediately upon filing the application or at a time specified by the FTC; and
- that the applicant shall follow the instructions of the FTC and provide honest, full and continuous assistance in the investigation from the time the application is filed until the case is concluded. Such assistance shall include the following:
 - the enterprise shall provide the FTC at the earliest opportunity with all information and evidence regarding the cartel activity in question that it currently possesses or may obtain in the future. For those applying for fine reductions, the information and evidence provided must be of significant help in the FTC's investigation on the cartel activity in question or able to enhance the probative value of the evidence the FTC has already obtained;
 - the enterprise shall follow the instructions of the FTC and provide prompt descriptions or cooperation to help the investigation with related facts capable of proving the existence of the cartel in question;
 - if necessary, the enterprise must require its staff members or representatives that have participated in activities related to the cartel in question to be examined by the FTC;

- none of the statements, information or evidence provided may contain any falsehoods, and no destruction, forgery, alteration or concealment of any information or evidence related to the cartel in question shall be tolerated;
- without the consent of the FTC, the applicant may not disclose to any other parties the fact that an application has been filed or the content of the application prior to the case being concluded; and
- other matters as specified by the FTC.

Complete immunity from administrative fines may be granted only under either of the following circumstances:

- the enterprise is the first to apply according to Condition 1, has been approved by the FTC for immunity with conditions attached and has fulfilled all of the conditions attached by the FTC; or
- the enterprise is the first to apply according to Condition 2, has been approved by the FTC for immunity with conditions attached and has fulfilled all of the conditions, provided that Condition 1 is not applicable to any other enterprises.

Enterprises in compliance with the above circumstances that have been approved by the FTC with conditions attached and have fulfilled all of the conditions attached may be granted a reduction in the fines to be imposed. The ratio of the fine reductions shall be applied as follows:

- the first applying enterprise that meets the requirements shall be granted a 30–50 per cent reduction in the fines to be imposed;
- the second applying enterprise that meets the requirements shall be granted a 20–30 per cent reduction in the fines to be imposed;
- the third applying enterprise that meets the requirements shall be granted a 10–20 per cent reduction in the fines to be imposed; and
- the fourth applying enterprise that meets the requirements shall be granted a reduction of up to 10 per cent of the fines to be imposed.

Enterprises applying for immunity or a reduction in fines shall each present their own information and evidence, and file an oral or written application with the FTC separately. In cases where there are multiple enterprises applying for immunity or a reduction in fines for the same cartel, priority status shall be determined in accordance with the time that the applications are filed. Two or more enterprises that are affiliated (as defined under Taiwan's Company Law) may jointly file an application and shall be regarded as one enterprise when priority status is determined.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

See question 24.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

See question 24.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

See question 24.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

See question 24.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

According to the Immunity and Reduction Rules, the identities of all applicants will be kept confidential unless the applicant has given prior consent to the contrary. Any document exchanges and communication records between the applicants and the FTC containing information that could identify the applicants will not be available for review by others, nor will they be provided to any agencies, groups or individuals other than investigation and judicial agencies, unless the law provides otherwise. When publishing its decisions, the FTC may redact information that could identify the applicants or may issue separate decision letters to the various enterprises participating in the cartel so as to not disclose information that could identify the other participants or the penalties given to the other participants.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

As an investigating authority, the FTC has the ability to enter into a plea bargain or settlement with a party for alleged cartel activity, and as a result, suspend the investigation. According to the Guidelines for Settlement published by the FTC, where the FTC is unable to determine the facts or the legal relationships as the basis for an administrative disposition notwithstanding an inquisition process to be conducted ex officio, the FTC may enter into a compromise or an administrative contract with the party in order to settle the dispute and effectively achieve its purpose of oversight. Before entering the negotiation, the FTC should consider the following factors:

- the legality and adequacy of compromising with the party;
- the maintenance of public interest; and
- damage to the interested person that may result from the agreed compromise.

According to article 28 of the FTL, when a compromise has been reached and the party commits to taking measures to cease and rectify any alleged cartel activities within the time prescribed by the FTC, the FTC may suspend the investigation.

Criminal sanctions may not be pursued unless administrative sanctions fail to halt the cartel activity.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The directors, representatives and managers of an enterprise involved, or others with the authority to represent the enterprise that, according to paragraphs 1 and 2 of article 15 or article 16 of Taiwan's Administrative Penalty Law, are to be jointly penalised, may also be granted immunity or a reduction in fines if the following requirements are met:

- the involved enterprise is granted immunity or a reduction of the fine;
- the involved parties provide honest and complete statements regarding the unlawful act; and
- the involved parties follow the instruction of the FTC and provide honest, complete and continuous assistance during the investigation until the case is concluded.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Enterprises applying for immunity or a reduction of the fine must present the information and evidence required and file an oral or written application with the FTC individually. Written applications must comply with the format established by the FTC and be submitted by registered mail or in person. Enterprises filing an oral application must send a representative to the offices of the FTC to make the statement. In such case, the FTC will record the statement given and will require that the representative sign a record confirming the statement.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No.

Defending a case**34 Disclosure**

What information or evidence is disclosed to a defendant by the enforcement authorities?

Under the Guidelines Governing Access to Materials and Files of the FTC promulgated by the FTC in accordance with article 46 of the Taiwan Administrative Procedure Act, parties to a complaint (both the complainant and the defendant) and any related third parties are allowed to access the materials and files of the FTC.

Production and marketing data, statements of opinion and relevant documents provided by the parties or related third parties can be accessed unless the information is confidential by nature, is subject to confidentiality requirements for legitimate reasons, or would impede the FTC in the performance of its duties. However, the identity and background data of the parties and related third parties, and data unrelated to the case are not accessible.

In general, the data from FTC investigations are accessible, such as investigation statement records, the structure of questionnaires and their statistical results, expert opinions, the opinions presented at forums and public hearings, opinions of other administrative authorities and investigation records of the FTC, unless the information is confidential by nature, is subject to confidentiality requirements for legitimate reasons, or would impede the FTC in the performance of its duties. Individual questionnaires, identity of experts and their background data, evidence gathered during FTC investigations (other than photographs) and video and audio records are not accessible.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Subject to Bar rules on conflicts of interest, counsel may represent employees under investigation as well as the corporation. There is no specified time for a present or past employee to be advised to obtain independent legal advice.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Subject to Bar rules on conflicts of interest, counsel may represent multiple corporate defendants, regardless of whether they are affiliated.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Subject to the company's internal rules, a corporation may pay the legal costs of and penalties imposed on its employees.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Fines and private damages awards are not tax-deductible.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

There are no regulations, rulings or precedents supporting or prohibiting the FTC from taking international double jeopardy into account. There are no regulations, rulings or precedents permitting or prohibiting the court from taking into account overlapping liability for damages in other jurisdictions.

陽明國際律師事務所
YANGMING PARTNERS

Mark Ohlson
Charles Hwang
Fran Wang

mohlson@yangminglaw.com
cwhwang@yangminglaw.com
franwang@yangminglaw.com

10F, No. 89, Song Ren Road
Xinyi District
Taipei 110
Taiwan

Tel: +886 2 8725 6677
Fax: +886 2 2729 5577
www.yangminglaw.com

40 Getting the fine down

What is the optimal way in which to get the fine down?

Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The optimal way to minimise a fine is to be the first to come forward to the FTC, preferably before the FTC initiates an investigation, and then to provide concrete evidence to and fully cooperate with the FTC. Article 35 of the FTL also provides for a leniency programme.

Turkey

Gönenç Gürkaynak and K Korhan Yıldırım

ELIG Gürkaynak Attorneys-at-Law

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation on cartel regulation is the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law). The Competition Law finds its underlying rationale in article 167 of the Turkish Constitution of 1982, which authorises the government to take appropriate measures and actions to secure a free market economy. The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The national authority for investigating cartel matters in Turkey is the Competition Authority. The Competition Authority has administrative and financial autonomy and consists of the Competition Board (the Board), presidency and service departments. Five divisions with sector-specific work distribution handle competition law enforcement work through approximately 130 case handlers. A research department, a decisions unit, an information-management unit, an external-relations unit, a management services unit, and a strategy development unit assist the five technical divisions and the presidency in the completion of their tasks. As the competent body of the Competition Authority, the Board is responsible for, inter alia, investigating and condemning cartel activity. The Board consists of seven independent members. If a cartel activity amounts to a criminally prosecutable act such as bid rigging in public tenders, it may separately be adjudicated and prosecuted by Turkish penal courts and public prosecutors.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The most recent changes with respect to the Turkish cartel regime were the publication of the amended Guidelines on Vertical Agreements, which concluded the two-year work of the Competition Authority. The amended version of the Guidelines now includes internet sales, which are acknowledged to provide a wider data set that allows for price comparisons by consumers. Furthermore, there are revisions concerning most favoured customer (MFN) clauses, a contemporary topic deemed significant by competition authorities around the globe.

In addition to that, the most significant development regarding Turkish competition law is that the Draft Proposal for the Amendment of the Competition Law (the draft law), which was issued by the Turkish Competition Authority in 2013 and officially submitted to the presidency of the Turkish parliament on 23 January 2014, is now null and void following the beginning of the new legislative year of the Turkish parliament. In order to reinitiate the parliamentary process, the draft law must again be proposed and submitted to the presidency

of the Turkish parliament. At this stage, it remains unknown whether the new Turkish parliament or the government will renew the draft law. However, it could be anticipated that the main topics to be held in the discussions on the potential new draft competition law will not significantly differ from the changes that were introduced by the previous draft.

Currently, a significant expected development in the Turkish competition law regime is the Draft Regulation on Administrative Monetary Fines for the Infringement of the Competition Law, which is set to replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance (the Regulation on Fines). There is no anticipated date for the enactment of the draft regulation on fines. The draft regulation is heavily inspired by the European Commission's guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation 1/2003. Thus, the introduction of the draft regulation clearly demonstrates the authority's intention to bring the secondary legislation in line with the EU competition law during the harmonisation process. The draft regulation was sent to the Turkish parliament on 17 January 2014, but no enactment date has been announced as yet.

Finally, the following key legislative texts were announced or enacted between 2013 and the time of writing:

- Block Exemption Communiqué No. 2016/5 on R&D Agreements;
- Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicle Sector;
- Communiqué No. 2017/2 Amending the Communiqué on Mergers and Acquisitions Calling for the Authorisation of the Competition Board (Communiqué No:2010/4);
- Communiqué on the Increase of the Lower Threshold for Administrative Fines Specified in paragraph 1, article 16 of Act No. 4054 on the Protection of Competition (Communiqué No. 2017/1);
- Guidelines Explaining the Block Exemption Communiqué on Vertical Agreements in the Motor Vehicle Sector (Communiqué No 2017/3) enacted on 7 March 2017;
- Guidelines on the Evaluation of the Abuse of Dominance through Discriminatory Practices, enacted on 7 April 2014;
- Guidelines on Exclusionary Abusive Conducts by Companies in Dominant Positions, enacted on 29 January 2014;
- Block Exemption Communiqué on Specialisation Agreements (Communiqué No. 2013/3), entered into force on 26 July 2013;
- Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions, enacted on 26 March 2013;
- Guidelines on Active Cooperation for the Exposure of Cartels, enacted on 17 April 2013;
- Guidelines on the Protection of Horizontal Agreements in line with articles 4 and 5 of the Competition Law, Act No. 4054, enacted on 30 April 2013;
- Guidelines on the Assessment of Horizontal Mergers and Acquisitions, enacted on 4 June 2013;
- Guidelines on the Assessment of Non-horizontal Mergers and Acquisitions, enacted on 4 June 2013;
- Guidelines on Cases Considered as Merger and Acquisition and Concept of Control, enacted on 16 July 2013; and
- Guidelines on General Principles of Exemption, enacted on 28 November 2013.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 4 of the Competition Law is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (formerly article 81(1) of the EC Treaty). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Article 4 does not bring a definition of 'cartel'. Rather, it prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Unlike the TFEU, article 4 does not refer to 'appreciable effect' or 'substantial part of a market' and thereby excludes any de minimis exception. The enforcement trends and proposed changes to the legislation are, however, increasingly focusing on de minimis defences and exceptions.

Article 4 prohibits agreements that restrict competition by object or effect. The assessment whether the agreement restricts competition by object is based on the content of the agreement, the objectives it attains and the economic and legal context. The parties' intention is irrelevant to the finding of liability but it may operate as an aggravating or mitigating factor, depending on circumstances. Article 4 also prohibits any form of agreement that has the potential to prevent, restrict or distort competition. Again, this is a specific feature of the Turkish cartel regulation system, recognising a broad discretionary power of the Board. Both actual and potential effects are taken into account. Pursuant to the Guidelines on Horizontal Cooperation Agreements, the restrictive effects are assessed on the basis of their adverse impact on at least one of the parameters of the competition in the market, such as price, output, quality, product variety or innovation. Article 4 brings a non-exhaustive list of restrictive agreements that is, to a large extent, the same as article 101(1) TFEU. The list includes examples such as price fixing, market allocation and refusal-to-deal agreements. A number of horizontal restrictive agreement types, such as price fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed to be per se illegal. Certain other types of competitor agreements such as vertical agreements and purchasing cartels are generally subject to a competitive effects test.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption (or both) issued by the Board. The applicable block exemption rules are:

- Block Exemption Communiqué No. 2002/2 on Vertical Agreements;
- Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
- Block Exemption Communiqué No. 2008/3 for the Insurance Sector;
- Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
- Block Exemption Communiqué No. 2013/3 on Specialisation Agreements; and
- Block Exemption Communiqué No. 2016/5 on R&D Agreements.

These are all modelled on their respective equivalents in the EU. The newest of these block exemptions, the Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicle Sector, sets out revised rules for the motor vehicle sector in Turkey, overhauling Block Exemption Communiqué No. 2005/4 for Vertical Agreements and Concerted Practices in the Motor Vehicle Sector. Restrictive agreements that do not benefit from the block exemption under the relevant communiqué or an individual exemption issued by the Board are caught by the prohibition in article 4.

The Turkish antitrust regime also condemns concerted practices and the Competition Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called 'the presumption of concerted practice'. The special challenges posed by the proof standard concerning concerted practices are addressed in question 14.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no industry-specific offences or defences. The Competition Law applies to all industries, without exception. To the extent that they act as an undertaking within the meaning of the Competition Law, state-owned entities also fall within the scope of application of article 4.

Owing to the 'presumption of concerted practice' (see question 14), oligopoly markets for the supply of homogeneous products (eg, cement, bread yeast, ready-mixed concrete) have constantly been under investigation for concerted practice. Nevertheless, whether this track record (over 32 investigations in the cement and ready-mixed concrete markets in 21 years of enforcement history) leads to an industry-specific offence would be debatable.

There are sector-specific antitrust exemptions. The block exemptions applicable in the motor vehicle sector and in the insurance sector are notable examples. The Competition Law does not provide any specific exceptions to government-sanctioned activities or regulated conduct. There are, however, examples where the Board took the state action defence into account (see, eg, *Paper Recycling*, 8 July 2013, 13-42/538-238; *Waste Accumulator*, 4 October 2012, 12-48/1415-476; *Pharmaceuticals*, 2 March 2012, 12-09/290-91; *Et-Balık Kurumu*, 16 June 2011, 11-37/785-248; *Türkiye Şöförler ve Otomobilciler Federasyonu*, 3 March 1999, 99-12/91-33; *Esgaz*, 9 August 2012, 12-41/1171-384).

6 Application of the law

Does the law apply to individuals or corporations or both?

The Competition Law applies to 'undertakings' and 'associations of undertakings'. An undertaking is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. The Competition Law therefore applies to individuals and corporations alike if they act as an undertaking.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Turkey is one of the 'effect theory' jurisdictions where what matters is whether the cartel activity has produced effects on Turkish markets, regardless of the nationality of the cartel members, where the cartel activity took place or whether the members have a subsidiary in Turkey. The Board has refrained from declining jurisdiction over non-Turkish cartels or cartel members in the past, as long as there has been an effect on the Turkish markets (see, for example, *The suppliers of rail freight forwarding services for block trains and cargo train services*, 16 December 2015, 15-44/740-267; *Güneş Ekspres/Condor*, 27 October 2011, 11-54/1431-507; *Imported Coal*, 2 September 2010, 10-57/1141-430; *Refrigerator Compressor*, 1 July 2009, 09-31/668-156). It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside of Turkey without any presence in Turkey, mostly due to enforcement handicaps (such as difficulties of formal service or failure to identify a tax number). The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules. Article 2 of the Competition Law would support at least a colourable argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside of Turkey does not in and of itself produce effects in Turkey.

The Board finds the underlying basis of its jurisdiction in article 2 of the Competition Law, which captures all restrictive agreements, decisions, transactions and practices to the extent they produce an effect on a Turkish market, regardless of where the conduct takes place.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

It is fair to say that export cartels do not fall within the scope of jurisdiction of the Competition Authority as per article 2 of the Competition Law. In *Poultry Meat Producers* (25 November 2009, 09-57/1393-362), the Competition Authority launched an investigation into allegations that included, inter alia, an export cartel. The Board found that export cartels are not sanctioned as long as they do not affect the markets of the host country. Although some other decisions (*Paper Recycling*, 8 July 2013, 13-42/538-238) suggest that the Competition Authority might sometimes be inclined to claim jurisdiction over export cartels, it is fair to assume that an export cartel would fall outside of the Competition Authority's jurisdiction if and to the extent it does not produce an impact on Turkish markets.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The Board is entitled to launch an investigation into an alleged cartel activity ex officio or in response to a complaint. In the case of a complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Board remains silent for 60 days. The Board decides to conduct a pre-investigation if it finds the notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced on-site inspections) (see question 10) and other investigatory tools (eg, formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Board within 30 days after a pre-investigation decision is taken by the Board. The Board will then decide within 10 days whether to launch a formal investigation. If the Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months by the Board.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences (first written defence). Subsequently, the main investigation report is issued by the Competition Authority. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence. The defending parties will have another 30-day period to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion are served on the Competition Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held ex officio or upon request by the parties. Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings Before the Board. The Board will render its final decision within 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal case must be brought within 60 calendar days of the official service of the reasoned decision. It usually takes around three to eight months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterpart.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Board may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Board. Failure to comply with a decision ordering the production of

information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine is 21,036 Turkish liras (Communiqué on the Increase of the Lower Threshold for Administrative Fines Specified in paragraph 1, article 16 of Act No. 4054 on the Protection of Competition (Communiqué No. 2018/1)). In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

Article 15 of the Competition Law also authorises the Board to conduct on-site investigations and dawn raids. Accordingly, the Board is entitled to:

- examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of the same;
- request undertakings and trade associations to provide written or verbal explanations on specific topics; and
- conduct on-site investigations with regard to any asset of an undertaking.

Refusal to grant the staff of the Competition Authority access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account). It may also lead to the imposition of a fine of 0.05 per cent of the Turkish turnover generated in the financial year preceding the date of the fining decision, for each day of the violation (if this is not calculable, the Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account).

The Competition Law provides vast authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. Other than that, the Competition Authority does not need to obtain judicial authorisation to use its powers. While the wording of the Law is such that employees can be compelled to give verbal testimony, case handlers do allow a delay in giving an answer so long as there is a quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them, provided that a written response is submitted within a mutually agreed time. Computer records are fully examined by the experts of the Competition Authority, including but not limited to deleted items.

Officials conducting an on-site investigation must be in possession of a deed of authorisation from the Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc) in relation to matters that do not fall within the scope of the investigation (that is, that which is written on the deed of authorisation).

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Article 43 of Decision No. 1/95 of the EC-Turkey Association Council (Decision No. 1/95) authorises the Competition Authority to notify and request the European Commission (DG Competition) to apply relevant measures if the Board believes that cartels organised in the territory of the European Union adversely affect competition in Turkey. The provision grants reciprocal rights and obligations to the parties (the EU and Turkey), and thus the European Commission has the authority to request the Board to apply relevant measures to restore competition in relevant markets.

There are also a number of bilateral cooperation agreements between the Competition Authority and the competition agencies in other jurisdictions (eg, Romania, Korea, Bulgaria, Portugal, Bosnia-Herzegovina, Russia, Croatia and Mongolia) on cartel enforcement matters. The Competition Authority also has close ties with the OECD, UNCTAD, WTO, ICN and the World Bank.

The research department of the Competition Authority makes periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition in order

to assess their results, and submits its recommendations to the Board. As an example, a cooperation protocol was signed on 14 October 2009 between the Turkish Competition Authority and the Turkish Public Procurement Authority in order to procure a healthy competition environment with regard to public tenders by cooperating and sharing information. Informal contacts do not constitute a legal basis for the Turkish Competition Authority's actions.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

It is fair to say that the interplay between jurisdictions does not in practice materially affect the Board's handling of cartel investigations, including cross-border cases. Principle of comity does not take part as an explicit provision in Turkish Competition law. A cartel's conduct that was investigated elsewhere in the world can be prosecuted in Turkey if it has had an effect on non-Turkish markets.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

The Board can initiate an inspection about an undertaking or an association of undertakings upon complaint or ex officio. Cartel matters are primarily adjudicated by the Board. Enforcement is supplemented with private lawsuits as well. Private suits against cartel members are tried before regular courts. Owing to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Competition Authority and build their own decision on that decision.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The most important material issue specific to Turkey is the very low standard of proof adopted by the Board. The participation of an undertaking in a cartel activity requires proof that there was such a cartel activity or, in the case of multilateral discussions or cooperation, that the particular undertaking was a participant. With a broadening interpretation of the Competition Law, and especially of the 'object or effect of which ...' branch, the Board has established an extremely low standard of proof concerning cartel activity. The standard of proof is even lower as far as concerted practices are concerned; in practice, if parallel behaviour is established, a concerted practice might readily be inferred and the undertakings concerned might be required to prove that the parallel behaviour is not the result of a concerted practice. The Competition Law brings a 'presumption of concerted practice', which enables the Board to engage in an article 4 enforcement in cases where price changes in the market, supply-demand equilibrium or fields of activity of enterprises bear a resemblance to those in the markets where competition is obstructed, disrupted or restricted. Turkish antitrust precedents recognise that 'conscious parallelism' is rebuttable evidence of forbidden behaviour and constitutes sufficient ground to impose fines on the undertakings concerned. Therefore, the burden of proof is very easily switched and it becomes incumbent upon the defendants to demonstrate that the parallelism in question is not based on concerted practice, but has economic and rational reasons behind it.

Unlike in the EU, where the undisputed acceptance is that tacit collusion does not constitute a violation of competition, the Competition Law does not give weight to the doctrine known as 'conscious parallelism and plus factors'. In practice, the Board sometimes does not go to the trouble of seeking 'plus factors' along with conscious parallelism if naked parallel behaviour is established.

Recent indications in practice also suggest that the Competition Authority officials are increasingly inclined to adopt a broadening interpretation of the definition of 'cartel'.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

The Board considers communication evidence and economic data that indicate coordination between competitors as circumstantial evidence. Communication evidence, for instance, can prove that the possible parties to an agreement communicated with or met each other, yet cannot demonstrate the actual content of such communication. If there is no direct evidence demonstrating the existence or content of a violation, the Board might establish an infringement through circumstantial evidence by itself or along with direct evidence, especially in concerted practice cases.

16 Appeal process

What is the appeal process?

As per Law No. 6352, which entered into force as of 5 July 2012, final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the justified (reasoned) decision of the Board. Decisions of the Board are considered as administrative acts, and thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

As per article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, at the request of the plaintiff the court, by providing its justifications, may decide on a stay of execution if the execution of the decision is likely to cause serious and irreparable damages, and the decision is highly likely to be against the law (that is, showing of a prima facie case).

The judicial review period before the Ankara administrative courts usually takes about eight to 24 months. Decisions by the Ankara administrative courts are, in turn, subject to appeal before the regional courts (appellate courts) and the High State Court. If the challenged decision is annulled in full or in part, the administrative court remands it to the Board for review and reconsideration.

After the recent legislative changes, administrative litigation cases will now be subject to judicial review before the newly established regional courts (appellate courts). The new legislation has created a three-level appellate court system consisting of administrative courts, regional courts (appellate courts) and the High State Court. The regional courts will go through the case file both on procedural and substantive grounds and investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, which are set forth in article 46 of the Administrative Procedure Law. In this case, the decision of the regional court will not be considered as a final decision. In such a case, the High State Court may decide to uphold or reverse the regional courts' decision. If the decision is reversed by the High State Court, it will be remanded back to the deciding regional court, which will in turn issue a new decision which takes into account the High State Court's decision. As the regional courts have recently been established, there is not yet experience on how long does it take for a regional court to finalise its review of a file. Accordingly, the Council of State's review period (for a regional court's decision) within the new system should also be tested before providing an estimated time period. The appeal period before the High State Court usually takes about 24 to 36 months. Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 30 months.

An appeal process is typically initiated by the infringing party in cases where the Board finds a violation, or by complainants if there is no finding of a violation. The Competition Authority does have the right to challenge a court decision by initiating a judicial review process if a decision of the Board is overturned by the deciding court.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The sanctions that could be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability), but no criminal sanctions. Cartel conduct will not result in imprisonment against individuals implicated. That said, there have been cases where the matter had to be referred to a public prosecutor before or after the competition law investigation was complete. On that note, bid-rigging activity may be criminally prosecutable under section 235 et seq of the Turkish Criminal Code. Illegal price manipulation (manipulation through disinformation or other fraudulent means) may also be punished by up to two years of imprisonment and a judicial fine under section 237 of the Turkish Criminal Code.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

In the case of a proven cartel activity, the undertakings concerned will be separately subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. After the recent amendments, the new version of the Competition Law makes reference to article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings or the compliance with their commitments, etc, in determining the magnitude of the monetary fine.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the restrictive agreement, to remove all de facto and legal consequences of every action that has been taken unlawfully and to take all other necessary measures in order to restore the level of competition and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed legally invalid and unenforceable with all its legal consequences. Similarly, the Competition Law authorises the Board to take interim measures until the final resolution on the matter in case there is a possibility of serious and irreparable damages.

The Board has recently levied an administrative monetary fine within the investigation launched against 13 financial institutions, including local and international banks, active in the corporate and commercial banking markets in Turkey (28 November 2017, 17-39/636-276). The main allegations concerned the exchange of competitively sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. After 19 months of an in-depth investigation, the Board has unanimously concluded that BTMU, ING and RBS have violated article 4 of Law No. 4054. In this respect, the Board imposed an administrative monetary fine on ING and RBS in the amount of 21.1 million liras and 66.4,000 liras, respectively, over their annual turnover in the financial year of 2016. However, the Board resolved that BTMU should not have an administrative monetary fine imposed pursuant to its leniency application, granting full immunity to BTMU while also relieving the other investigated undertakings from an administrative monetary fine.

Another recent decision concerns allegations that 10 undertakings active in producing ready-mix concrete in the İzmir region in Turkey would have artificially increased the prices of ready-mix concrete by entering into an anticompetitive agreement or concerted practice (22 August 2017, 17-27/452-194). The Board took into account that the economic evidence shows the relevant undertaking was not involved in any kind of anticompetitive agreement or concerted practices and

it is understood that the Board took the view of the defendants that it was implausible to reach an agreement within the alleged duration of the agreement, which was three months. Moreover, it could be argued that the decision constitutes a good example that the undertakings subject to investigation based on the allegations of anticompetitive agreements or concerted practice are able to defend themselves based on economic and legal evidence even under the presumption of concerted practice of article 4 of the Competition Law and marks the importance of economic evidence.

Civil actions are still rare but increasing in practice.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

After the recent amendments, the new version of the Competition Law makes reference to article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings, compliance with their commitments, etc, in determining the magnitude of the monetary fine. In line with this, the Regulation on Monetary Fines was recently enacted by the Turkish Competition Authority. The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but illegal concentrations are not covered by the Regulation on Fines. According to the Regulation on Fines, fines are calculated by first determining the basic level, which in the case of cartels is between 2 and 4 per cent of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision); aggravating and mitigating factors are then factored in.

The aggravating and mitigating factors are set forth in the Regulation on Fines. As per article 5/3 of the Regulation on Fines, the amount of fine determined according to the above-mentioned method may be increased by 50 per cent for violations that lasted between one and five years, and by 100 per cent for violations that lasted more than five years. Pursuant to article 6 of the Regulation on Fines, the base fine may be increased by 50 to 100 per cent for each instance of repetition if the violation is repeated and if the cartel is maintained after the notification of the investigation decision. Moreover, the base fine may be increased by:

- 50 to 100 per cent, where the commitments made for the elimination of the competition problems raised within the scope of article 4 of the Competition Law have not been met;
- up to 50 per cent, where no assistance with the examination is provided; and
- up to 25 per cent in cases such as coercing other undertakings into the violation.

Mitigating factors on the other hand are regulated under article 7 of the Regulation on Fines in a non-exhaustive manner. In this regard, the base fine may be reduced at a rate of 25 to 60 per cent if the undertakings or association of undertakings concerned prove certain facts such as provision of assistance to the examination beyond the fulfilment of legal obligations, existence of encouragement by public authorities or coercion by other undertakings in the violation, voluntary payment of damages to those harmed, termination of other violations, and occupation of a very small share by practices subject to the violation within annual gross revenues. The Regulation on Fines applies also to managers or employees who had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity), and provides for certain reductions in their favour.

The Regulation on Fines is binding on the Competition Authority.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Bid riggers in government procurement tenders may face blacklisting (ie, debarment from government tenders) for up to two years under article 58 of the Public Tenders Law No. 4734. The blacklisting is decided by the relevant ministry implementing the tender contract or by the relevant ministry that the contracting authority is subordinate to or is associated with. It is even a duty, not an option, for administrative authorities to apply for blacklisting in the case of bid rigging in government tenders.

Blacklisting is only applicable to bid rigging – it is not available in cases of other forms of cartel infringement.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Yes. The same conduct can trigger administrative or civil sanctions (or criminal sanctions in the case of bid rigging or other criminally prosecutable conduct) at the same time.

Private rights of action**22 Private damage claims**

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

One of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Article 57 et seq of the Competition Law entitle any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. The Turkish obligation law regulates the joint creditors and prevents the debtor from the double recovery. All the creditors shall pursue a claim against the debtor and in that case, the debtor shall pay on the amount of their shares. However, in the event that the debtor make a payment to only one creditor as a whole, this creditor shall be liable to the others and the other creditors.

Antitrust-based private lawsuits are rare but increasing in practice. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal-to-supply allegations. Civil damage claims have usually been settled by the parties involved prior to the court rendering its judgment.

Indirect purchaser claims have not yet been tested before the courts.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Turkish procedural law does not allow for class actions or procedures. Class certification requests would not be granted by Turkish courts. While article 73 of Law No. 6502 on the Protection of Consumers allows class actions by consumer organisations, these actions are limited to violations of Law No. 6502, and do not extend to cover antitrust infringements. Similarly, article 58 of the Turkish Commercial Code enables trade associations to take class actions against unfair competition behaviour, but this has no reasonable relevance to private suits under article 57 et seq of the Competition Law.

Turkish procedural law allows group actions under article 113 of the Turkish Procedure Law No. 6100. Associations and other legal entities may initiate a group action to 'protect the interest of their members', 'to determine their members' rights', and 'to remove the illegal situation or prevent any future breach'. Group actions do not cover actions for damages. A group action can be brought before a court as one single lawsuit only. The verdict shall encompass all individuals within the group.

Cooperating parties**24 Immunity**

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Regulation on Active Cooperation for Discovery of Cartels (Regulation on Leniency) was enacted on 15 February 2009. The Regulation on Leniency sets out the main principles of immunity and leniency mechanisms. In parallel to the Regulation on Leniency, the Board published the Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels on April 2013.

The leniency programme is only applicable for cartel cases. It does not apply to other forms of antitrust infringement. Section 3 of the Regulation on Leniency provides for a definition of cartel that encompasses price fixing, customer, supplier or market sharing, restricting output or placing quotas and bid rigging.

A cartel member may apply for leniency until the investigation report is officially served on it. Depending on the timing of the application, the applicant may benefit from full immunity or fine reduction.

The first one to file an appropriately prepared application for leniency before the investigation report is officially served may benefit from full immunity. Employees or managers of the first applicant can also benefit from the full immunity granted to the applicant firm. However, there are several conditions an applicant must meet to receive full immunity from all charges. One of them is not to be the coercer of the reported cartel. If this is the case (ie, if the applicant has forced the other cartel members to participate in the cartel), the applicant firm and its employees may only receive a reduction of between 33 per cent and 100 per cent. The other conditions are as follows:

- the applicant shall submit information and evidence in respect of the alleged cartel, including the products affected, the duration of the cartel, the names of the undertakings party to the cartel, specific dates, locations and participants of cartel meetings;
- the applicant shall not conceal or destroy information or evidence related to the alleged cartel;
- the applicant shall end its involvement in the alleged cartel except when otherwise is requested by the assigned unit on the ground that detecting the cartel would be complicated;
- the applicant shall keep the application confidential until the end of the investigation, unless otherwise is requested by the assigned unit; and
- the applicant shall maintain active cooperation until the Board takes the final decision after the investigation is completed.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The Regulation on Leniency provides for the possibility of a reduction of the fine for 'second-in' and subsequent leniency applicants. Also, the Competition Authority may consider the parties' active cooperation after the immunity application as a mitigating factor as per the provisions of Regulation on Fines.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The second firm to file an appropriately prepared application would receive a fine reduction of between 33 and 50 per cent. Employees or managers of the second applicant that actively cooperate with the Competition Authority would benefit from a reduction of between 33 and 100 per cent.

The third applicant would receive a 25 per cent to 33 per cent reduction. Employees or managers of the third applicant that actively cooperate with the Competition Authority would benefit from a reduction of 25 per cent up to 100 per cent.

Subsequent applicants would receive a 16 per cent to 25 per cent reduction. Employees or managers of subsequent applicants would benefit from a reduction of 16 per cent up to 100 per cent.

Amnesty Plus is regulated under article 7 of the Regulation on Fines. According to article 7, the fines imposed on an undertaking that cannot benefit from immunity provided by the Regulation on Leniency will be decreased by 25 per cent if it provides the information and documents specified in article 6 of the Regulation on Leniency prior to the Board's decision of preliminary investigation in relation to another cartel.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

As stated in question 24, a cartel member may apply for leniency until the investigation report is officially served. Although the Regulation on Leniency does not provide detailed principles on the 'marker system', the Competition Authority can grant a grace period to applicants to submit the necessary information and evidence. For the applicant to be eligible for a grace period, it must provide minimum information concerning the affected products, duration of the cartel and names of the parties. A document (showing the date and time of the application and request for time to prepare the requested information and evidence) will be given to the applicant by the assigned unit.

Leniency applications submitted after the official service of the investigation report would not benefit from conditional immunity. Still, such applications may benefit from fine reductions.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The applicant must submit: information on the products affected by the cartel; information on the duration of the cartel; names of the cartellists; dates, locations, and participants of the cartel meetings; and other information or documents about the cartel activity. The required information may be submitted verbally. A marker is also available. Admission of actual price effect is not a required element of leniency application. The applicant must avoid concealing or destroying the information or documents concerning the cartel activity. Unless the Leniency Division decides otherwise, the applicant must stop taking part in the cartel. Unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served. The applicant must continue to actively cooperate with the Competition Authority until the final decision on the case has been rendered. The applicant must also convey any new documents to the Authority as soon as they are discovered; cooperate with the Authority on additional information requests; and avoid statements contradictory to the documents submitted as part of the leniency application.

These ground rules apply to subsequent cooperating parties as well.

Indications in practice show that the Authority was, until recently, inclined to adopt an extremely high standard regarding what constitutes 'necessary documents and information for a successful leniency application' and the 'minimum set of documents that a company is required to submit'. In 3M (27 September 2012; 12-46/1409-461), the investigation team recommended that the Board revoke the applicant's full immunity on the grounds that the applicant did not provide all of the documents that could be discovered during a dawn raid. Unfortunately, the reasoned decision did not go into the details of the matter, since the case was closed without a finding of violation. This approach arguably sets an almost impossible standard for 'cooperation' in the context of the leniency programme that very few companies will be able to meet. The trend towards adopting an extremely broadening interpretation of the concepts of 'coercion' and 'the Authority's already being in possession of documents that prove a violation at the time of the leniency application' are all alarming signs of this new trend.

Recently, however, the Board eased the tensions a little and handed a new decision that could beckon a new era for the Turkish leniency programme. On 30 March 2015, the reasoned decision of the fresh yeast producers investigation was released (14-42/783-346). The decision

is the first of its kind to be entered by the Board where it granted full immunity, based on article 4/2 of the Regulation on Active Cooperation for Detecting Cartels. This immunity was afforded to a submission made after the initiation of the preliminary investigation and dawn raids. It serves as a landmark case as it is the first instance where the Board granted immunity after dawn raids. The Board justified its unprecedented application by claiming that substantive evidence and added value was brought in through the leniency application. The case is therefore expected to result in an increase in number of leniency applications in Turkey in the near future.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

According to the principles set forth under the Regulation on Leniency, the applicant (the undertaking or the employees or managers of the undertaking) must keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit. The same level of confidentiality is applicable to subsequent cooperating parties as well. While the Board can also evaluate the information or documents ex officio, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential. Undertakings must request in writing confidentiality from the Board and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. Non-confidential information may become public through the reasoned decision, which is typically announced within three to four months after the Board has decided on the case.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The Board does not enter into plea bargain arrangements. A mutual agreement on other liability matters (which would have to take the form of an administrative contract) has also not been tested in Turkey. When enacted, the new Draft Law is expected to introduce a form of settlement procedure.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The current employees of a cartel entity also benefit from the same level of leniency or immunity that is granted to the entity. There are no precedents about the status of former employees as yet.

Apart from this, according to the Regulation on Leniency a manager or employee of a cartelist may also apply for leniency until the investigation report is officially served. Such an application would be independent from applications by the cartel member itself, if there are any. Depending on the application order, there may be total immunity from, or reduction of, a fine for such manager or employee. The reduction rates and conditions for immunity or reduction are the same as those designated for the cartelists.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Since active cooperation is required from all applicant cartel members in order to maintain the leniency or immunity granted by the Board, extra effort should be spent to keep the Board informed to the maximum possible extent regarding the cartel that is subject to investigation.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or proposed leniency and immunity policy assessments or policy reviews. That said, the Turkish Competition Authority has recently published the Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels in April 2013.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The right of access to the file has two legal bases in the Turkish competition law regime: Law No. 4982 and Communiqué No. 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué No. 2010/3). Article 5/1 of Communiqué No. 2010/3 provides that the right of access to the case file will be granted upon the written requests of the parties within due period during the investigations. The right to access the file can be exercised on written request at any time until the end of the period for submitting the last written statement. This right can only be used once so long as no new evidence has been obtained within the scope of the investigation. On the other hand, Law No. 4982 does not have such a restriction in terms of timing or scope. Access to the case file enables the applicant to gain access to information and documents in the case file that do not qualify as either internal documents of the Competition Authority or trade secrets of other firms or trade associations. Law No. 4982 provides for similar limitations.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

So long as there are no conflicts of interest, Turkish law does not prevent counsel from representing both the investigated corporation and its employees. That said, employees are hardly ever investigated separately, and there is no criminal sanction against employees for antitrust infringements in practice.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

So long as there are no conflicts of interest, and all the related parties consent to such representation, attorneys-at-law (members of a Turkish bar association qualified to practise law in Turkey) can and do represent multiple corporate defendants, even if they are not affiliated. Persons who are not attorneys sometimes also undertake representations, but they are not bound by the same ethics codes binding attorneys in Turkey.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes. It is advisable to seek separate tax or bookkeeping advice before the corporation pays the legal costs or penalties imposed on its employee.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Pursuant to article 11 of the Corporate Tax Law No. 5520, any administrative monetary fine is not considered as tax-deductible. Depending on the specific circumstances, losses, damages and indemnities paid based upon judicial decisions may or may not be tax-deductible. This requires a case-by-case analysis and it is advisable to seek separate tax or bookkeeping advice in each case.

Update and trends

The year in review did not witness any groundbreaking cartel cases or record fines for cartel activity. In fact, there is an easily detectable decline in the number of cartel cases. Most of the fully fledged investigations did not result in monetary fines against the defendants.

According to the annual report of the Turkish Competition Authority for 2017, the Board decided on 296 cases and 80 of them are related to competition law violations. Thirty-seven out of 80 relate article 4 of Law No. 4054.

According to the annual report of the Turkish Competition Authority, the Authority accepted two leniency applications in 2017. Both applicants were granted immunity in investigations where other undertakings were fined. One application concerned the recent financial institutions decision of the Board where three of the 12 defendants were fined. The other leniency application concerned the mechanical engineering sector (14 December 2017, 7-41/640-279) within the Burdur region. The case largely rested on the allegation that mechanical engineers in the Burdur region pooled their revenue and shared it on the basis of predetermined percentages. One of the defendants applied for leniency and was granted immunity.

There is a reduction mechanism for the administrative monetary fines. The relevant legislation on payment of administrative monetary fines allows the undertakings to discharge from liability by paying 75 per cent of the fine, provided that the payment is made before any appeal. The payment of such amount is without prejudice to a later appeal. The time frame in which to pay the 75 per cent portion terminates on the 30th calendar day from the service of the full reasoned decision.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

No. The Turkish Competition Authority would not take into account penalties imposed in other jurisdictions. The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules (see question 9).

Overlapping liability for damages in other jurisdictions is not taken into account.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Aside from the recently introduced leniency programme, article 9 of the Competition Law, which generally entitles the Board to order structural or behavioural remedies to restore the competition as before the infringement, sometimes operates as a conduit through which infringement allegations are settled before a full-blown investigation is launched. This can only be established through a very diligent review of the relevant implicated businesses to identify all the problems, and adequate professional coaching in eliminating all competition law issues and risks. In cases where the infringement was too far advanced for it to be subject to only an article 9 warning, the Board at least found a mitigating factor in that the entity immediately took measures to cease any wrongdoing and if possible to remedy the situation.

There have been cases where the Board considered the existence of a compliance programme as an indication of good faith (*Unilever*, 12-42/1258-410; *Efes*, 12-38/1084-343). However, recent indications suggest that the Board is disinclined to consider a compliance programme to be a mitigating factor. Although they are welcome, the mere existence of a compliance programme is not enough to counter the finding of an infringement or even to discuss lower fines (*Frito Lay*, 13-49/711-300; *Industrial Gas*, 13-49/710-297). In *Industrial Gas*, the investigated party argued that it had immediately initiated a competition law compliance programme as soon as it received the complaint

letters, which were originally submitted to the authority. However, the Board did not take this into account as a mitigating factor. On the other hand, the Board's recent *Mey İçki* (16 February 2017, 17-07/84-34) might be signalling a change in the Board's perception of compliance programmes. The Board decided to apply a 25 per cent reduction on the grounds that *Mey İçki* ensured compliance with competition law by taking into account the competition law sensitivities highlighted by the Board even before the final decision of the Board. Similarly, in *Consumer Electronics* (7 November 2016, 16-37/628-279), the Board applied a 60 per cent reduction to an undertaking because of its compliance efforts, since the undertaking amended its contracts before the final decision of the Board.

ELİG
GÜRKAYNAK

Attorneys at Law

Gönenç Gürkaynak
K Korhan Yıldırım

gonenc.gurkaynak@elig.com
korhan.yildirim@elig.com

Çitlenbik Sokak No. 12
Yıldız Mahallesi Besiktas
34349 Istanbul
Turkey

Tel: +90 212 327 1724
Fax: +90 212 327 1725
www.elig.com

Ukraine

Nataliia Isakhanova, Igor Kabanov and Andrii Pylypenko

Sergii Koziakov & Partners

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The main domestic legislation regarding protection of economic competition is as follows:

- the Constitution of Ukraine, 28 June 1996 (last amended 30 September 2016);
- the Economic Code of Ukraine, 16 January 2003 (last amended 17 June 2018);
- Code of Ukraine of Administrative Offences, 7 December 1984 (last amended 28 August 2018);
- Law No. 3659-XII on the Antimonopoly Committee of Ukraine, 26 November 1993 (last amended 2 August 2017);
- Law No. 2210-III On Protection of Economic Competition, 11 January 2001 (last amended 7 March 2018);
- Law No. 236/96-BP On Protection Against Unfair Competition, 7 June 1996 (last amended 3 March 2016);
- Law No. 1197-VII On Public Procurements, 25 December 2015 (last amended 27 January 2018); and
- Law No. 1555-VII On State Aid to Undertakings, 1 July 2014 (last amended 2 August 2018).

A noteworthy detail is that Ukrainian competition law does not apply a term ‘cartels’ but rather use notion of ‘anticompetitive concerted actions’. Moreover, the Code of Ukraine of Administrative Offences and the Economic Code of Ukraine apply the term ‘illegal contracts’ to contracts dealing with monopoly price (tariff) fixing (raising), discounts, allowances (surcharges), market setting (raising), market allocation based on geographic areas, types of products, types of customers, output volume or other factors. Therefore, both horizontal and vertical anticompetitive concerted actions are subject to substantially the same control regime.

The Law On Protection of Economic Competition (the Competition Law) distinguishes between concerted actions and anticompetitive concerted actions.

According to Part 1 of article 5 of the Competition Law, concluding agreements in any form by undertakings, taking decisions in any form by associations and other concerted competitive behaviour (actions, inactivity) of undertakings is considered as concerted actions.

At the same time, article 6 of the Competition Law defines anticompetitive concerted actions as concerted actions that have or may have impeded, eliminated or restricted competition.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Antimonopoly Committee of Ukraine (the AMCU) is in charge of conducting investigations to detect and terminate anticompetitive concerted actions in Ukraine. Under the law, the AMCU authorities constitute a system of bodies with appropriate division of competences.

The main objectives, competences, powers and organisational principles of the AMCU’s system are envisaged in the Law of Ukraine on the Antimonopoly Committee of Ukraine, articles 3 and 7.

Notably, pursuant to article 3 of the Law on the Antimonopoly Committee of Ukraine, the AMCU’s key goal is to prevent, detect and terminate infringements of the legislation on protection of economic competition, and also control the coordinated concerted actions of economic undertakings. In order to fulfil these objectives the AMCU, in accordance with its powers under article 7 of the Law of Ukraine on the Antimonopoly Committee of Ukraine, considers cases of infringements in the form of anticompetitive concerted actions and after receiving the results of an investigation makes a decision, including one on the recognition, suspension and elimination of infringements, and imposition of fines and revocation of permission for concerted actions in the case of prohibited actions. Owing to these powers, the AMCU has an opportunity to execute control over the activity of certain participants in the economic sphere and to respond quickly to violation of the legislation on protection of economic competition, which allows it to prevent a negative impact on the competition or to lessen its impact.

Article 60 of the Competition Law provides the possibility for undertakings to challenge decisions of the AMCU in economic courts. Under the Economic Code of Ukraine, such claims fall within the exclusive jurisdiction of the economic courts of Ukraine.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The AMCU adopted a new Regulation on Concerted Actions on 21 June 2016, which details the procedure of consideration of respective applications. It should be mentioned that it envisages a significant reduction of the amount of data and documents required under the simplified procedure. Also the list of documents and information to be submitted as part of application under the general procedure is properly structured. This regulation came into force on 19 August 2016.

On 3 March 2016, amendments to article 22-1 the Law On the Antimonopoly Committee of Ukraine came into force. These amendments deal with ensuring the rights of anti-cartel investigation participants to protection of their confidential information and access thereto by other parties to the procedure.

On 9 August 2016 the AMCU approved new Recommendation Clarifications on the application of the provisions of the second, fifth and sixth paragraphs of article 52 of the Law of Ukraine on Protection of Economic Competition, parts 1 and 2 of article 21 of the Law of Ukraine On Protection Against Unfair Competition (No. 39-pp) (the Recommendation Clarifications). The Recommendation Clarifications define the approaches of the Antimonopoly Committee of Ukraine, which are recommended to its authorities in the process of determining the amount of the fines for violation of legislation on economic competition protection in order to ensure legal certainty and predictability of the application of these laws.

In the process of calculating the amount of a fine for a violation the AMCU is guided by the principles of proportionality, non-discrimination and reasonableness.

The determination of the amount of penalty is carried out in two stages:

- at the first stage the basic amount of the fine for each respondent party is defined; and
- at the second stage this amount is adjusted for aggravating and mitigating circumstances.

The amount of the fine imposed for anticompetitive concerted actions shall not exceed the limits specified in Part 2 of article 52 of the Competition Law.

As is known, in accordance with Part 2 of article 52 of the Competition Law, a fine shall be imposed for anticompetitive concerted actions for up to 10 per cent of income (revenue) of an undertaking from sales of products (goods and services) for the last financial year preceding the year in which the fine is imposed. In case of illegal profit exceeding 10 per cent of the mentioned income (revenue), a fine is imposed at a rate not exceeding triple the amount of the illegally obtained profit. The amount of illegally obtained profit may be assessed through the estimation algorithm.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The definition of anticompetitive concerted actions is set out in part 1 of article 6 of the Competition Law. Such actions imply the concerted actions that have resulted or may result in negative effects on competition (ie, prevention, elimination or restriction of competition). The legislator considers anticompetitive concerted actions to be illegal regardless of whether they are intentional or negligent. Moreover, this term encompasses concerted actions (concluding agreements in any form by undertakings), adoption of any kind of decisions by a group of undertakings and other concerted competitive conduct (acts and omission) of undertakings. Concerted actions may be committed by both individuals and companies. For certain actions to be found illegal, the anticompetitive effect shall be determined. The Competition Law provides for an inexhaustive list of factors, which the AMCU should consider, for example:

- setting prices or other conditions with respect to the purchase or sale of products;
- limitation of production, product markets, technical and technological development, investments or establishment of control over them;
- distribution of markets or sources of supply based on territorial principle, in accordance with the assortment of products, the volume of their sale or purchase, circle of sellers, buyers or consumers or otherwise;
- distortion of the results of bids, auctions, contests or tenders;
- removal from the market or restriction of access to the market (exit from the market) for other undertakings, buyers or sellers;
- applying different conditions to equivalent agreements with other undertakings, which results in the creation of a disadvantage for these undertakings in terms of competition;
- concluding agreements provided that other undertakings assume supplementary obligations, which according to their content or in terms of trade customs and other fair customs in entrepreneurial activities do not relate to the subject of these agreements; and
- significant restriction of the competitive ability of other undertakings on the market without objective reasons thereto.

Moreover, taking account of particularities of market economy development in Ukraine, anticompetitive concerted actions also imply similar acts (omissions) by undertakings on the commodity market, which have resulted or may result in prevention, elimination or restriction of competition in case if the analysis of situation on the commodity market gives evidence that there are no objective reasons for taking such acts (omissions).

Anticompetitive concerted actions are prohibited and give rise to responsibility under the law. The AMCU may set conditions under which the concerted actions are exempt from such prohibition. The AMCU adopted Model Requirements as for criteria of admissibility applied to horizontal concerted actions (cartels).

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

All anticompetitive concerted actions are a priori forbidden. But the law grants a plethora of exceptions from the general requirements. Exemption from liability in certain circumstances may occur if the offender voluntarily informs the AMCU authorities about the illegal deal. The system of exceptions to the general requirements of the prohibition on anticompetitive concerted actions also includes agreements on the transfer of intellectual property rights and exemptions for small and medium-sized enterprises. In addition, concerted actions in relation to the supply and use of one's own products do not fall under the prohibition. With the general prohibition on anticompetitive concerted actions the law provides for actions that in certain circumstances are permitted by the AMCU according to the Regulation on the order of submission of applications to the AMCU for granting permission for concerted actions of undertakings (AMCU Order No. 26-p as of 12 February 2002). These are the cases when the participants in such actions can prove that such actions contribute to the improvement of production, purchase or sale of goods, technical, technological and economic development; development of small and medium-sized enterprises; optimisation of export-import of goods; elaboration and application of unified technical specifications or standards; or rationalisation of production. Without the permission of the AMCU entrepreneurs have no right to perform these concerted actions.

If the AMCU does not grant permission because of the threat of negative impact on competition, participants have the opportunity to prove that the positive effect of concerted action overcomes negative consequences of competition restriction and on this ground to obtain permission of the Cabinet of Ministers of Ukraine (CMU Regulation No. 219 as of 28 February 2002, last amended 17 July 2003).

6 Application of the law

Does the law apply to individuals or corporations or both?

The legislation on protection of economic competition regulates relations of governmental authorities, municipal authorities, bodies of administrative and economic management and control and business undertakings, undertakings with other undertakings, with consumers, other legal and natural persons in relation to an economic competition. Both individuals and companies may participate in anticompetitive concerted actions.

Under article 52 of the Competition Law, the AMCU may impose fine on undertakings (ie, companies, individuals and groups of undertakings).

Hence, the legislation on competition shall apply to all undertakings in the meaning of article 1 of the Competition Law, including individuals. In addition, official of undertaking may be subject to administrative responsibility under the Code of Administrative Offences of Ukraine.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

In conditions of internationalisation of economic links and restricting business practice, legislation on protection of economic competition in major countries of the world provides for extraterritorial approach to elimination of anticompetitive actions: sanctions shall apply to offenders of competition irrespective of their legal allocation.

In accordance with article 2 of the Competition Law it shall apply to relations that influence or may influence economic competition in the territory of Ukraine (ie, shall apply to relations where participating undertakings' relations or actions influence or may influence economic competition in the territory of Ukraine, and also in the case of performance by undertakings of actions outside Ukraine, if such actions result or may result in negative influence on competition in the territory of Ukraine).

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no practice on export cartels in Ukraine.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The procedure for investigating infringements in the form of anticompetitive concerted actions is determined by the relevant provisions of the Competition Law and the Rules of Consideration of Infringement Cases, approved by Order of the AMCU as of 19 April 1994 No. 5. It envisages the following stages of the investigation:

- determination of signs of the violation;
- starting the proceedings;
- collection and analysis of evidence in the case;
- drafting presentation on preliminary findings;
- preparation of objections and comments to submission, familiarisation by the parties with the case materials, carrying out a preliminary hearing in the case;
- adoption of the preliminary decision in the case;
- adoption by the AMCU of its decision; and
- execution of the decision.

Grounds for commencement of an investigation

The AMCU starts an investigation on violation of legislation on protection of economic competition following the applications of: undertakings, citizens, associations, institutions and organisations on violation of the legislation on the protection of economic competition; following presentations of bodies of power, bodies of local self-government, bodies of administrative management and control concerning violations of the legislation on the protection of economic competition; under the own initiative of the AMCU.

In considering the application on violation of antimonopoly legislation a check of the facts stipulated in the application to identify signs of abuse must be performed.

The period of consideration of applications on violation of the legislation on protection of economic competition or legislation on protection from unfair competition is 30 calendar days.

If additional information is needed, the period of consideration of application may be extended by 60 days.

Conclusions made based on the analysis of applications and motions may be either negative (no signs of violation of legislation revealed) or positive. If the conclusions are negative, then the case will be dismissed, and the applicant shall be notified thereof in writing.

Consideration of the case on violation of the legislation on protection of economic competition

In the presence of signs of infringement, the competent authority of the AMCU orders the investigation of the case to begin.

The order to start proceedings shall be notified to the defendant within three working days from the day of its adoption.

In cases when the defendant is determined after the start of the case, within three working days he or she shall be notified on the order on the initiation of the case consideration and the order on involvement in the case as a defendant.

The plaintiff may ask for confidentiality of its information in the case if a reasoned motion from the plaintiff is submitted to the address of the authority of the AMCU at the start of the case including:

- compilation and analysis of documents, expert opinions, explanations of persons, other information that is evidence in the case;
- obtaining an explanation of persons involved in the case or any person upon their request or upon their own initiative; and
- drawing up a presentation with preliminary conclusions following the results of the collection and analysis of evidence in the case.

Adoption of the preliminary decision

In order to prevent negative and irreversible consequences for undertakings the AMCU may adopt a preliminary decision on banning the defendant, whose actions constitute signs of abuse, from performing

certain actions; or oblige them to perform certain actions when an urgent commitment to these actions is necessary under the legitimate rights and interests of others.

Adoption by the AMCU of its decision

Upon consideration of cases of violation of legislation on protection of economic competition and unfair competition the AMCU adopts its decision.

Execution of the decision

The decision provided by the AMCU is subject to execution by way of sending or delivery with a receipt or notifying otherwise.

Decisions or orders of the AMCU shall be considered as handed to the defendant in 10 days after the disclosure of the information on the adopted decision.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

In accordance with article 7 of the Law of Ukraine On the Antimonopoly Committee of Ukraine, the AMCU has the following authority in the field of control over observance of the legislation on economic competition protection:

- to consider applications and cases of violation of the legislation on economic competition protection, and to carry out investigations on these applications and cases;
- to make orders and decisions envisaged by the legislation on economic competition protection in respect of applications and cases, check and revise case decisions and make its conclusions as to classification of actions under the legislation on economic competition protection;
- to check undertakings in accordance with the legislation as to their compliance with the requirements of the legislation on economic competition protection
- to request from undertakings, associations, their officials and employees and other individuals and legal entities an information, including restricted data, during consideration of applications and cases of violation of the legislation on economic competition protection;
- to appoint an examination and expert from among persons who have knowledge necessary for giving an expert opinion;
- to examine the office premises and transport of undertakings – legal entities, withdraw or arrest articles, documents or other information media, which may be used as evidence or sources of evidence in the case;
- in the case of keeping employees of the Antimonopoly Committee of Ukraine from exercise of their powers, to engage police authorities for application of measures provided by legislation, in order to overcome any obstacles;
- to engage police authorities, customs and other law-enforcement authorities to ensure consideration of a case of violation of the legislation on economic competition protection;
- to carry out market research, set limits on the commodity market, as well as the position of undertakings in this market, and make relevant decisions or orders;
- to apply to a court with claims, applications and complaints on application of the legislation on economic competition protection; and
- to apply to, and receive from, competent authorities of other states the information necessary for exercising their powers.

The above-mentioned powers of the AMCU do not require court authorisation for their execution.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The AMCU's bilateral cooperation in the area of competition policy is based on principles of mutual confidence, similarity of interests and traditions, and enhanced legal norms. Inter-agency cooperation

is geared to the practical implementation of bilateral agreements in cross-border investigations.

The AMCU has concluded a range of inter-agency cooperation agreements to deepen professional cooperation with foreign competition authorities in conducting investigations on violation of Ukrainian competition law. These agreements, for example, are as follows:

- the Memorandum on Cooperation in the sphere of competition policy between the AMCU and Competition Authority of Turkey as of 09 October 2013;
- the Memorandum on Cooperation between the AMCU and the Austrian Competition Authority as of 22 October 2009;
- the Cooperation Agreement between the AMCU and the Ministry of Industry and Investment of the Republic of Belarus of 18 February 1997;
- the Memorandum on Cooperation between the AMCU and the Commission on Protection of Competition of Bulgaria as of 12 December 2007;
- the Cooperation Agreement between the AMCU and the Competition Council of Latvia as of 29 April 2005;
- the Cooperation Agreement between the AMCU and the Competition Council of the Republic of Lithuania as of 18 February 1997;
- the Cooperation Agreement between the AMCU and the President of the Office of Competition and Consumer Protection of Poland as of 5 June 1997 (amended on 17 December 2007);
- the Memorandum on Cooperation between the AMCU and the Competition Council of Romania as of 18 November 2010;
- the Memorandum on Cooperation between the AMCU and the Antimonopoly Office of the Slovak Republic as of 30 March 2007;
- the Cooperation Agreement between the AMCU and the Office of Economic Competition of the Hungarian Republic as of 27 January 2006; and
- the Cooperation Agreement between the AMCU and the Ministry of Economic Competition of the Czech Republic of 19 December 1994.

Cooperation between the AMCU and foreign competition authorities contributes to the exchange of experience, protection of competition within the parties' territory and termination of distortion of competition in the cases that go beyond the jurisdiction of domestic competition law.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Currently, the AMCU's practice has not reported any examples of such interplay with foreign jurisdictions concerning termination of anticompetitive concerted actions.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Upon receipt of parties' commentaries and objections, the AMCU has to prepare a draft decision on the basis of its preliminary findings. Normally, a decision on cartels is made by the collegiate authorities that form part of the AMCU structure. The parties may submit commentaries on a preliminary decision. The authority adopts a final decision after considering commentaries, proper discussion and deliberation.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof lies with the AMCU, which shall prove critical facts of the case, unless otherwise prescribed by law. Any factual data may be regarded relevant evidence when they find an infringement or lack thereof. These data may be obtained from different sources: parties' or third parties' statements, statements of public officials and individuals, documentary and material evidence or expert opinions. National

courts acknowledge that competition authorities are not limited in choosing the source for obtaining the information necessary for the fulfilment of their tasks envisaged by the legislation on the protection of economic competition.

The AMCU collects evidence regardless of where it is located. Parties involved in a case may also submit evidence and prove its authenticity.

Evidence of anticompetitive concerted actions may be divided into two groups:

- direct evidence that directly expose a link between cartel participants and prove anticompetitive nature of the concerted actions; this is a documentary confirmation of the anticompetitive concerted actions; and
- secondary evidence that implies cartel practice but does not directly expose the conditions under which the concerted actions were carried out (eg, records of phone calls between competitors' representatives, correspondence, joint participation in events, other proofs of contact making targeted at conduct coordination, compelled withdrawal from a market by competitors).

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Concerted actions may be committed by both individuals and companies. For certain actions to be found illegal, the anticompetitive effect must be determined. The Competition Law provides a comprehensive list of factors on which the AMCU should focus, for example:

- setting prices or other conditions with respect to the purchase or sale of products;
- limitation of production, product markets, technical and technological development, investments or establishment of control over them;
- distribution of markets or sources of supply based on territorial principle, in accordance with the assortment of products, the volume of their sale or purchase, circle of sellers, buyers or consumers or otherwise;
- distortion of the results of bids, auctions, contests or tenders;
- removal from the market or restriction of access to the market (exit from the market) for other undertakings, buyers or sellers;
- applying different conditions to equivalent agreements with other undertakings, which results in the creation of a disadvantage for these undertakings in terms of competition;
- concluding agreements provided that other undertakings assume supplementary obligations, which according to their content or in terms of trade customs and other fair customs in entrepreneurial activities do not relate to the subject of these agreements; and
- significant restriction of the competitive ability of other undertakings on the market without objective reasons therefor.

If there are facts of synchronous establishment of uniform prices by business entities, these facts may be deemed evidence of violation of consumers' rights to purchase products on the free market, whose participants compete with each other, and also confirm the intention and direction of such actions to restrict competition. Thus, if there is no agreement, but business entities collectively restrict competition, their behaviour can be recognised as concerted action. The ban on concerted actions may be in addition to the ban on restrictive competition agreements in the sense that the behaviour of economic entities may be deemed to be anticompetitive even in the absence of an agreement.

In order to recognise collective actions as coordinated and violating antimonopoly legislation, it is necessary to ascertain that business entities informed each other about their actions, coordinated them and that these actions harmed competition by preventing, restricting or eliminating it. It is necessary to prove the reason for harming competition, the harm to competition and the relationship between cause and effect. It is worth noting that the criteria for attributing collective actions to concerted actions and the delineation of agreements and concerted actions are quite vague in the Competition Law.

16 Appeal process

What is the appeal process?

AMCU decisions may be reviewed either by the committee or its administrative board, on its own initiative or upon application of the parties involved in a dispute. In the latter case, the AMCU initiates a review based on the appropriate request. The period for consideration of the review application or request shall not exceed two months.

The decision shall be reviewed by the authority that has made the corresponding decision. It conducts the review on its own initiative or upon a party's complaint. The decision may be reviewed if any circumstances existed that led to the illegal or groundless decision. The law defines such circumstances as follows: essential facts of the case the AMCU was not or could not be aware of; or when the decision was made on the basis of unreliable information; or when the AMCU authorised the concerted actions on the basis of circumstances that have ceased to exist.

Pending the review, the AMCU may suspend enforcement of the decision. It shall respectively inform the parties involved in the case in writing.

Upon the result of the review, the AMCU authority may uphold the decision, modify the decision, reverse the decision or make a new decision.

The decisions made by the AMCU authority may be modified, reversed or rendered invalid if the AMCU fails to fully assess the facts that are relevant to the case; prove the facts relevant to the case and that are deemed established; the findings of the decision do not correspond to the facts of the case; or duly comply with or apply substantial or procedural legal provisions.

The plaintiff, defendant or third party may appeal a decision of the AMCU authority in full or in part to an economic court within two months from the date of receipt of the decision. Moreover, parties to the case may challenge the AMCU authorities' actions in the administrative court.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Currently there is no criminal liability under Ukrainian legislation for anticompetitive concerted actions (cartels), as it was repealed in 2011 for the purposes of humanisation of criminal legislation. Nevertheless, the issue of defining criminal responsibility for anticompetitive concerted actions has been much debated and in the near future we are likely to see the incorporation of relevant provisions into Ukrainian legislation.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Competition Law provides for sanctions to be imposed on the participants of anticompetitive concerted actions as follows: a fine for anticompetitive concerted actions of up to 10 per cent of income (revenue) of an undertaking for the previous financial year; double compensation for damage caused by committing the infringement; or obligations upon termination of the consequences of infringing legislation on the protection of economic competition.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Cartels in Ukraine are not uncommon. The government should always analyse markets and identify the preconditions that allow and even encourage business representatives to negotiate and violate legislation on the protection of economic competition.

Identifying signs of a cartel is, in principle, not difficult, since most consumer markets are currently transparent for monitoring. Its main symptom is rising prices. But it is difficult to prove the substance in court, because there is usually no direct evidence for this.

In 2016 the AMCU updated the Recommendation Clarifications regulating the order of fines determined for each infringement of the legislation on protection of economic competition. The above-mentioned document submits anticompetitive concerted actions to the severest punishments. In the process of fine determination the AMCU is guided by the above-mentioned Clarifications.

Horizontal anticompetitive concerted actions of undertakings (cartels) are subject to the severest punishments. For such actions the AMCU's Clarifications provide for a basic fine of 45 per cent of income (revenue) from sales of goods (works, services) or the buyer's expenses on the purchase of a product, either directly or indirectly related to the violation.

The total amount of a fine is to be determined in two steps. First, the AMCU determines a basic amount of the fine, and second, the basic amount is adjusted according to any aggravating and mitigating factors.

The basic amount of the fine shall be reduced up to 50 per cent in aggregate if evidence of mitigating factors is as follows:

- a defendant ceases the alleged infringements (acts or omissions), before an AMCU structural division has made a corresponding final or preliminary decision;
- a defendant compensates for damage caused by the infringement, or remedies the infringement in another way, before the AMCU structural division makes a corresponding final or preliminary decision;
- a defendant eliminated conditions contributing to the infringements, before the AMCU structural division has made the corresponding final or preliminary decision;
- the defendant's cooperation with the AMCU structural division contributed to the finding of facts, notably where some facts and data not requested by the authorities were revealed or other infringements of competition legislation were found, including those committed by another person; or
- the defendant proved that infringements were committed under undue influence exercised by an executive authority, a local authority, a body of administrative management and control or other enterprise, on which the defendant is economically dependent.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is envisaged in article 17 of the Public Procurement Act of Ukraine. Its application is mandatory by the respective customer of procurement as a sanction for anticompetitive concerted actions (cartel infringements) leading to distortion of public procurement procedure results and committed in the last four years before the organisation of respective procurement. The list of undertakings that are subject to debarment is available on the AMCU's website. A tender committee automatically makes a decision on debarment on the basis of this list.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

At the date there is no criminal responsibility provided in Ukrainian legislation for anticompetitive concerted actions. Administrative sanctions for violation of competition legislation are imposed by the Antimonopoly Committee of Ukraine. In addition, administrative responsibility may be imposed on authorised persons or employees of an undertaking in the event of a violation by the said persons of the Code of Ukraine on administrative offences.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

According to paragraph 1 of article 55 of the Competition Law, persons who have suffered harm as a result of violations of the legislation on protection of economic competition, may apply to the economic court for compensation for damage. The procedure for application with respective claim to the court is common for all participants in the process. Damage caused by anticompetitive concerted actions shall be compensated by the person who committed the violation at twice the amount of the damage.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions under their usual meaning are not possible in Ukraine. Economic Procedural Code of Ukraine provides an opportunity to file a complaint by several plaintiffs; however, each plaintiff acts in a lawsuit as an independent party.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Leniency programmes are allowed in Ukraine. Full release from liability is granted only to the participant in collusion that first appealed to the AMCU with its application. The proof of first application is the marker letter of the AMCU.

Member cartels claiming immunity must first voluntarily notify the antimonopoly authority about their participation in the anticompetitive concerted actions. At the same time a participant has to provide information essential for rendering a decision on the case. Throughout the investigation this party should cooperate as much as possible with the antimonopoly agency.

It is also worth noting that the party is not relieved from liability and does not receive immunity if it acted as the initiator of anticompetitive concerted actions, provided for control of such actions or has not provided all the evidence and information about the commitment of anticompetitive concerted actions that it was party to and could freely obtain.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The official immunity programme does not provide leniency to individuals who appealed to the competition authorities following the application of immunity. However, it should be noted that in accordance with paragraphs 17 and 18 of the Recommendation Clarifications of the Antimonopoly Committee, the fine for violation of legislation on economic competition may be reduced to 50 per cent where evidence of the existence of mitigating circumstances is presented. Among such circumstances the following should be noted:

- termination of actions that contain elements of a violation before the relevant decision of the AMCU;
- remedying the conditions that contributed to commitment of the offence to the relevant decision; and
- cooperation throughout the proceedings with the committee authorities that contributed to clarifying the circumstances of the case.

It should also be noted that, depending on the circumstances of the case, other mitigating circumstances may be taken into account indicating that the defendant has committed actions aimed at mitigating the negative effects of a violation of competition in the interests of consumers on the commodity markets of Ukraine.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

At the moment, the immunity programme can only be granted to the first party of anticompetitive concerted actions appealed to the office of the AMCU. Other participants of anticompetitive concerted actions had better to cooperate with the AMCU in the process of considering of the case, as such cooperation may be regarded as a mitigating circumstance when rendering the decision. The above-mentioned conditions of cooperation are laid down in paragraphs 17 and 18 of Recommendation Clarifications of the Antimonopoly Committee No. 39-pp.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

The basic requirement of legislation regarding the application of immunity is the necessity of submission of application on release from liability before the date of presentation of the preliminary findings of the case.

Yes, there is a practice of marker letters in Ukraine. The participant may apply for a marker letter that confirms the primacy of its application to the committee on the release from liability.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The applicant is entitled to immunity (full release of liability), if at the same time it satisfies the two following conditions:

- voluntarily reporting on its participation in the anticompetitive concerted actions before other participants of anticompetitive concerted actions; and
- providing information essential to the decision in the case. This is information whose amount and content proves the violation of competition legislation in the form of a commitment to anticompetitive concerted actions, in particular, information on the membership of the participants in anticompetitive concerted actions; and the existence and content of agreements, notes, memos, correspondence, minutes of general meetings proving coordinated competitive behaviour, with presenting relevant supporting documents, evidence on paper or other media.

It is also worth noting that a party is not relieved from liability and does not receive immunity if it acted as the initiator of anticompetitive concerted actions or provided for control of such actions.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Limited access is a special information regime that is to be established in the interest of the competition investigation for protection of a party applying for such regime upon a substantiated request. In this case the applicant has to provide the AMCU with a corresponding non-confidential version of its information.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Currently there is no dispute settlement mechanism enshrined in the law allowing the AMCU and parties to the investigation to enter into deals on admission of guilt or otherwise.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Currently, Ukrainian legislation does not provide for employee responsibility for anticompetitive concerted actions. Under the amendments made to the Criminal Code of Ukraine in 2014, companies may be held liable, as may companies' officers. However, economic crimes resulting in substantial damages or threat of public danger have not yet been listed as giving rise to the criminal liability of employees. In its turn, the AMCU imposes fines directly on undertakings.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

A cartel participant applying for immunity must be first to report its participation in the cartel to the AMCU. In addition, the immunity applicant has to provide the AMCU with data of critical relevance for the case's outcome. The applicant for immunity must cooperate with the AMCU as much as possible extent throughout the investigation. Moreover, a cartel participant cannot be exempt from responsibility and obtain immunity if it initiated concerted anticompetitive actions, ensured control over such actions or failed to provide the AMCU with all the data and evidence of concerted anticompetitive actions that it was aware of and was able to freely obtain.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

Currently, there are some proposals to introduce partial immunity for cartel participants. However, this legislative initiative is still under discussion and has not been formalised in any legal act so far.

Defending a case**34 Disclosure**

What information or evidence is disclosed to a defendant by the enforcement authorities?

A defendant may get access to case materials after the evidence has been collected and analysed and the AMCU has issued a statement on its preliminary findings. The AMCU discloses to the defendant all information that is available, except for any data that is confidential or with limited access. Under a special disclosure procedure, this is possible either upon parties' agreement, after the non-confidential version is prepared or by the court's decision.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

Ukrainian antitrust law does not provide for employee liability. The AMCU imposes fines directly on undertakings.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Legal counsel may not represent multiple corporate defendants as conflict of interest between the clients arises.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

It is possible but, as mentioned in question 31, Ukrainian competition law does not provide for employee liability. The AMCU imposes fines directly on undertakings.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

The fine shall be paid from the undertaking's income that is subject to taxation. The fine as such is tax-deductible.

SERGII KOZIAKOV & PARTNERS
ATTORNEYS & COUNSELLORS AT LAW

Nataliia Isakhanova
Igor Kabanov
Andrii Pylypenko

n.isakhanova@kievbarrister.com
i.kabanov@kievbarrister.com
a.pilipenko@kievbarrister.com

Office 93
5/24 Irynynska Street
Kiev 01001
Ukraine

Tel: +380 44 590 4828
Fax: +380 44 590 4830
www.kievbarrister.com

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The AMCU gives consideration to circumstances under which decisions in analogous cases were made in other jurisdictions. The AMCU acts in full conformity with Ukrainian legislation.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The total amount of a fine is determined in two steps. First, the AMCU determines a basic amount of the fine, and second, the basic amount is adjusted according to any aggravating and mitigating factors.

The basic amount of the fine shall be reduced up to 50 per cent in aggregate if evidence of mitigating factors is as follows:

- a defendant ceases the alleged infringements (acts or omissions), before an AMCU structural division has made a corresponding final or preliminary decision;
- a defendant compensates for damages caused by the infringement, or remedies the infringement in another way, before the AMCU structural division makes a corresponding final or preliminary decision;
- a defendant eliminated conditions contributing to the infringements, before the AMCU structural division has made the corresponding final or preliminary decision;
- the defendant's cooperation with the AMCU structural division contributed to the finding of facts, notably where some facts and data not requested by the authorities were revealed or other infringements of competition legislation were found, including those committed by another person; or
- the defendant proved that infringements were committed under undue influence exercised by an executive authority, a local authority, a body of administrative management and control or other enterprise, on which the defendant is economically dependent.

United Kingdom

Lisa Wright and Sophia Haq

Slaughter and May

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

There are two principal pieces of UK legislation governing cartel activity in the UK: the Competition Act 1998 (the Competition Act) and the Enterprise Act 2002 (the Enterprise Act). Both the Competition Act and the Enterprise Act were amended in 2014 by the Enterprise and Regulatory Reform Act 2013 (the Reform Act). In addition, EC Council Regulation No. 1/2003 allows the UK competition authorities and courts to apply and enforce article 101 (and 102) of the Treaty on the Functioning of the European Union (TFEU).

See also question 4 for an explanation of the substantive law.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

In the UK, both the Competition Act and article 101 (and 102) TFEU are currently enforced by the Competition and Markets Authority (CMA) and certain sectoral regulators, such as those responsible for communications matters, electricity and gas, water and sewerage, civil and railway services. These sectoral regulators have concurrent competition powers, subject to the CMA's role as a central governing body. The Financial Conduct Authority (in relation to financial sector activities) and the Payment Services Regulator (in relation to participation in payment systems) are the most recent regulators to be given a full set of concurrent powers (from 1 April 2015). There is no separate prosecution authority for civil cartel infringements.

The CMA's powers of investigation and prosecution in respect of the criminal cartel offence under the Enterprise Act are shared with the Serious Fraud Office (SFO). The SFO is the intended prosecutor for this criminal offence in England, Wales and Northern Ireland in cases that involve serious or complex fraud. In Scotland, the Lord Advocate is responsible for all prosecutions and exercises the same powers as the SFO through the National Casework Division (NCD) of the Crown Office. The CMA and NCD cooperate to investigate and prosecute criminal cartel cases in Scotland.

The Competition Appeal Tribunal (CAT) hears appeals against cartel decisions taken by the CMA or the sectoral regulators under the Competition Act. The criminal cartel offence may be tried either in a magistrates' court or before a jury in the crown court. With regard to the criminal cartel offence, there is a right of appeal to the higher courts under the normal rules governing criminal cases. For further details of the appeals regime, see question 16.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (the Damages Regulations), which

implement the EU Damages Directive in the UK, came into force on 9 March 2017. The Damages Regulations amend the Competition Act to introduce further provisions in relation to private actions for damages including clarification on the burden of proof in claims relating to overcharges or underpayments, a rebuttable presumption that cartels cause harm and limits on the disclosure of cartel leniency statements, settlement submissions, competition authority investigation materials and materials in a competition authority's file. It also provides that final decisions of the competition authorities or review courts of EU member states are prima facie evidence of an infringement of competition law and prohibits the award of exemplary damages in competition proceedings.

The CMA has been active in revising its procedural guidance to clarify and streamline its processes:

- in April 2018 the CMA issued revised penalties guidance (see question 19). The revisions have clarified the CMA's approach to calculating penalties but do not represent any major changes to the CMA's practices;
- in November 2017 the CMA published guidance on leniency applications, with the effect that the CMA is now the single first port of call for all such applications, including those in regulated sectors (see question 24);
- at the time of writing the CMA is consulting on proposed revisions to its guidance on investigation procedures (see question 9). The proposed changes do not represent any significant changes to the CMA's processes; and
- the CMA has also indicated that it will be launching a consultation on proposed revisions to its guidance on director disqualification orders (see question 18).

The UK's withdrawal from the European Union may result in changes to cartel regulation within the UK. At this stage it is difficult to predict with certainty how and when the legal framework may change.

See also 'Updates and trends'.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The provisions of article 101 TFEU are outlined in the EU chapter. The Competition Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that:

- may affect trade within the United Kingdom; and
- have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

This prohibition, known as the Chapter I prohibition, is modelled on article 101. The Competition Act contains a non-exhaustive list of conduct that will be caught by the Chapter I prohibition, mirroring the equivalent provisions of article 101. This includes agreements, decisions or practices that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, technical development or investment; or
- share markets or sources of supply.

As a matter of practice, any agreement that fixes prices, limits output, shares markets, customers or sources of supply or involves other cartel behaviour such as bid rigging will almost inevitably be regarded as an agreement restricting competition within the meaning of Chapter I. The CMA's view is that these types of restriction are 'hard-core' and may be presumed to have negative market effects.

If, however, the criteria set out in section 9 of the Competition Act are satisfied, an agreement that is otherwise caught by the Chapter I prohibition will be exempt. This provision mirrors article 101(3) TFEU and requires that the efficiencies flowing from the agreement outweigh the anticompetitive effects. It is, however, almost inconceivable that a hard-core cartel agreement could qualify for such an exemption.

The Competition Act provides that, as far as possible, it is to be interpreted consistently with the corresponding EU rules.

Under the Enterprise Act, it is a criminal offence if an individual agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements relating to at least two undertakings involving the following prohibited cartel activities: price fixing, market sharing, limitation of production or supply, and bid rigging. Generally, the offence only applies to horizontal agreements (although it may also apply, for example, where a supplier procures or facilitates a horizontal arrangement between retailers). An offence may be committed regardless of whether the agreement is actually implemented.

The Reform Act has removed the requirement in the cartel offence for individuals to have acted 'dishonestly' in order for a conviction to be secured. The only mental elements that the prosecution has to prove are the intention to enter into an agreement and the intention as to the agreement's effect. To counterbalance the broader scope of the reformed cartel offence, the Reform Act has introduced new exclusions and defences. The exclusions provide that no offence will be committed where:

- in a case where the arrangements would affect the supply of a product or service in the UK, customers are given relevant information regarding such arrangements prior to purchasing the product or services;
- in the case of bid-rigging arrangements, the person requesting bids is given relevant information regarding the arrangements before the bids are made; or
- in any case, if relevant information about these arrangements is published in a specified manner.

Relevant information includes the names of the relevant undertakings, the nature of the agreements between them, and the products or services (or both) to which the agreements relate. The Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014 specifies that relevant information is published if it is advertised once in any of the London Gazette, the Edinburgh Gazette or the Belfast Gazette.

Similarly, the defences provide that an individual shall not be convicted:

- in a case where the arrangements would affect the supply of a product or service in the UK but the defendant did not intend that the nature of the arrangements would be concealed from customers before they acquired the product or service;
- if, at the time of making the agreements, the defendant did not intend the nature of the agreements to be concealed from the CMA; or
- if, before making the agreements, the defendant took reasonable steps to ensure that the nature of the agreements was disclosed to professional legal advisers to obtain advice about the making or implementation of the agreements.

Note that arrangements or agreements made before the new cartel offence came into force on 1 April 2014 remain subject to the previous version of the offence, which requires an element of dishonesty.

The CMA has published guidance relating to the exercise of its prosecutorial discretion in relation to the criminal cartel offence (see *Cartel offence prosecution guidance* (CMA9)). The CMA intends to apply the Full Code Test, as set out in the Code for Crown Prosecutors, in deciding whether or not to prosecute the offence. This is composed of the evidential stage and the public interest stage. If the evidential stage is passed (ie, the CMA considers that there is sufficient evidence

against a suspect to provide a realistic prospect of conviction), the CMA will go on to consider whether a prosecution is in the public interest. In doing so, it will pay particular attention to:

- the severity of the offence;
- the level of culpability of the suspect;
- the impact on the community; and
- whether prosecution is a proportionate response.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The Competition Act excludes from the scope of the Chapter I prohibition certain agreements relating to the production of, or trade in, agricultural products. Certain types of public transport ticketing schemes are also exempt (pursuant to a block exemption expiring in February 2026). In addition, the Competition Act excludes agreements that are subject to competition scrutiny under other legislation (the Broadcasting Act 1990 and the Communications Act 2003). Provision is also made for other non-industry-specific exclusions. The Secretary of State may exclude further categories of agreement if satisfied that there are exceptional and compelling public policy reasons for exclusion. There is no blanket exemption for government-sanctioned activity or regulated conduct – such conduct must be assessed in accordance with any sector-specific legislation or, if there is none, the Competition Act.

6 Application of the law

Does the law apply to individuals or corporations or both?

Both article 101 and the Chapter I prohibition apply to agreements and practices between undertakings as defined in EU case law. An undertaking includes any natural or legal person engaged in commercial or economic activity, whatever its legal status and the way in which it is financed. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, trade associations and non-profit-making organisations.

In contrast, the criminal cartel offence only applies to individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Chapter I prohibition applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK.

Article 3(1) of EC Council Regulation No. 1/2003 provides that, where the CMA applies national competition law to agreements or practices that may affect trade between member states, it must also apply article 101. In practice, the CMA will usually apply both article 101 and the Chapter I prohibition in parallel (although an undertaking will not be penalised twice for the same anticompetitive conduct).

In accordance with the European Commission notice on cooperation within the Network of Competition Authorities (2004/C 101/03), the CMA can be considered well placed to act in a particular article 101 case if the following three criteria are all met:

- the agreement or practice has substantial, direct, actual or foreseeable effects on competition within the UK, is implemented within or originates from the UK;
- the CMA is able effectively to bring an end to the entire infringement; and
- the CMA can gather, possibly with the assistance of other national competition authorities (NCAs), the evidence required to prove the infringement.

The criminal offence under the Enterprise Act only applies to an agreement outside the UK if it has been implemented in whole or in part in the UK.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

As described in question 7, the Chapter I prohibition only applies to agreements implemented, or intended to be implemented, in the UK.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The CMA's current guidance on its investigation procedures in Competition Act 1998 cases came into effect on 1 April 2014 (see 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA8)). At the time of writing the CMA is consulting on proposed revisions to this guidance. The proposed amendments do not represent any significant changes to the CMA's processes; the changes are intended to facilitate procedural efficiencies and reflect current investigation and decisional practice.

The key stages in an investigation are set out below.

The sources of the CMA's investigations

The CMA obtains information about possible competition law breaches through a number of sources:

- its own research and market intelligence functions;
- other workstreams, such as the CMA's merger or markets functions, or use of the CMA's powers under the Regulation of Investigatory Powers Act 2000, or information received via the European Competition Network or the European Commission;
- individuals with 'inside' information about a cartel who apply for leniency; and
- complaints.

What the CMA does when it receives a complaint

The CMA decides which cases to investigate on the basis of the principles laid out in its publication *Prioritisation principles for the CMA* (CMA16). These take into account the likely impact of the investigation in the form of direct or indirect benefits to consumers, the strategic significance of the case, the risks involved in taking on the case, and the resources required to carry out the investigation.

The CMA Enforcement Directorate is responsible for investigating and enforcing suspected civil cartel infringements of the Competition Act and criminal cartel and consumer law infringements.

Once the CMA has decided to take forward a case within the Enforcement Directorate, it may gather more information from the complainant, the company or companies under investigation and any third parties on an informal basis. On the basis of the information it has gathered at that time, if the CMA considers that it has reasonable grounds for suspecting that competition law has been breached, it can open a formal investigation.

Opening a formal investigation

The decision to open a formal investigation depends on whether the legal test that allows the CMA to use its formal investigation powers has been satisfied (ie, there are reasonable grounds for suspecting that competition law has been breached) and whether the case continues to fall within the CMA's casework priorities.

When the CMA opens a formal investigation, the case is allocated a Team Leader (responsible for the day-to-day running of the case), a Project Director (directs the case and is accountable for delivery of high-quality timely output), and a senior responsible officer (SRO) (responsible for authorising the opening of the formal investigation and taking certain other decisions including, where the SRO considers that there is sufficient evidence, authorising the issue of a statement of objections).

Once the decision has been taken to open a formal investigation, the CMA will send the businesses under investigation a case initiation letter, setting out brief details of the conduct that the CMA is looking into, the relevant legislation, the case-specific timetable and key contacts. The CMA will also generally publish a notice of investigation on its website, containing basic details of the case, a brief summary of the suspected infringement and the industry sector involved. The CMA will also outline the administrative timetable for the case. It may include

the names of any businesses it is investigating. CMA guidance notes that it would not generally expect to publish the names of the parties under investigation other than in exceptional circumstances (eg, where the parties' involvement in the CMA's investigation is already in the public domain or subject to significant public speculation and the CMA therefore considers it appropriate to publish details of the parties).

The CMA will keep parties under investigation (and any complainants) updated about the progress of the investigation, either by telephone or in writing. Parties under investigation will also have an opportunity to meet with representatives of the case team at 'state of play' meetings, at which the CMA will update the party of the progress it has made and its provisional thinking.

The CMA's formal powers of investigation are set out in question 10.

Investigation outcomes

CMA investigations can be resolved in a number of ways. The CMA may:

- close an investigation on grounds of administrative priorities;
- issue a decision that there are no grounds for action if the CMA has not found sufficient evidence of an infringement of competition law;
- accept commitments from a business relating to its future conduct where the CMA is satisfied that these commitments fully address the competition concerns; or
- issue a statement of objections where its provisional view is that the conduct under investigation amounts to an infringement of competition law – after allowing the parties under investigation to make representations, if the CMA still considers that they have committed an infringement, the CMA may issue an infringement decision against them and impose fines or directions to bring the anticompetitive conduct to an end (enforceable by court order).

Infringement decisions are generally extensive and detailed (eg, the non-confidential version of the OFT decision in the *Tobacco Chapter I* infringement case runs to 715 pages). A non-confidential version of the decision will be published on the register kept at the CMA and on the CMA's website.

If the decision is taken to prosecute an alleged criminal cartel offence under the Enterprise Act, the case will be tried either in a magistrates' court or before a jury in the crown court.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Information requests

Where the CMA has reasonable grounds for suspecting that an agreement or concerted practice falls within article 101 or the Chapter I prohibition, it may, by written notice, require any person (not only the alleged cartel members but also third parties) to provide specified documents or information relevant to the investigation. This is the power that the CMA will rely on most frequently. The power to require the provision of information is subject to legal professional privilege and the privilege against self-incrimination (except in relation to existing documents). The CMA can fine any person who fails, without reasonable excuse, to comply with a formal information request. It is a criminal offence, punishable by fine and/or imprisonment, to provide false or misleading information, or to destroy, falsify or conceal documents.

The Reform Act has also given the CMA the power to require individuals connected to a business which is a party to an investigation to answer questions (in the form of a compulsory interview) during an article 101 or Chapter I investigation, similar to the power under the Enterprise Act for criminal investigations (see below). Any information obtained by virtue of the exercise of this power will not be able to be used against that person in a criminal prosecution, except in certain limited circumstances. Any person being formally questioned or interviewed by the CMA may request to have a legal adviser present to represent their interests. In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation; however, the CMA's starting point is that it will generally be inappropriate for a legal adviser acting only for the undertaking to be present at the interview.

Dawn raids

In addition, the CMA may at the outset of or during an article 101 or Chapter I investigation, conduct on-site investigations to:

- require the production of any relevant document or information (including relevant information that is held on a computer and accessible from the premises);
- take copies of, or extracts from, any document produced;
- require an explanation of any such document; and
- if a document is not produced, require a statement as to where it can be found.

The procedure for, and scope of, an on-site investigation or 'dawn raid' differs according to whether the investigation is made with or without a court-obtained warrant, and whether the premises concerned belong to a person being investigated or to a third party.

The type of on-site investigation described above may be carried out at any business premises without a warrant.

In addition, where certain conditions are met, the CMA has a power of entry in respect of both business and domestic premises with a warrant issued by the CAT or by a judge of the High Court (or of the Court of Session in Scotland). Where a warrant has been issued, reasonable force may be used to obtain entry. The warrant will specify the kind of documents in respect of which the authorised officer may search the premises and take copies and extracts. The officer has available to him or her those powers that apply in the case of entry without warrant and can, in addition, take away originals of documents and retain them for three months if copying on the premises is not practicable, or if taking them away appears necessary to prevent their disappearance. The investigating officer can also take any other steps necessary to preserve the existence of documents. The officer can also take away copies of computer hard drives, mobile phones, mobile email devices and other electronic devices. The CMA can exercise similar powers of investigation when assisting a European Commission investigation in the UK and when carrying out an inspection in the UK on behalf of the European Commission or another NCA.

Powers of investigation under the Enterprise Act

The CMA may only commence a formal investigation in respect of an alleged criminal cartel offence under the Enterprise Act where there are reasonable grounds for suspecting that such an offence has been committed. Although it is likely that a criminal cartel investigation will initially be led by the CMA in cooperation with the SFO, the SFO may, at a later stage in the investigation, decide to carry out additional inquiries using its powers of investigation under section 2 of the Criminal Justice Act 1987. These powers are broadly equivalent to the CMA's powers of investigation under the Enterprise Act. The power to require the provision of information is subject to legal professional privilege and the privilege against self-incrimination (except in relation to existing documents).

Power to require information and documents

For the purposes of a criminal cartel investigation, the CMA may by written notice require the person under investigation or any other person, at a specified time and place, to:

- answer questions or otherwise provide information related to the investigation (including in the form of a compulsory interview);
- produce documents related to the investigation (the CMA may take copies of such documents or extracts from them and may require an explanation of them); and
- if such documents are not produced, provide a statement as to where they are.

Where individuals are required to participate in a compulsory interview, they are entitled to seek legal advice but will face criminal sanctions if they fail to answer all questions put to them (or provide false or misleading answers). However, the information obtained under a compulsory interview cannot be used against that person in a criminal prosecution except in certain limited circumstances.

Alternatively, when investigating a potential criminal cartel offence, the CMA may conduct a voluntary interview under caution. In this case, the interviewee will be given the standard criminal caution before being questioned and is again entitled to legal advice:

interviewees may refuse to answer some or all of the questions but their answers (or failure to answer) may be given as evidence in court.

Power to enter premises under a warrant

For the purposes of a criminal investigation and on specified grounds, the CMA may apply to the CAT or to the High Court (or in Scotland, the procurator fiscal may apply to the sheriff) for a warrant. Where a warrant has been issued, a named officer of the CMA, accompanied by other named CMA officers and specified persons (such as IT experts) will be authorised to:

- enter and search premises, using such force as is reasonably necessary;
- take possession of relevant documents (including original documents) or take necessary steps to preserve or prevent interference with such documents;
- require any person to provide an explanation of a relevant document or to state, to the best of his or her knowledge and belief, where it may be found; and
- require any relevant information that is stored electronically and is accessible from the premises to be produced in a form that is legible and in which it can be taken away.

CMA officials also have the power, on giving written notice to the occupier of the premises, to remove material where it is not reasonably practicable to determine on the premises the extent to which it may be seized (eg, where there is a large bulk of material or where special technical equipment is needed to separate material that the CMA would be entitled to take, such as a computer hard drive). At the time of writing, the UK government has concluded its consultation on the Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014 (Draft Warrant Rules), which prescribe the procedure to be followed on an application by the CMA (or one of the sectoral regulators with concurrent powers) to the CAT for a warrant to enter premises. The Draft Warrant Rules draw on existing practice directions dealing with warrant applications under the Competition Act and the Enterprise Act, but are tailored to the particular procedures of the CAT and will be adapted for application outside England and Wales. The final rules are still to be published.

Surveillance and access to communications data

The CMA can authorise directed surveillance (such as the watching of business premises) and covert human intelligence sources (informants) in cartel investigations under both the Competition Act and the Enterprise Act (ie, in relation to both civil and criminal cartel investigations).

The Enterprise Act also gives the CMA additional powers of surveillance solely to investigate the criminal cartel offence. These powers enable the CMA to carry out intrusive (covert) surveillance in respect of residential premises and private vehicles and to interfere with property for the purpose of covert installation of surveillance devices. The CMA is also authorised to obtain access to communications data (such as records of telephone numbers called) in criminal investigations under the Enterprise Act.

Use of evidence obtained under the Competition Act and the Enterprise Act

Any information obtained from an individual by the CMA using its compulsory interview powers under the Enterprise Act will not be used as evidence in a Competition Act investigation against the undertaking that employs that individual. However, information provided during a voluntary interview under caution in the course of a criminal investigation may also be used in a Competition Act investigation.

Any statement obtained from an individual by the CMA using its compulsory powers of investigation under the Competition Act cannot be used in a criminal prosecution against that person except in certain limited circumstances.

Original documents seized by the CMA or SFO during a criminal investigation under the Enterprise Act may also be used by the CMA in proceedings against undertakings under the Competition Act. Equally, any documents obtained by the CMA using its powers of investigation under the Competition Act may be admissible in a subsequent criminal prosecution of the cartel offence under the Enterprise Act (subject to the rules regarding the standard of evidence used in criminal prosecutions). In addition, the CMA can use its powers under the

Enterprise Act to obtain original versions of documents copied during a Competition Act investigation.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The CMA cooperates extensively with the European Commission and with the NCAs in the other member states through the European Competition Network (see the European Union chapter).

The CMA has a memorandum of understanding with the authorities in Scotland in respect of cooperation in criminal cartel cases over which Scottish courts may have jurisdiction.

In addition, the Enterprise Act permits the CMA, in certain circumstances, to disclose confidential information to agencies in other jurisdictions to facilitate the performance of their respective enforcement functions. This takes into account existing mutual assistance arrangements relating to competition law enforcement such as those in force between the UK and each of the United States, Australia, Canada and New Zealand.

As noted in question 2, UK competition law is enforced by both the competition regulators (the CMA) and sectoral regulators. Under the Reform Act, sectoral regulators are required to consider whether their cartel powers are more appropriate than their sector-specific powers to promote competition. The Reform Act also requires the CMA and sectoral regulators to work more closely in competition cases. The CMA has published a guidance document, *Regulated industries: Guidance on concurrent application of competition law to regulated industries* (CMA10), which sets out the proposed arrangements for cooperation between the CMA and the sectoral regulators in connection with the enforcement of competition law.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

If a cartel has an effect on trade within the UK and on trade between EU member states, it may be caught by both article 101 and the Chapter I prohibition. In these circumstances, Council Regulation No. 1/2003 requires the CMA to apply article 101 in parallel with the Chapter I prohibition (see the European Union chapter).

In cases where the European Commission is investigating an infringement of article 101 involving a potential criminal cartel offence in the UK under the Enterprise Act, the CMA and the European Commission will cooperate to coordinate their investigations.

When the CMA is investigating a suspected infringement of article 101 in the UK on its own behalf or on behalf of the European Commission or another NCA, the UK rules on legal professional privilege will apply. However, when CMA officials assist the European Commission in its investigations, the European Commission's privilege rules (which do not extend to in-house lawyers or non-EU qualified lawyers) apply.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

See questions 9 and 16.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In its judgment in *Napp* (2002) [CAT 1], the CAT confirmed that, throughout the procedure, the burden is on the OFT (now the CMA) to prove its case according to the normal civil standard (balance of probabilities) but that, given the seriousness of the penalties for infringement of the Competition Act, strong and convincing evidence would be required. In criminal cartel cases, the onus will be on the prosecution to

prove its case according to the normal criminal standard (beyond reasonable doubt).

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes. This has been confirmed by the CAT in various cases including in *Napp*, where the CAT stated that it would be permissible to rely on inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts.

16 Appeal process

What is the appeal process?

Decisions of the CMA and the sectoral regulators made under the Competition Act may be appealed to the CAT, an independent judicial tribunal, on a point of law or fact or as to the amount of any fine. An appeal to the CAT in respect of a decision made under the Competition Act is a full appeal on the merits of the case. There is a further right of appeal from judgments of the CAT, either on a point of law or as to the amount of any fine, to the Court of Appeal (or the Inner House of the Court of Session in Scotland). Permission must be granted either by the CAT or the Court of Appeal. Further appeal lies to the Supreme Court (formerly the House of Lords) on a point of law of general public importance. Permission must be granted by the Court of Appeal or the Supreme Court. Appeals to and from the CAT may be made by any party to an agreement in respect of which the CMA has made a decision, and by third-party applicants who can show a sufficient interest in relation to any such decision (although third-party applicants cannot appeal the quantum of any fine imposed). Interested parties may also apply to intervene in appeal proceedings in the CAT. Appeals from the CAT to the Court of Appeal (and subsequently the Supreme Court) may additionally also be made by the CMA or the relevant sectoral regulator who is a party to the proceedings at the CAT (or the Court of Appeal).

Appeals to the CAT are initiated by filing a notice of appeal, containing details of the parties and the case, summarising the issues in dispute and stating the relief sought. The notice must be filed with the CAT registrar within two months of the appellant being notified of the decision. The CAT registrar will then send the notice to the respondent (eg, the CMA), which will have six weeks to file a defence. Once a notice of appeal has been served on the respondent, the CAT will normally convene a case-management conference to fix the timetable for the case and deal with other procedural issues. The CAT aims to deal with the more straightforward cases in nine months, although more complex cases may take longer.

In respect of criminal cartel offences, there is a right of appeal to the higher courts under the normal rules governing criminal cases. It is also possible to challenge procedural issues, either by way of an application to the CMA's Procedural Officer or by an application to the High Court for judicial review.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Any individual found guilty of committing the criminal cartel offence under the Enterprise Act may be imprisoned for up to six months and receive a fine of up to the statutory maximum (up to £5,000 for offences committed before 12 March 2015 and unlimited for offences committed on or after 12 March 2015) if tried and convicted in a magistrates' court, and may be imprisoned for up to five years and receive an unlimited fine if tried and convicted in the crown court. Criminal sanctions may also be imposed on individuals who fail to comply with or frustrate CMA or SFO criminal cartel investigations under the Enterprise Act. The offences and sanctions range in severity, with the most serious (falsification, destruction or concealment of relevant documents in the knowledge that an investigation is being, or is likely to be, carried out) attracting a prison sentence of up to five years and an unlimited maximum fine if tried and convicted in the crown court.

The longest sentence that a court has imposed so far on a defendant convicted of the cartel offence is two-and-a-half years, in the *Marine Hose* cartel case (*R v Whittle & Others* [2008] EWCA Crim 2560 (14

November 2008)). The case was highly unusual in that the defendants had entered into plea agreements with the US authorities. Under these plea agreements, the defendants' US sentences were reduced by the number of days of imprisonment to which they would be sentenced in the UK. As part of these agreements, the defendants had committed not to seek terms of imprisonment in the UK shorter than those provided for in the US plea agreements. The crown court initially imposed sentences of three years on two of the defendants and two-and-a-half years on the third defendant. The defendants appealed, seeking sentences that were no longer than their respective US terms of imprisonment. On appeal, the Court of Appeal suggested that the extensive cooperation of the defendants with the authorities was a significant mitigating factor that could warrant a reduction of the sentences beyond that which was sought by the defendants. However, the Court of Appeal was constrained by the absence of submissions to reduce the sentences below the levels of the US plea agreements. It therefore reduced each of the sentences to a level equivalent to that of the US plea agreements: two-and-a-half years, two years and 20 months respectively.

In June 2014, the CMA announced that an individual who had been charged under the cartel offence for dishonestly agreeing with others to divide customers, fix prices and rig bids between 2004 and 2012 in respect of the supply in the UK of galvanised steel tanks for water storage had pleaded guilty. In September 2015, this individual received a six month suspended sentence (suspended on the condition that the defendant completes 120 hours of unpaid work and does not commit any offence punishable by imprisonment for the next 12 months). The individual was not subject to a fine and was not disqualified from serving as a director owing to mitigating factors (eg, no previous convictions; not motivated by personal gain; cooperated with the authorities to a 'very substantial degree'). Two other individuals who had pleaded not guilty in relation to the same investigation were acquitted following a trial in June 2015.

Most recently, in March 2016, an individual pleaded guilty to dishonestly agreeing with others to divide supply, fix prices and divide customers between 2006 and 2013 in respect of the supply in the UK of precast concrete drainage products. In September 2017 the individual received a two-year suspended sentence and a six-month curfew order. The individual was also disqualified from acting as a company director for seven years. The CMA determined that there was insufficient evidence to charge any further individuals with the cartel offence in this case.

In all of the above cases, the applicable cartel offence was as it existed before April 2014. There have been no cases under the new cartel offence (introduced by the Reform Act in April 2014 (see question 4)).

Criminal sanctions (fines and, in certain cases, imprisonment for up to two years) also exist for failing to comply with or frustrating a CMA investigation under the Competition Act. Under the Reform Act, the criminal offences for failing to comply with certain CMA investigative powers have been replaced with civil penalties, but criminal liability still attaches to certain frustrating actions, including obstructing an officer in the exercise of powers to enter premises, destroying or falsifying documents, and providing false or misleading information.

There are no criminal sanctions under the Competition Act for cartel activity itself in the UK (although the CAT has confirmed (in *Napp*) that the scale of the civil fines that may be imposed for breaches of the Competition Act is such that cartel proceedings should be treated as criminal proceedings for the purposes of the procedural right to a fair trial under article 6(1) of the European Convention on Human Rights).

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

On making an infringement decision under the Competition Act in respect of a breach of article 101 or the Chapter I prohibition, the CMA may impose a fine of up to 10 per cent of the infringing undertaking's worldwide turnover in its last business year. In addition, the CMA or the relevant sectoral regulator may apply to the High Court (or Court of Session in Scotland) for the disqualification of a company director in certain circumstances (see below for further details). Directors may be disqualified for up to 15 years.

Fines are levied in the majority of cases in which the CMA finds that there has been a breach of the article 101 or Chapter I prohibition, although disqualification of directors is less common. Nevertheless, the

CMA decides each case on its facts: the nature and the level of the sanctions imposed on parties to cartel arrangements are determined by the nature of the anticompetitive arrangements between the parties, the impact of these arrangements on consumers, whether the parties have applied for leniency and, if so, the conditions under which they have applied.

Recent and notable penalties include:

- £58.5 million on British Airways for its role in an alleged transatlantic passenger air transport fuel surcharge price-fixing agreement with Virgin Atlantic in April 2012.
- £2.8 million on Mercedes-Benz and four of its dealers for market-sharing, price coordination and exchange of commercially sensitive information, with the object of restricting competition for sales of vans and trucks in March 2013.
- £44.99 million on GlaxoSmithKline (GSK) and two suppliers of generic medicines for entering into a series of agreements that delayed generic entry of the drug paroxetine in February 2016 (the CMA also found that GSK's conduct infringed the Chapter II prohibition). (This case has been appealed to the CAT. The CAT has referred a number of legal questions to the CJEU before handing down its final judgment.)
- £2.8 million collectively on three suppliers of furniture parts (drawer fronts and drawer wraps) for entering into an agreement to share the market and coordinate commercial behaviour (in particular pricing practices) through bid rigging and the exchange of confidential commercially sensitive information in March 2017.
- £3.4 million on CPL and Fuel Express for rigging competitive tenders for the supply of household fuels (including coal, fire logs and charcoal) to national supermarkets, and associated exchange of confidential pricing information in March 2018.

Under the Company Directors Disqualification Act (as amended by the Enterprise Act) the court must make a competition disqualification order (CDO) on the application of the CMA or a sectoral regulator if the following two conditions are satisfied:

- the company of which the individual is a director has committed a breach of competition law (including, for these purposes, a breach of the Chapter I prohibition and a breach of article 101); and
- the court considers that his or her conduct as a director makes him or her unfit to be concerned in the management of a company.

As regards this second condition, the court must have regard to the following considerations:

- whether the director's conduct contributed to the breach of competition law;
- whether, even if his or her conduct did not contribute to the breach, he or she had reasonable grounds to suspect that the conduct of the company constituted a breach of competition law and he or she took no steps to prevent it; and
- whether he or she did not know but ought to have known that the company's conduct constituted such a breach.

Moreover, the court may have regard to the individual's conduct as a director of a company in connection with any other breach of competition law.

CMA guidance on the circumstances in which it and sectoral regulators will exercise their powers to apply for a CDO (*Director disqualification orders in competition cases*, OFT 510), identifies five factors relevant to the decision of whether to apply for a CDO:

- whether the company has committed a breach of competition law proven by a competition authority decision or the courts. In exceptional circumstances, the CMA (or sectoral regulator) may also apply for a CDO against a director even where there is no prior infringement decision (but they will then still have to satisfy the court that there has been an infringement of competition law);
- the nature of the breach of competition law. The CMA (or sectoral regulator) is more likely to consider an application for a CDO to be appropriate in cases involving serious breaches, such as those in which a financial penalty has been imposed;
- whether the company has made a successful leniency application. The CMA (or sectoral regulator) will not apply for a CDO against any current director whose company has benefited from leniency in respect of the activities concerned, unless the director has been removed or otherwise ceases to act as a director of a company

owing to his or her role in the breach of competition law in question or for opposing the relevant application for leniency, or both; or the director fails to maintain continuous and complete cooperation throughout the leniency process. The CMA (or sectoral regulator) will not apply for a CDO against any beneficiary of a no-action letter in respect of the cartel offences specified in the letter;

- the extent of the director's responsibility for, or involvement in, the breach. The CMA (or sectoral regulator) will consider: whether the director's conduct contributed to the breach; whether the director had reasonable grounds to suspect there was a breach but took no steps to prevent it; and whether the director ought to have known of the breach. The CMA and sectoral regulators do not expect directors to have specific expertise in competition law. However, they do expect all company directors to appreciate the importance of complying with competition law and, more specifically, that price-fixing, market-sharing and bid-rigging agreements are likely to breach competition law; and
- the presence of any aggravating or mitigating factors. Aggravating factors increase the likelihood that the CMA (or sectoral regulator) will apply for a CDO, and include evidence that the director destroyed or advised others to destroy records relating to the breach of competition law. Conversely, the presence of mitigating factors, for example, evidence that there was genuine uncertainty as to whether the activity was illegal, may reduce the likelihood that an application for a CDO will be made.

At the time of writing, the CMA is reviewing the guidance in OFT510 and intends to publish draft guidance and launch a public consultation in due course.

The maximum period of disqualification under a CDO is 15 years. During the disqualification period it is a criminal offence for the individual to be a director of a company, act as a receiver of a company's property, in any way (whether directly or indirectly) be concerned with or take part in the promotion, formation or management of a company without the leave of the Court or act as an insolvency practitioner. In addition, details of a CDO will be entered in a public register.

Instead of applying for a CDO, the CMA or sectoral regulator may accept a competition disqualification undertaking (CDU). In this case the person giving the CDU undertakes for a specified period (not exceeding 15 years) not to perform any acts that would breach a CDO as listed above. Breach of a CDU has the same consequences as breach of a CDO but engaging with the CMA voluntarily through the CDU process may result in a shorter period of disqualification than under a CDO. As with a CDO, details of a CDU will be entered in a public register. For example, in April 2018, the CMA secured undertakings from two individuals involved in fee-fixing arrangements between a group of estate agents. The individuals were disqualified from acting as company directors for three-and-a-half years and three years, respectively.

Additionally, where an individual company director has been convicted of the criminal cartel offence under the Enterprise Act and that offence has been committed in connection with the management of a company, the convicting court has the power to make a disqualification order against that individual director. In September 2017 an individual involved in cartel activity in the supply of precast concrete drainage products received a two-year suspended sentence, a six-month curfew order, and was also disqualified from acting as a company director for seven years.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

According to the CMA's guidance on penalties, which was revised in April 2018, any financial penalty imposed in respect of an article 101 or a Chapter I infringement will be calculated according to the six-step approach set out below. The Competition Act requires both the CMA and the CAT to 'have regard' to this penalty guidance.

Step 1: calculation of the starting point

The starting point will be calculated with regard to the seriousness of the infringement and the 'relevant turnover' of the undertaking (ie, the turnover of the undertaking in the relevant market in the last business year).

Price-fixing or market-sharing agreements and other cartel activities are considered among the most serious infringements of article 101 and the Chapter I prohibition. The relevant turnover is that of the undertaking in the relevant product and geographic markets affected by the infringement in the last full financial year before the infringement ended. This may include turnover generated in another member state if the relevant geographic market is wider than the UK and the express consent of the relevant member state or the NCA is given. The starting point will not exceed 30 per cent of the relevant turnover.

The starting point will be assessed by reference to: (i) the nature of the infringement; (ii) the extent or likelihood of harm to competition in the circumstances of the case; and (iii) the need for deterrence. The starting point will generally be between 21 and 30 per cent for the most serious types of infringement. A starting point between 10 and 20 per cent is more likely to be appropriate for certain less serious object infringements, and for infringements by effect. These principles will not prevent the CMA from applying a starting point of below 10 per cent (this may occur where the CMA has made a downwards adjustment to reflect the particular circumstances of the case).

Step 2: adjustment for duration

The starting point may then be increased (or, exceptionally, and only in the case of infringements lasting less than one year, decreased) to take account of the duration of the infringement, provided that it is not multiplied by more than the number of years of the infringement. Part years may be treated as full years.

Step 3: adjustment for aggravating and mitigating factors

Aggravating factors include:

- persistent and repeated unreasonable behaviour that delays the CMA's enforcement action (including missing deadlines);
- the role of the undertaking as a leader in, or instigator of, the infringement;
- the involvement of directors or senior management;
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuing the infringement after the start of the investigation;
- repeated infringements by the same undertaking or other undertakings in the same group (recidivism);
- infringements which are committed intentionally rather than negligently;
- retaliatory measures taken or commercial reprisals sought by the undertaking against a leniency applicant; and
- failure to comply with competition law following receipt of a warning or advisory letter in respect of the same or similar conduct.

Mitigating factors include:

- the role of the undertaking, for example, where the undertaking is acting under severe duress or pressure;
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- adequate steps having been taken with a view to ensuring compliance with competition law (the mere existence of compliance programmes is not sufficient, but compliance activities are likely to be treated as a mitigating factor where an undertaking demonstrates that adequate steps, appropriate to the size of the business concerned, have been taken to achieve a clear and unambiguous commitment to competition law);
- termination of the infringement as soon as the CMA intervenes (unless the CMA directs otherwise); and
- cooperation which enables the enforcement process to be concluded more effectively or speedily than would otherwise be the case.

Step 4: adjustment for specific deterrence and proportionality

The penalty figure may be increased to ensure that the infringing undertaking will be deterred from breaching competition law again in the future, having regard to the undertaking's size and financial position, and any other relevant circumstances (eg, an increased penalty may be warranted where an undertaking has significant turnover outside the relevant market). The penalty figure may also be increased under this head to take account of any gain made by the undertaking from the infringement. The CMA will then assess whether, in its view, the overall penalty proposed is proportionate and appropriate in the round.

Step 5: adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy

The overall penalty figure may not exceed 10 per cent of the worldwide turnover of the undertaking in the previous business year. The penalty will therefore be adjusted if necessary to ensure that it does not exceed this maximum. If a penalty has already been imposed by the European Commission or by another member state in respect of the same agreement or conduct, the CMA must take that penalty into account.

Step 6: adjustment for leniency or settlement discounts and/or approval of a voluntary redress scheme

The CMA will reduce the penalty where an undertaking has entered into a leniency or settlement agreement with the CMA. In exceptional circumstances, the CMA may reduce the penalty where the undertaking is unable to pay the proposed amount due to financial hardship. On 14 August 2015 the CMA published the final version of its guidance on its new powers under the Consumer Rights Act 2015 (the Consumer Rights Act) to approve voluntary redress schemes (CMA40). The CMA may take any voluntary redress schemes established by the infringing party (see question 30) into account when assessing the level of the fine to be imposed and grant a fine reduction (likely to be up to 20 per cent of the penalty that would otherwise have been imposed). Where the CMA applies discounts at this step, these discounts will be applied consecutively.

Parties will have the opportunity to make written and oral representations in response to the draft penalty statement that will be issued by the CMA before it makes any infringement decision.

The sentencing limits in respect of the criminal cartel offence are set out in the Enterprise Act (see question 17). The UK courts have sentencing guidelines regarding criminal offences generally, which also apply to the cartel offence. The sentencing limits in respect of the criminal cartel offence under the Enterprise Act are binding.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Automatic debarment from government procurement procedures is not available as a sanction for cartel infringements. Under the Public Contracts Regulations 2015, which took effect from 26 February 2015 for public procurements that commenced on or after 26 February 2016, there is the possibility of discretionary debarment by the contracting authority where it has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition. For discretionary debarment, the period during which the economic operator may be excluded is three years from the date of the relevant event.

An exclusion from the tendering process may also be possible under the EU rules on public procurement with regard to grave professional misconduct (article 57(4)(c) Directive 2014/24/EU) (see the European Union chapter).

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Criminal and administrative sanctions can be pursued in respect of the same conduct, although as noted above the criminal offence applies only to individuals and the Chapter I prohibition applies only to undertakings (see question 6).

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Private actions for damages for breach of the Chapter I prohibition or article 101 may be brought in the High Court. In addition, under section 47A of the Competition Act, the CAT may hear claims for damages in cases where the authorities have already issued a decision that there has been a breach of the Chapter I prohibition or of article 101 ('follow-on' action) or in cases where no such decision has been reached but there is an alleged infringement ('stand-alone' action). The possibility of bringing a 'follow-on' action is intended to create a quicker and cheaper route for aggrieved persons – both consumers and businesses – to obtain compensation. Representative bodies may also bring damages actions before the CAT on behalf of groups of named and identifiable consumers (see question 23).

For both the High Court and the CAT, claims may be brought by any individual or business who has suffered loss as a result of an infringement of competition law. This includes both direct and indirect purchasers, as well as other parties who have suffered loss.

Where an action for damages is brought in a UK court in respect of a breach of the Chapter I or article 101 prohibition, the court is bound by a prior decision of the CMA, European Commission or CAT that the relevant provision has been infringed, provided that any period for appeal has expired. Similarly, under EC Council Regulation No. 1/2003, a UK court cannot take a decision that runs counter to a prior European Commission decision relating to the same agreement or practice.

In April 2014, the Supreme Court considered the issue of whether it was possible to bring a private action where some, but not all, of the parties to a cartel had appealed against a decision of the European Commission (*Deutsche Bahn AG v Morgan Crucible Co Plc* [2014] UKSC 24). The Supreme Court held that, as a successful appeal by an addressee of a European Commission decision would deprive an addressee who had not appealed of a potential contributing party, it might be appropriate to adjourn the determination of the contribution proceedings until all appeals by other addressees had been determined. However, it remained the case that, as against a non-appealing addressee, the Commission decision that there had been a cartel involving all addressees stood, even though some of them might appeal successfully. As a result, a non-appealing addressee might, at least theoretically, find itself carrying full civil liability (without any fellow cartel members from which it might seek contribution) in respect of a cartel. However, if there really was no cartel, it might be difficult for a claimant to prove that it had suffered any loss caused by the conduct.

The UK government has implemented a raft of measures, including the encouragement of alternative dispute resolution and changes to the role of the CAT. The Consumer Rights Act widens the CAT's scope and improves its operations, by:

- enabling the courts to transfer competition law cases from the High Court to the CAT and vice versa (irrespective of whether such cases are stand-alone, follow-on, or hybrid cases involving both stand-alone and follow-on aspects);
- harmonising the limitation periods for the CAT with those of the High Court;
- enabling the CAT to grant interim and final injunctions; and
- introducing a fast-track procedure for simpler private claims in the CAT.

The level of damages that may be recovered is assessed by reference to the victim's loss. Damages are therefore usually calculated by reference to what is necessary to restore the victim to the position in which he or she would otherwise have been had the infringement not occurred. In *Sainsbury's v MasterCard* [2016] CAT 11, the CAT noted that the pass-on 'defence' is in reality not a defence and simply reflects the need to assess damages in a way that ensures that a claimant is not overcompensated. Part 2 of Schedule 8A of the Competition Act (as recently introduced by the Damages Regulations) clarifies that the burden of proving that an overcharge has been passed on lies with the defendant.

The UK government has previously rejected the idea of introducing treble damages. Section 36 of Schedule 8A of the Competition Act (as recently introduced by the Damages Regulations) provides that

exemplary damages cannot be awarded by a court or a tribunal in competition proceedings. The Consumer Rights Act also explicitly provides that exemplary damages will not be available in collective actions.

As regards costs awards, in the High Court, the general rule is that the losing party must pay the winning party's costs. There is no general rule on costs in the CAT; the 'loser pays' principle is not necessarily the starting point (although it is often applied in practice) and the CAT may make any order it thinks fit in relation to costs. Section 47C of the Competition Act (inserted by the Consumer Rights Act) does, however, make special provision in relation to the costs of collective proceedings: any unclaimed part of aggregated damages in opt-out collective proceedings may be used by the class representative to pay legal costs or expenses.

Damages in relation to a cartel claim have so far only been awarded in the Sainsbury's case in which MasterCard was ordered to pay £68,582,245 in respect of overcharge in relation to credit cards and £760,406 in respect of overcharge in relation to debit cards, plus interest. However, on appeal, the Court of Appeal remitted the case to the CAT on various points, including on quantum of damages.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Section 47B of the Competition Act provides that a specified consumer body can bring a representative action before the CAT on behalf of two or more consumers. Schedule 8 of the Consumer Rights Act amends the Competition Act to introduce a new collective proceedings regime, which covers both opt-in and opt-out actions.

In the new 'opt-out' collective action regime, affected consumers are automatically included in a claim and have to take positive steps to exclude themselves from it (should they wish to do so). The regime covers both follow-on and stand-alone cases and is available to both consumer and business complainants. The opt-out aspect of a claim only applies to UK-domiciled claimants, but non-UK claimants are able to opt in to a claim.

Collective proceedings must be commenced by a person who will act as the representative of the claimants. The CAT may authorise a person to act as representative whether or not that person is also a class member. However, proceedings may only be commenced if the CAT grants a collective proceedings order following a hearing to certify the representative claimant. The collective proceedings order authorises the person bringing the proceedings to act as representative, it provides a description of the class of persons whose claims may be included in the proceedings and it specifies whether the proceedings are to continue on an opt-in or opt-out basis. A collective proceedings order is only granted if:

- the CAT considers that it is just and reasonable for the person bringing the proceedings to act as the representative (whether or not they are a claimant); and
- the claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

If an opt-out action results in the award of damages to the class of claimants, any unclaimed damages will not be returned to the defendants. Rather, these unclaimed sums will be paid to the Access to Justice Foundation (an organisation which supports pro bono legal assistance). Defendants will be free to settle on other terms, subject to the approval of the CAT judge.

In addition, the Consumer Rights Act provides for an opt-out collective settlement regime to allow for rapid settlement of opt-out cases in relation to which a collective proceedings order has been made. Under this system, a representative of those who have suffered loss and a potential defendant can jointly apply to the CAT, providing agreed details of the claims to be settled and the proposed terms of the settlement. The CAT can approve such mutually agreed settlement agreements on an opt-out basis if it is satisfied that the terms of the relevant agreement are just and reasonable.

The CMA has published guidance relating to taking action for breaches of competition law (see *Competition law redress: A guide to taking action for breaches of competition law* (CMA55)).

An application for the first UK class action was made in May 2016 in relation to the CMA's finding of an infringement in the market for mobility scooters. This application was adjourned by the CAT in March 2017 on the basis that the claimant's proposed methodology for estimating consumer losses was inadequate. However, the claimant was given the opportunity to amend her application using new economic evidence to estimate consumer losses on a new basis. The class action was subsequently abandoned. A second application for a class action was made in September 2016 in relation to the European Commission's decision regarding interchange fees charged by MasterCard. The CAT dismissed this class action in July 2017 on the basis that it would not be possible to estimate the loss to each individual consumer (which would form the basis for distribution of any damages awarded) in a practicable manner. The claimant sought the right to appeal against the CAT's ruling in August 2017. On 28 September 2017, the CAT rejected the claimant's application on the basis that an appeal from the CAT is only available on a point of law or when the CAT awards damages or grants an injunction in collective or stand-alone damages proceedings. At the time of writing two separate class action applications have been made to the CAT relating to the European Commission's 2016 *Trucks* cartel decision.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The CMA's immunity programme is set out in the OFT-published document Applications for leniency and no-action in cartel cases (OFT 1495; published July 2013 (and adopted in full by the CMA)). This provides different types of protection to an applicant depending on its position in the queue and whether an investigation has already commenced, as set out below.

The CMA published an information note in November 2017, explaining that the CMA will now be the single port of call for all leniency applications, including those in regulated sectors. The ultimate decision to grant leniency will be made by the authority to which the case has been allocated (in accordance with the Concurrence Regulations). Previously applicants had the option of applying to the CMA or the sectoral regulator under a 'single queue system'. The new approach is designed to streamline the process.

Type A immunity

Available where the undertaking is the first to apply and there is no pre-existing civil or criminal investigation into such activity. Type A immunity provides automatic immunity from civil fines for an undertaking, and criminal immunity for all current and former employees and directors who cooperate with the CMA. Cooperating individuals should also avoid director disqualification.

Type B immunity

Available where the undertaking is the first to apply but there is already a pre-existing civil or criminal investigation into such activity. In such circumstances, the CMA retains discretion regarding whether to provide civil immunity to the undertaking and criminal immunity to current and former employees and directors who cooperate with the CMA. Cooperating individuals should also avoid director disqualification. Type B immunity will no longer be available where the CMA has sufficient information to establish an infringement, where another undertaking has been granted Type B immunity, or when the CMA already has, or is in the course of gathering, sufficient information to bring a successful criminal prosecution.

Type B leniency

Where the CMA decides not to grant Type B immunity to an undertaking, it may still provide a reduction from any financial penalty imposed under the Competition Act. There is no limit to the level of reduction that may be granted under Type B leniency. The CMA will consider whether it is in the public interest to grant immunity (from criminal sanctions) on a blanket or individual basis. Cooperating individuals should also avoid director disqualification.

Type C leniency

Available to undertakings which are not the first to apply but provide evidence of cartel activity before a statement of objections is issued (provided such evidence genuinely advances the investigation). Recipients of Type C leniency may be granted a reduction of up to 50 per cent of the level of a financial penalty imposed under the Competition Act. The CMA may exercise its discretion to award immunity from criminal prosecution for specific individuals. Cooperating individuals should also avoid director disqualification.

In addition to fulfilling the criteria above, an undertaking must fulfil the following conditions to be granted Type A or Type B immunity or leniency:

- accept that it participated in cartel activity in breach of law;
- provide the CMA with all information, documents and evidence available to it regarding the cartel activity;
- maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CMA as a result of the investigation;
- refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA); and
- not have taken steps to coerce another undertaking to take part in the cartel activity.

In order to be granted Type C leniency, an undertaking must also fulfil each of the above conditions, except the non-coercion condition, which does not apply.

When it comes to vertical agreements, the CMA's leniency policy only applies to vertical price fixing such as resale price maintenance (although leniency is in principle also available for vertical behaviour that facilitates horizontal cartel activity). This is justified on the basis that other vertical restrictions on competition are visible on the market and are therefore, over time, self-detecting.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

See question 24.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Importance of going in second

See question 24.

Any reduction in the financial penalty in these circumstances is discretionary and will be calculated taking into account the stage at which the undertaking comes forward, the evidence in the CMA's possession, the evidence provided by the undertaking and the overall level of cooperation provided. The guidance on leniency and no-action notes that Type C leniency will generally involve discounts in the range of 25 to 50 per cent, although it is possible that low value or late applications may gain awards of less than 25 per cent. Blanket criminal immunity will not be granted in Type C leniency cases, but the CMA will consider whether it is in the public interest to grant immunity on an individual basis.

Immunity or amnesty plus

The leniency programme under the Competition Act provides an incentive for applicants to come forward with information about other cartels they may be involved in. If an undertaking is cooperating with an investigation in respect of one cartel activity and comes forward with information such that it obtains total immunity from (or a reduction in) fines in relation to a completely separate cartel activity (on the basis that it is the first undertaking to come forward with evidence regarding that second cartel activity), it will also receive a reduction in the fine imposed in respect of the first cartel (over and above the reduction it would have received for its cooperation in relation to the first cartel alone). The additional reduction granted in relation to the first market because of the successful application in the second market is known as 'leniency

plus'. However, the guidance on leniency and no-action makes clear that leniency plus should be regarded as a secondary benefit and, as such, reductions to financial penalties granted under leniency plus are unlikely to be high. The most recent example was in 2011 in the context of the dairy retail price initiatives investigation, when the OFT granted Asda a 10 per cent discount on the basis that it had been granted total immunity from financial penalties in respect of a completely separate suspected infringement of the Chapter I prohibition in relation to its activities in other, separate markets.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

If an undertaking or individual wishes to apply for leniency, it is advisable to approach the CMA as soon as possible to secure the benefits of being the first to come forward as described above. In particular, type A immunity is only available before the CMA has commenced an article 101 or Chapter I investigation. The CMA will not accept leniency applications from undertakings after it has issued a statement of objections in relation to the reported cartel activity. Similarly, the CMA will not accept leniency applications from an individual after that individual has been charged with a cartel offence in relation to the reported activity. Additionally, financial incentives are offered to individuals to come forward with information about cartels – the CMA offers to pay up to £100,000 to individuals in return for information that helps the CMA to identify and take enforcement action against cartels (this is separate from the leniency-immunity programme).

While it is preferable to approach the CMA as soon as possible to be the 'first in', there may be some disadvantages to seeking leniency or immunity that need to be considered carefully before approaching the CMA:

- It is not possible for an undertaking to know for sure whether it will be the first to provide the CMA with evidence of the existence and activities of a cartel (although it is possible to seek confirmation as to whether type A immunity is available on a confidential, no-names basis provided that the legal adviser making such contact with the CMA can confirm that he or she has instructions to apply for type A immunity if it is available).
- Similarly, it is not possible to know in advance whether the information being provided to the CMA is new, or indeed what the precise state of the CMA's existing knowledge is (although, as noted above, it is possible to seek confirmation as to whether type A immunity – and, if not, Type B immunity – is available).
- The CMA does not (and cannot) provide immunity from third-party damages actions (see question 22).

Any undertaking considering an approach to the CMA ought first to assess carefully its exposure risk, not only in the UK but in all jurisdictions in which the cartel is active, thus recognising the impact of the likely cooperation that will occur between competition authorities. The exposure assessment will need to take account of the degree of consumer detriment that has resulted from the cartel, the impact of the cartel on the relevant market and the likelihood that the CMA will otherwise discover the existence of the cartel, either independently or through a third party. Account will also need to be taken of the exposure of individuals to criminal prosecution under the Enterprise Act if they do not secure leniency. Before conducting internal investigations into possible cartel conduct, undertakings should refer to the CMA guidance on leniency and no-action, which sets out guidelines designed to ensure that internal investigations do not prejudice any subsequent CMA investigation or enforcement action. The undertaking should ensure, before approaching the CMA, that it is able to prove positively that it has withdrawn from the cartel, and also that it can provide a sufficiently complete document trail to meet the stringent conditions for leniency.

In a case involving cartel activity that may have an effect on trade between member states, the undertaking should also consider as a matter of urgency whether it is appropriate to make simultaneous leniency applications to the European Commission and other competition authorities within the European Competition Network (ECN). An application for leniency to the CMA will not be considered as an application

for leniency to the European Commission or another NCA within the ECN. The ECN Model Leniency Programme has been established to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN. The ECN Model Leniency Programme therefore sets out the treatment that an applicant can anticipate in any ECN jurisdiction once the alignment of all programmes has taken place. In addition, the ECN Model Leniency Programme aims to alleviate the burden associated with multiple filings in cases with which the European Commission is particularly well placed to deal by introducing a model for a uniform summary application system.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The CMA has adopted the OFT's *Guidelines on applications for leniency and no action in cartel cases*, published in July 2013 (OFT 1495). These provide that all leniency applicants, whether they are applicants for immunity or leniency, have a duty to maintain 'continuous and complete' cooperation throughout the CMA's investigation and any subsequent proceedings (including criminal proceedings and defending civil or criminal appeals) by the CMA as a result of the investigation. This requires applicants to engage positively, proactively and in a timely manner with the CMA to assist it in effectively detecting, investigating and taking enforcement action against cartel conduct. In particular, leniency applicants must provide the CMA with all non-legally privileged information, documents and evidence available to them regarding the existence and activities of the reported cartel. They must also, where appropriate, make current and former directors, employees and agents available for interviews and use their best endeavours to ensure that relevant individuals respond completely and truthfully to the CMA and not attempt to falsely protect or implicate any undertaking in relation to any infringement or any individual in relation to a cartel offence. Failure to comply could lead to a loss of all protection under the leniency programme.

Furthermore, leniency applicants must accept that the activity in which they engaged amounts to cartel activity in breach of article 101 or the Chapter I prohibition, or, in the case of individual applicants, amounted to commission of the cartel offence. This will ultimately be reflected in the leniency agreement. The CMA will regard any of the applicant's representations following the issue of a statement of objections which amount to a denial of cartel participation as inconsistent with the grant of leniency.

See also question 24.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The CMA will endeavour, to the extent that it is consistent with its statutory obligations to disclose information, and its obligations to exchange information with the ECN, to keep the identity of cooperating undertakings confidential throughout the course of the investigation until the issue of a statement of objections. These protections apply both to applicants for immunity and to other leniency applicants.

In practical terms, the rights of access to the file afforded to the undertakings under investigation and the eventual publication of a reasoned decision will normally result in the identity of an immunity applicant becoming apparent both to other members of the cartel and, more widely, to others operating in the industry and to the public. Details of a leniency application may also be disclosed during an appeal to the CAT in respect of the infringement decision. Similarly, the fact that an individual has received a no-action letter may become evident because of disclosure obligations during the prosecution of other participants in a criminal cartel offence.

Section 28 of Schedule 8A of the Competition Act (as recently introduced by the Damages Regulations) explicitly provides that a disclosure

order may not be made in respect of leniency statements regardless of whether they have been subsequently withdrawn. The CMA's guidance also emphasises that the CMA will 'firmly resist' requests for disclosure of leniency materials.

The CMA's guidelines confirm that the CMA will not require the waiver of legal professional privilege as a condition for leniency either in civil or criminal proceedings. However, the CMA has decided that it will require a review of any relevant information in respect of which legal professional privilege is claimed by external independent counsel who will be selected, instructed and funded on a case-by-case basis by the CMA. While external independent counsel will be instructed by the CMA, the relevant information in respect of which legal professional privilege is claimed will not be provided to the CMA (unless independent counsel concludes that it is not privileged).

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

In March 2014, the CMA published guidance on its investigation procedures which includes the first formal guidance on the settlement process (the OFT had previously covered the issue only very briefly, in response to a consultation which took place in 2012). The CMA will consider settlement for any case falling under the Chapter I prohibition or article 101 as long as the CMA considers that the evidential standard for giving notice of its proposed infringement decision is met. There is no 'right' to settle – the CMA retains broad discretion in determining which cases to settle. Should the CMA decide to proceed with settlement, at a minimum, it will require the settling parties to:

- make an admission of liability;
- cease the infringement immediately; and
- confirm that they will pay a penalty set at a maximum amount.

Settlement discussions can be initiated either before or after the statement of objections is issued. Businesses may wish to approach the CMA during an investigation to discuss the possibility of settlement – the CMA will not make any assumptions about a business' liability from the fact that it is interested in engaging in settlement discussions. Before the CMA case team can commence settlement discussions, the SRO will be required to obtain a mandate from the CMA's Case and Policy Committee to engage in settlement discussions. Once this is received, the settlement discussions themselves will be overseen by the SRO. There may, however, be exceptional circumstances where the CMA considers it appropriate for the Case Decision Group to oversee the settlement discussions and remain decision-maker on the case.

In exchange for settling a case, the CMA will grant settling parties a discount of up to 20 per cent (if settlement took place pre-statement of objections) or 10 per cent (if settlement took place post-statement of objections). The actual discount awarded will take account of the resource savings achieved.

The CMA's preference for resolving disputes flexibly, quickly and cost-effectively has been reflected in the CMA's decisional practice. The CMA agreed its first settlement under the formalised procedure in March 2015, in relation to its property sales and letting investigation, and granted a 10 per cent settlement discount. More recently, in March 2018 the CMA announced a settlement in relation to the household fuel bid-rigging investigation and granted a 20 per cent discount. In May 2017 the CMA announced a settlement in relation to online resale price maintenance for light fittings. While settlement occurred post-statement objections, a 20 per cent discount was permitted as the parties expressed a genuine willingness to enter into settlement discussions pre-statement of objections.

Finally, it should be noted that the Consumer Rights Act provides that the CMA is able to approve voluntary redress schemes, that is to say, binding commitments entered into by infringers to provide compensation (whether monetary or otherwise) to consumers.

Settlements can be judicially reviewed. The developments in relation to the settlements in the OFT's tobacco investigation provide an interesting insight. In that case, the OFT's case collapsed following an appeal by non-settling parties. Two settling parties who had not joined

the appeal, Gallaher and Somerfield, sought to recover the fines levied against them. They pursued appeals against the OFT's decision using normal routes. However, their appeals were held to be out of time. In the meanwhile, the OFT announced that it would be returning the £2.7 million fine it had imposed on TM Retail, one of the parties investigated, together with a contribution to certain other costs. This was because TM Retail had been given assurances by the OFT that even if it entered into a settlement agreement, any successful appeal against the decision would allow it to claim its money back. Gallaher and Somerfield applied for a judicial review of the OFT's behaviour, alleging breach of the principles of fairness and equal treatment. They argued that the benefit of these assurances should be extended to them. They were unsuccessful. The High Court held that the OFT had made a mistake by giving the other party those assurances (as they were simply wrong in law), and that as a matter of principle mistakes should not be replicated where public funds are involved, even in the interests of fairness. Gallaher and Somerfield appealed to the Court of Appeal, which overturned the High Court's decision – it held that the OFT had breached the principle of fairness and equal treatment and ordered the authority to repay the penalties paid by Gallaher and Somerfield together with interest and costs. The case was appealed to the Supreme Court, which reinstated the High Court's decision in May 2018.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

See question 24.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

An undertaking or individual wishing to take advantage of the CMA's leniency programme must contact the senior director of cartels and criminal enforcement at the CMA. The CMA is now the single port of call for all leniency applications. See question 24.

Where a leniency application under the Competition Act regime is made on behalf of an undertaking, this step has to be taken by a person who has the power to represent the undertaking for that purpose. However, an initial approach to the CMA may be made by the undertaking's legal advisers on a hypothetical 'no names' basis to secure a marker, provided that the adviser has instructions to apply for type A immunity if the CMA confirms that it is available. The adviser must also ensure that there is a concrete basis for a suspicion that the undertaking has participated in cartel activity and the undertaking must have a 'genuine intention to confess'; that is, acceptance as a matter of law and fact that the available information suggests that it has been engaged in cartel conduct in breach of the Chapter I or article 101 prohibitions. If the CMA confirms that type A immunity is available, the adviser must identify the undertaking and apply for immunity. A discussion of the timing and process for perfecting the marker will then follow. The undertaking can also apply for automatic individual immunity for all of its current and former employees and directors.

A similar approach may be made to obtain a marker for Type B immunity, although in Type B cases it is possible to ask the CMA whether immunity is available without a requirement to make an immediate application if the CMA confirms that it is available. To perfect a marker for Type B immunity, the undertaking must add significant value to the CMA's investigation. An undertaking can explore on a no names basis whether the information it is likely to provide would genuinely advance the CMA's investigation. Again, where a marker in a Type B case has been perfected, the undertaking can also apply for automatic individual immunity in respect of all current and former employees and directors.

In the case of a separate application for a no-action letter, the approach to the CMA may be made by the individual concerned, by a lawyer representing the individual or by an undertaking on behalf of named employees where that undertaking is also seeking leniency from the CMA or the European Commission. The senior director of cartels and criminal enforcement will give an initial indication as to whether

the CMA may be prepared to issue a no-action letter. The CMA will then interview the individual concerned before advising the applicant in writing whether it is prepared to issue a no-action letter. Again, the CMA may also advise on a no names basis whether a hypothetical scenario would be likely to lead to individual criminal prosecution.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

The latest version of the guidance regarding leniency and no-action letters was published in July 2013. The CMA has adopted this guidance. The CMA published an information note providing guidance on handling of initial leniency enquiries and applications in November 2017. See question 24.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

Part 6 of Schedule 8A of the Competition Act (as introduced recently by the Damages Regulations) prohibits the court or CAT from granting a disclosure order in respect of cartel leniency statements (whether or not withdrawn), settlement submissions (if not withdrawn), competition authority investigation materials (prior to the day on which the competition authority closes the investigation to which those materials relate) and materials in a competition authority's file (unless the court or CAT is satisfied that no-one else is reasonably able to provide the documents or information).

As a general rule, the CMA and its staff cannot disclose information obtained under the Enterprise Act, Competition Act or certain other legislation (specified in Schedule 14 of the Enterprise Act) that relates to the affairs of a living individual, or to the business of an existing undertaking during the lifetime of such individual or the existence of such undertaking, unless such information has already been previously lawfully disclosed to the public. However, the following statutory information gateways in Part 9 of the Enterprise Act allow the CMA to disclose 'specified information' (information that the CMA obtains during the exercise of any of its functions) to the defendant where:

- the CMA has obtained the required consents;
- the disclosure is for the purpose of facilitating the exercise by the CMA of its statutory function; or
- the information is disclosed to any person in connection with the investigation of a criminal offence or any criminal proceedings in any part of the UK or for the purpose of deciding whether to commence or bring to an end such an investigation or proceedings.

Where the CMA discloses information to a defendant under the gateways listed above, there are restrictions on the further disclosure or use of the information by the defendant. It is a criminal offence to breach these restrictions.

Before making a disclosure, the CMA takes the following considerations into account:

- the need to exclude from disclosure, so far as practicable, information whose disclosure would be against the public interest;
- the need to exclude from disclosure business information or information relating to an individual's private affairs, where such disclosure would significantly harm the legitimate business interests of the undertaking to which the information relates, or the interests of the individual to whom the information relates; and
- the extent to which disclosure related to the private affairs of an individual or commercial information is necessary for the purpose for which the disclosure is being made.

To safeguard the right to a fair trial, the CMA must allow defendants reasonable time (typically six to eight weeks in practice) to inspect copies of disclosable documents on its file that relate to the matters contained in the statement of objections. The CMA's guidance on its investigation procedures clarifies that confidential information (ie, commercial information whose disclosure the CMA thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual whose

disclosure the CMA thinks might significantly harm the individual's interests, or information whose disclosure the CMA thinks is contrary to the public interest) and CMA internal documents are not disclosable.

Where documents are disclosable, the CMA will consider the best means to protect any confidential information (eg, it may redact, anonymise or aggregate confidential information or use confidentiality rings or data rooms). It will be a condition of access to a confidentiality ring or data room that information accessed and reviewed by any adviser is not shared with its client.

The CMA may disclose new documentary evidence or information relevant to the infringement received during settlement discussions; however, any admissions made during failed settlement discussions will not be disclosed.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

In the absence of a conflict of interest, there is no absolute legal restriction preventing a law firm from representing both employees and the undertaking under investigation, provided that this is compatible with the law firm's own professional conduct obligations. In practice, however, it is possible that the undertaking may wish to distance itself from the conduct of individual employees and to argue that the employee was acting without authority. In addition, given the real possibility for conflicts of interest, separate representation is likely to be appropriate where individual employees face possible criminal prosecution under the Enterprise Act.

See question 10 in relation to representation of individuals being interviewed under the CMA's compulsory interview powers.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Again, there is no legal restriction on counsel representing more than one member of the alleged cartel provided this is compatible with counsel's own professional conduct obligations. In practice, depending on the circumstances, single representation of multiple corporate defendants may not be advisable where conflicts of interest may be anticipated.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

There is no absolute prohibition on an undertaking paying the legal costs incurred by, or financial penalties imposed on, individual employees. However, company law provisions may restrict such payments in certain circumstances.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Fines or penalties imposed for a breach of the law are not tax-deductible in circumstances where the penalty is intended to punish. Where the payment is intended to compensate for damages caused by normal trading operations, it may be tax-deductible to the extent that it can be described as a loss connected with or arising out of trade (and wholly and exclusively so incurred).

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The CMA is required to take into account penalties imposed by the Commission or by another EU member state when setting the amount of penalty in relation to that conduct. However, UK authorities are not required to take into account penalties imposed on economic operators by jurisdictions outside of the EU.

Update and trends

The CMA has an increased focus on cartel enforcement. In February 2018, the CMA launched a new crack-down campaign on cartels to encourage reporting of cartel behaviour. In December 2017, the CMA launched a digital tool to combat bid rigging; the tool aims to assist public procurement professionals in identifying suspicious behaviour by suppliers when bidding for contracts. In recent cases the CMA has also emphasised the personal responsibility of management, securing a number of director disqualifications.

This chapter sets out the state of the law at the time of writing. The UK's withdrawal from the European Union may result in changes to cartel regulation within the UK. At this stage it is difficult to predict with certainty how and when the legal framework may change. If the UK and the EU finalise a withdrawal agreement by 29 March 2019 (or any such extended time period), it has been agreed in principle that there will be a 'transitional period' from 30 March 2019 until 31 December 2020. During the transitional period, most EU law would continue to apply in the UK. If there is no withdrawal agreement, EU law will stop applying on 29 March 2019. Post-withdrawal, subject to any major legislative change, the substantive legal provisions relating to cartel conduct in the Competition Act will remain the same (see question 4); however, the legal obligation for the CMA and courts to interpret UK competition law in line with EU law and decisional practice may cease. Critically, it is expected that the CMA will run civil and criminal competition investigations in parallel with the European Commission. It is unclear whether Commission decisions will be binding in follow-on damages actions in the UK for post-withdrawal conduct.

There are no rules specifically preventing international double jeopardy against individuals in relation to the cartel offence (see the *Marine Hose* cartel discussed in question 17).

In the context of private damages claims, the UK courts generally award compensatory damages only (ie, to cover the amount actually lost by the claimant as a result of the defendant's breach of competition law). If the claimant has already recovered damages for exactly the same loss in another jurisdiction, it will no longer be able to prove its loss in the UK courts so damages would no longer be available (avoiding double recovery).

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Avoidance or reduction of an undertaking's exposure to fines as a result of its participation in a cartel is inevitably subject to one precondition: withdrawal from the cartel. Withdrawal needs to be managed, however, in such a way as to optimise the possibility of a fine reduction. There are three key points listed below:

- Internal investigation – the undertaking should conduct an immediate and thorough internal investigation to establish the full extent of its participation in the cartel and of its exposure. This should involve the collection of all relevant documents and, to the extent possible, the gathering of witness statements from all employees with first-hand knowledge of the cartel's operation. This should place the undertaking in a position to assess its exposure fully, not only in the UK but in all jurisdictions in which the cartel is operating. Undertakings should note the section dealing with internal investigations in the CMA's guidance on leniency and no action (see questions 24 to 26).
- Paper trail – the documents and witness statements collected will provide the basis for an assessment by the undertaking, together with its external lawyers, of its ability to meet the often stringent conditions to benefit from the leniency programmes of the regulatory authorities. It is, however, important to avoid the creation of new documents that are not legally privileged.
- Whistle-blowing – where the decision is taken to 'blow the whistle' on the cartel, it will often be helpful to be able to demonstrate conclusively the undertaking's withdrawal from the cartel. Such withdrawal may, however, put the other members on notice that the undertaking may make an early approach to the CMA or other

regulator for leniency. The undertaking should be prepared to act swiftly to make the most of this first-mover advantage to obtain a maximum reduction in fines. In exceptional cases, the CMA may direct that the applicant continues to participate in the cartel to protect the element of surprise of any forthcoming inspection or to obtain further evidence.

Compliance programmes may be considered as a 'mitigating factor' under the CMA's six-step approach to calculating financial penalties (see question 19). The mere existence of a compliance programme will not be sufficient to prove that a party has taken the required steps to ensure compliance with competition law and thereby qualify for a fine to be reduced. However, if the party is able to demonstrate that its senior management has taken adequate steps to achieve a clear and unambiguous commitment to competition law compliance from the top down - together with appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities - this is likely to be treated as a mitigating factor, warranting a fine reduction of up to 10 per cent. The CMA's updated penalties guidance explains that the CMA will expect these 'appropriate steps' to include making a public statement on the undertaking's website regarding its commitment to compliance and conducting a periodic review of compliance activities, and reporting that to the CMA.

The CMA in two decisions in March 2017 in relation to its furniture parts investigation granted two furniture parts suppliers a 10 per cent reduction after they provided evidence that they had developed a competition compliance policy that would be distributed to every member of staff who might come into contact with other businesses in the course of his or her employment. They also provided evidence to show that senior managers, directors and sales teams had been trained in competition compliance, that appropriate employees would continue to receive competition compliance training on a regular basis, and that they had published a compliance plan on their websites. The reduction was granted on the condition that the two suppliers would provide an annual update to the CMA confirming their ongoing commitment to compliance activities for the next three years. In May 2017, the CMA also granted NLC a 10 per cent reduction in recognition of its constructive engagement with the CMA to introduce a comprehensive competition law compliance programme to which its board had fully committed. In particular, the CMA identified that NLC had provided it with evidence that the area sales managers and the board would be trained in competition compliance and that adherence to the competition law compliance policy would form an integral part of the NLC Group employment policy.

BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY
URIA MENÉNDEZ

Lisa Wright
Sophia Haq

lisa.wright@slaughterandmay.com
sophia.haq@slaughterandmay.com

Square de Meeûs 40
1000 Brussels
Belgium

Tel: +32 2 737 9400
Fax: +32 2 737 9401
www.belex.com
www.bredinprat.fr
www.debrauw.com
www.hengeler.com
www.slaughterandmay.com
www.uria.com

United States

Steven E Bizar, Ethan E Litwin and Benjamin McAnaney

Dechert LLP

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The primary statutory basis for federal cartel enforcement in the US is section 1 of the Sherman Act (15 USC section 1), which prohibits ‘every contract, combination... or conspiracy... in restraint of trade’. The Federal Trade Commission Act prohibits ‘unfair methods of competition’ and ‘unfair or deceptive acts or practices’. The Federal Trade Commission (FTC) does not technically enforce the Sherman Act, it instead relies on the FTC Act to challenge conduct that would also violate the Sherman Act. Additionally, the FTC may bring cases under the FTC Act challenging coordinated conduct that is beyond the scope of the Sherman Act, such as invitations to collude. On the state level, state antitrust and unfair competition laws prohibit substantially the same conduct as their federal counterparts and, depending on the state, may provide for criminal as well as civil enforcement.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

There are three principal enforcers of the federal antitrust laws. The US Department of Justice, Antitrust Division (DOJ) has the power to investigate and to civilly and criminally prosecute cartel activity in federal courts. The FTC enforces the FTC Act, but has only civil enforcement powers in FTC administrative proceedings or in federal court. Private plaintiffs may also sue in federal court for treble monetary damages and injunctive relief under the Sherman Act. State antitrust laws are enforced criminally and civilly by state attorneys general in state courts and civilly by private plaintiffs. State attorneys general may also enforce federal antitrust statutes.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

There have been no changes to the federal antitrust laws since 2004. A 2017 bill to provide anti-retaliation protections for antitrust whistle-blowers passed in the US Senate and is pending in the House of Representatives.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Federal court decisions provide the framework for analysing cartel activity under the Sherman Act. Hard-core agreements among competitors to fix prices (or any component of pricing), restrict output, rig bids or allocate customers or geographic territories are considered to be per se illegal (ie, the law provides for an irrebuttable presumption that such conduct had an anticompetitive effect on the market). Per se cartel offences may be prosecuted criminally.

There are four elements of a criminal cartel offence: (i) an agreement, (ii) between two or more competitors, (iii) that restrains trade,

and (iv) that affects either domestic (interstate) commerce or import commerce. In the absence of such an agreement, unilateral conduct does not violate section 1 of the Sherman Act (though it may violate section 2 and other laws).

An ‘agreement’ under the Sherman Act need not be a formal written document. Agreements may be formed informally, through emails, instant messages, orally or even with a ‘telling nod or wink’. The DOJ’s practice is to establish the existence of an agreement in criminal cases through direct evidence, reflecting the higher standard of proof that applies in the criminal context. The law, especially as it pertains to civil enforcement, is more lenient. To establish an agreement in civil cases where the evidence is circumstantial, the US Supreme Court has held that the evidence must tend ‘to exclude the possibility of independent action’ and establish that the defendants ‘had a conscious commitment to a common scheme’ (*Monsanto v Spray-Rite Service Corp*, 465 US 752, 768 (1984)). Proof that defendants engaged in parallel conduct is insufficient, standing alone, to evince such a ‘conscious commitment’ (*In re Chocolate Confectionary Antitrust Litigation*, 801 F.3d 383, 397–98 (3d Cir 2015)). Plaintiffs must also allege certain ‘plus factors’ to give rise to an inference of an agreement. Plus factors are ‘proxies for direct evidence’ because they tend to ensure that courts punish concerted actions as opposed to ‘unilateral, independent’ competitor conduct (*In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 360 (3d Cir 2004)). There is no definitive set of plus factors, although some decisions do contain lists of such factors (ibid at 360). The most important plus factor is traditional, non-economic (non-expert) evidence of a conspiracy (ibid at 361).

Information exchanges among competitors are not prosecuted criminally, but may be challenged in civil court if the anticompetitive effect of the exchange outweighs its procompetitive benefits. That said, evidence that competitors exchanged competitively sensitive information may constitute circumstantial evidence of an underlying cartel. For this reason, competitors should exercise caution during business discussions not to discuss competitively sensitive topics such as pricing, production levels, capacity, margins and the status and details of customer negotiations or bids. The scope of information that is competitively significant varies by industry and companies should seek legal guidance about the scope of information that could give rise to antitrust liability if shared with a competitor.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are numerous statutory and judicially created exemptions and immunities from the antitrust laws. Congress has to varying degrees expressly exempted certain industry practices and activities from antitrust liability, usually in heavily regulated sectors such as the transport, healthcare, telecommunications, energy, insurance and financial industries. The McCarran-Ferguson Act (15 USC section 1013) is one example of such legislation, exempting state law-regulated insurance business that does not involve any agreement to ‘boycott, coerce, or intimidate’. Courts have also created various industry-specific exemptions, including the well-known ‘baseball exemption’.

Other exemptions and immunities apply more broadly, but generally share the characteristic that they seek to avoid disruption of an existing regulatory scheme. The ‘filed-rate doctrine’ or ‘Keogh doctrine’, for example, limits liability for unreasonable rates if those rates are filed with a federal or state regulatory agency (*Keogh v Chicago & Northwestern Railway*, 260 US 156, 161–65 (1922)). Similarly, the ‘political question doctrine’ removes from federal judicial jurisdiction cases raising questions of policy decisions that are the prerogative of the executive or legislative branches of government.

Similarly, a series of court decisions beginning with *Parker v Brown*, 317 US 341 (1943) have exempted state governments from antitrust liability for conduct that, if engaged in by a private actor, would certainly be considered anticompetitive. This ‘state action doctrine’, or ‘Parker doctrine’, may also extend to private actors in certain limited circumstances, when their conduct is taken in furtherance of an express regulatory scheme in accordance with state policy, and is subject to state supervision.

Under the ‘Noerr-Pennington doctrine’, another court-created immunity, competitors are generally not liable under the antitrust laws for joint petitioning of government entities (*United Mine Workers v Pennington*, 381 US 657, 661, 670 (1965)), *Eastern RR Presidents Conference v Noerr Motor Freight*, 365 US 127, 135–36 (1961)).

Internationally, the ‘foreign sovereign compulsion doctrine’ may provide a defendant with antitrust immunity if it can establish that it was compelled to violate US antitrust law because it was impossible to comply with both US antitrust law and the law of a foreign jurisdiction simultaneously.

6 Application of the law

Does the law apply to individuals or corporations or both?

Both individuals and corporations are subject to the antitrust laws. Criminal enforcement actions may be brought against corporations and individuals, while civil enforcement actions (both government and private) are generally brought solely against corporations.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The extraterritorial reach of the US antitrust laws is governed by the Foreign Trade Antitrust Improvements Act (FTAIA) (15 USC section 6a). The FTAIA establishes a two-step test for determining whether a defendant’s foreign conduct falls within the scope of US antitrust laws. First, the threshold inquiry is whether the defendant’s foreign conduct involves US ‘import trade or import commerce’. If so, the conduct falls within the scope of US antitrust laws. Courts have strictly interpreted import commerce to capture only ‘transactions in which a good or service is being sent directly into the United States, with no intermediate stops’ (*Minn-Chem, Inc v Agrium, Inc*, 683 F.3d 845, 854 (7th Cir 2012)). The Ninth Circuit has likewise interpreted import commerce to capture only ‘transactions that are directly between the plaintiff purchasers and the defendant cartel members’ (*US v Hsiung*, 778 F.3d 738, 755 (9th Cir 2015)).

Alternatively, if the conduct does not involve ‘import trade or import commerce’, the defendant’s foreign conduct falls outside the scope of US antitrust law unless it satisfies both prongs of the FTAIA’s ‘domestic effects’ exception (ie, the foreign conduct has a ‘direct, substantial, and reasonably foreseeable effect’ on US domestic or import commerce, or on the export commerce of a US-based exporter, and that effect ‘gives rise to’ the plaintiff’s claims (*F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155, 162 (2004); 15 USC section 6(a)).

Courts are split on the degree of ‘directness’ required to satisfy the domestic effects test. The Ninth Circuit has held that an effect is ‘direct’ only if it ‘follows as an immediate consequence of [defendants’] activity’ (*US v LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir 2004)). Thus ‘[a]n effect cannot be ‘direct’ where it depends... on uncertain intervening developments’ (ibid at 681). The Second and Seventh Circuits and the DOJ have interpreted directness more broadly, applying a ‘proximate cause’ standard. See *Minn-Chem, Int v Agrium Inc*, 683 F.3d 845, 859–61 (7th Cir 2012) (en banc); *Motorola Mobility LLC v AU Optronics Corp*, 775 F.3d 816, 817–20 (7th Cir 2015); *Lotes Co v Hon Hai Precision Indus Co*, 753 F.3d 395, 410 (2d Cir 2014). While these standards are

different, these differences may be of little practical distinction in most cases.

Courts have yet to define standards that would satisfy the ‘substantiality prong’ of the FTAIA. At least one court has remarked, however, that Congress intended to permit antitrust claims only where the alleged ‘anticompetitive conduct has... a quantifiable effect on the US economy’ (*In re TFT-LCD (Flat Panel) Antitrust Litigation*, 822 F Supp 2d 953, 964 (NDCA 2011)). Finally, courts have held that plaintiffs must demonstrate that the requisite ‘direct effect’ on US commerce was ‘foreseeable’ to an objectively reasonable person making practical reasonable judgments (*Animal Science Products, Inc v China Minmetals Corp*, 654 F.3d 462, 471 (3d Cir 2011)).

Civil plaintiffs must further establish, as an additional element of their Sherman Act claim, that this ‘direct, substantial and reasonably foreseeable’ effect on US domestic commerce ‘gave rise to’ their claims (*Motorola Mobility v AU Optronics Corp*, 775 F.3d 816, 818 (7th Cir 2015)). Moreover, because each sale to the plaintiff represents a ‘separate accrual’ of a claim, the ‘give rise to’ prong of the FTAIA must be satisfied for each transaction for which plaintiffs seek damages. In assessing whether a claim regarding a particular transaction satisfies the ‘give rise to’ prong of the FTAIA, courts have generally used a proximate cause standard.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

See question 7. Under its current interpretation, the FTAIA limits the scope of Sherman Act claims to anticompetitive conduct that affects either import commerce or has a direct, substantial and reasonably foreseeable effect on US domestic commerce or US exporters. Export cartels are thus beyond the scope of the Sherman Act.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The existence of a cartel typically comes to light when a participant applies for leniency and provides evidence of criminal activity (see question 24). Many leniency applications are now triggered as a result of corporate compliance programmes. Other common sources of information for the enforcement agencies include existing investigations or litigation in related industries, whistle-blowers, tips from customers or competitors, or even publicly available evidence of suspicious market behaviour. Evidence of cartel behaviour has also been uncovered during merger control investigations conducted pursuant to the Hart-Scott-Rodino Act.

In a criminal investigation, the DOJ presents evidence to a grand jury, whose purpose is to determine whether there exists sufficient evidence to indict the targeted company or individuals. An indictment is simply a finding of sufficient evidence to proceed to trial, not a finding of guilt. The bar the grand jury must meet in order to return an indictment is low and defence counsel is excluded from the grand jury process. The DOJ therefore generally will obtain any indictment it seeks from a grand jury. Defendants facing criminal antitrust charges have the right to a trial by jury, where the DOJ must prove guilt beyond a reasonable doubt.

The grand jury has broad investigatory powers that are separate from those of the DOJ (see question 10). A grand jury may subpoena the production of documents and the testimony of witnesses. Witnesses may be served with a grand jury subpoena anywhere in the US (Fed R Crim P 17(e)). While witnesses have the right under the Fifth Amendment to the US Constitution to refuse to testify if their testimony would potentially incriminate them, the DOJ may compel testimony by granting the witnesses immunity, thereby removing the risk of self-incrimination.

Prior to indictment, the DOJ will identify certain targets of the investigation, including corporations and individuals whom it considers to be potential defendants based on the existence of substantial evidence linking the target to the crime. Individual targets typically obtain individual outside counsel once they become aware of their status. Targets have the right to meet the DOJ to try to avoid indictment through a proffer of cooperation and testimony or by offering

counterevidence of their own. Targets also have the right to testify on their own behalf before the grand jury, though in practice this is uncommon, given the exclusion of defence lawyers from the grand jury.

Civil investigations do not involve a grand jury. Instead of subpoenas, the federal or state enforcement agency will generally issue civil investigative demands (CIDs) to obtain documents or sworn written or oral testimony from targets of the investigation, as well as from third parties. The evidence resulting from CIDs may form the basis of a civil lawsuit in federal court (by the DOJ or FTC) or in an FTC administrative proceeding before an administrative law judge.

Cartel investigations, either civil or criminal, follow no set timeline and may linger for a number of years before proceeding to any enforcement action or termination.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The antitrust enforcement agencies have far-reaching, though not unlimited, investigative powers. As described in question 9, the DOJ has at its disposal the broad investigative powers of the grand jury. Through a grand jury subpoena, testimony and documents may be obtained from witnesses throughout the US. Additionally, upon a finding of probable cause by a federal judge, the DOJ may obtain warrants permitting it, through the FBI, to search for and seize physical evidence located on private premises, including documents and electronic devices, or to place wiretaps allowing it to audit and record private phone calls between suspected cartel participants. Because much of the necessary evidence is in the possession of the cartel participants, the DOJ often grants immunity to key individual witnesses in exchange for cooperation and testimony.

In the case of witnesses located outside the US, the agency may initiate a border watch. If an individual on a border-watch list were to voluntarily enter the US, immigration and border control authorities may detain the individual and will automatically notify the DOJ. There is no requirement of a warrant or showing of probable cause to place an individual on a border-watch list, which is not public and not formally disclosed to defence counsel. If the individual enters the US and is not detained, the DOJ's practice is to conduct a drop-in interview, whereby lawyers and agents may appear unannounced, often at the person's hotel or workplace, and request to speak with the individual. Although cooperation with the interviewers is voluntary, individuals often are not aware of their rights and resisting the pressure exerted by the authorities in such situations may be difficult. There also exists the risk that physical evidence, such as documents and electronic devices, may become vulnerable to search or seizure at the US border, where border control authorities enjoy extensive investigative powers. Foreign companies under investigation by the DOJ should therefore carefully consider the circumstances under which executives may travel to the US.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

US antitrust agencies routinely cooperate with their counterparts in the European Commission and elsewhere around the globe. In its most visible form, this cooperation includes the coordinated raids of global cartel participants, but cooperation behind the scenes is increasingly common. For example, pursuant to bilateral mutual legal assistance treaties (MLATs), US agencies share information with foreign counterparts. The US has MLATs with approximately 80 jurisdictions that create a channel for the taking of testimony, the provision of documents or other physical evidence, and executing searches and seizures. Pursuant to these MLATs, investigators may exchange evidence, where possible under law, as well as theories of the case.

In addition to MLATs, the US has entered into bilateral antitrust cooperation agreements (ACAs) and memoranda of understanding (MOUs), which are less formal than MLATs and do not generally bind the agencies to provide information or evidence, but facilitate cooperation between the agencies. The US has entered into ACAs with, among others, Australia, Brazil, Canada, the European Union, Germany, Israel, Japan and Mexico. The DOJ and FTC have bilateral MOUs with

corresponding agencies in China, India and Russia, which serve a similar function to the ACAs.

The US and the individual agencies participate in a number of organisations or international cooperative efforts whose aim is to increase and facilitate cooperation among antitrust authorities and to promote greater procedural and substantive convergence among the global antitrust regimes, including the International Competition Network, the Competition Committee of the Organisation for Economic Cooperation and Development and the United Nations Conference on Trade and Development.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Because the DOJ's subpoena powers extend only as far as the US border, relationships with foreign enforcers are critical to its ability to collect evidence located overseas. Particularly in recent years, the DOJ has increased its scrutiny of foreign cartels, and frequently relies on information shared among international agencies in preparing to prosecute foreign defendants. This is particularly true for (but is not limited to) the jurisdictions with which the US has entered into MLATs, ACAs or MOUs, as further described in question 11.

Where provided for by treaty, the DOJ may seek extradition of individuals from foreign jurisdictions. Extradition had been largely theoretical in antitrust cases, because most treaties contain a dual criminality requirement, but the risk of extradition has increased over time as more jurisdictions around the world have criminalised cartel conduct. In 2014, the DOJ successfully extradited an Italian national from Germany on a charge of participating in a conspiracy to rig bids, fix prices and allocate market shares for sales of marine hose sold in the US and elsewhere.

The DOJ may also place an individual target of a grand jury investigation on INTERPOL's red notice list. Where extradition is not possible, and such individuals decline to voluntarily surrender to US jurisdiction, listing on a red notice will expose the individual to detention and extradition at the borders of the 190 participating countries. Obtaining a red notice requires the issuance of a valid national arrest warrant, but not proof that the individual is guilty of any crime. There is no time limit on a red notice, so in effect listing on a red notice may indefinitely confine individuals to their home countries. Some commentators have criticised the DOJ's use of red notices as a violation of due process rights, because it amounts to the imposition of a sanction without a trial.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel cases are adjudicated by courts of law. Criminal cases that proceed to trial are heard in federal court, where the defendant may demand trial by jury. Civil cases may also be heard in federal court, or, where the FTC is the enforcing agency, in administrative proceedings before an administrative law judge. Cases brought by state regulators under both federal law and state law may be heard in federal court, but purely state prosecutions are heard in state courts alone.

In practice, the vast majority of cartel prosecutions are resolved prior to trial by way of a plea agreement (see question 30). In the civil context, nearly all litigations are resolved by way of a dispositive motion or by way of settlement.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

Criminal violations of the US antitrust laws must be proven beyond a reasonable doubt. Civil liability is established using the lower standard of preponderance of the evidence. The initial burden to prove guilt or liability always rests with the government or the plaintiff. Defendants have the burden to prove any affirmative defences only after this initial burden is satisfied.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

In the criminal context, the DOJ's practice is to establish the existence of an agreement through direct evidence. Federal law, however, does permit civil plaintiffs to use circumstantial evidence to establish the existence of an agreement. See question 4.

16 Appeal process

What is the appeal process?

Defendants have the right to appeal a guilty verdict in a criminal trial. Both plaintiffs and defendants have the right to appeal adverse rulings in civil cases. The government may not appeal an acquittal of a criminal defendant because of the constitutional prohibition of double jeopardy.

In the federal court system, trial takes place at the district court level. Appeals from the trial decision are taken to the federal circuit Court of Appeals for the geographic region in which the trial court sits. Appellate courts give great deference to trial courts' findings of fact, overturning them only when they are clearly erroneous. Questions of law, by contrast, are reviewed *de novo*, meaning the appellate court considers the law as if for the first time. The right to appeal is generally lost unless timely asserted, and the windows in which appeals must be noticed are extremely short. For civil litigants, the deadline to appeal is usually 30 days from entry of the judgment or order appealed from; for criminal defendants, the deadline is 14 days from the date of entry of judgment, or from the filing of the government's notice of appeal, whichever is later (Fed R App P 4(a)(1)(A), 4(b)(1)(A)). From the circuit court, appeals are taken to the US Supreme Court. Supreme Court review is discretionary, and only a very small proportion of cases seeking review every year are ultimately heard.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Both corporations and individual defendants face severe sanctions for cartel activity under the US antitrust laws, including high financial penalties and, for individuals, prison time. For corporations, the Sherman Act imposes a maximum fine of US\$100 million per offence. For individuals, the maximum is US\$1 million, plus up to 10 years in prison. There is no minimum fine for either corporations or individuals, nor is there a minimum prison term.

The US\$100 million cap has been surpassed in practice, however. The Alternative Sentencing Act (18 USC section 3571) may permit penalties to exceed the statutory maximum. A defendant may be fined up to twice its gross pecuniary gain from the criminal conduct, or twice the victim's gross pecuniary loss. At least one federal district court has held that if a fine in excess of the US\$100 million cap is sought, the government must prove the pecuniary gain or loss beyond a reasonable doubt (*US v AU Optronics Corp*, No. C 09-00110 SI, 2011 WL 2837418, at *4 (NDCA 18 July 2011)). In that case, the judge imposed a fine of US\$500 million. Total annual criminal penalties exceeded US\$1 billion for four years in a row, from 2012 to 2015, and topped US\$3.6 billion in 2015 alone. These levels then dropped sharply in 2016 to US\$399 million, largely because of the conclusion of several major investigations during the prior year.

Prison sentences for individuals do not in practice approach the statutory maximum of 10 years. Few individuals take the risk of a criminal trial, preferring to accept a reduced sentence in exchange for a guilty plea and a cooperation commitment. Prison sentences averaged 22 months between 2010 and 2016.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The DOJ may seek equitable injunctive remedies for cartel activity via civil actions (15 USC section 4), but has no power to seek civil fines. Such actions rarely proceed to trial and are commonly resolved by consent decrees usually requiring the defendant to cease the problematic conduct or impose other internal changes in response to the government's

concerns. The FTC is similarly limited to equitable remedies, including injunctive relief and disgorgement.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The Federal Sentencing Guidelines (the Guidelines) apply to both individual and corporate violators of the antitrust laws. The Guidelines are not binding on federal judges (*US v Booker*, 543 US 220, 226–27 (2005)), though 'respectful consideration' to the Guidelines must still be given (*Pepper v US*, 562 US 476, 490 (2011)). The full text of the Guidelines is available at www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf.

In recommending the appropriate prison sentence for an individual defendant, the Guidelines assign a 'base offence level' to a crime. For antitrust violations, the base offence level is 12, which results in a starting range of 10 to 16 months' imprisonment. The Guidelines further recommend increases to the base offence level when the specific antitrust offence is bid rigging, or when the affected volume of commerce exceeds certain thresholds starting at US\$1 million. The judge may then consider aggravating or mitigating factors in adjusting the time up or down, such as whether the individual abused a position of trust, or participated in the obstruction of justice (Guidelines, sections 3B1, 3C1). With respect to individual criminal fines, the Guidelines suggest beginning amounts corresponding to 1 to 5 per cent of the affected volume of commerce but no less than US\$20,000. The judge may then consider aggravating or mitigating factors in setting the fine, considering the extent of the defendant's participation in the cartel and the role he or she played, and whether and to what extent the defendant personally profited from the scheme, including through bonuses, promotions, or other career enhancements. Individuals who lack the ability to pay the fine are sentenced to community service, which the Guidelines recommend should be 'equally as burdensome as a fine' (Guidelines, section 2R1.1, application note 2).

For convicted corporations, the Guidelines recommend a 'base fine' equal to 20 per cent of the affected volume of commerce. This 'base fine' is then multiplied according to a 'culpability score', which is calculated based on factors including the firm's previous criminal history, whether it has or will implement antitrust compliance programmes or policies, evidence of obstruction of justice, and self-reporting. The minimum multiplier is 0.75, but the final fine is usually the result of extensive negotiation as part of the plea-bargain process.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment of federal contractors from government procurement procedures is available as a discretionary sanction in response to cartel infringements. The Federal Acquisition Regulation System governs the process through which government agencies procure goods and services. The agency head or his or her designee may determine whether to debar a contractor convicted of a violation of federal or state antitrust laws relating to the submission of offers (48 CFR section 9.406-1, -2). Contractors that have been found liable in a civil enforcement proceeding may also be debarred. Whether to impose the sanction and for how long requires the debarring official to consider both aggravating and mitigating factors, but the length of debarment usually should not exceed three years (*ibid* at section 9.406-4). Suspension from government contracts is also available as a sanction prior to conviction or civil judgment. A contractor may be suspended for the duration of an investigation and any associated legal proceedings on suspicion of or indictment for antitrust violations, unless proceedings have not been initiated after a period of 18 months (*ibid*).

Unless they have previously been convicted, contractors must receive notice and an opportunity to be heard prior to being debarred. Suspension requires notice but may be imposed prior to being heard (*ibid* at sections 9.406-3, 9.407-3). The debarring official may impute

the conduct of the contractor's officers, directors, shareholders, partners, employees, other associated individuals or joint venture partners to the contractor, and its conduct may likewise be imputed to them (ibid at sections 9.406-5, 9.407-5).

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

The DOJ does not pursue the same defendant for the same conduct in both criminal and civil proceedings. Proof of a criminal violation requires knowledge and intent; where such evidence is weak, the DOJ may choose not to prosecute criminally. Likewise, where a case presents novel issues of law or fact, the DOJ may opt instead to pursue civil remedies (Antitrust Division Manual at III-12).

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Direct purchasers are preferred plaintiffs under the antitrust laws and federal precedent. The Supreme Court's holding in *Illinois Brick Co v Illinois*, 431 US 720 (1977) bars indirect purchasers from asserting federal antitrust claims based on claims that direct purchasers 'passed on' the overcharge. Many states, however, have enacted 'Illinois Brick repealer statutes', to provide standing for indirect purchasers to bring claims pursuant to state antitrust and unfair competition laws. The Supreme Court further limited the standing of indirect purchasers to assert antitrust claims in *Associated General Contractors of California, Inc v California State Council of Carpenters*, 459 US 519 (1983) (AGC). In AGC, the court established a balancing test to determine standing:

- the directness of plaintiff's injury;
- the existence of more direct victims of the antitrust violation;
- the potential for duplicative recovery; and
- the likelihood that apportionment of damages would be overly complex or speculative.

As a practical matter, state law claims brought as class actions will be consolidated into the federal multi-district litigation pursuant to the Class Action Fairness Act of 2005.

Section 4 of the Clayton Act provides for a private right of action to enforce section 1 of the Sherman Act. The Clayton Act entitles successful antitrust plaintiffs to treble damages, calculated based on the amount of overcharge the plaintiff paid as a result of the cartel activity, and also to compensation for their attorneys' fees and associated costs of litigation. Defendants in private civil suits face joint and several liability, meaning that a single defendant could find itself responsible for the total damages for the entire cartel, trebled, plus attorneys' fees and costs. While damage claims and even awards against defendants may be enormous, particularly in the context of class actions, no individual plaintiff may recover more than its actual damages, trebled. Civil trials are rare and settlements are common because of the *in terrorem* effect that results from the prospect of treble damages and joint and several liability. Recent class action settlements routinely exceed US\$100 million. The largest antitrust settlement in history, in the *Visa-Mastercard Antitrust Litigation*, was US\$27 billion.

The Clayton Act does not provide a remedy for successful defendants to recover their costs of litigation.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

The majority of private civil antitrust lawsuits are brought as class actions pursuant to rule 23 of the Federal Rules of Civil Procedure. In a class action, a representative plaintiff or group of plaintiffs sues on behalf of all similarly situated plaintiffs. Classes and subclasses of

plaintiffs may be defined based on geographic location, product purchased or characteristics of the plaintiffs themselves. The class format allows for enormous efficiencies for plaintiffs, enabling them to establish liability for the entire class at once, to avoid inconsistent findings of fact or adjudications of law, and to define a clear process for establishing damages for each individual plaintiff. Where individual damages are small and not worth the cost of litigation, the efficiencies of the class format allow victims of cartel behaviour the possibility of recovery when it would otherwise have been infeasible.

Rule 23 sets forth the standards for courts to assess whether a claim may be adjudicated on a class-wide basis. To qualify for class treatment, plaintiffs must plead and prove the following rule 23 factors:

- numerosity (that the class is so numerous that joinder of every individual plaintiff is impracticable);
- commonality (that there are questions of law or fact common to the class);
- typicality (that the claims or defences of the class representatives are typical of the class); and
- adequacy of representation (that the class representatives will adequately represent the interests of the class).

In addition, plaintiffs must prove that common questions of law and fact will predominate over any individual questions and that the class action device is a superior method for adjudicating the dispute. In many antitrust class actions, the key issue for class certification is demonstrating whether plaintiffs can establish injury and damages on a class-wide basis. The class certification phase is a significant bar for plaintiffs to clear, requiring the court to rigorously assess expert opinions as well as factual evidence gleaned from discovery, often resulting in multi-day evidentiary hearings. See *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir 2008).

Participation in the class is not compulsory. Certain putative class members may elect to opt out and pursue their own claims parallel to the class, usually cooperating with class counsel on certain discovery or drafting efforts that jointly benefit them, but with the power to diverge from the class in issues of strategy, discovery, other litigation processes and settlement. Such opt-out plaintiffs are usually individuals or corporations with large damages, who do not wish to defer to or be bound by decisions or settlements made by class counsel on behalf of the rest of the class.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Individuals and corporations may apply for leniency through the DOJ's leniency programme. If the application is granted, the applicant receives full immunity from criminal prosecution. Applicants that satisfy the requirements of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), Pub L No. 108-237, 118 Stat. 661 (22 June 2004), may also become eligible for benefits in private civil cases, including reduction from treble to single damages, and the elimination of joint and several liability. The requirements under ACPERA include cooperation with plaintiffs in civil actions.

To obtain leniency, an applicant must ordinarily be the first to report illegal activity to the government, prior to the commencement of an investigation (Type A leniency). This 'first in' requirement is true for both individuals and corporations. The applicant must not have been the ringleader of the cartel, must have promptly and effectively terminated its participation in the cartel, must fully disclose all relevant facts regarding the illegal activity and fully cooperate with the government investigation, and must make restitution to victims. Further, the DOJ must determine that granting leniency would not be unfair to others. Even if an investigation has already begun, obtaining leniency may still be possible for a first-in applicant as long as all other requirements are met and the DOJ does not already have evidence that warrants a conviction (Type B leniency).

For individual applicants who do not meet all the requirements, leniency may still be possible at the discretion of the DOJ, but it is usually more limited.

Further details about the DOJ's leniency programme may be found at www.justice.gov/atr/leniency-program.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Formal leniency is available only to the first-in applicant, and no formal leniency programme exists for cooperating parties who are not the leniency applicant. Under the Guidelines, however, cooperation is a mitigating factor that judges may consider in sentencing. Similarly, the DOJ has the discretion to treat cooperating parties with greater leniency during an investigation or the plea-bargain process.

The DOJ also has the discretion to enter into non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs). In practice, NPAs and DPAs are rarely used in the cartel context because of the existence of the DOJ's leniency programme. In rare instances, however, applicants who were not 'first in' for leniency have received NPAs as a reward for their efforts in cooperating with the DOJ's investigation. NPAs and DPAs are more commonly granted to individuals who cooperate with the government's investigation, rather than corporations.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

To receive amnesty under the DOJ's leniency programme, the applicant must be the first to file. There is no formal leniency available for subsequent cooperating parties. See question 25.

There is no significance to being 'second in', although in general the earlier a company begins cooperating with the government the greater the potential it has to receive a downward departure from the fine recommended under the Guidelines.

The DOJ's 'amnesty plus' programme is designed to create an incentive for later-cooperating parties to confess wrongful conduct outside the scope of the existing investigation. Under amnesty plus, if a later-cooperating party applies for leniency for one or more other cartels, that party, in addition to receiving full leniency for those separate cartel violations, would receive a considerable discount on any criminal fine assessed with respect to the initial cartel violation. This contrasts with the DOJ's 'penalty plus' policy, under which the government will seek fines and prison sentences at the upper end of the range recommended by the Guidelines if a company was aware of additional anti-trust violations but chose not to report them.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

In order to preserve its position as the first filer, a company that finds evidence of criminal cartel behaviour should contact the DOJ as quickly as possible to obtain a marker. The marker is then valid for a certain period of time (often 30 days, though this may be extended or shortened on a case-by-case basis) to allow the company to perfect its application. This process usually involves a rapid and comprehensive internal investigation, involving document collection and review and witness interviews.

The decision whether to seek amnesty is highly fact- and company-specific. If the evidence of criminal activity is unambiguous and the company is prepared to devote the considerable human and financial resources demanded of an amnesty applicant as part of its obligation to cooperate fully, seeking amnesty quickly may be advisable. If the evidence is ambiguous or weak, or the company judges that the risks and burdens of cooperation outweigh the potential benefits, amnesty may not be the company's strongest option. Given the government's high burden to prove criminal liability beyond a reasonable doubt, if strong defences (such as jurisdictional or statute of limitations defences, for example) exist, the better option may be to put the government to its proof.

If amnesty is unavailable, the company may face the decision whether to plead guilty or to take its risks at trial. As with the

decision whether to seek amnesty, the decision whether to plead is highly defendant- and situation-specific, requiring consideration of the strength of the evidence, the strength of any available defences, and the risks associated with accepting a plea, which could expose the defendant to liability in follow-on civil cases.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

Leniency recipients must cooperate fully and transparently with the DOJ's investigation in exchange for complete immunity. Additionally, if a leniency recipient satisfies the ACPERA requirements (including cooperation with the civil plaintiffs), it may be eligible for reduced civil damages (single, rather than treble), and may avoid joint and several liability.

There are no formal requirements defining the level of cooperation expected of subsequent cooperating parties. Ordinarily, the DOJ will request desired documents or access to witnesses, and then the party's response will be the product of negotiation. If a party pleads guilty in exchange for a reduced sentence, cooperation requirements are usually set forth in the plea agreement.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The DOJ must keep confidential the identity of the applicant, the fact it has been granted amnesty, and the substance of any negotiations with the applicant or subsequent cooperating parties. Depending on the nature of the cartel and the parties involved, however, the identity of the leniency applicant often does not remain a secret, at least among the other defendants. Plea agreements, by contrast, and the cooperation provisions contained within them, are made public.

In the related civil litigation, both the fact of amnesty and the ordinary-course materials produced by the recipient may become discoverable. Parties usually negotiate strict protective orders limiting the use of such materials to the litigation, and designate documents with varying levels of confidentiality restrictions during discovery. If the case goes to trial, confidentiality of such materials will be determined on a document-by-document basis, though given the public interest in the adjudicative process, it is often impossible to prevent disclosure of all documents. Trials are typically open to the public.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Most criminal cartel prosecutions are resolved via plea agreement rather than at trial. The parties typically negotiate the scope of the defendant's agreement, often using the Guidelines as a starting point for negotiations. The negotiated agreement must be presented to the court for approval. Judges have discretion to approve or modify such proposed agreements, but usually defer to the DOJ's recommendation.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

When a corporate defendant receives immunity under the DOJ's leniency programme, current employees, officers and directors will also receive immunity if they admit any wrongdoing and continue to assist the government's investigation. The DOJ also has discretion to include

Update and trends

US v Kemp & Associates: US court applies rule of reason in criminal case

Pursuant to its enforcement guidelines, DOJ only criminally prosecutes per se violations of the Sherman Act, namely that conduct which 'on its face appears to be one that would always restrict competition and decrease output'. As the per se rule largely restricts defences based on efficiencies or other procompetitive effects, courts have routinely held that the per se rule applies only where courts can 'predict with confidence that the rule of reason will condemn it'. Although disputes concerning the application of the per se rule arise routinely in civil litigation, challenges to the application of the per se rule in the criminal context have been rare. It was therefore notable that, in August 2017, a district court granted the defendants' motion to apply the rule of reason in a criminal prosecution concerning alleged allocation of customers by heir locator companies. Noting that it may not simply 'rely on labels applied by the government' in an indictment, the court stated that it 'must instead analyse the substance of the allegations to determine

whether the challenged conduct constitutes customer allocation in a form that has been treated by the courts as a per se violation.' Doing so, the court found that the defendants' agreement was 'structured in an unusual way, affected a small number of estates, and occurred in a highly obscure industry (heir locator services) with an unusual manner of operation.' Concluding that the defendants' agreement 'would not [on its face] necessarily restrict competition or decrease output', the court held that the agreement's 'potential for increased efficiency' supported application of the rule of reason standard. The DOJ appealed the court's ruling to the 10th Circuit Court of Appeals, which, on 31 October 2018, held that it lacked jurisdiction to review the trial court's decision. In its ruling, however, the 10th Circuit took the unusual step of criticising the decision to apply the rule of reason and suggested that the trial court should reconsider the issue on remand. If the trial court refuses to do so, or otherwise affirms its earlier holding, that would effectively end the case as the DOJ has repeatedly affirmed that it will not pursue criminal charges in a rule of reason case.

specifically named former employees, officers and directors in the grant of immunity.

Where a company agrees to a plea bargain, its directors, officers and employees will similarly receive immunity from future prosecution, save for those who have been carved out of the plea. The DOJ's practice is to carve out a number of targets of the investigation who may be indicted for wrongful conduct associated with the violations set forth in the plea agreement. Not all carved-out individuals are indicted and fewer still are ultimately prosecuted. These carved-out individuals are often, though not always, higher-ranking executives who held pricing authority and actively promoted the cartel activity, whose prosecutions may serve as a warning to others. The DOJ may also choose to carve out individuals who attended cartel meetings and entered into the agreements on behalf of the company, against whom the documentary evidence is often the strongest. The DOJ generally seeks to prosecute individuals who were in a position to stop the illegal conduct, both because of their knowledge of the cartel and their position of authority. In the past year, the DOJ has indicted two CEOs in connection with its cartel enforcement activities.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The process of applying for leniency, once the decision is made to do so, moves extremely quickly. Typically the application begins with a phone call by counsel to the DOJ, to establish the applicant's marker as the first to file. Usually some information regarding the nature of the illegal conduct and the evidence supporting it must be shared at this time, but merely putting in the marker does not require disclosure of full details of the scope of the cartel and the applicant's involvement. If the agency accepts the marker, the applicant must move rapidly through an internal investigation, including collection and review of documents and witness interviews, to prepare a formal proffer of evidence to the DOJ establishing that the company satisfies the requirements to obtain leniency. Successful applicants will receive a conditional letter of amnesty, setting forth the requirements of cooperation by which the company must abide in order to maintain its immunity. Compliance with these requirements is strict and inflexible, necessitating complete transparency with the agency and the immediate and full disclosure of all evidence of illegal cartel activity. Failure to comply may result in the loss of immunity.

In all dealings with the enforcement agencies, complete candour and truthfulness are essential. Immunity will not be granted for illegal activity that is not disclosed. Equally important is to prevent obstruction of justice in the form of intentional or even careless destruction of documents or other evidence. Penalties for obstruction of justice are severe, sometimes exceeding those of the underlying crime itself, and may be pursued independent of or parallel to penalties for the initial antitrust violation.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or anticipated assessments or reviews of the current leniency programme. The corporate and individual leniency policies were most recently updated in 1993 and 1994, respectively. The DOJ's model corporate and individual conditional leniency letters were most recently updated in early 2017, and are available for review on the DOJ's website at www.justice.gov/atr/leniency-program.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The enforcement authority is required to disclose evidence or information favourable to a criminal defendant, including evidence that would tend to prove innocence, permit impeachment of government witnesses, or mitigating evidence that would tend to reduce a criminal sentence (*Brady v Maryland*, 373 US 83, 87-88 (1963)). In general, the DOJ provides to defendants the majority of its investigative materials anyway. Under certain circumstances, the government must also disclose any statements of its witnesses that relate to the subject matter on which the witness testified (Jencks Act, 18 USC section 3500).

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

If there is no conflict or potential conflict of interest, counsel may simultaneously represent both a corporation and its employees that are under investigation. During the course of a government investigation, however, conflicts may arise that necessitate obtaining separate counsel for the individuals. This can occur when the DOJ identifies an individual as a target of the investigation, and the individual's interests and the company's interests diverge, each potentially having an incentive to place responsibility for the illegal activity on the other. It may also occur during the company's internal investigation or preparations for litigation, when previously unknown evidence of the individual's illegal activity emerges. The existence of conflicts is not unusual, and must continually be assessed on a case-by-case basis throughout the course of the investigation. Occasionally the DOJ will demand that an individual be provided separate counsel, either because a genuine conflict exists or as a strategic move to try to obtain greater cooperation from the individual. There may also be reasons apart from conflicts of interest in which it may be advisable to obtain separate counsel for an individual, especially if that person expresses that this is his or her desire. Ultimately, the decision whether separate counsel is necessary belongs to the lawyer and the clients, not the DOJ.

36 Multiple corporate defendants**May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?**

It is generally inadvisable for counsel to represent multiple corporate defendants in a single civil case when those defendants are not part of a single corporate family. While it is common for counsel to represent both a parent and subsidiary company in a single litigation, because in general such entities share a unity of interest, such unity is far murkier or non-existent in the case of unaffiliated cartel participants. In practice such joint representations rarely occur. In the criminal context, joint representations may not satisfy the defendant's Sixth Amendment right to effective assistance of counsel.

37 Payment of penalties and legal costs**May a corporation pay the legal penalties imposed on its employees and their legal costs?**

Legal penalties and legal costs are treated differently for indemnification purposes. It is not permissible for a corporation prospectively to agree to indemnify an employee for future illegal activity. In some cases, however, indemnification for past criminal activity has been allowed. It is permissible for a company prospectively to agree to indemnify an employee for legal defence costs. Most company by-laws permit such indemnification.

38 Taxes**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

Punitive payments to governments or their agencies or instrumentalities for violations of law, including fines and penalties, are generally not tax-deductible. These include payments settling potential liability for fines or penalties, or amounts forfeited as collateral posted in connection with proceedings where fines or penalties are possible. Compensatory damages paid to a government or government agency or instrumentality are usually not considered to be a fine or penalty.

Private damages awards or settlements may be considered business expenses under the tax laws – and therefore may be deductible, to an extent. It may also be possible to structure settlements in ways that maximise the ability of the payer to deduct or minimise the tax obligation incurred by the recipient. Understanding the tax implications of any penalty, settlement, compensatory damages award or other such payment will require the advice of a tax specialist.

39 International double jeopardy**Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

The DOJ does not recognise a principle of international double jeopardy, meaning that it does not consider the fact that another jurisdiction may have prosecuted a defendant for a crime as a bar to US enforcement. Generally speaking, however, the DOJ does in certain circumstances consider the enforcement actions taken by other jurisdictions in recommending fines or other sanctions. For example, the DOJ has recommended in some plea agreements that time served in the foreign jurisdiction be counted as time served toward a defendant's US sentence.

In civil cases, double recovery by a plaintiff is generally not permitted, and private damage awards will be reduced by amounts a plaintiff receives from other parties, including amounts paid in settlements. The principle of collateral estoppel may also bar a plaintiff from maintaining a claim in the US against a defendant against whom it obtained a judgment on the same facts in a foreign jurisdiction.

40 Getting the fine down**What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

Approaches for reducing fines vary from case to case and party to party. While a pre-existing compliance programme is advisable in general, the DOJ has not typically considered the presence of such a programme to be a strong mitigating factor that would merit a significantly reduced fine. Compliance initiatives that a company takes after an investigation commences may contribute to lowered fines, but this is one factor among many, several of which are beyond the control of the defendant once the investigation has begun, such as the nature of the past criminal conduct itself or the volume of commerce affected. One of the meaningful ways a defendant may be able to reduce the fine is through early cooperation, though such a decision may not always be advisable for all defendants (see question 27). It should be noted that adopting an effective compliance programme is the surest method to uncovering cartel activity in real time, which can put the company in a position to apply first for leniency.

In general, however, because fines are set through settlement negotiations, the best way to secure a lower fine is to negotiate from a position of strength. This requires the development of a robust defence from the outset, preserving the company's right to contest the government's case at trial, while at the same time looking for opportunities to cooperate proactively with the government in exchange for a reduced fine.

Dechert
LLP

Steven E Bizar
Ethan E Litwin
Benjamin McAnaney

steven.bizar@dechert.com
ethan.litwin@dechert.com
benjamin.mcananey@dechert.com

1095 Avenue of the Americas
New York
NY 10036
United States

Tel: +1 212 698 3500
Fax: +1 212 698 3599
www.dechert.com

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice.

The information in each table has been supplied by the authors of the relevant chapter.

Australia				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
Australian law contains civil and criminal prohibitions on cartel conduct.	For companies, the maximum penalty for each criminal or civil cartel offence is the greater of: A\$10 million; three times the total value of the benefits obtained by one or more persons and that are reasonably attributable to the offence or contravention; or where the benefits to the company cannot be determined, 10 per cent of the annual Australian turnover of the company in the preceding 12 months. For individuals involved in criminal cartel conduct, the maximum penalty is 10 years in jail, a fine of A\$420,000 per offence, or both. For a civil contravention, the maximum penalty is a fine of A\$500,000.	The ACCC is responsible for granting immunity for civil cartel contraventions in accordance with its immunity and cooperation policy. A marker is available for applicants seeking immunity. If a party is not first in, or is ineligible for immunity, the party may nevertheless agree to cooperate with the ACCC. The CDPP is responsible for granting immunity from criminal prosecution, although the CDPP may choose to rely on the recommendation of the ACCC. Courts take into account cooperation when imposing civil or criminal penalties and sanctions.	Liability for cartel conduct that occurs outside Australia extends to bodies corporate carrying on business within Australia, Australian citizens or persons ordinarily resident in Australia. For a cartel to arise, the alleged cartel participants must be actual or potential competitors in relation to the supply, acquisition or production of relevant goods or services in trade or commerce within Australia, or between Australia and places outside Australia.	None.

Austria				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The Austrian cartel regime is in essence a civil regime with certain specifics. The investigative phase before the Federal Competition Agency is governed by administrative rules. The proceedings before the Cartel Court follow special civil procedural rules.	The Cartel Court may impose a fine of up to 10 per cent of the group's turnover in the previous business year. If the behaviour also qualifies as (severe) fraud, jail terms of up to 10 years may be handed down.	Austria has had a leniency regime since 1 January 2006, which is being used increasingly.	Austrian competition law also applies to conduct carried out abroad as long as there is some effect on the domestic market.	Austria is one of the jurisdictions where many private enforcement cases are pending.

Belgium				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The regime is of administrative nature with civil liability. Individuals can be administratively prosecuted and sanctioned.	Fines imposed on a company cannot exceed 10 per cent of the turnover realised in Belgium. Fines imposed on individuals cannot exceed €10,000.	Both immunity and leniency regimes are available for companies and individuals under Belgian law.	No, the immunity and leniency regimes are limited to the cartel activities performed by the investigated undertaking in Belgium (cooperation with neighbouring countries is highly advanced).	The Commission proposal in the 'ECN+' Directive indicates that the maximum fine shall not exceed 10 per cent of the total worldwide turnover of the investigated company. The BCA would thus be able to impose higher fines than under the current legislation.

QUICK REFERENCE TABLES

Brazil				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
A cartel is administratively (for companies and individuals) and criminally (for individuals) prosecuted in Brazil. Companies and individuals are also liable for civil damages.	For companies, the maximum administrative fine is 20 per cent of the gross revenue of the company, group, or conglomerate, in the fiscal year before the initiation of the administrative process, in the field of the business activity in which the violation occurred. For individuals in managerial positions (CEOs, directors, managers, etc) directly or indirectly responsible for the violation, an administrative maximum fine of 20 per cent of the fine imposed on the company. For other individuals or public or private legal entities, an administrative maximum fine of 2 billion reais. For individuals, the maximum criminal penalty is imprisonment for five years.	Yes, the leniency agreement and TCC (settlement agreement).	Yes, if the misconduct has direct or indirect effects in Brazil, even if potentially.	None.

Bulgaria				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
Under Bulgarian law, cartels represent administrative violation and the administrative law regime applies. Cartels are regulated by the Law on Protection of Competition, envisaging procedures deviating from the provisions of the general Law on Administrative Violations and Sanctions. Civil law regime applies to the consequences of prohibited agreements that are declared by law null and void and to claims for damages.	The maximum sanction for cartel activity under Bulgarian law is up to 10 per cent of the annual turnover of the undertaking participating in a cartel.	The Bulgarian competition authority last adopted a leniency programme in 2011. To date, the leniency programme has never been applied in practice.	To the extent that cartel activity could affect competition in the Bulgarian market, the CPC may investigate undertakings and impose sanctions under the LPC.	None.

Canada				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The regime has both criminal and civil/administrative provisions.	A price-fixing conviction carries penalties of up to 14 years in prison and fines of up to C\$25 million (five years and C\$10 million for pre-2010 conduct). In foreign-directed conspiracies and bid rigging, corporations are liable to a fine at the discretion of the court. The civil/administrative provisions permit a prohibition order only.	A highly successful immunity programme has been in place since 2000. It is also complemented by a formal leniency programme for subsequent cooperating parties. Further updates were released in September 2018.	International conspiracies directed at Canadian markets fall within the jurisdictional scope of the Competition Act. However, conspiracies that relate only to the export of products from Canada are expressly exempted.	Amendments that came into force in 2010 have significantly changed the former 'partial rule-of-reason' approach to criminal conspiracies. The Act now provides for a per se criminal cartel offence and a civil reviewable practice dealing with other competitor collaboration agreements.

China				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
China relies on both administrative enforcement and civil litigation.	1 to 10 per cent of the turnover of the defending party together with confiscating illegal gains.	There is a leniency programme in China, which is still developing and is already an important enforcement tool for the AMEA.	China claims extraterritorial jurisdiction and has applied this in several high-profile international cartel cases.	China's enforcement against cartels has been very active over the past decade since the AML took effect. With a new central antitrust agency (SAMR) in place, we may see further development of the antitrust policies in the future.

Colombia				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The regime is administrative, criminal and civil. Administrative sanctions are imposed by the Superintendency of Industry and Commerce (SIC), while criminal and civil sanctions are imposed by criminal and civil courts, respectively.	The maximum sanction for corporations represents 100,000 monthly minimum wages (approximately US\$25.4 million for 2017), while the maximum sanction for individuals may be 2,000 monthly minimum wages (approximately US\$510,000 for 2017). In the particular case of bid rigging, the maximum sanction is US\$260,000, and an individual may face up to 12 years in prison.	Yes. The first in to apply for the programme may obtain full exemption from the fine. The second applicant may obtain reductions between 30 and 50 per cent, depending on the utility of the information and evidence submitted. Subsequent qualified applicants may obtain reductions of up to 25 per cent, depending also on the utility of the information and evidence submitted. Additionally, the criminal law establishes the following benefits in bid-rigging cases: reduction by one-third of the term of imprisonment, reduction of 40 per cent of the fine imposed and reduction of the time period of debarment from government procurement procedures up to five years.	No, the regime applies to conduct that takes place in Colombia.	The importance of granting broader powers to the SIC is currently widely discussed, allowing it to pronounce on private damage claims. The increase in fine levels in 2009 was very important in discouraging companies and individuals from engaging in anticompetitive practices.

Denmark				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The regime is criminal. Furthermore, private damage claims are possible. See questions 17–18 and 22 of the Denmark chapter.	The maximum sanction for undertakings is a fine of up to 10 per cent of the undertaking's annual worldwide turnover. For individuals, the maximum sanction is imprisonment for six years. See question 17 of the Denmark chapter.	A leniency programme exists, which is largely comparable to the leniency programme set out under EU law. See questions 24–33 of the Denmark chapter.	The Danish Competition Act does not contain any provisions on extraterritoriality. However, it is generally assumed that the Act extends to conduct which has anticompetitive effects in Denmark. See question 7 of the Denmark chapter.	None.

European Union				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
No penalties on individuals, but substantial fines may be imposed on undertakings. Although the regime is technically civil and administrative, arguably the size of the fines makes it criminal or quasi-criminal in nature for human rights purposes.	10 per cent of worldwide group turnover.	Yes.	Yes.	Fines imposed by the Commission in cartel cases are high and the trend is towards even higher penalties. To complement the Fining Guidelines and Leniency Notice, the Commission introduced a settlement procedure in 2008.

QUICK REFERENCE TABLES

Finland				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The regime is administrative.	The maximum fine can be up to 10 per cent of the undertaking's total annual turnover in the last year of its cartel participation.	Yes, there is immunity and a leniency programme largely harmonised with that of the Commission and the ECN.	Yes, if such conduct has effects within Finland.	None.

France				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The cartel regime is first and foremost an administrative one: most cartels are dealt with by the FCA, an independent administrative authority that can only impose administrative sanctions. Furthermore, any entity or individual may bring civil actions before national courts if they have suffered damages from a cartel. Individuals may also face criminal sanctions if they have fraudulently taken a personal and decisive action in a cartel.	The maximum amount of penalty is 10 per cent of their worldwide turnover for companies, and €3 million if the offender is not a company.	French law provides for different programmes that may allow an undertaking to avoid, or lower the level of, a fine for infringement of competition rules: (i) full and partial leniency; (ii) settlements; and (iii) commitments (not applicable to cartels).	Anticompetitive practices committed directly or indirectly through the intermediary of a subsidiary located outside the French territory are expressly included within the scope of the prohibition of article L420-1 of the FCC if they have effect on one or more markets located in France.	None.

Germany				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The regime is mainly administrative, but criminal for offences like bid rigging and fraud. Consequences under civil law (follow-on damages litigation) play an increasingly important role.	The maximum fine is €1 million or, in excess of that, up to 10 per cent of the worldwide turnover generated (in the year preceding the fining decision) by the economic unit to which the infringing corporation belongs. The 10 per cent upper limit, however, only applies to corporations, not individuals.	Yes. Between 2014 and 2017, the German competition authority (FCO) has received 244 leniency applications.	The regime extends to conduct outside the jurisdiction as long as there is also an appreciable effect within Germany.	A leniency programme was published by the FCO in 2006; new guidelines on administrative fines came into force in 2013.

Greece				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The proceedings within the Greek enforcement system are of an administrative nature. Participation in a cartel is both an administrative and criminal offence. However, the HCC does not have the power to impose criminal sanctions, which lie within the competence of the criminal courts.	The administrative fine imposed on the members of a cartel may be up to 10 per cent of the total turnover of the undertaking for the financial year in which the infringement ceased or, if it continues until the issuing of the decision, the year preceding the issuing of the decision. In determining the level of the fine, account must be taken of the gravity, duration and geographical scope of the infringement, the duration and nature of participation in the infringement by the undertaking concerned, and also the economic benefit derived.	Yes. The leniency programme in case of collusions in violation of article 1 of the Competition Law and/or article 101 TFEU.	There must be effect within the jurisdiction of the Hellenic Republic.	In July 2016, the HCC adopted a new settlement procedure concerning cartel cases and the subsequent breach of competition law. According to this, companies have to plead guilty and admit the infringement in order to get a 15 per cent discount on the fine.

Hong Kong				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
Civil.	Financial penalties of up to 10 per cent of Hong Kong turnover for each year of the infringement, up to a maximum of three years, or disgorgement orders.	Yes.	The Ordinance gives extraterritorial effect to the First Conduct Rule, providing that it will apply to any agreement, concerted practice or decision that has the object or effect of preventing or restricting competition in Hong Kong.	We expect the Commission to continue to step up its enforcement role and bring further cases before the Tribunal.

India				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
Proceedings under the Competition Act are civil in nature.	A penalty of up to three times the profit for each year of the duration of cartel or 10 per cent of the turnover for each year of the duration of the cartel, whichever is higher, can be imposed on each of the members and their directors and officers involved in the cartel.	The CCI has the power to impose lesser penalties on members of a cartel and the directors and officers of members that were involved in a cartel if the CCI is satisfied that such member has made full and true disclosures in respect of the alleged contraventions and such disclosures are vital. Lesser Penalty Regulations have been framed for this purpose.	The CCI has the power to inquire and pass appropriate orders in relation to anticompetitive agreements entered into outside India or where a party to such agreement is outside India, if such agreement has or is likely to have an appreciable adverse effect on competition in India.	Hefty penalties are being imposed in cases involving contraventions.

Indonesia				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
KPPU under the current ICL only has the authority to impose administrative sanctions. However, if the undertakings are obstructing the investigation, according to the current ICL, which is further supported by the MoU between KPPU with the national police, KPPU may ask the police to take up the case for criminal breach.	The maximum administrative sanction that KPPU may impose is 25 billion rupiah. However, there is no limitation on damages should anyone be pursuing such as a result of a proven cartel allegation before KPPU.	No, there is no immunity/leniency programme under the current ICL. The new amendment draft, however, may accommodate the leniency programme.	Yes, the jurisdiction extension is possible for the following reasons: (i) KPPU adopts the applicability of single economic entity, implementation and extraterritoriality doctrines; and (ii) the more intense cooperation of KPPU with competition agencies from other jurisdictions.	Some prominent cartel cases have been initiated owing to KPPU's suspicions regarding certain associations' activities (<i>Cement</i> cartel, <i>Electricity Installation</i> cartel, <i>Container</i> cartel, <i>Tyre</i> cartel, <i>Beef</i> cartel) and simply due to scarcity in the market of the relevant products and the parallel pricing (<i>Garlic</i> cartel and <i>Beef</i> cartel).

Italy				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The regime is administrative.	10 per cent of the company's turnover as evidenced in the last approved balance sheet.	The Italian Antitrust Authority adopted an immunity and leniency programme on 15 February 2007. Pursuant to the programme, a company that spontaneously informs the Authority of a secret cartel will be awarded full immunity from fines if it submits decisive evidence on the cartel that the Authority does not already possess. Further, companies may be awarded a reduction of up to 50 per cent if they offer qualified evidence. In any case, such companies will have to withdraw immediately from the cartel and cooperate with the Authority throughout the proceedings.	The regime covers conduct that has the object or the effect of restricting competition on the national territory, regardless of where it takes place.	After the reform of EU competition law the Antitrust Authority is applying article 101 TFEU to cartels affecting the entire national territory (rather than Italian antitrust rules), since this is considered as a relevant part of the EU territory.

QUICK REFERENCE TABLES

Japan				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
Administrative, criminal and includes civil (private action).	Criminal: imprisonment of up to five years and fines of up to ¥5 million for individuals, and ¥500 million for corporations (for large enterprises). Administrative: surcharge of, in principle, 10 per cent of sales of cartel products over the cartel period up to the previous three years. Civil: amount of damage; no triple damages.	Yes, effective 4 January 2006. Amended as of 1 January 2010.	Yes, the Fair Trade Commission of Japan may challenge conduct affecting the Japanese market.	Amendment to the Antimonopoly Law regarding the reform of the administrative proceeding became effective as of 1 April 2015. Amendment to the Criminal Procedure Law regarding the introduction of the plea bargaining system for certain types of crimes including violation of the Antimonopoly Law (eg, cartel) became effective as of 1 June 2018.

Kenya				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
Kenya The Kenyan competition regime is criminal and administrative, while the Constitution provides for the civil aspect. COMESA The COMESA regime is administrative and has a reference to offences though no penalties or mechanism is provided for enforcement of this criminal aspect.	Kenya The CAK can impose a financial penalty of up to 10 per cent of the preceding year's gross annual turnover of the offender in Kenya. The courts may, on conviction of an offender, sentence a person to a term of imprisonment not exceeding five years or a fine not exceeding 10 million Kenya shillings. COMESA The CCC may impose a monetary penalty of US\$300,000 provided this penalty does not exceed 10 per cent of the annual turnover of the corporation for the preceding business year.	Kenya Kenya has a leniency programme. COMESA COMESA does not have a leniency programme.	Kenya Yes. The Kenyan competition regime prohibits any cartel conduct, regardless of where the activities take place, which has the object or effect of preventing, distorting or lessening competition in Kenya. COMESA Similarly, the COMESA competition regime may potentially capture cartel conduct outside COMESA that has the object or effect of prevention, restriction or distortion of competition within COMESA.	None.

Korea				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
Administrative and criminal, with civil damages actions available.	10 per cent of affected sales in administrative fines and a criminal fine of 200 million won for corporations, as well as a criminal fine of the same amount and imprisonment for three years for individuals.	Yes, the programme is fairly effective.	Yes, if the conduct has an effect on the relevant market in Korea.	Strengthening enforcement with high administrative fines and increasingly frequent criminal prosecution.

Malaysia				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
Civil and administrative.	Financial penalty of up to 10 per cent of the infringing enterprise's worldwide turnover for the duration of the infringement.	Yes.	Yes, if the anticompetitive conduct affects competition in any market in Malaysia.	Since the Competition Act 2010 came into force on 1 January 2012, the regulator has actively enforced against cartel conduct.

Mexico				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The regime is administrative, criminal and civil. Administrative sanctions are imposed by the CFCE and the IFT. Criminal sanctions are imposed by criminal courts. Compensation for damages is awarded by federal specialised courts in competition, broadcasting and telecommunications.	An individual faces up to 10 years in prison for committing cartel conduct. Fines to direct offenders add up to 10 per cent of the offender's income. Individuals that represent or collaborate with the company in committing anticompetitive practices are liable to receive fines of up to 16.1 million pesos. Also, those who acted on behalf of the company face disqualification from acting as an adviser, administrator, director, manager, officer, executive, agent, representative or proxy at any company for up to five years. Likewise, individuals that contributed, facilitated or instigated the execution of cartel conduct are liable to receive a fine of up to 14.5 million pesos. In case of recidivism, the CFCE may impose a fine of up to two times the applicable fine or order the divestiture of assets. There is no limit for damages awarded as a result of anticompetitive conduct.	Yes. The first in to apply for the programme may obtain full immunity (ie, the defendant will be fined a symbolic amount). Second and subsequent qualified applicants may obtain reductions of up to 50, 30 and 20 per cent of the applicable fine. All qualified applicants will obtain full immunity from criminal liability. Immunity does not apply to civil liability for monetary damages.	Cartel conduct performed abroad will be sanctioned by the CFCE if it produces effects in Mexican territory. The existence of subsidiaries and affiliates in Mexico has been considered by the CFCE as indicia of the extensive effects of the practice in national territory.	In June 2013, the Constitution was amended to transform the competition commission into an autonomous constitutional entity and to increase the effectiveness of competition policy and law enforcement. On 7 July 2014, a new Competition Law and modifications to the Federal Criminal Code came into force. In November 2014, the CFCE issued new Regulations of the LFCE. In January 2015, the IFT issued new regulations of the LFCE, regarding broadcasting and telecommunications industries. In June 2015, the CFCE issued new guidelines regarding the amnesty programme and the initiation of investigations. In December 2015, the CFCE published guidelines for information exchange among competitors and regarding cartel investigation procedures. In January 2017, the IFT published the Guidelines on the Immunity and Reduction of Sanctions Programme.

Netherlands				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
Civil and administrative.	40 per cent of annual turnover, or €900,000, whichever is higher, is the statutory maximum figure that can be imposed on a legal or natural person to whom a breach of article 6 of the Competition Act can be attributed.	Yes.	Yes, if the conduct has an effect on the whole or a part of the Dutch market.	The ACM does not hesitate to impose significant fines.

Portugal				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The regime is mainly administrative and quasi-criminal, with fines and periodic penalty payments as sanctions. Civil sanctions include nullity of agreements. Third-party claims for damages may also be filed under the Damages Act recently enacted (Law No. 23/18 of 5 June) and the general principles of civil liability.	Fines of up to 10 per cent of the turnover in the year immediately preceding that of the final decision adopted by the Competition Authority. Multiple infringements are punished with a fine, the maximum limit of which is the sum of the fines applicable to each infringement. However, the total fine cannot exceed the double of the higher limit of the fines applicable to the infringements in question.	Yes. The programme provides for full immunity or reduction of the fines that would apply to the infringement.	Yes, if such conduct produces effects within Portugal.	Law No. 19/2012 of 8 May (the Act) put in place the new Competition regime, thereby superseding Law No. 18/2003, of 11 June 2003. The Act considerably enhanced the powers of investigation granted to the Authority, notably in respect of investigation of restrictive practices.

Russia				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The regime is administrative with a potential for criminal prosecution subject to damages and profit value thresholds and may entail civil proceedings in case of private damage claims.	The maximum administrative sanction is a fine of up to 15 per cent of the total annual turnover of the infringing entity from sales on the market on which the violation occurred, or, alternatively, the infringing entity may be required to transfer all income received from its anticompetitive behaviour to the state budget. The maximum criminal sanction is seven years' imprisonment.	Leniency is offered for both administrative and criminal liability, but only to the first applicant. Limited administrative liability leniency is offered to the second and third applicants, but not for criminal liability.	Yes, Russian antimonopoly rules, including those regulating cartels, have extraterritorial application and apply to any agreements or actions which affect competition on the territory of the Russian Federation.	Cartels are a swiftly developing area of Russian competition legislation and with the introduction of criminal liability leniency and the global tendency to battle international cartels, it is expected that there will be more cartel cases in Russia each year.

Singapore				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The competition law regime in Singapore is administrative in nature.	The Competition and Consumer Commission of Singapore (CCCS) may impose a financial penalty (where the infringement has been committed intentionally or negligently) of up to 10 per cent of such turnover of the business of the infringing undertaking in Singapore for each year of infringement, up to a maximum of three years. In addition, the CCCS may make directions to bring an infringement to an end, or to mitigate the adverse effect of the infringement.	Yes. The CCCS operates a leniency programme, which encompasses the prospect of full immunity. This programme includes a leniency plus system and a marker system.	Yes. Such activities will be prohibited by the section 34 prohibition if they have the object or effect of preventing, restricting or distorting competition within Singapore.	The CCCS has the ability to enter into cooperation agreements with foreign competition bodies. The CCCS inked its first cross-border enforcement cooperation agreement with the Japan Fair Trade Commission on 22 June 2017, and its second cross-border enforcement cooperation agreement with the Indonesian Commission for the Supervision of Business Competition on 30 August 2018.

Slovenia				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The Agency acts as administrative and minor offence authority. Criminal offences are prosecuted by state prosecutors and adjudicated by the courts.	The maximum sanction for a minor offence is up to 10 per cent of the annual turnover of the undertaking in the preceding business year for a legal entity, entrepreneur or individual performing economic activity and €30,000 for a responsible person.	The offender may apply for immunity from or for a reduction of the fine.	Restrictive agreements that have as their object or effect the prevention, restriction or distortion in the territory of Slovenia are prohibited, regardless of where they occurred or were entered into.	Further amendments to the Competition Act regarding procedure may be anticipated in the near future.

Spain				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The Spanish legal regime for the investigation and declaration of cartel practices is an administrative regime that is dealt with by the National Markets and Competition Commission (NMCC), the regional competition authorities, as well as the corresponding courts, such as the National High Court and the Supreme Court. In addition, the commercial courts are also entitled to declare the existence of a cartel.	The NMCC may sanction very serious infringements with a fine of up to 10 per cent of the total turnover of the infringing undertaking in the business year immediately preceding to that of the imposition of the fine. If the offender is a legal person, the NMCC may impose a fine of up to €60,000 for participating in a cartel.	The Spanish Competition Act has included in its provisions a leniency programme in order to facilitate the detection of cartels or to advance the investigation of those that have already been detected and supports the investigative work of the NMCC and its capacity to establish the investigated facts and conduct to the legally required standard of evidence.	Only conduct that may affect the Spanish market can be reviewed by the NMCC, so its regime cannot extend to conduct that takes place outside the Spanish jurisdiction.	None.

Sweden				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
Civil/administrative.	10 per cent of the turnover of the violating undertaking (the basis for calculation does not include the company group to which the undertaking may belong).	Yes, there is a leniency programme similar to that of the European Commission.	Yes, as long as there is an appreciable effect on competition in Sweden.	The current Competition Act introduced the possibility of imposing an injunction against trading against persons who have participated in serious breaches of Chapter 2, section 1 or article 101 TFEU, provided such an injunction is necessitated by the public interest.

Switzerland				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
For undertakings, the regime is civil and administrative. However, fines for hard-core restraints do also qualify as criminal sanctions inter alia in the meaning of the European Convention of Human Rights and investigations should in principle respect the respective procedural rights. For individuals, there are no direct criminal sanctions for cartel activities. However, individuals acting for an undertaking (but not the undertaking itself) and violating an amicable settlement decision, any other legally enforceable decision or a court judgment in cartel matters, or intentionally failing to comply or only partly complying with the obligation to provide information, may be fined.	The maximum administrative fine for undertakings is 10 per cent of the consolidated net turnover generated in Switzerland during the last three business years (cumulative). The competition authorities may impose administrative sanctions on undertakings if they violate an amicable settlement, decision or judgment to their own advantage. The maximum criminal sanction for individuals is 100,000 Swiss francs.	Yes, as of 1 May 2004.	Yes, as long as the conduct may have effects within Switzerland.	None.

Taiwan				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
All three.	Administrative fines: 10 per cent of the total sales income of the enterprise in the previous fiscal year. Civil compensation: actual damages and, in some situations, up to three times the value of proven damages. Criminal: in the event of failure to comply with an administrative order to cease or rectify behaviours, imprisonment for up to three years or detention; a fine of up to NT\$100 million; or both.	Yes, but for administrative fines only.	Yes.	None.

QUICK REFERENCE TABLES

Turkey				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
Administrative and civil.	10 per cent of the turnover of each of the undertakings concerned generated in the financial year preceding the date of the fining decision in Turkey (if this is not calculable, the Turkish turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or associations of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings.	Yes, as of February 2008. The secondary legislation specifying the details of the leniency mechanism was put into force in February 2009 and April 2013. A cartel member may now apply for leniency until an investigation is officially served. Companies may benefit from total immunity from or reduction of a fine depending on their application order.	Yes, if the cartel activity produces effects in the Turkish jurisdiction.	None.

Ukraine				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
Administrative sanctions for the violation of legislation on competition are imposed by the AMCU. In addition, administrative responsibility may be imposed on authorised persons or employees of an undertaking in the event of a violation by said persons of the Code of Ukraine on administrative offences.	Horizontal anticompetitive concerted actions of undertakings (cartels) are subject to the severest punishments. For such actions the AMCU regulations provide for a basic fine of 45 per cent of income (revenue) from sales of goods (works, services) or the buyer's expenses on the purchase of a product, either directly or indirectly related to the violation. The amount of the fine shall not exceed 10 per cent of the total turnover of the undertaking.	Leniency programmes are allowed in Ukraine. Full release from liability is granted only to the participant in collusion that first appealed to the AMCU with its application. The proof of first application is the marker letter of the AMCU. Member cartels claiming immunity must first voluntarily notify the antimonopoly authority about their participation in anticompetitive concerted actions. At the same time a participant has to provide information that is essential for rendering a decision on the case. Throughout the investigation this party should cooperate as much as possible with the antimonopoly agency. The party is not relieved from liability and does not receive immunity if it acted as the initiator of anticompetitive concerted actions, tried to control such actions or has not provided all the evidence and information on the commitment of anticompetitive concerted actions.	No, the regime does not extend outside the jurisdiction. To date, there are no examples of cooperation between other jurisdictions and Ukraine.	In January 2016 the economic part of the Association Agreement between Ukraine and the EU came into force. In accordance with the agreement, a number of regulations of the EU Council and the EU Commission for the protection and development of economic competition are subject to implementation in the Ukrainian legal system. Ukraine has already taken the first steps in aligning its competition laws and law enforcement practices with EU standards by amending existing laws and regulations.

United Kingdom				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
All.	Fines: up to a maximum of 10 per cent of the infringing undertaking's worldwide turnover in the previous business year; individuals can receive unlimited fines. Imprisonment: a maximum custodial sentence of five years.	Yes.	Yes, provided that the agreement is implemented (or is intended to be implemented) at least in part in the UK.	None.

United States				
Is the regime criminal, civil or administrative?	What is the maximum sanction?	Are there immunity and/or leniency programmes?	Does the regime extend to conduct outside the jurisdiction?	Remarks
The US regime has criminal, civil and administrative elements. Criminal actions are, by DOJ policy, reserved for per se violations of the antitrust laws, which generally include price-fixing agreements, bid rigging, and market allocation agreements.	For corporations, the maximum criminal fine is the greater of (i) US\$100 million, (ii) twice the gross gain from the offence, or (iii) twice the gross loss to victims of the offence. For individuals, the maximum criminal fine is US\$1 million and up to 10 years' imprisonment. In civil litigation, there are no maximum damage awards, and private parties are entitled to recover treble their actual damages plus attorneys' fees.	The DOJ's formal leniency programme provides full immunity for criminal antitrust violations for the first to file, pending satisfaction of the programme criteria. Under ACPERA, the leniency recipient may be eligible for reduced civil damages (single, not treble) and avoid joint and several liability in civil litigation.	The Sherman Act applies to extraterritorial conduct to the extent it involves either (i) import commerce or (ii) foreign commerce that has a direct, substantial and reasonably foreseeable effect on US domestic commerce or US exporters. In civil actions, the plaintiff bears the additional burden of establishing that their claim arose from that direct, substantial and reasonably foreseeable effect.	None.



Keep moving forward

Dechert has the global presence and experience to work with you across jurisdictions to quietly and efficiently prevent or resolve cartel investigations.

You can trust us to understand your business, efficiently manage internal investigations and successfully implement remedies and preventive measures that minimize risk.

If a government investigation is imminent, you are in good hands. We routinely defend raids and work with enforcers at the Department of Justice, the European Commission and other major competition authorities. Our advocacy has helped clients prevent charges and reduce compliance burdens and fines, often with no public attention.

It's simple. You're in the business of progress — we're here to help you keep moving forward.

[dechert.com/antitrust](https://www.dechert.com/antitrust)

Dechert
LLP

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com